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THE BRAZILIAN CFIA MODEL AS A MECHANISM FOR ENHANCING PROTECTION AND RESPECT FOR SOCIO-ECONOMIC RIGHTS

Dissertation for Master's Degree

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1.THE PURPOSE OF INVESTMENT AGREEMENTS. 2. THE RELATION BETWEEN SOCIO-ECONOMIC RIGHTS AND INVESTMENT AGREEMENTS. 3. HOW TO PROMOTE PROTECTION AND RESPECT FOR SOCIO-ECONOMIC RIGHTS UNDER INVESTMENT AGREEMENTS? 4. DOES THE CFIA MODEL ENCHANCE PROTECTION AND RESPECT FOR SOCIO-ECONOMIC RIGHTS?

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A Silvana Cristina Martins, *in memoriam*. A ela que me ensinou que a vida sempre segue, e que cabe a nós enxergar sua beleza para então ter coragem de transformá-la no que sonhamos.

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"If law shapes real power, and ideas shape the law, then we control our fate. We can choose to recognize certain actions and not others. We can cooperate with those who follow the rules and outcast those who do not. And when the rules no longer work, we can change them". Oona A. Hathaway and Scott J. Shapiro (*The Internationalists,* 2017, p. 423)

ABSTRACT

MARTES, Marina Martins. *The Brazilian CFIA Model as a Mechanism for Enhancing Protection and Respect for Socio-Economic Rights*. 2021. Masters' Dissertation. Master of Law. Faculty of Law. University of São Paulo, São Paulo, 2021.

This dissertation has the purpose of evaluating whether the new model of investment agreement developed by Brazil (CFIA model) is a mechanism for enhancing protection and respect for social and economic rights. For examining and answering this question, the dissertation starts by exploring the origins on investment treaties, how they have evolved over time, and what are the main characteristics of traditional investment treaty models. It then explores why investment treaties and socio-economic rights are related, by mapping cases in which investment treaties have already impaired the protection of such rights in host-countries, and then investigating the reasons for considering both issues as complementary matters under the notion of sustainable development. After exploring the reasons why the relation between foreign investment and socio-economic rights protection and promotion should be investigated, this dissertation analyses how these two issues shall be jointly handled. It analyses international organizations initiatives to regulate business and human rights and propose investment treaties' frameworks that foster sustainable development, as well as new investment agreements' models developed by other countries, and then suggests criteria for evaluating whether an investment treaty is adequate from the socio-economic rights standpoint. Finally, this research investigates the CFIA model, brings a brief historical overview of Brazil's policy with respect to investment treaties, and evaluates CFIAs wording and how some of its institutional mechanisms are considering corporate social responsibility issues. In conclusion, this research asserts that CFIA model may be a mechanism for enhancing protection and respect for socio-economic rights, but some concerns (particularly related to safeguarding States' regulatory space and providing for stronger obligations to investors and States to protect human rights) need to be addressed.

Key Words: Investment Treaties – CFIA – Sustainable Development – Human Rights - Socio-economic rights

RESUMO

MARTES, Marina Martins. *The Brazilian CFIA Model as a Mechanism for Enhancing Protection and Respect for Socio-Economic Rights*. 2021. Dissertação de Mestrado. Mestrado em Direito. Faculdade de Direito. Universidade de São Paulo, São Paulo, 2021.

O objetivo desta dissertação é avaliar se o modelo de acordo de investimento desenvolvido pelo Brasil (modelo ACFI) é um mecanismo a reforçar a proteção e respeito aos direitos socioeconômicos. Para avaliar e responder a essa pergunta, essa dissertação começa explorando as origens dos tratados de investimento, analisa como eles evoluíram com o tempo, e quais são as principais características dos tradicionais modelos de acordos bilaterais de investimento. Após isso, a pesquisa explora o porquê da relação entre acordos de investimentos e direitos socioeconômicos, mapeia casos em que acordos de investimento prejudicaram a proteção de tais direitos em Estados receptores, e investiga as razões para que as duas questões sejam consideradas como complementares sob a noção de desenvolvimento sustentável. Após a compreensão do porquê da relação entre investimento estrangeiro e a proteção e promoção de direitos socioeconômicos, a dissertação investiga como tratar essas questões em conjunto. São analisados instrumentos internacionais regulando as questões atinentes a empresas e direitos humanos e que propõem modelos de acordos de investimentos que contribuam para o desenvolvimento sustentável, além de novos modelos de acordos de investimento desenvolvidos por outros países. A partir disso, são sugeridos critérios para avaliar se um acordo de investimento é adequado do ponto de vista de direitos socioeconômicos. Por fim, a dissertação analisa o modelo ACFI, traz um breve panorama histórico sobre a política brasileira em relação a acordos de investimento, e avalia a redação dos ACFIs e como alguns de seus mecanismos institucionais vêm considerando a questão da responsabilidade social corporativa. Em conclusão, essa pesquisa defende que o modelo ACFI pode ser um mecanismo para reforçar a proteção e o respeito a direitos socioeconômicos, mas algumas preocupações (especialmente relacionadas à proteção do espaço regulatório dos Estados, e a inclusão de obrigações mais consistentes a investidores e Estados no sentido de proteção de direitos humanos) precisam ser endereçadas.

Palavras-chave: Acordos de Investimento – ACFI – Desenvolvimento Sustentável – Direito Humanos – Direitos Socioeconômicos.

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LIST OF ABBREVIATIONS

ACFI	*Acordo de Cooperação e Facilitação de Investimentos*
APEX	*Agência Brasileira de Promoção de Exportações e Investimentos*/ Brazilian Trade and Investment Promotion Agency
ARSIWA	Articles on State Responsibility for Internationally Wrongful Acts
BIT	Bilateral Investment Treaties
CAMEX	*Câmara de Comércio Exterior* / Brazilian Chamber of Foreign Trade
CERDS	Charter of Economic Rights and Duties of States
CFIA	Brazilian Cooperation and Facilitation Investment Agreement
COMESA	Common Market for Eastern and Southern Africa Investment Area
CONINV	*Comitê Nacional de Investimentos* / National Committee of Investment
CPS	Corporate Social Responsibility
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IISD	International Institute for Sustainable Development
ILC	International Law Commission
ILO	International Labor Organization
IMF	International Monetary Fund
ITO	International Trade Organization
MDIC	*Ministério da Indústria, Comércio Exterior e Serviços* / Ministry of Industry, Foreign Trade and Services
MERCOSUR	Southern Common Market
MFN	Most Favored Nation
NAFTA	North American Free Trade Agreement

NCP	OECD's National Contact Point for Multinational Enterprises
NGO	Non-Governmental Organization
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
OID	*Ombudsman de Investimentos Diretos*/ Ombudsman of Foreign Investment
PCA	Permanent Court of Arbitration
SECAMEX	*Secretaria Executiva da Câmara de Comércio Exterior*/ Executive Secretariat of the Brazilian Chamber of Foreign Trade
SGD	Sustainable Development Goals
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	Agreement between the United States of America, the United Mexican States and Canada
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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PRELIMINARY NOTES ON METHODOLOGY

The purpose of this research is to evaluate whether the CFIA model enhances protection and respect for socio-economic rights. To do that, three methodological cuttings and four main methods of research were adopted, as described below.

1. Methodological Cuttings

The methodological cuttings adopted in this research were the following:

i) Although this research departs from the concept of sustainable development, it focuses on the pillar of social development. This means that the pillar of environmental protection[1] – albeit intrinsically connected with the promotion of human rights (and, especially, socio-economic rights), is not discussed. Furthermore, although the economic pillar is mentioned and considered in some investigations made on the sustainability of investment agreements, the CFIA model is not analyzed in terms of economic impact generated.

ii) Having seen that the notion of human rights is a broad concept, this research focuses on "socio-economic rights", as established by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which include the right to health, to fair wages and to proper work standards. Cultural rights were not considered, because, albeit closely connected to social and economic issues, they usually comprise different discussions, *e.g.,* protection of cultural heritage.

It is important to bear in mind, however, that the protection of socio-economic rights naturally enhances the promotion of cultural rights and of human rights of other generations and vice-versa[2]. The selection of socio-economic rights was made only

[1] For a comprehensive analysis of the intersection between investment and environmental law see VIÑUALES, Jorge E. *Foreign Investment and the Environment in International Law*. Cambridge: Cambridge University Press, 2012.

[2] One of the first documents to expressly recognize the indivisibility of human rights was the Vienna Declaration and Program of Action adopted at the World Conference on Human Rights, in June 1993. Available at: <https://www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_English.pdf>. Access on 08th June 2019. For more information, see WHELAN, Daniel J. *Indivisible Human Rights: A History*. Pennsylvania, University of Pennsylvania Press, 2010.

The Vienna Declaration and Program of Action was adopted by the World Conference on Human Rights of 25 June 1993. Art. I.5 of such Declaration provides that: "5. **All human rights are universal, indivisible and interdependent and interrelated**. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political,

for methodological purposes, given that these are rights that are frequently impacted by business activities.

Moreover, it is not possible to establish a list of specific rights to be analyzed, due to the broad nature of human rights[3]. Notwithstanding that, some specific rights were considered in the case analysis, based on rights usually discussed in investor-State disputes. Such criteria are further detailed in Chapter 2 below.

iii) The purpose of this research project is to evaluate whether the Brazilian CFIA model enhances protection and respect for socio-economic rights. This means that the research investigates the investment treaty model developed by Brazil, but not all policy measures involving the Brazilian investment regime. Further, the present research does not analyze how the Brazilian CFIA model interacts with other international agreements/treaties or with national laws concerning protection and promotion of social and economic rights. This would be a separate analysis. The objective here is to understand whether the provisions of the CFIA model and the measures taken by institutions created or related to such Agreements are sufficient to protect and promote social and economic rights.

2. Research Methods

To evaluate whether the CFIA model enhances protections and respect for socio-economic rights, the following studies and research were conducted:

economic and cultural systems, to promote and protect all human rights and fundamental freedoms". (emphasis added by the author).

In this matter, Flávia Piovesan explains that human rights are indivisible because "(…) the guarantee of civil and political rights is a condition for the observance of socio, economic and cultural rights and vice-versa. When one of these rights is violated, the other are violated as well. Human rights compose, therefore, an indivisible unit, interdependent and interrelated, capable of combining civil and political rights with the catalogue of socio, economic and cultural rights. Under this full perspective, two impacts are identified: i) the interrelation and interdependence of the different categories of human rights; ii) parity in terms of relevance of socio, economic and cultural rights and civil and political rights" (free translation). PIOVESAN, Flávia. *Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano*. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, p. 105.

[3] John Ruggie assessed the broad range of internationally recognized human rights that have already been violated by corporations and concluded that, given the broad nature of human rights, it is not possible to create an exhaustive list of human rights that may be affected by businesses. See RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 49.

(I) Evaluation of the relevant bibliography on sustainable development, investment promotion, human rights (particularly socio-economic rights), and on the CFIA model.

(II) Analysis of selected international cases concerning investment and socio-economic rights.

(III) Evaluation of all CFIAs already signed by Brazil until September 2020 to check how they address socio-economic rights issues.

(IV) Interviews with Government officials to understand how the Brazilian Government has been addressing socio-economic rights issues in relation to foreign investment, particularly under the CFIA model.

The methodology adopted for the case analysis, CFIA model evaluation and interviews are further detailed below.

2.1. Case Analysis

The purpose of the case analysis conducted in this research was to map awards of investor-State disputes that have debated socio-economic rights issues, and based on that answer the following questions:

i) Which are the most common socio-economic rights discussed by investment tribunals?

ii) By whom were these issues brought to the present proceedings?

iii) How have the parties brought socio-economic issues to arbitration disputes? Under which clauses of investment agreements?

iv) How have arbitral tribunals debated and considered these issues, and balanced the protection of socio-economic rights with investment protection?

The mapping of investor-State awards was done based on data extracted from the public database of the United Nations Conference on Trade and Development (UNCTAD)[4], the Investment Dispute Settlement Navigator (ISDS Navigator).

Considering that there is no public database that provides investment arbitration data in a comprehensive and systematic manner, *i.e.,* with the possibility of searching for terms inside the

[4] UNCTAD. *Investment Policy Hub – Investment Dispute Settlement Navigator*. Available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement?status=100>. Access on 09th September 2020.

awards/decisions without first extracting them, the present empirical research adopted an explorative method (and not an exhaustive one)[5].

ISDS Navigator was used because it contains "information about publicly known IIA-based international investor-State arbitration proceedings"[6].It is thus the most comprehensive public database with information on investor-State disputes from different arbitral institutions (the International Centre for Settlement of Investment Disputes – ICSID, the Permanent Court of Arbitration – PCA, etc.).

The first step for selecting awards was to extract all data from the UNCTAD database. Data was extracted on 02nd September 2020 and was updated as of 31st December 2019.

At that time, the ISDS Navigator reported **674** ISDS disputes concluded: **246** decided in favor of State, **198** decided in favor of investor, **14** in favor of no party, **77** discontinued and **139** settled. The methodology adopted for such classification is described in ISDS Navigator's website:

> "• Decided in favour of State: the tribunal dismissed the case for lack of jurisdiction or found that the respondent State has not committed any breach of the applicable IIA.
> • Decided in favour of investor: the tribunal found that the respondent State committed one or more breaches of the applicable IIA and awarded monetary compensation or non-pecuniary relief to the claimant investor.
> • Decided in favour of neither party (liability found but no damages awarded): the arbitral tribunal found that the respondent State committed one or more breaches of the applicable IIA but did not award monetary compensation or non-pecuniary relief to the claimant investor.
> • Settled: the disputing parties settled the case and the arbitral proceedings were discontinued for that reason.
> • Discontinued: the arbitration was discontinued for any reason other than due to a (known) settlement. This includes discontinuance as a result of non-payment of arbitration fees, in order to pursue litigation in another forum, or for any other reason (including for unknown reasons)"[7].

All data from the disputes contained in the ISDS Navigator was extracted, except for the disputes that were discontinued, given that these do not result in awards - not even in consent awards, as some settled disputes do.

Data provided by ISDS Navigator on all these disputes was inserted in a spreadsheet (Appendix I) and cases with the "year of initiation" as of 2000 were selected. This time criterium

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[5] A similar method was adopted by Silvia Steininger. See STEININGER, Silvia. *What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration*. Leiden Journal of International Law (2018), 31, pp. 33-58.

[6] UNCTAD. *Investment Policy Hub – Investment Dispute Settlement Navigator - Methodology*. Available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement?status=100>. Access on 09th September 2020.

[7] UNCTAD. *Investment Policy Hub – Investment Dispute Settlement Navigator - Methodology*. Available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement?status=100>. Access on 09th September 2020.

was applied because there is only a little number of awards prior to this year[8] and a considerable growth in the number of awards as of 2000[9]. This first selection resulted in **557** cases to be analyzed.

To verify which of these cases involved debates on socio-economic rights, the awards[10] of such cases were downloaded and some specific terms were searched within each of them. The terms searched had the purpose of checking whether: i) the award contained any explicit and relevant reference to human rights; ii) there was any debate on socio-economic rights in the award.

To find the cases which contained explicit and relevant references to human rights, the term searched in the awards was "**human right**"[11]. Three different types of references to "human right" were disregarded: i) those contained in qualifications of arbitrators, legal representatives or the parties or task forces involved in any analysis mentioned in the awards; ii) references contained in names of articles/books/journals/documents mentioned in the award; iii) those referring to the facilities where the hearings have taken place, *e.g.,* the facilities of the Inter-American Human Rights Court.

On the other hand, references to the European Court of Human Rights, European Convention on Human Rights and the Inter-American Convention on Human Rights were considered as they are generally accompanied by discussions of human rights issues – although usually not related to socio-economic aspects.

To evaluate whether the awards reflected any relevant debate on socio-economic rights, the terms searched were "**water**"[12] and "**health**"[13]. These terms were selected because some of the most relevant and known investor-State disputes that addressed socio-economic rights discussed access to water and the right to health. According to one empirical research conducted in 2017,

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[8] According to UNCTAD's ISDS Navigator, out of the 674 disputes concluded by December 2019, only 44 were initiated before 2000. The same criterium was applied in the research developed by Isadora Postal Telli. See TELLI, Isadora Postal. *Investimento estrangeiro e meio ambiente: uma análise sobre o tratamento das questões ambientais suscitadas nos casos decididos pelo ICSID entre 2000-2013.* Dissertação (Dissertação em Direito). Universidade de São Paulo, Faculdade de Direito, São Paulo, 2015.

[9] This was also observed by Silvia Steininger. See STEININGER, Silvia. *What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration*. Leiden Journal of International Law (2018), 31, pp. 33-58.

[10] Only awards were considered since they correspond to the decision on the merits or to final decisions on the lack of jurisdiction by the tribunal. When the final award did not reflect all liability issues, partial awards were also evaluated. Awards which were not available in English, French or Spanish were not analyzed.

[11] In the awards in Spanish, the terms searched were *derechos humanos* and/or *derecho humano*; in the awards in French the term *droits de l'homme* was searched.

[12] In awards in Spanish, the term *agua* was searched, and in awards in French *eau*.

[13] In awards in Spanish, the term *salud* was searched, and in French *santé*.

only three investor-State cases brought forward socio-economic rights until then, *i.e*., *Impregilo v. Argentina*, *Urbaser v. Argentina* and *Phillip Morris v. Uruguay*, and these cases debated the right to water and to heath[14].

References to "water" and "health" in different contexts were disregarded. These include references to health of banking systems, financial situation of corporations, healthcare facilities, health insurance, and absence of witnesses and arbitrators due to health issues. References to "public health" considerations as mere examples of possible exceptions to investors' protection were not considered as well.

With respect to "water", references to water in the name of organs and departments of the State were not considered. References such as waterfall of payments, water infrastructure, water pipelines, etc., were disregarded as well. Additionally, when the water issue was brought only to discuss environmental aspects the case was not considered[15].

All the terms indicated above were searched in all awards that were available. In investment disputes, for confidentiality reasons, sometimes awards are not disclosed and in such circumstances the awards could not be analyzed. These situations are indicated as "award not available" in the spreadsheet contained in Appendix I.

The two criteria (*i.e.,* reference to human rights and debate on socio-economic rights) were cumulatively considered. This means that the words "health" and "water" were searched even in awards that do not contain any reference to human rights. This was made because during the research it was noted that awards of certain important disputes involving socio-economic issues did not contain explicit reference to human rights[16].

Explicit references to human rights and to water and health (in the context of access to water and right to health) were then analyzed to check whether they in fact referred to debates on socio-economic rights.

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[14] See STEININGER, Silvia. *What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration*. Leiden Journal of International Law (2018), 31, pp. 33-58.

[15] This is, for instance, what happened with the *Ballantine v. Dominican Republic* case, in which there is a discussion on the threats posed to water by the investment, but the effects of such threats were environmental (on the ecosystem and biodiversity). There is no debate on the right to access to water.

[16] The award on the *Chemtura v. Canada* case, for instance, contains an important debate on the right to health but no reference to human rights.

Cases selected were those in which a socio-economic right was brought by a party in the form of a claim, counterclaim or defense and raised debate[17]. Cases which referred to human rights but not to socio-economic rights (by referring, for instance, to civil and political rights) were disregarded[18].

Moreover, cases in which regulatory measures related to health issues were adopted by the State but resulted in no debate on the right to health[19] were also not considered, since the purpose of this analysis was to understand how socio-economic rights were considered by investment tribunals and not simply to identify regulatory measures related to socio-economic rights adopted by States. For the same reason, general references to health conditions[20] or right to water, as well as mere allegations without proper evidence[21], were disregarded for they do not result in an actual debate on such topics.

Furthermore, cases in which socio-economic concerns were brought by the Parties but not analyzed by the Tribunal because it concluded that it lacked jurisdiction on the dispute were also disregarded[22].

A closer look was taken at the cases involving the provision of public services in Argentina around the 2000s. This is because, starting in 1999, Argentina faced a severe economic crisis and took several measures to try to cope with it, including the enactment of the January 6, 2002, Law

[17] Cases which mentioned socio-economic rights but focused on violations of other rights (such as environmental or cultural rights) were not considered in the present analysis. This is what took place in the *South American Silver v. Bolivia* case in which health and water are mentioned a few times in the award, but debate is focused on pollution of sacred spaces (environmental/cultural rights), and deceiving community members (including rape of women from the nearby community).

[18] This is what happened, for instance, in the *Kılıç v. Turkmenistan* case, in which there is reference to human rights, but the debate is focused on lack of due process and fair trials.

[19] This is what happened in the *A11Y v. Czech Republic* case, in which the State adopted regulatory measures providing subsidies to persons with health impairment. Claimant alleged that the adoption of such measures constituted an indirect expropriation. There was however no debate on the duty of the State to promote the right to health and tribunal concluded that there was no expropriation for other reasons.
This is also what occurred in the *Glamis Gold v. USA* case, in which public health is mentioned as one justification for the adoption of certain regulations by the State but the debate is focused on environment and culture protection.

[20] This occurred, for instance, in the *Busta v. Czech Republic* case, in which the State was accused of expropriation because it removed objects from a warehouse with safety and health problems. Right to health was not mentioned as a public interest justification for expropriation and the Tribunal concluded in favor of the State for other reasons. Therefore, the case was not analyzed.

[21] This is what happened in the *Abengoa v. Mexico* case, for instance. Respondent made mere allegations that the investment was threatening public health, but no evidence was provided. This issue was therefore not properly discussed in the dispute and the case was disregarded in the present research.

[22] This is what happened in the *Beijing Shougang and others v. Mongolia* case, in which environmental and socio concerns were brought by Respondent as justifications for the alleged expropriation, but the Tribunal concluded that it lacked jurisdiction and thus did not analyze such issues.

No. 25.561, from January 06, 2002 (the "Emergency Law") which resulted in the alteration of the rules on the charge of tariff rates for public services. Some of these measures have been contested in investment tribunals. Thus, although some of these cases (*e.g.,* the *Enron v. Argentina case)* do not contain explicit references to human right and/or to right health and water, they all refer to measures adopted in times of an economic and social crisis with respect to the provision of public services and hence contain important debate on socio-economic rights[23].

Notwithstanding that, Argentinian cases which did not refer to the provision of public services (*i.e*., water, gas, and electricity) and simply discussed the regulatory right of the State of Argentina were not considered in this investigation[24].

Considering all these criteria, the present research identified **35 cases** that properly debated socio-economic rights issues under investment treaties. Out of these **35** cases, according to UNCTAD's classification (as described above), **5** were decided in favor of State, **27** in favor of investor and **3** in favor of no party.

Not all these cases were, however, selected for analysis. The last criterium applied was to select only cases involving **Latin-American States**. This was done because the purpose of this research is to evaluate the adequacy of the Brazilian CFIA model and the reality of Latin America countries is generally closer to the Brazilian one than are those of European, Asian and North American countries.

Latin American countries have similar economic and social conditions for they are almost all developing countries[25] and face similar social issues, such as high levels of inequality[26], and the protection of indigenous populations.

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[23] The claims and defenses brought by the parties in these cases were generally the same. This has been indicated in the *Sempra* award: "A number of awards issued by ICSID tribunals have dealt with many issues concerning the measures adopted by the Respondent which have also been brought before this Tribunal. In some instances, counsel for each side has been the same as in previous cases and memorials have been written in similar or identical language. Members of this Tribunal have also sat in other such cases. On occasion, the wording used in the paragraphs that follow resembles that of prior awards, particularly insofar as it concerns the explanation of the positions of the parties and some of the considerations relating thereto. The Tribunal, however, has examined every single argument and petition on the basis of their merits in this proceeding". See *Sempra v. Argentina* Award, p. 19.

[24] This is what happened for instance with the *Daimler v. Argentina* dispute, where right to health is mentioned only as example of a public order measure, and in the *Continental Casualty v. Argentina* case, where health is mentioned for the investor in an insurance company but does not provide public services.

[25] UNITED NATIONS. *Country Classification*. Available at: <https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>. Access on 11th September 2020.

[26] According to an article published in the World Bank Blog in 2020, inequality rates in Latin America (in terms of income distribution) remain the highest in the world. FERREIRA, Francisco; SCHOCH, Marta.; *Inequality and Social Unrest in Latin America: The Tocqueville Paradox Revisited.* World Bank Blogs: Let's Talk Development. February

Based on that, nineteen cases were selected for analysis:

Table 1 – Cases Selected for Analysis

Number	Year of Initiation	Short Case Name	Decided in Favor of Whom?
1	2014	Bear Creek Mining v. Peru	Investor
2	2011	Copper Mesa v. Ecuador	Investor
3	2011	Crystallex v. Venezuela	Investor
4	2010	Philip Morris v. Uruguay	State
5	2009	Gold Reserve v. Venezuela	Investor
6	2007	Urbaser and CABB v. Argentina	No Party
7	2007	Impregilo v. Argentina (I)	Investor
8	2004	SAUR v. Argentina	Investor
9	2003	AWG v. Argentina (Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina)	Investor
10	2003	EDF and others v. Argentina	Investor
11	2003	El Paso v. Argentina	Investor
12	2003	National Grid v. Argentina	Investor
13	2003	Suez and Interagua v. Argentina	Investor
14	2002	LG&E v. Argentina	Investor
15	2002	Sempra v. Argentina	Investor
16	2001	Azurix v. Argentina (I)	Investor
17	2001	CMS v. Argentina	Investor
18	2001	Enron v. Argentina	Investor
19	2000	Tecmed v. Mexico	Investor

Source: ISDS Navigator

2.2. CFIA Model Evaluation

CFIAs selected for analysis were the bilateral treaties signed (even if not yet internalized[27]) by Brazil with other States until September 2020. This corresponds to fourteen bilateral CFIAs[28]:

i) Angola

ii) Colombia

2020. Available at: https://blogs.worldbank.org/developmenttalk/inequality-and-social-unrest-latin-america-tocqueville-paradox-revisited. Access on 10th March 2021.

[27] According to the information provided by the Brazilian Government, until May 26th, 2021, only two CFIAs were in force: the one with Angola (enacted by means of Decree nº 9.167, of 11 October 2017) and Mexico (enacted by Decree nº 9.498, of 6th September 2018). SISCOMEX, Agreements in Force. Available at: <http://siscomex.gov.br/acordos-comerciais/acordos-em-vigor/>. Access on 26th May 2021.

[28] All information was extracted from the official platform of the Brazilian Government: System of Foreign Trade (SISCOMEX). See SISCOMEX, Agreements Signed, in Process of Internalization. Available at: <http://siscomex.gov.br/acordos-comerciais/acordo-assinado-em-processo-de-internalizacao/>. Access on 26th May 2021.

iii) Chile[29]

iv) Ecuador

v) Ethiopia

vi) Guyana

vii) India

viii) Malawi

ix) Mexico

x) Morocco

xi) Mozambique

xii) Peru[30]

xiii) Suriname

xiv) United Arab Emirates

2.3. Interviews

Interviews were conducted to collect information on how the provisions of the CFIA model affecting protection and promotion of socio-economic rights (particularly CSR clauses) are being considered by the organs created[31] or related to CFIAs.

To do that, representatives of the Undersecretariat of Foreign Investment (*Subsecretaria de Investimentos Estrangeiros* - *SINVE*), an Undersecretariat of the Brazilian Ministry of Economy, were interviewed by videoconference on June 02nd, 2021.

SINVE comprises two different organs whose work is extremely relevant for the present research: The Ombudsman of Direct Investment (*Ombudsman de Investimentos Diretos – OID*). and the Brazilian National Contact Point for the OECD (*Ponto de Contato Nacional – PCN*).

These two organs are relevant for collecting information on CFIA's implementation because: i) the Ombudsman is an organ originally created by the CFIAs that receives consultations made by

[29] The CFIA signed in 2015 with Chile was incorporated into the Brazil-Chile Free Trade Agreement, incorporated into the Mercosur Economic Complementation Agreement (Acordo de Complementação Economica) n. 35, by means of the 64th Additional Protocol, signed in 14 december 2018 and still in ratification process.

[30] The CFIA signed with Peru was incorporated into the Brazil-Peru Economic-Commercial Expansion Agreement, signed in 2016.

[31] Members of the Brazilian Ministry for Foreign Relations that coordinate the Joint Committees have not been interviewed because only two Committees have been constituted by then and they are still starting to operate. As indicated in Chapter 4, the first of such Committees have occurred to develop the internal regulations on the committees' functioning. Notwithstanding, some information about the Joint Committees' work was collected during the interview with the Ombudsman.

investors (which may relate to socio-economic rights issues, such as labor rights); ii) the CSR clauses in CFIAs bear close relation to the OECD's Guidelines for Multinational Corporations (some of them make even explicit reference to such Guidelines) and the NCP is the organ responsible for raising awareness on responsible business conduct of multinational enterprises operating in Brazil.

The following officers were interviewed:

i) Mr. Marcio Luiz de Freitas Naves de Lima
Undersecretariat of Foreign Investments
marcio.lima@economia.gov.br

ii) Ms. Hevellyn Menezes Albres
General Coordinator of Investment Attraction
hevellyn.albres@economia.gov.br

iii) Mr. Ricardo Figueiredo de Oliveira
Division Chief (Foreign Investments Ombudsman)
ricardo.oliveira@economia.gov.br

The questions posed to the officers interviewed are described in the interview guides attached in Appendix II, and the relevant information provided by the officers from the socio-economic rights perspective is reported in Chapter 4 of this research. Interviews were conducted in Portuguese and hence the original interview guides are in Portuguese. Translations of the guides to English are also provided in Appendix II.

INTRODUCTION

Globalization has significantly increased the levels of foreign direct investment around the world and made countries dependent on it. Although foreign investment may foster development, the traditional structure of the international investment treaties collides with other areas, including human rights.

One of the causes for such collision is the understanding that economic development is something to be regarded separately from social development. For a long time, investment treaties were seen as instruments exclusively concerned with protection of investors - which was then considered as a sufficient means of promoting economic development.

In 1990s, influenced by the liberal wave, several developed and developing countries concluded Bilateral Investment Treaties (BITs) focused on investment protection and liberalization. Strong criticism over such treaties, however, arose after different countries (particularly developing countries) faced large investor claims before arbitral tribunals questioning, among other issues, their regulatory space. BITs were criticized for creating obligations only to States and none to investors.

Because of that, new models of Investment Agreements have started to be created. Such models aim to recalibrate the protection of investor and the needs of States to promote economic and social development, in line with the notion of sustainable development. In this context, in 2015, Brazil, one of the main critics to the BIT model, developed and signed the first Agreement on Cooperation and Facilitation of Investment (*Acordo de Cooperação e Facilitação de Investimentos* – CFIA).

The CFIA model was developed to address some of the concerns arising out of the BITs model: the unbalance between States and investors obligations, the need to ensure States' regulatory space and to attract investors for promoting sustainable development. The CFIA model is built under three pillars: i) risk mitigation; ii) institutional governance; and iii) thematic agendas for promoting cooperation and facilitation of investments.

CFIAs do not entail some of the traditional protections granted to investors under BITs, and constantly stress the importance of safeguarding States' regulatory space and the intention of the parties to promote sustainable development. Further, under the risk mitigation pillar, the CFIA includes clauses on investors' obligations and corporate social responsibility.

The CFIA model brings a new perspective to investment treaties and may correspond to a new path for attracting responsible investors and boosting sustainable development by means of the presence of foreign investors. The model, however, has its deficiencies, including from the sustainable development perspective. CSR clauses addressed to investors entail a soft-law wording and are not subject to State-State arbitration. Therefore, the enforcement and effectiveness of such clauses comes into question.

The purpose of this research is to explore these issues and answer the question as to whether the CFIA model in fact enhances protection and respect for socio-economic rights. For investigating such question, this research is divided between four Chapters.

Chapter 1 presents a brief historical overview of investment law and discusses how investment agreements (especially BITs) are generally structured. After this assessment, the Chapter explores what has been and currently is the objectives of investment treaties, evaluates the literature on the impact of investment treaties to economic growth and development, and shows that "not all investment is good investment".

Chapter 2 then examines the relation between foreign investment and socio-economic rights, which is argued to be one criterium for evaluating whether an investment may in fact contribute to sustainable development. For exploring this issue, Chapter 2 first investigates the notion of social and economic rights, and then shows that there are two main reasons for considering socio-economic rights under the scope of investment agreements: i) investment treaties and the activities of multinational corporations may affect the protection of socio-economic rights in host-States' territories (and this has taken place in different investor-State disputes analyzed in this Chapter); ii) without respect for human rights and promotion of social development, there is no sustainable development and, therefore, no real growth.

After understanding how investment treaties have been designed up to this moment and why they are closely related to protection and promotion of social and economic rights, Chapter 3 investigates how socio-economic rights should be considered in investment agreements. To that end, the Chapter first evaluates the relevant international instruments on business and human rights, and new investment treaty models to understand how this issue is being handled by the international community. Based on this assessment, the Chapter then suggests criteria for evaluating whether an investment treaty enhances protection and respect for human rights and shows what is the

importance of including such provision in investment treaties and not leaving the matter for tribunals' interpretation.

Having seen *why* and *how* investment and human rights should be considered within investment agreements, the Brazilian CFIA model is investigated in Chapter 4. This last Chapter presents first a brief historical overview of Brazilian investment agreements, from the signature and non-ratification of BITs in the 1990s to the signature of the first CFIAs in 2015. The Chapter then provides an analysis of the CFIA model focused on verifying whether it enhances protection and respect for socio-economic rights. To do that, two evaluations are made: i) the texts of the CFIAs are examined to identify provisions related to socio-economic rights protection and promotion; ii) institutional mechanisms created or related to CFIAs are investigated to understand particularly how CSR obligation are being considered in practice.

In conclusion, this research asserts that the CFIA model may be a good mechanism for enhancing protection and respect for socio-economic rights, but some concerns (particularly related to safeguarding States' regulatory space and providing for stronger obligations to investors and States to protect human rights) should be addressed for ensuring that all CFIAs signed are in fact capable of promoting protection and respect for socio-economic rights.

1. THE PURPOSE OF INVESTMENT AGREEMENTS

Investment treaties were originally designed, by the end of the 1950s, to protect foreign investors abroad. In the 1990s, this objective was expanded, and the liberalization of investment was also included in the realm of said agreements.

Investment treaties have always had as their main objective the protection and promotion of investment, without considering how this affects the economic and social development of the countries that receive foreign investment.

With the deepening of globalization in the last decades, investment agreements have become continuously more common and, hence, more complicated issues involving foreign investors - including those related to human rights - have arisen.

Prior to understanding why human rights and investment law should be considered as complementary and reinforcing matters, it is important to comprehend the origins of investment law, as well as how bilateral investment treaties (BITs) – by now the most common model of investment agreements - are generally structured. Thus, this topic provides a brief historical overview of foreign investment law and explains what the meaning and objectives of the most common clauses in investment treaties, particularly BITs, are.

1.1.A BRIEF HISTORICAL OVERVIEW OF FOREIGN INVESTMENT LAW

Although investment law has considerably evolved in the last three decades, the debate on protection of foreign direct investment (FDI) is not new. As explained by Surya Subedi[32], when Europeans started going to Asia, Africa, and Latin America to engage in businesses and trade with local people, they claimed that their investments should not be subject to local law. At that time, foreign investors already looked for special treatment and argued that local legislation could not be used to expropriate or nationalize their assets. This claim was supported by renowned scholars, such as Hugo Groutius[33].

After the Second World War, when many of these territories gained independence and the notion of sovereignty was strengthened, this idea started to change. Home-States argued that they

[32] SUBEDI, Surya. *International Investment Law: Reconciling Policy and Principle*. Portland: Hart Publishing, 2008, pp. 7-8.
[33] GROUTIUS, Hugo. *De Jure Belli ac Pacis Tres* (1946), reprinted in (1925), as cited in SUBEDI, Surya. *International Investment Law: Reconciling Policy and Principle*. Portland: Hart Publishing, 2008.

had the right to expropriate and nationalize foreign assets, provided that adequate compensation was paid[34].

This was also a period of resumption of foreign investment, due to the need for reconstruction after the war[35]. Investment agreements that arose during this time (mostly during the 1960s) were directed at protecting investors from arbitrary measures, particularly from "Soviet moves"[36].

In this scenario, the doctrine of *international minimum standard* arose. At that time, given that there were no international treaties on foreign investment, local law applied to international investment. Nonetheless, when local law was allegedly inadequate or underdeveloped, it was claimed that the international minimum standard of protection had to be applied. Surya Subedi highlights that this notion of minimum standard was based on investment law and on human rights law, especially on the right to property[37]. Therefore, expropriation or nationalization could not occur without payment of prompt and adequate compensation.

The doctrine of *international minimum standard* was repudiated by developing countries, particularly in Latin America, which claimed that payment of compensation should not always be due. It was asserted that payment of compensation was only necessary if and to the same extent that it was guaranteed to national corporations. This was known as the *Calvo doctrine,* supported by the Argentinian jurist Carlos Calvo. The Calvo doctrine was based on the notion of equality of treatment between foreign investors and nationals[38].

Developed countries, especially the United States, opposed to this. In 1938, the former Secretary of State, Cordell Hull, after the expropriation of agrarian properties of US-citizens by the Mexican Government, sent a letter to the Mexican Ambassador, affirming that expropriation

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[34] SUBEDI, Surya. *International Investment Law: Reconciling Policy and Principle*. Portland: Hart Publishing, 2008, pp. 8-11.
[35] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. UK: Oxford University Press, 2008, p. 1.
[36] See Abs and Shawcross, *The Proposed Convention to Protect Foreign Investment: A Round Table: Comment on the Draft Convention by its Authors*, Journal of Public Law, 9, 1960, pp. 119-24. In.: MANN, Howard. *Reconceptualizing International Investment Law: Its Role in Sustainable Development*. Lewis & Clark Law Review, Vol 17:3, 2013, p. 522.
[37] SUBEDI, Surya. *International Investment Law: Reconciling Policy and Principle*. Portland: Hart Publishing, 2008, p. 11.
[38] SUBEDI, Surya. *International Investment Law: Reconciling Policy and Principle*. Portland: Hart Publishing, 2008, pp. 14-16.

without adequate compensation was confiscation[39]. He pleaded that the principle of equality was not sufficient to discharge States from the obligation to pay adequate, prompt, and effective compensation and that foreign investors had to be protected according to be the standard of justice recognized by international law[40]. This gave rise to the so-called *Hull formula*.

This debate between developed and developing countries went on for decades until when, in 1974, the General Assembly adopted the Charter of Economic Rights and Duties of States (CERDS), providing that States have the right to:

> "Nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent (….)[41]". (emphasis by the author)

As highlighted by Andrew Guzman[42], the adoption of such Charter represented a victory to developing countries, since the right to expropriation was assured upon payment of appropriate compensation to be determined according to the circumstances[43] - as opposed to the adequate, prompt, and effective compensation supported by the *Hull formula*.

This was only until the rise and expansion of the BITs in the 1990s, which did not only incorporate the *Hull formula*, but also, in general, provide greater protection for investors. Guzman indicates that from 1959 to 1991, only 400 BITs were signed worldwide, whereas in 1996, almost

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[39] HULL, Cordell. *Letter of the Secretary of State to the Mexican Ambassador (Castillo Nájera)*. Washington, July 21st, 1938. Available at: <https://history.state.gov/historicaldocuments/frus1938v05/d662>. Access on June 20, 2019.

[40] In a second letter sent to the Mexican Ambassador on 22 August 1938, Hull asserted that: "The statement in your Government's note to the effect that foreigners who voluntarily move to a country not their own assume, along with the advantages which they may seek to enjoy, the risks to which they may be exposed and are not entitled to better treatment than nationals of the country, presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations. Actually, the question at issue raises no possible problem of special privilege. The plain question is whether American citizens owning property in Mexico shall be deprived of their properties and, in many instances, their very livelihood, in clear disregard of their just rights". HULL, Cordell. Letter of the Secretary of State to the Mexican Ambassador (Catillo Nájera). August 22nd, 1930. Available at: <https://history.state.gov/historicaldocuments/frus1938v05/d665>. Access on: June 20, 2019.

[41] Chapter II- Economic rights and duties of states, Art. 2, c). UNITED NATIONS GENERAL ASSEMBLY. *Charter of Economic Rights and Duties of States*. Available at: <https://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Charter_of_Economic_Rights_and_Duties_of_States_Eng.pdf>. Access on: June 20, 2019.

[42] GUZMAN, Andrew T. *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, Virginia Journal of International Law, 38, 1998, p. 650.

[43] UNITED NATIONS GENERAL ASSEMBLY. *Charter of Economic Rights and Duties of States*. Available at: <https://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Charter_of_Economic_Rights_and_Duties_of_States_Eng.pdf>. Access on: June 20, 2019.

1000 BITs had been signed[44]. This means that it took 30 years for States to sign 400 BITs[45], and only 5 years to sign 600 more.

In the 1990s, States were seeking for liberalizing investment and, hence, the great expansion of investment agreements (especially BITs) took place in this period. Investment treaties, which had as their original purpose the protection of foreign investors, now were also an important part of the investment liberalization policy, mostly of developed countries[46]. Therefore, in the 1990s, BITs were designed with the sole purpose to protect investors and liberalize investment.

Finally, it should be recalled that the FDI system is intrinsically connected to the trade regime.

The trade system was built simultaneously to the FDI developments explained above, and the division between the two regimes may cause the false impression that both systems are not interrelated.

There are in fact numerous differences between the trade and investment system, especially in terms of institutional background, normative profile, scope of application of the relevant rules, and actors involved[47].

Nonetheless, such differences do not exclude the close relation between the two systems. In fact, such relation was recognized in both the Havana Charter for an International Trade Organization and in the Package of the Marrakesh Agreement Establishing the World Trade Organization.

The Havana Charter for an International Trade Organization (ITO) of 1948, organization that led to the creation of the World Trade Organization (WTO) in 1995, already established that one of the purposes of the former ITO was to "formulate and promote the adoption of a general

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[44] GUZMAN, Andrew T. *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, Virginia Journal of International Law, 38, 1998, p. 652.

[45] The lack of consolidation of investment law was recognized in the ICJ Barcelona Traction case: "Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane". INTERNATIONAL COURT OF JUSTICE (ICJ). *Case Concerning the Barcelona Traction, Light and Power Company, Limited*. The Hague, Judgement of 05th February 1970, pp. 47-48.

[46] MANN, Howard. *Reconceptualizing International Investment Law: Its Role in Sustainable Development.* Lewis & Clark Law Review, Vol 17:3, 2013, p. 522-525.

[47] FONTOURA COSTA, Jose Augusto. *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*. Oñati Socio-Legal Series, Vol. 1, No. 4, 2011; PAUWELYN, Joost. *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus*. American Journal of International Law, 109(4), 761-805, 2015.

agreement or statement of principles regarding the conduct, practices and treatment of foreign investment"[48]. Further, article 12 of the Havana Charter was also destined to "international investment for economic development and reconstruction".

The Marrakesh Agreement Establishing the WTO in 1995 also refers to investment. Albeit the text of the Marrakesh Agreement does not expressly mention the linkage between trade and investment, one of its Annexes corresponds to the Agreement on Trade-Related Investment Measures (TRIMS)[49]. TRIMS is destined to address certain investment measures that can cause trade-restrictive and distorting effects to trade of goods. Its preamble establishes that:

> "Desiring to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition"[50].

Moreover, Annex 1B of the Marrakesh Agreement established the General Agreement on Trade in Services (GATS), which, as indicated in the WTO website, "addresses foreign trade in services as one of four modes of supply of services"[51].

In 1996, the WTO created a Working Group on Trade and Investment. In 1998, the Working Group released a report on the different connections between trade and investment[52], *i.e.,* the implications of the relationship between trade and investment for development and economic growth, the economic relationship between trade and investment, and the existing international instruments and activities regarding trade and investment[53].

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[48] WORLD TRADE ORGANIZATION. *Havana Charter for an International Trade Organization*, Art. 11, 2, c). Available at: <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf>. Access on 20th March 2021.

[49] WORLD TRADE ORGANIZATION. *Agreement on Trade-Related Investment Measures (TRIMS)*. Available at: <https://www.wto.org/english/docs_e/legal_e/18-trims.pdf>. Access on 20th March 2021.

[50] WORLD TRADE ORGANIZATION. *Agreement on Trade-Related Investment Measures (TRIMS)*. Available at: <https://www.wto.org/english/docs_e/legal_e/18-trims.pdf>. Access on 20th March 2021.

[51] World Trade Organization. *Trade and Investment*. Available at: <https://www.wto.org/english/tratop_e/invest_e/invest_e.htm>. Access on 21st March 2021.

[52] World Trade Organization. *Report (1998) of the Working Group on the Relationship Between Trade and Investment to the General Council*. Available at: < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=1725,51054,60811,41789,68747,10147,3614,17496,20020,11397&CurrentCatalogueIdIndex=8&FullTextHash=>. Access on 21st March 2021.

[53] Such report recommended that the Working Group continued to work on the issues raised by Members, covering different issues raised by Members on the three main topics identified (impact of the relationship to economic growth, economic relation between trade and investment, and international instruments on investment and trade). After the publication of this report of 1998, however, no further updates were included on WTO's website. See WORLD TRADE ORGANIZATION. *Trade and Investment*. Available at: <https://www.wto.org/english/tratop_e/invest_e/invest_e.htm>. Access on 21st March 2021.

Giorgio Sacerdoti explains that the trade and investment systems are connected because the liberalized trading system and an open regime of foreign direct investment are mutually supportive[54].

Trade impacts FDI for different reasons. When it comes to *services*, competitiveness increases when the service provider has a physical presence (FDI). With respect to trade of *goods*, trade barriers may impact the localization of FDI, as described by Giorgio Sacerdoti:

> "Trade barriers have a variety of effects on the localization of FDI, depending on the nature of the barrier and the type of investment. **A sufficiently high tariff may induce FDI motivated by "tariff jumping" to establish in a protected market to serve it better.** On the other hand the evidence supports the view that protected markets do not favour integration and export by foreign investors. Export oriented FDI has been attracted more by the relatively open markets of certain Asian countries, while local market oriented FDI have been attracted rather by the until recently protected Latin America markets**. Low tariffs are thus the preferred strategy for countries wishing to integrate themselves into the global economy also through the inflow of FDI**"[55]. (emphasis by the author)

FDI impacts trade flows as well, since the presence of foreign investors may increase exports:

> "If trade policies, including regional agreements, affect FDI flows, FDI has in turn an impact on trade. The effects on the home versus that on the host countries' trade position have been distinguished and debated at length. It is widely held today that the traditional view that FDI and home country exports are substitutes ignores the complexity of the relationship in the contemporary global economy. **On the contrary the gain in competitive position of the internationalized firm may well induce additional exports of intermediate goods and services to the subsidiaries, besides generating profits remittances.** Analysis has shown that United States and Swedish exports, among others, were positively influenced by their foreign investments"[56]. (emphasis by the author)

In conclusion, albeit FDI and trade systems are formally divided, they are closely connected: trade impacts FDI flows and *vice-versa*. Further, if adequately designed, both systems may as well enhance economic growth, as demonstrated in topic 1.3 of this Chapter.

1.2.INVESTMENT AGREEEMENTS' MOST COMMON PROVISIONS

BITs are bilateral treaties that aim to regulate how foreign investors from the contracting States will be treated when operating in the other country. As mentioned above, although they

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[54] SACERDOTI, Giorgio. *Bilateral Treaties and Multilateral Instruments on Investment Protection*. The Hague: Collected Courses of the Hague Academy of International Law, Vol. 269, 1997, p. 285.
[55] SACERDOTI, Giorgio. *Bilateral Treaties and Multilateral Instruments on Investment Protection*. The Hague: Collected Courses of the Hague Academy of International Law, Vol. 269, 1997, p. 286.
[56] SACERDOTI, Giorgio. *Bilateral Treaties and Multilateral Instruments on Investment Protection*. The Hague: Collected Courses of the Hague Academy of International Law, Vol. 269, 1997, p. 286.

originated in the 1950s[57], the BITs expanded in the 1990s, mostly after the US developed its BIT program in 1977. Guzman[58] indicates that the main concerns of the United States when creating such program were to: i) reinforce the Hull formula; ii) protect foreign investors; and iii) provide a mechanism to resolve dispute independent from the national courts (investor-State arbitration).

Although BIT's clauses vary from agreement to agreement, there are certain provisions that are present in almost all treaties signed in the modern era of BITs (*i.e.,* after the 1990s). Moreover, most of these clauses are also generally encompassed by other kinds of investment agreements, such as regional investment agreements.

1.2.1. Expropriation

In general, expropriation is prohibited under BITs. It is exceptionally allowed when there is public purpose, non-discrimination, and adequate, prompt, and effective compensation[59].

The concept of expropriation does not refer only to direct expropriation, *i.e.,* nationalization/direct taking of foreign assets. It usually also includes what is known as "indirect expropriation".

Although BITs usually do not define indirect expropriation, it normally includes regulatory taking, which concerns situations in which the host-State establishes further regulatory requirements that may impair the investors' business[60]. Such regulatory measures may refer to environmental aspects, labor laws, and/or laws to ensure the respect for human rights by corporations. Therefore, it is necessary to draw a line between what is a legitimate regulatory

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[57] As indicated by Guzman, the first BIT was signed in 1959, between Germany and Pakistan. See GUZMAN, Andrew T. *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, Virginia Journal of International Law, 38, 1998, p. 653.

[58] GUZMAN, Andrew T. *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, Virginia Journal of International Law, 38, 1998, p. 654.

[59] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. UK: Oxford University Press, 2008, p. 90.

[60] James Crawford provides a very clear definition of what is indirect expropriation. Although he refers specifically to indirect expropriation under NAFTA, it generally reflects the general idea of indirect expropriation in investment agreements: "Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, **but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably to- be-expected economic benefit of property** even if not necessarily to the obvious benefit of the host State". (emphasis added). CRAWFORD, James. *Browlie's Principles of Public International Law*. 8th Ed. UK: Oxford University Press, 2012, p. 622.

measure (usually related to public purpose[61]) and what consists in indirect expropriation. As will be seen below, this is one of the issues that new investment agreement models are trying to address.

1.2.2. National Treatment

National treatment clauses establish that foreign investors shall be receive a treatment no less favorable than that accorded to nationals. Thus, it does not imply that investors shall be treated in the exact same way as nationals, but rather that they cannot be treated in a less favorable manner[62].

In some treaties, the national treatment clause expressly mentions that the nationals must be in "like situations". It is the case, for instance, of the "new-NAFTA" Agreement, *i.e.,* the Agreement between the United States of America, the United Mexican States and Canada ("USMCA") [63] and of the US-BIT Model, which provide that:

> "Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory" [64]. (emphasis by the author)

For this reason, in order to invoke the national treatment clause under USMCA and under a BIT signed with the US, the investor has to show that its activities are similar to that of the national investor[65]. The analysis of whether an activity is similar or not shall be done on a case-by-case basis and does not require that the product or the industry sector of the foreign and national investors are the same[66].

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[61] Pedro Martinez-Fraga and Bryan C. Paisner explain that the notion of public purpose is generally not defined in investment agreements and sustain that the harmonization of such concept is a fundamental step for ensuring investors' protection. See MARTINEZ-FRAGA, Pedro; REETZ, Ryan Cave. *Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era*. 1st Ed. New York: Cambridge University Press, 2015.

[62] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. UK: Oxford University Press, 2008, pp. 178-179.

[63] Agreement between the United States of America, the United Mexican States, and Canada 05/30/19 Text. Available at: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>. Access on 21st June 2019.

[64] UNITED STATES TRADE REPRESENTATIVE (USTR). *U.S. Model Bilateral Investment Treaty.* Available at: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. Access on: June 21, 2019.

[65] Rodney Neufeld highlights that this provision which refers to "like situations" originated in the Friendship, Commerce and Navigation Treaties and, therefore, it shall not be interpreted in light of the expression "similar product" under GATT. See BETHLEHEM, Daniel; MCRAE, Donald; NEUFELD, Rodney; VAN DAMME, Isabelle. *The Oxford Handbook of International Trade Law*. UK: Oxford University Press, 2009, p. 633-634.

[66] BETHLEHEM, Daniel; MCRAE, Donald; NEUFELD, Rodney; VAN DAMME, Isabelle. *The Oxford Handbook of International Trade Law*. UK: Oxford University Press, 2009, pp. 633-634.

1.2.3. Most Favored nation

The national treatment clause is often accompanied by the most favored nation clause ("MFN-clause"), given that both provisions are aimed at preventing discriminatory treatment from the host-State. However, instead of guaranteeing treatment no less favorable than that granted to national investors, the MFN-clause ensures treatment no less favorable than that accorded to third parties, which means investors from other countries[67].

Some MFN clauses, as those inserted in the UCMCA and US BIT model, also refer to the notion of "like circumstances", as do national treatment clauses. Thus, for investors to claim their application, they also must prove that the third party is in a like situation.

1.2.4. Fair and Equitable Treatment (FET)

In addition to the national treatment and MFN clauses, which, as seen, have the purpose of avoiding discriminatory treatment, several investment treaties also contain fair and equitable treatment clauses.

As observed by José Alvarez, the FET standard is frequently raised by investors and adjudicated on their behalf:

> "(…) [T]the treaty based protection ensuring "fair and equitable treatment" (FET) is the **most important and frequently adjudicated question in international investment law.** FET is not only the most frequently invoked claim by investors, it is also the **most successful on their behalf**"[68]. (emphasis by the author)

The language of such clauses varies a lot, but they generally indicate that home-States should grant foreign investors fair and equitable treatment - and some expressly mention that this treatment shall be accorded as determined by international law[69]. Due to the broad language provided by these clauses, they need to be interpreted on a case-by-case basis[70].

In this sense, José Alvarez explains that:

> "Despite the linguistic differences among investment treaties with respect to how FET is incorporated, there is an emerging consensus among arbitral decisions issued to date that FET is a single, unified

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[67] See DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, pp. 186-187.
[68] ALVAREZ, José E. *The Public International Law Regime Governing International Investment*. 1st Ed. The Hague: Hague Academy of International Law, 2011, p. 177.
[69] See some examples in DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, pp. 121-122.
[70] SACERDOTI, Giorgio. *Bilateral Treaties and Multilateral Instruments on Investment Protection*. The Hague: Collected Courses of the Hague Academy of International Law, Vol. 269, 1997, p. 346.

> standard and does not license two separate enquiries (that is a determination of whether a Government's action was "fair" and a separate determination of whether it was "equitable"); that it is an independent absolute standard and not a "relative" standard of treatment such as national treatment or a standard whose application depends on the law of the host State; **but also that it is fact-specific, flexible and contextual standard whose application turns on the circumstances of each case**"[71]. (emphasis by the author)

Fair and equitable treatment clauses derive from the notion of good faith. Therefore, they commonly imply the prohibition of contradictory behavior – *venire contra factum proprium/ estoppel*, and the need to respect due process. They may also be interpreted according to international law standards, which means that the existence of this clause in an investment treaty may give additional protection to foreign investors in relation to nationals[72]. This is also one of the concerns of developing countries that led to the creation of new treaty models, as further detailed in the next Chapters.

1.2.5. Full Protection and Security (FPS)

Most investment treaties contain clauses on full protection and security. As explained by Rudolf Dolzer and Christoph Shreuer, such clauses suggest that: "the host state is under an obligation to take active measures to protect the investment from adverse effects. The adverse effects may stem from actions of the host state and its organs or from third parties"[73].

Originally, FPS clauses were aimed at protecting the physical security of the investment – and different investment tribunals have rule in this sense[74]. Rudolf Dolzer and Christoph Shreur, nonetheless, indicate that "the contemporary understanding extends beyond physical protection to guarantees against infringements of the investor's right by the operation of laws and regulations of the state"[75]. There are also more recent decisions of investment Tribunals that have adopted this position, such as the award in the *Azurix v. Argentina* case.

Notwithstanding such more extended contemporary vision of such clauses, the authors explain that it does not imply on an absolute protection against physical or legal infringement:

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[71] ALVAREZ, José E. *The Public International Law Regime Governing International Investment*. 1st Ed. The Hague: Hague Academy of International Law, 2011, p. 206.
[72] See DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, p. 122-123.
[73] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, p. 149.
[74] See *Impregilo v. Argentina* Award, p. 75; *Suez and Interagua v. Argentina* Award, p. 62; *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 139; AWG v. Argentina, p. 68.
[75] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, p. 149.

> "There is a broad consensus that the standard does not provide an absolute protection against **physical or legal infringement**. In terms of the law of the state responsibility, the host state is not placed under an obligation of strict liability to prevent such violations. Rather, **it is generally accepted that the host state will have to exercise 'due diligence' and will have to take such measures protecting the foreign investment as are reasonable under the circumstances**. Lack of resources to take appropriate action will not serve as a defense for the host state. Whenever state organs themselves act in violation of the standard, or significantly contribute to such action, no issues of attribution or due diligence will arise because the state will then be held directly responsible". (emphasis by the author)

As seen, full protection and security clauses may be interpreted in a very strict manner, *i.e.,* encompassing only physical security of investments, or with a broader perspective, involving legal security as well. The latter interpretation is sometimes used by Tribunals[76] and is closely related to the FET standard.

1.2.6. Umbrella Clause

Umbrella clauses guarantee that host-states observe their treaty obligations in relation to investors, including under the contracts entered between the host State and the investor[77].

Rudolf Dolzer and Christoph Schreuer explain that such clauses originated when large-scale foreign investments started to arise and needed more protection:

> "After 1945, projects for large-scale foreign investments had prompted the question whether guarantees provided under the domestic law of the host state provided sufficient legal stability to justify the required expenditures for such projects. **Umbrella clauses were seen as a bridge between private contractual arrangements, the domestic law of the host state, and public international law allowing for more investor security.** One effect of these clauses is to blur the distinction between investment arbitration and commercial arbitration; in the absence of such clauses, contractual matters would normally be dealt with in the framework of commercial arbitration"[78]. (emphasis by the author)

The referred authors also explain that the presence of this clause in investment agreements received little attention in the academic discussion between 1959 and 2003 but such consensus fell apart with the *SGS v. Pakistan* arbitration[79]. In this case, the Tribunal concluded that they lacked jurisdiction over contractual claims, despite the presence of an alleged umbrella clause in the respective BIT[80].

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[76] As in the *Azurix v. Argentina case.*

[77] See DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, p. 153.

[78] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, pp. 154-155.

[79] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, p. 157.

[80] *SGS v. Pakistan* Decision of The Tribunal on Objections to Jurisdiction, para. 161.

Thus, umbrella clauses may extend the protection granted to investors under BITs to contractual claims made by investors against host states. Although there is no longer a consensus over this issue, such claims have already been raised in investment arbitrations which debated issues concerning socio-economic rights, as will be seen in Chapter 2.

1.2.7. Dispute settlement

One of the main aspects of the investment treaties' model developed in the 1990s is the inclusion of dispute settlement clauses that do not depend on national courts. Thus, most of the investment treaties signed in this period entail investor-State arbitration clauses, usually providing that disputes will be settled under the International Center for Settlement of Investment Disputes (ICSID), of the World Bank Group[81].

ICSID was funded in 1966, after the ICSID Convention was ratified by the first 20 States. The center has jurisdiction over all investment disputes arising between Contracting States. Therefore, most investor-State arbitrations are brought to the ICSID[82].

Developing States have opposed to this system and claimed that they were facing too onerous proceedings. As it will be further explained, this is why some countries in the global south, such as Brazil, are creating new models of investment agreements, which provide for other means of settling disputes, such as mediation.

1.2.8. Emergency, Necessity and Public Order

Many BITs contain clauses on the legal rules applicable to extraordinary circumstances. Rudolf Dolzer and Christoph Schreuer elucidate that such clauses are destined to establish the rules on how such situations can be handled by the host-State without violating investors' rights:

> "The host state's concern is to retain sufficient legal flexibility in dealing with extraordinary situations without incurring any liability towards the foreign investor. The investor and its home state will be aware that during a longer investment project, extraordinary situations may arise and that one of the purposes of the legal framework created by an investment treaty will be precisely to protect the investments during such difficult periods"[83].

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[81] See DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, pp. 222-223.

[82] More information is available at: <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx>. Access on June 21, 2019.

[83] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, p. 166.

The referred authors explain that investment agreements have generally accepted the customary international law rules on *force-majeure*. Therefore, the principle of non-responsibility applies to host-States in times of extraordinary crisis, provided that the State exercises due diligence[84].

In the *Enron v. Argentina case,* the expert opinion of José Alvarez specified the requirements for applying the necessity clause of the Argentina-USA BIT[85]:

> "The expert opinion of Professor Alvarez summarized its conclusions on the meaning of Article XI stating that this essential security/public order clause "(1) is not self-judging; (2) **does not apply to 'economic emergencies', except in the most extraordinary and so far unprecedented circumstances**; and (3) even when it does apply (for example, in the event of war or insurrection), is not the equivalent of a 'denial of benefits' or termination clause in a treaty, and so **does not negate state responsibility to pay compensation for actions that harm investors**." (emphasis by the author).

Different Tribunals[86] have also relied on the International Law Commission (ILC) Articles on State Responsibility (ARSIWA) to interpret public order and necessity clauses under investment treaties, especially its article 25:

> "**Article 25 Necessity**
> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
> (a) the international obligation in question excludes the possibility of invoking necessity; or
> (b) the State has contributed to the situation of necessity"[87].

Therefore, public order clauses do not necessarily exempt States from responsibility under BITs. Actually, as it will be seen in Chapter 2 below, host-States have already lost several investor-State arbitrations for measures taken in times of serious economic crisis.

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[84] DOLZER, Rudolf; SHREUER, Christoph. *Principles of International Investment Law*. 1st Ed. UK: Oxford University Press, 2008, pp. 166-167.

[85] Article XI of the Argentina-USA BIT provides that: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests". *Enron v. Argentina* Award, para. 323.

[86] See *Impregilo v. Argentina, CMS v. Argentina.*

[87] Art. 25, ILC Articles on Responsibility of States.

1.3.WHAT IS THE PURPOSE OF INVESTMENT AGREEMENTS?

As explained above, originally, investment treaties were aimed at protecting foreign investors and promoting investment liberalization. Liberalization was then seen as the most efficient path to development[88] and, hence, BITs were considered as important instruments for countries (including developing countries) to grow[89]. Liberal though was so strong at that time that in some cases the World Bank and the International Monetary Fund (IMF) imposed liberal structural adjustment policies as a condition for the receipt of loans[90].

By celebrating BITs developed countries were looking to reduce investor risk and protect their investors abroad, whereas the promise to developing countries was that celebrating BITs and liberalizing investments would enhance economic development[91].

Such promises fell apart for two main reasons.

First, because BITs were found *not to be a guarantee of FDI flows' increase*. In a study published in 2009, UNCTAD recognized that BITs have an ***indirect*** impact on FDI flows and in some cases may influence the decision of investors from developed countries to invest in developing States. This is however not a guarantee[92] - as it was expected when BITs were created.

> "BITs add a number of necessary components to the policy and institutional determinants for FDI, and **hence impact FDI inflows into developing countries only indirectly**. This indirect impact of BITs on FDI has been measured in a series of econometric studies, published between 1998 and 2008. Its assessment is not an easy task, given the complexity of host country FDI determinants, the sometimes poor state of FDI data and difficulties with properly capturing and reflecting in econometric models all important FDI determinants. **Whereas the findings of early empirical studies on the impact of BITs**

[88] Kenneth Vandeveld is one of the scholars that argue that the purpose of investment treaties is to establish the application of the rule of law and create a liberal investment regime. See VANDEVELD, Kenneth. *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*. Columbia Journal of Transnational Law, pp. 502-527. 1998; UNCTAD. *Trends in International Investment Agreements: An Overview*, 1999. Available at: https://unctad.org/system/files/official-document/iteiit13_en.pdf. Access on 28th March 2021. Pp. 38-29.

[89] In this sense, Kenneth Vandeveld stated in 1998: "liberalization may not be essential to economic development. The recent history with planned economies and important substitution development policies suggests, however, that states that choose an illiberal path have encountered enormous difficulties with economic development beyond a certain point. In short, states seeking to develop economically may have little alternatives as a practical matter, but to embrace the kinds of policies that a BIT requires". VANDEVELD, Kenneth. *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*. Columbia Journal of Transnational Law, pp. 502-527. 1998. P. 526.

[90] VANDEVELD, Kenneth. *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*. Columbia Journal of Transnational Law, pp. 502-527. 1998, p. 502.

[91] See FOX, Genevieve. *A Future for International Investment? Modifying BITs to Drive Economic Development*. Georgetown Journal of International Law, n. 229, 260, 2014, p. 232.

[92] This was also the conclusion of Umberto Celli Jr in an article published already in 2004. See CELLI JUNIOR, Umberto. *Os Países Emergentes e As Medidas de Investimento Relacionadas ao Comércio: O Acordo TRIMS da OMC*. Revista da Faculdade de Direito, Universidade de São Paulo, v. 99 (2004), pp. 505-521.

> **on FDI flows were ambiguous, with some showing weak or considerable impact (and one or two no impact at all), more recent studies published between 2004 and 2008 – based on much larger data samples, improved econometric models and more tests – have shifted the balance towards concurring that BITs appear to have an impact on FDI inflows from developed countries into developing countries. Although most BITs do not change the key economic determinants of FDI, they improve several policy and institutional determinants, and thereby increase the likelihood that developing countries engaged in BIT programme will receive more FDI[93]**". (emphasis by the author)

Investment treaties may thus indirectly impact FDI increase flows, but do not provide a guarantee that this will in fact occur. Brazil, for instance, has never ratified any BIT and still is one of the countries which has the greatest rate of FDI inflows, according to data collected by the World Bank[94].

The second reason why the investment treaties promise started to crumble was because even in cases where FDI inflows increased, investment treaties did not guarantee that such increase would in fact contribute to host-States' development.

Increase in FDI flows were found to cause development mainly because of the capital and technology transfers theoretically associated with it. This was a particular concern of developing countries when celebrating investment agreements[95]. In fact, FDI **can** enhance capital, technological and employment development, and may as well promote increase of domestic production[96]. Consequently, FDI can promote economic growth[97].

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[93] UNCTAD. *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*. UNCTAD Series on International Investment Policies for Development. New York and Geneva, 2009. p. 55.

[94] WORLD BANK. *Foreign Direct Investment, net inflows*. Available at: <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?most_recent_value_desc=true>. Access on 28th March 2021.

[95] SALACUSE, Jeswald W. *The Emerging Global Regime for Investment*. Harvard International Law Jornal n. 427, Vol.51, N. 2, summer 2010, pp. 435-441.

[96] BOONE, Joshua. *How Developing Countries Can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies*. The Global Business Law Review, n 187, Vol. 1, Issue 2, Article 5, 2011.

[97] Different scholars have argued that FDI can generate economic growth – albeit this is not a guarantee. Dirk Willem Velde explains that FDI "can raise economic growth by increasing the amounts of factors or production (by increasing capital or employment, directly, or indirectly in local suppliers and competitors), in the traditional growth accounting context, or increasing the efficiency by which these factors are used (by using superior technology, or locating in high productivity areas, or through productivity spillovers)". VELDE, Dirk Willem te. *Foreign Direct Investment and Development An historical perspective.* Background paper for 'World Economic and Social Survey for 2006', Commissioned by UNCTAD. Available at: <https://odi.org/en/publications/foreign-direct-investment-and-development-an-historical-perspective/>. Access on 29th March 2021. P. 14.
Dani Rodrik, one the critical voices against globalization, still acknowledges that Dani Rodrik explains that the benefits that can be generated by trade (including foreign investments) are positive externalities, which means that the social benefits that they may promote exceeds the gains of private actors. RODRIK, Dani. *The Globalization Paradox: Democracy and the Future of the World Economy*. New York, London: W.W. Norton & Company, Inc, 2011, p. 157.

The positive effects of FDI to economic growth, however, are not automatic. First, because not all investment is good investment. Second, because host-States need to ensure that, along with the increase of FDI inflows, the investment climate is being improved, a competitive environment is being created and human resources are being developed[98]. Otherwise, the benefits of FDI will not be enjoyed and there may be adverse effects.

In this regard, the UNCTAD Investment Policy Framework for Sustainable Development clarifies that investment agreements **can**: i) promote stability, predictability, and transparency, reinforce investor confidence, and consequently promote investment; ii) foster collaborative initiatives between home and host countries; iii) contribute to the creation of a more attractive investment climate[99]. Investment agreements, on the other hand, **cannot** "turn a bad investment climate into a good one and they cannot guarantee the inflow of foreign investment"[100].

Moreover, even in cases where FDI in fact generates economic growth, it should be recalled that economic growth is not a synonym for development.

Development scholars, such as Amartya Sen, have also showed that economic growth does not necessarily imply development. According to Sen, the ultimate goal of the sought for economic growth is the expansion of human freedom. Therefore, any notion of growth that does not integrate the economic and social approaches of development would be limited[101]: "The basic point is that the impact of economic growth depends much on how the fruits of economic growth are used"[102].

Similarly, Dani Rodrik, one of the critical voices against globalization, sustains that trade, investment and globalization should not be ends in themselves but rather means for achieving other goals:

> "Trade is a means to an end, not an end in itself. Advocates of globalization lecture the rest of the world incessantly about how countries must change their policies and institutions in order to expand their international trade and become and become more attractive to foreign investors This way of thinking confuses means for ends.

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[98] VELDE, Dirk Willem te. *Foreign Direct Investment and Development An historical perspective.* Background paper for 'World Economic and Social Survey for 2006', Comissioned by UNCTAD. Available at: <https://odi.org/en/publications/foreign-direct-investment-and-development-an-historical-perspective/>. Access on 29th March 2021. P. 17.

[99] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 74.

[100] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 74.

[101] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, pp. 294-295.

[102] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, p. 44.

> **Globalization should be an instrument for achieving the goals that societies seek: prosperity, stability, freedom, and qualify of life**"[103]. (emphasis by the author)

In the book *Straight Talk on Trade*, Dani Rodrik explains that trade liberalization (including investment) has produced winners and losers and the benefits of international trade have not always been equality distributed among society. And shows that this one of the reasons why trade openness has been causing so many populist reactions lately[104].

The purpose of investment treaties is to promote development – which shall not be confused with economic growth. This means that the benefits of FDI cannot be enjoyed only by investors[105].

Considering the foregoing, one may conclude the following.

First, investment agreements can increase FDI inflows and consequently promote economic growth by promoting technology and capital transfer, and employment generation. **Second**, no economic growth will take place if host-States do not adopt measures to improve investment climate, create a competitive environment and develop human resources. **Third**, economic growth is not a synonym for development. Development requires redistribution of wealth and protection of social and environmental rights in the host countries – which naturally includes socio-economic rights, as explored in the following Chapter.

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[103] RODRIK, Dani. *The Globalization Paradox: Democracy and the Future of the World Economy.* New York, London: W.W. Norton & Company, Inc, 2011, p. 240.

[104] See RODRIK, Dani. *Straight Talk on Trade: Ideas for a Sane World Economy*. 1st Ed. Princeton: Princeton University Press, 2016.

[105] In this context, Aron Broches explains the role of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) has the objective of improving investment climate for both investors and States. BROCHES, Aron. *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. *Collected Courses, Hague Academy of International Law*, 136, 1972-II. Pp. 335- 348.

2. THE RELATION BETWEEN SOCIO-ECONOMIC RIGHTS AND INVESTMENT AGREEMENTS

As seen, investment agreements have until recently been designed with the sole purpose of protecting foreign investors and liberalizing investments. Investors have been granted a protection not only equal to nationals and third countries, but also in accordance with the notion of "fair and equitable treatment", which in certain circumstances implies a greater protection than that accorded to local investors. Further, most investment treaties establish arbitration as their dispute settlement mechanism (without the obligation to exhaust local remedies), which has led developing countries to face numerous and onerous proceedings[106].

One may thus conclude that foreign direct investment is not always positive, especially for developing countries. This does not mean, however, that FDI should be avoided and that it cannot be used promote development. On the contrary – foreign investment can be useful for enhancing innovation and diffusing new technologies. Nonetheless, this shall not be promoted whatever the cost.

This research submits that one of the most important criterium for analyzing whether an investment is positive or not is the respect for human rights, including socio-economic rights[107]. This is the problem where this research departs from: how to balance FDI protection with protection of socioeconomic rights to promote development.

As will be seen, socio-economic rights should be considered within the scope of investment agreements, mainly for two reasons: i) because investment treaties and the activities of multinational corporations may affect the protection of socio-economic rights in host-States' territories – and this has already happened in various cases; and ii) because without the respect for human rights and promotion of social development, there is no sustainable development and, therefore, no real growth.

Before exploring such reasons more deeply, however, it is important to understand which rights are comprised by the notion of socio-economic rights and their relevance.

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[106] See BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, pp. 218-222.

[107]. David Kinley highlights that investment and human rights should not be treated as diametrically opposed, but as interrelated and interdependent matters. KINLEY, David. *Civilising Globalisation: Human Rights and the Global Economy.* 1st Ed. Cambridge: Cambridge University Press, 2009.

2.1. WHAT ARE SOCIAL AND ECONOMIC RIGHTS?

The contemporary notion of human rights was introduced by the Universal Declaration of Human Rights of 1948, which provides in its article 22 that every member of society is entitled to economic, social, and cultural rights:

> "Article 22 Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".

In 1966, the International Covenant on Socio-Economic and Cultural Rights (ICESCR) was created, which describes with more details the social, economic, and cultural rights established in the Universal Declaration of 1948.

Part III of ICESCR describes how different social, economic, and cultural rights shall be enjoyed by people and protected by States. Different socio-economic rights are mentioned in the Covenant, including: i) right to work (art. 6); ii) right to the enjoyment of just and favorable conditions of work (art. 7); iii) right to form trade unions (art. 8); iv) right to social security (art. 9); v) right to adequate food, clothing, and housing (art. 11), vi) right to physical and mental health (art. 12); vii) right to education (art. 13).

ICSER also determines that such rights shall be protected and achieved not only by individual actions by States, but by using **international cooperation**:

> "Art. 2.1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

Concerning specifically social rights, Rodolfo Arango explains that:

> "Social rights are **subjective rights** that require a positive action by the State. (…)
> Subjective rights are normative provisions or relations for which it is possible to give valid and sufficient reasons, whose unjustified non-recognition causes **imminent harm to the person**"[108]. (emphasis by the author)

[108] Original in Spanish: "Los derechos sociales son derechos subjetivos que tienen como contenido uma prestación positiva fáctive del Estado. (...) Los derechos subjetivos son posiciones o relaciones normativas para las cuales es posible dar razones validas y suficientes, cuyo no reconocimento injustificado ocasiona um daño inminente a la persona". ARANGO, Rodolfo. *Derechos Sociales: Un Mapa Conceptual*. In.Coord. ANTONIAZZI, Mariela Morales; RONCONI, Liliane; CLÉRICO, Laura. *Interamerizanización de Los DESCA: El Caso Cuscul Pivaral de La Corte IDH*. 1st Ed. Querétaro, México: Instituto de Estudios Constitucionales del Estado de Querétaro, 2020, pp. 32-33.

Flávia Piovesan indicates that, by analyzing the understanding of the Committee on Social, Economic and Cultural Rights, one extracts five specific principles concerning social rights: i) observance of the *minimum core obligation*; ii) progressive application; iii) inversion of the burden of proof; iv) participation, transparency, and accountability; v) international cooperation[109].

The **minimum core obligation** refers to the obligation of States to observe to minimum essential levels of a right, based on the idea of human dignity[110]. **Progressive application** means that States should adopt measures to ensure implementation of social rights and have the duty of avoiding rights regression[111].

In this regard, David Blichitz points out that socio-economic rights encompass both obligations of conduct and of result:

> "The UN Committee has provided various categorizations of the obligations imposed by socio-economic rights on state parties. In General Comment 3, it recognized the distinction between obligations of conduct and obligations of result. Obligations of conduct require the taking of action "reasonably calculated to realise the enjoyment of a particular right". Obligations of result require "states to achieve specific targets to satisfy a detailed substantive standard. (…) **socio-economic rights typically impose both obligations of conduct and obligations of result**"[112].(emphasis by the author)

As for the **inversion of the burden of proof**, it relates to the obligation of States to prove that they have adopted all measures to ensure protection of socio-economic rights but were not successful for reasons beyond their control[113].

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[109] PIOVESAN, Flávia. *Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano*. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, p. 118.

[110] PIOVESAN, Flávia. *Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano*. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, p. 118. PIOVESAN, Flavia; FUKUNAGA, Nathalia. *Proteção Constitucional dos direitos sociais: jurisprudência emblemática do Supremo Tribunal Federal sob a perspective multinível*. In. Org. BOGDANDY, Armin Von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales. *Constitucionalismo Transformador, Inclusão e Direitos Sociais: Desafios do Ius Constitutionale Commune Latino-Americano A Luz do Direito Econômico Internacional*, p. 632.

[111] PIOVESAN, Flávia. *Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano*. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, pp. 118-120. PIOVESAN, Flavia; FUKUNAGA, Nathalia. *Proteção Constitucional dos direitos sociais: jurisprudência emblemática do Supremo Tribunal Federal sob a perspective multinível*. In. Org. BOGDANDY, Armin Von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales. *Constitucionalismo Transformador, Inclusão e Direitos Sociais: Desafios do Ius Constitutionale Commune Latino-Americano A Luz do Direito Econômico Internacional*, pp. 633-634.

[112] BILCHITZ, David. *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*. Oxford/NY: Oxford University Press, 2007, pp. 183-184. Apud PIOVESAN, Flávia. *Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano*. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, p. 119.

[113] PIOVESAN, Flávia. *Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano*. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, p. 120. PIOVESAN, Flavia; FUKUNAGA, Nathalia. *Proteção Constitucional dos direitos sociais: jurisprudência emblemática do Supremo Tribunal Federal sob a perspective multinível*. In. Org. BOGDANDY, Armin Von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales.

The principle of **participation, transparency and accountability** is destined to ensure public participation both at the domestic and international level. As explained by Flávia Piovesan, such principles are intrinsically connected to the idea of democracy, as democratic regimes require public participation, interaction, and dialogue[114].

Finally, **international cooperation** results in the obligation of all States not only to respect, protect and implement socio-economic rights but also to cooperate with other States to ensure the protection, respect, and implementation of such rights in all countries. Flávia Piovesan explains that cooperation is fundamentally linked to the concept of social rights, which are substantially based on solidarity[115].

Therefore, socio-economic rights protection cannot be achieved without international cooperation or without adequate participation, transparency and accountability of all actors involved. As it will be seen in Chapter 3 below, this is one of the reasons why including provision on corporate social responsibility (and/or related provisions) in investment treaties is fundamental for advancing the protection of such rights.

Social and economic rights are also intrinsically connected to the notion of development - an important idea when dealing with investment treaties that are supposed to promote economic (and sustainable) development.

In this regard, the UN Declaration on the Right to Development of 1986 provides in its preamble that:

> "Recognizing that development is a comprehensive **economic, social,** cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals

Constitucionalismo Transformador, Inclusão e Direitos Sociais: Desafios do Ius Constitutionale Commune Latino-Americano A Luz do Direito Econômico Internacional, pp. 634-635.

[114] PIOVESAN, Flávia. *Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano*. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, p. 121. PIOVESAN, Flavia; FUKUNAGA, Nathalia. *Proteção Constitucional dos direitos sociais: jurisprudência emblemática do Supremo Tribunal Federal sob a perspective multinível*. In. Org. BOGDANDY, Armin Von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales. *Constitucionalismo Transformador, Inclusão e Direitos Sociais: Desafios do Ius Constitutionale Commune Latino-Americano A Luz do Direito Econômico Internacional*, p. 635.

[115] PIOVESAN, Flávia. *Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano*. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, pp. 122-124. PIOVESAN, Flavia; FUKUNAGA, Nathalia. *Proteção Constitucional dos direitos sociais: jurisprudência emblemática do Supremo Tribunal Federal sob a perspective multinível*. In. Org. BOGDANDY, Armin Von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales. *Constitucionalismo Transformador, Inclusão e Direitos Sociais: Desafios do Ius Constitutionale Commune Latino-Americano A Luz do Direito Econômico Internacional*, pp. 636-638.

> on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom (…)"[116]. (emphasis by the author)

As observed, social and economic aspects are indicated already in the preamble of the declaration, clearly demonstrating that there can be no development without the protection of socio-economic rights.

Moreover, Article 2 of the Declaration brings important considerations about development and actors responsible for achieving it:

> **"Article 2**
> 1. The **human person is the central subject** of development and should be the active participant and beneficiary of the right to development.
> 2. **All human beings have a responsibility for development, individually and collectively**, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development. (…)[117]" (emphasis by the author)

The plain wording of Article 2 indicates that: i) development does not simply mean growth of corporations or increase of GDP, but rather on giving proper conditions for each human person (and the society as a whole) to develop; and ii) all actors are responsible for promoting development.

In this context, Articles 3 and 4 of the Declaration provide that:

> **"Article 3**
> 1. States have the **primary responsibility** for the creation of **national and international conditions** favourable to the realization of the right to development.
> 2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and **co-operation among States** in accordance with the Charter of the United Nations.
> 3. **States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development**. States should realize their rights and fulfil their duties in such a manner as to promote a **new international economic order** based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.
> **Article 4**
> 1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
> 2. Sustained action is required to promote more rapid development of developing countries. **As a complement to the efforts of developing countries, effective international co-operation is essential**

[116] UNITED NATIONS - OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Declaration on the Right to Development*. Available at: <https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx>. Access on 10th March 2021.
[117] UNITED NATIONS - OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Declaration on the Right to Development*. Available at: <https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx>. Access on 10th March 2021.

> **in providing these countries with appropriate means and facilities to foster their comprehensive development"[118]**. (emphasis by author).

Development is something that needs to be primarily promoted by States but cannot achieved without international cooperation – and neither can the protection and promotion of socio-economic rights. States need to cooperate to create a new system that can promote development to all individuals in all countries. And developed countries have an important role in assisting developing countries in this mission.

From the reading of the Declaration (since its preamble), it becomes clear as well that there is no development without protection of human rights, including socio-economic rights. In this regard, Celso Lafer indicates that: "(…) [t]he right to development, in addition to its inherent connection to economic rights, is also intrinsically related to social, cultural, environmental, civil and political rights"[119] (free translation).

Flávia Piovesan understands that one of the biggest achievements of the Declaration on the Right to Development is to bring the human rights-based approach to development:

> "One of the most extraordinary advances of the Declaration of 1986 is bringing the human rights-based approach to right to development. The human rights-based approach is a structural conception to the process of development, normatively based on international parameters of human rights and directly destined to the promotion and protection of human rights. The human rights-based approach aims to integrate norms, standards and principles of the international system of human rights to plans, politics and principles related to development. The perspective of rights strengthens the component of social justice, by stressing the protection of the rights of the most vulnerable and excluded groups with the central aspect of the right to development"[120]. (free translation)

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[118] UNITED NATIONS - OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Declaration on the Right to Development*. Available at: <https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx>. Access on 10th March 2021.

[119] Original in Portuguese: "(…) o direito ao desenvolvimento, além de sua inerente ligação com os direitos econômicos, está também intrinsicamente relacionado com os direitos sociais, culturais, ambientais, civis e políticos". LAFER, Celso. *Direito ao Desenvolvimento - Direitos Humanos: Um Percurso no Direito no Século XXI.* Vol, 1. São Paulo: Atlas, 2015, p. 109.

[120] Original in Portuguese: "Um dos mais extraordinários avanços da Declaração de 1986 é lançar o *human rights-based approach* ao direito ao desenvolvimento. O *human rights-based approach* é uma concepção estrutural ao processo de desenvolvimento, amparada normativamente nos parâmetros internacionais de direitos humanos e diretamente voltada à promoção e à proteção dos direitos humanos. O *human rights-based approach* ambiciona integrar normas, standards e princípios ao sistema internacional de direitos humanos nos planos, políticas e processos relativos ao desenvolvimento. A perspectiva de direitos endossa o componente da justiça social, realçando a proteção dos direitos dos grupos mais vulneráveis e excluídos como um aspecto central do direito ao desenvolvimento". PIOVESAN, Flávia. Proteção dos Direitos Sociais: Desafios do Ius Commune Sul-Americano. Revista Tribunal Superior do Trabalho (TST), Brasília, vol. 77, nº 4, oct/dec 2011, p. 112.

It is important to bear in mind as well that, albeit the Declaration on the Right to Development is seen as a soft-law instrument[121], it was not the first document to recognize the right to development.

The United Nations indicate that the right to development was already circumscribed in the Charter of the United Nations, the Universal Declaration on Human Rights and the two International Human Rights Covenants:

> "The right to development can be **rooted in the provisions of the Charter of the United Nations, the Universal Declaration on Human Rights and the two International Human Rights Covenants**.
> Through the United Nations Charter, Member States undertook to "promote social progress and better standards of life in larger freedom" and "to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."
> The Universal Declaration on Human Rights contains a number of elements that became central to the international community's understanding of the right to development. It attaches importance, for example, to the promotion of social progress and better standards of life and recognizes the right to non-discrimination, the right to participate in public affairs and the right to an adequate standard of living. It also contains everyone's entitlement to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized"[122]. (emphasis by the author)

Social and economic rights are fundamental rights comprised by different international treaties, covenants, and declarations, and are intrinsically connected to the notion of development.

In Brazil, human rights treaties, if approved by three thirds of the Brazilian Congress, are incorporated into the legal regime in the same level as constitutional amendments ("*emendas constitucionais*")[123]. The Covenant on Social, Economic and Cultural Rights was ratified by Brazil in 1992[124] and, hence, is in the highest level of the Brazilian legal regime.

2.2. HOW FDI MAY AFFECT SOCIO-ECONOMIC RIGHTS?

To understand how human rights and particularly socio-economic rights may be impacted by investment treaties, two different investigations were made: i) review of the relevant literature, ii) a case analysis.

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[121] ARTS, Karin; TAMO, Atabongawung. *The Right to Development in International Law: New Momentum Thirty Years Down the Line?* Springer, published online on 24 October 2016, p. 8.
[122] United Nations - Office of the High Commissioner for Human Rights. *Milestone events in the right to development*. Available at: <https://www.ohchr.org/en/issues/development/pages/backgroundrtd.aspx>. Access on 14th March 2021.
[123] Brazilian Federal Constitution, art. 5º, § 3º. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm> Access on 13th March 2021.
[124] The Covenant was approved by the Brazilian Congress in 1991, by means of the Legislative Decree nº 226/1991 and was promulgated by the President in 1992, by means of Decree nº 591/1992.

2.2.1. Review of the Relevant Literature

The legitimacy of the investment regime has been highly contested in the last years[125]. José Alvarez summarizes such legitimacy complaints (which, according to him, were mainly vociferated by NGOs and scholars) in five different topics:

> "(1) The investment regime produces inconsistent law and undermines the stability and predictability that is the ostensible goal of the regime.
> (2) The investment regime is unduly intrusive on national sovereignty or "domestic jurisdiction" as it is insufficiently deferential to the rights of FDI host States to regulate in the public interest.
> (3) The investment regime is biased in favour of investors and the capital exporting States that they come from.
> (4) The investment regime inappropriately adopts arbitral mechanisms normally used for resolving private commercial disputes to resolve public disputes.
> (5) The investment regime constitutes a form of global administrative law that fails to contain the guarantees that make such a form of governance accountable"[126].

The investment system has overall been highly criticized for favoring investors and developed countries, and for establishing investor-State arbitration as a dispute settlement mechanism. With respect to the latter, UNCTAD Investment Policy Framework for Sustainable Development points out that the investor-State arbitration system was "meant to provide finality and enforceability, and to depoliticize disputes"[127], but turned out to a system with serious shortcomings, such as "inconsistent and unintended interpretations of clauses, unanticipated uses of the system by investors, challenges against policy measures taken in the public interest, costly and lengthy procedures, limited or no transparency"[128].

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[125] It is important to bear in mind that the criticism pointed out in this topic (and generally in this whole dissertation) is the one brought by developing countries. As explained by Fábio Morosini and Michelle Ratton, developed countries have also been contesting old BIT models and hence creating new models of investment agreements. This occurs because developed countries have become capital importers in the last years. Their criticism to investment agreement is different than the one brought by developing countries. Developed countries are creating new agreement models with a neoliberal perspective, with the purpose of increasing investors protection, while correcting some negative externalities brought by the old models. Developing countries, on the other hand, are focused on having new investment model agreements wholly designed to protect States' policy space and fostering development. Criticism, therefore, takes place on both sides but for different reasons. See BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, pp. 13-15. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 220.

[126] ALVAREZ, José E. *The Public International Law Regime Governing International Investment*. 1st Ed. The Hague: Hague Academy of International Law, 2011, p. 257.

[127] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 84.

[128] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 84.

Additionally, there are specific clash points when it comes to the relation between FDI and socio-economic rights. Foreign investment may affect the promotion and protection of human rights in different ways, depending on the nature of the activity performed by the investor, as well as on the provisions of the respective investment agreement on the matter (if there are any).

After examining the relevant literature on the matter, three aspects of investment treaties that may significantly impair the promotion and protection of socio-economic rights in host-States were identified.

First, investors usually have no obligations under investment treaties. This allows multinational corporations to go abroad and take advantage out of the lack of human rights legislation and enforcement in developing or less developed countries[129]. Some of the most recent investment agreement models contain provisions that indirectly create obligations to investors, by admitting counterclaims by States against investors that have violated human rights obligations[130]. Other treaties, albeit not admitting counterclaims, entail corporate social responsibility provisions directed at the investors – this is the case of the Brazilian Agreements on Cooperation and Facilitation of Investment (CFIAs), which will be carefully analyzed in Chapter 3.

A second aspect of investment agreements that may undermine promotion and protection of human rights is that there are no clear rules determining when and to what extent the promotion of public interest (which includes socio-economic rights) should constitute an exception to certain protections granted to investors. Further, some clauses (such as the FET standard) are not subject to public interest exceptions. This may be particularly problematic in situations in which foreign investors render public services. In this case, the protection granted to investors under the investment agreement may undermine the right of the population to access to the relevant service. This issue will be further explored in the following topics.

Finally, a third human rights issue that arose out of the present FDI structure is the appearance of "stabilization clauses" in some investor-State contracts celebrated under the umbrella of

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[129] This is what happened, for instance, when Nike was found to be forcing its employees in Asia to work in degrading circumstances. See RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 3-6.

[130] The new Dutch BIT model, for instance, contains a clause establishing that: "Article 23. Behaviour of the Investor: Without prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises". Available at: <https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf> Access on June 22, 2019.

investment agreement. There are three main types of "stabilization clauses": clauses that (i) preclude States from enacting new laws that affect the relevant project; (ii) provide that the investors should be compensated if new legislation is created; and (iii) establish that the investors should be exempted from any new legislation affecting their business in the host State[131]. Such clauses are designed to protect investors from new laws that may hinder their business. Nonetheless, they may inhibit States from enhancing their human rights laws, which directly affects the promotion of these rights, especially in developing and less developed countries where the human rights system is generally weak.

Investment agreements may, thus, directly and negatively affect the promotion and protection of human rights, which includes socio-economic rights. Now the question is how socio-economic rights have already been impacted by the presence of foreign investors and by investment agreements.

To understand this issue more deeply, nineteen investor-State arbitration awards were examined, as explored in the following topic.

2.2.2. Case Analysis

As mentioned in the methodological notes above, the purpose of the case examination was to map awards of investor-State disputes which have discussed socio-economic rights issues and based on that answer the following questions:

v) Which are the most common socio-economic rights debated by investment tribunals?

vi) By whom were these issues brought to the present proceedings?

vii) How have the parties brought socio-economic issues to arbitration disputes? Under which clauses of investment agreements?

viii) How have arbitral tribunals debated and considered these issues, and balanced the protection of socio-economic rights with investment protection?

To answer these questions, this topic first presents brief summaries of the cases selected for analysis (as indicated in the methodological notes), focusing on the socio-economic issues debated, and then evaluates the questions indicated above.

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[131] BRILLO, Romullo; GEHNE, Katia. *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*. *Beiträge zum Transnationalen Wirtschaftsrecht*, Vol. 143, March 2017. Institute of Economic Law: Transnational Economic Law Research Center (TELC). Martin Luther University Halle-Wittenberg. Available at: http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20143.pdf. Access on: June 22, 2019.

To facilitate the analysis, given that the Argentinian cases selected involved similar circumstances, they were jointly evaluated according to the sector affected*, i.e.,* water, electricity, and gas distribution.

Cases' summaries are presented below in the following order:

Table 2 – Order of Analysis of the Selected Cases

DECIDED IN FAVOR OF STATE
Philip Morris v. Uruguay
DECIDED IN FAVOR OF INVESTOR
Non-Argentinian Cases
Bear Creek Mining v. Peru
Copper Mesa v. Ecuador
Crystallex v. Venezuela
Gold Reserve v. Venezuela
Tecmed v. Mexico
Argentinian Cases
Water and Sewage Sector
Impregilo v. Argentina (I)
SAUR v. Argentina
AWG v. Argentina (Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina)
Suez and Interagua v. Argentina
Azurix v. Argentina (I)
Electricity Sector
EDF and others v. Argentina
El Paso v. Argentina
National Grid v. Argentina
Gas Sector
LG&E v. Argentina
Sempra v. Argentina
CMS v. Argentina
Enron v. Argentina
DECIDED IN FAVOR OF NO PARTY
Urbaser and CABB v. Argentina

2.2.2.1. Philip Morris v. Uruguay

The dispute was initiated by a claim brought by Phillip Morris Brands Sàri, Philip Morris Products S.A. and Abal Hermanos S.A. (Claimants), in 2010, due to the tobacco control campaign initiated by the State of Uruguay (Respondent) in 2005, which resulted in the enactment of several decrees to regulate the tobacco industry in the country.

Debate on socio-economic rights (*i.e.,* right to health) was mainly brought by Claimants under two clauses of the BIT: i) prohibition of exportation; ii) fair and equitable treatment (FET) clause.

Regarding the expropriation argument, according to Claimants, Respondent indirectly expropriated its investments by enacting the new regulations. Claimants alleged that the police powers doctrine does not excuse States from liability for expropriating investment[132].

Uruguay argued that it "has the right to exercise its inherent sovereign power to protect public health without incurring international responsibility generally (either for alleged expropriation or breach of other standards of treatment)"[133], and that "a *bona fide*, non-discriminatory exercise of a State sovereign police power to protect health or welfare does not constitute an expropriation as a matter of law[134]".

In the Tribunal's view, the adoption of the relevant regulations by Uruguay was a valid exercise of the State's police powers since it aimed at protecting public health:

> "It is the Claimants' contention that Article 5(1) of the BIT prohibits any expropriation unless it is carried out in accordance with the conditions established by said Article and that the existence of a public purpose, one of such conditions, does not exempt the State from the obligation to pay compensation.381 In the Claimants' view, the State's exercise of police powers does not constitute a defense against expropriation, or exclude the requirement of compensation.382 The Claimants add that there is no room under Article 5(1) or otherwise in the BIT for carving out an exemption based on the police powers of the State.383
>
> The Tribunal disagrees. As pointed out by the Respondent, Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of "[a]ny relevant rules of international law applicable to the relations between the parties," a reference "which includes … customary international law." This directs the Tribunal to refer to the rules of customary international law as they have evolved.
>
> **Protecting public health has since long been recognized as an essential manifestation of the State's police power**, as indicated also by Article 2(1) of the BIT which permits contracting States to refuse to admit investments "for reasons of public security and order, public health and morality."
>
> (…)

[132] *Philip Morris v. Uruguay* Award, pp. 53-55.
[133] *Phillip Morris v. Uruguay* Award, p. 59.
[134] *Phillip Morris v. Uruguay* Award, pp. 59-60.

> According to the OECD, "[i]t is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police power of the State, compensation is not required."
> **The principle that the State's reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory did not find immediate recognition in investment treaty decisions.**
> (…)
> In light of the foregoing, the Tribunal concludes that the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health. As such, they cannot constitute an expropriation of the Claimants' investment. For this reason also, the Claimants' claim regarding the expropriation of their investment must be rejected"[135]. (emphasis by the author)

As for the FET clause, the Claimants alleged that the new regulations enacted by respondent were arbitrary, inconsistent with its legitimate expectations, and deprived it of legal stability[136].

Respondent contended that such measures were adopted in good faith, and in a non-discriminatory manner to protect public health. It also argued that the measures are reasonable regulatory measures logically connected to the State's public health objectives[137].

The Tribunal concluded, in summary, that the relevant measures did not violate the FET standard for they: i) were not arbitrary as they were reasonable, adopted in good faith, aimed at protecting public health and based on adequate scientific evidence, ii) did not modify the stability of the Uruguayan framework and, hence, did not breach claimants' legitimate expectations[138]. The Tribunal also made interesting comments on the "margin of appreciation" of the public authorities when making public policy determinations:

> "The Tribunal agrees with the Respondent that the "margin of appreciation" is not limited to the context of the ECHR but "applies equally to claims arising under BITs," at least in contexts such as public health. **The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health**. In such cases respect is due to the "discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors." As held by another investment tribunal, "[t]he sole inquiry for the Tribunal… is whether or not there was a manifest lack of reasons for the legislation"[139].

[135] *Philip Morris v. Uruguay* Award, pp. 81-88.
[136] *Philip Morris v. Uruguay* Award, pp. 93-100.
[137] *Philip Morris v. Uruguay* Award, pp. 100-110.
[138] *Philip Morris v. Uruguay* Award, pp. 111-126.
[139] *Philip Morris v. Uruguay* Award, p. 115.

In view of that, the Tribunal dismissed all of Claimants' requests and decided in favor of the State of Uruguay[140].

2.2.2.2. Bear Creek Mining v. Peru

This dispute brings a very interesting debate on the social license to operate. It arose after Bear Creek Mining Corporation, the Claimant, was prevented from exercising its exploitation rights over an area with potential silver ore deposits (*Santa Ana* Project) due to violent protests and strikes promoted by the neighboring communities (including indigenous populations) that would be affected by the project[141]. Local communities presented their concerns on the possibility of contamination of land and water (including drinking water) by the Project[142].

After the heavy protests, the State of Peru (Respondent) issued Decree 032, derogating the previous declaration made by of Decree 083 that the *Santa Ana* Project was a public necessity and authorizing Claimant to own and operate in the area[143]. Respondent alleged that Decree 032 was necessary to protect the health and safety of its citizens[144].

Claimant alleged that the enactment of Decree 032 constituted an indirect expropriation for it rendered its investments "worthless and incapable of sale"[145], was discriminatory and disproportional[146].

Respondent argued that Decree 032 did not constitute expropriation and was necessary, among other reasons, because of the "social crisis and protests against the *Santa Ana* Project"[147].

When analyzing this issue, the Tribunal recognized that Claimant could have taken further actions to obtain its social license to operate, but concludes that this does not exclude or reduce Respondent's responsibility in this case for it was not able to prove the casual link between Claimant's activities and the enactment of Decree 032:

> "Indeed, the Tribunal considers that **actions beyond those that Claimant undertook would have been possible and feasible.**
> (…)
> 410. For its legal evaluation, the Tribunal agrees with the Abengoa Award, in which the tribunal held:

[140] *Philip Morris v. Uruguay* Award, p. 169.
[141] *Bear Creek Mining v. Peru Award*, pp. 21-52.
[142] *Bear Creek Mining v. Peru* Award, pp. 56-57.
[143] *Bear Creek Mining v. Peru* Award, p. 48.
[144] *Bear Creek Mining v. Peru* Award, p. 149.
[145] *Bear Creek Mining v. Peru* Award, p. 109.
[146] *Bear Creek Mining v. Peru* Award, pp. 109-116.
[147] *Bear Creek Mining v. Peru* Award, p. 121.

> "For the international responsibility of a State to be excluded or reduced based on the investor's omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered. In other words, for the argument to succeed, there must be evidence that if a social communication program had been timely implemented since 2003, the 2009 and 2010 events that led to the loss of the Claimants' investment would not have occurred."
> **In the view of the Tribunal, Respondent has not been able to prove such a causal link between Claimant's activity in relation to its Santa Ana Project and Supreme Decree 032. Rather, the evidence shows that Respondent's various authorities involved in the procedure were aware of and did not object to Claimant's outreach activities and, from the very beginning until before the meeting of June 2011, approved and often even endorsed these**:
> (…)
> The evidence summarized above shows that from the very beginning until the time before the meeting of June 23, 2011, all outreach activities by Claimant were known to Respondent's authorities and were conducted with their approval, support, and endorsement, and that no objections were raised by the authorities in this context. While, as mentioned above, further actions by Claimant would have been feasible, on the basis of the continued coordination with and support by Respondent's authorities, **the Tribunal concludes that Claimant could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities. Respondent, after its continuous approval and support of Claimant's conduct, cannot in hindsight claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region**."[148]. (emphasis by the author)

The Tribunal concluded therefore that the social unrest was no reason for the derogation of Decree 083 and that the Respondent indirectly expropriated Claimant's investments[149]. Claimant also alleged that the derogation of Decree 083 constituted a direct expropriation, a violation of the FET and the full protection and security clauses, and a breach of the protection against unreasonable or discriminatory measures. The Tribunal did not analyze these other allegations since it already concluded that Decree 032 constituted an unlawful indirect expropriation[150]. The Tribunal also dismissed Respondent's request for reduction of damages due to Claimant's contribution to the social unrest[151].

2.2.2.3. Copper Mesa v. Ecuador

This case also concerns mining concessions which were revoked by the State due to environmental and social issues, as well as the lack of absence of social license to operate. Copper

[148] *Bear Creek Mining v. Peru* Award, pp. 136-140.
[149] *Bear Creek Mining v. Peru* Award, p. 143.
[150] *Bear Creek Mining v. Peru* Award, pp. 143-206.
[151] Professor Philippe Sands issued a dissenting opinion on this issue, indicating that there is sufficient evidence that Claimant contributed to the failure of the Project and recommending the reduction of the damages awarded to Claimant by one half. See *Bear Creek Mining v. Peru*, Partial Dissenting Opinion by Professor Phillipe Sands.

Mesa Mining Corporation, or the Claimant, owned three mining concessions at Junín, Chaucha and Telimbela in Ecuador granted by the State of Ecuador, or the Respondent[152].

Due to the enactment of the Mining Mandate, which established the need to consult local populations and addressed environmental and socio-economic issues (including the protection of health of surrounding communities), Respondent revoked such concessions, without the payment of compensation[153]. Claimant alleged that such revocation amounted to violations of the FET and full protection and security standards, as well as to the national treatment and prohibition on expropriation clauses[154].

Aside from responding to the liability/merit's issues, Respondent brought the unclean hands doctrine to argue that Claimant's requests were inadmissible. Respondent alleged that Claimant committed several human rights violations (including socio-economic rights violations) and therefore its claims should not be admitted[155]. The Tribunal understood that admissibility arguments could not be raised at that stage of the proceedings but considered Respondent's submission when evaluating causation and contributory fault[156].

The Tribunal concluded that Respondent acted in an arbitrary manner, with violation of due process and no payment of compensation, and that it was liable for violating the treaty with respect to the Junin and Chaucha concessions[157]. The Tribunal found no liability with respect to the Telimbela concession for it understood that Claimant had no interest over such concession[158].

With respect to Respondent's claims on Claimant's human rights violations[159], the Tribunal recognized Claimant's contributory negligence and assessed Claimant's injury on 30 per cent regarding the Junin concession[160].

2.2.2.4. Crystallex v. Venezuela

[152] *Coper Mesa v. Ecuador* Award, part 2, p. 4.
[153] *Coper Mesa v. Ecuador* Award, part 6, p. 3.
[154] *Coper Mesa v. Ecuador* Award, part 6.
[155] *Coper Mesa v. Ecuador* Award, part 5, pp. 21-22.
[156] *Coper Mesa v. Ecuador* Award, part 5, pp. 21-22.
[157] *Coper Mesa v. Ecuador* Award, part 6, pp. 38-39.
[158] *Coper Mesa v. Ecuador* Award, Part 6, p. 38.
[159] The acts committed by Claimant which led to this decision of the Tribunal were in summary the use of armed men, guns and spray mace at civilians due to illegal provocations by local residents. See *Coper Mesa v. Ecuador* Award, part 6, p. 32.
[160] *Coper Mesa v. Ecuador* Award, part 6, p. 39.

This is another dispute which involves mining activities and their effects to the environment and local communities. Crystallex International Corporation, or the Claimant, is a Canadian investor which claimed that the State of Venezuela, the Respondent, adopted several measures which wrongfully affected its investment in *Las Cristinas*, an area with gold deposits. One of such measures was the denial of the exploitation permit for concerns with the environment and impacts (including those of socio-economic nature) on indigenous populations which lived in the surroundings.

Claimant alleged that the denial of the permit was purely political and constituted a violation of the FET standards as well as an indirect expropriation of its investments[161]. Respondent argued that Crystallex could not have any legitimate expectations to start the project because there was never a promise that the permit would be granted, and that there was no indirect expropriation since the permit was denied for application of environmental regulation[162].

The Tribunal concluded that, even though it is a State's sovereign prerogative to grant or deny a permit, it should do so in a non-arbitrary procedure:

> "First, the Tribunal wishes to highlight that it is a state's sovereign prerogative to grant or deny a permit, particularly one that affects natural resources over which the state has sovereign rights. The Tribunal thus does not share the Claimant's presentation of the issues in terms of it being "entitled" or having a "right" to a Permit. From the point of view of international law, a state could not be said to be under an obligation to grant a permit to affect natural resources, and would always maintain the freedom to deny a permit if it so considers. It would, however, incur liability under the BIT if the treatment of the investor in the process leading to the denial was unfair and inequitable, because it was arbitrary, lacking transparency or consistency. Thus, Venezuela's contention that Crystallex had no "right" to a Permit appears in principle correct to the Tribunal, because of course the "right" was conditioned on the Administration granting the necessary approvals. These approvals, however, needed to be granted or denied *after conducting a procedure which was not arbitrary and in which the applicant was treated fairly*"[163].

In view of that, the Tribunal concluded that Venezuela breached the FET clause by engaging in arbitrary conduct and by taking measures which lacked transparency and consistency.

With respect to the expropriation claim, the Tribunal stressed once again that the permit per se could not amount to an expropriation because there is no right to a permit for investors:

> "That being said, the Tribunal wishes to make it clear that it is not ready to consider the Permit denial as per se amounting to an act of expropriation. **This view is consistent with the Tribunal's earlier finding that Crystallex had no "right" to a Permit under**

[161] *Crystallex v. Venezuela* Award, p. 124.
[162] *Crystallex v. Venezuela* Award, p. 125.
[163] *Crystallex v. Venezuela* Award, p. 154.

> **international law, because a state would always maintain its freedom to deny a permit if it so decides, and under Venezuelan law the "right" was conditioned on the Administration granting the necessary approvals**. The Tribunal is of course aware that investor-state tribunals have on occasions found that a denial of a permit or of an authorization critical to the investor's investment may constitute a measure tantamount to expropriation, as the cases of Metalclad v. and Tecmed v. Mexico show. However, it considers that, under the circumstances of this case, the actions surrounding the permit denial should rather be considered as one series of acts which in combination with other actions gave rise to an expropriation".[164] (emphasis by the author)

Despite that, the Tribunal concluded that all measures taken by the State of Venezuela combined constituted an indirect expropriation which was unlawful for the lack of compensation[165].

2.2.2.5. Gold Reserve v. Venezuela

Similar to the *Cristallex v. Venezuela* case, this dispute involves claims brought by a mining company (Gold Reserve Inc., or the Claimant) against Venezuela (the Respondent) as a result of the denial of authorization for exploiting certain areas, following the termination of the concessions.

Respondent alleged that since the beginning it had grave concerns with respect to one of the projects (the *Brisas* Project) mainly because of issues concerning water resources management, biodiversity protection and socio-economic impacts[166].

Claimant sustained that by denying the permits and terminating the concessions, Respondent violated the FET and MFN standards as well as indirectly expropriated its investments[167].

The Tribunal concluded that the reasons for the denial of permits and termination of concessions were not merely environmental but rather political[168], and that Respondent violated the FET standards for acting with lack of transparency, consistency, and good faith in dealing with the investor[169]. The Tribunal acknowledged the State's responsibility to protect the environment and human rights but indicated that this should be done in a balanced manner with investor's protection:

> "The Tribunal acknowledges that a State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted.

[164] *Crystallex v. Venezuela* Award, p. 185.
[165] *Crystallex v. Venezuela* Award, p. 197.
[166] *Gold Reserve v. Venezuela* Award, p. 71.
[167] *Gold Reserve v. Venezuela* Award, p. 129.
[168] *Gold Reserve v. Venezuela* Award, p. 145.
[169] *Gold Reserve v. Venezuela* Award, p. 149.

> **However, this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions**"[170]. (emphasis by the author)

With respect to the indirect expropriation claim, however, the Tribunal decided that Respondent's acts were an exercise of regulatory powers and did not amount to an expropriation[171].

2.2.2.6. Tecmed v. Mexico

This dispute also concerns denial of authorization for operation, but it is not related to mining activities. Tecmed, the Claimant, was the awardee of a public auction related to the sale of real property, buildings, and facilities of a controlled landfill of hazardous industrial waste[172].

After few years of operation, Tecmed's authorization to operate was not renewed by the Mexican State (the Respondent)[173] and Claimant alleged that such refusal amounted to an expropriation of its investments and a violation of other clauses of the BIT (including FET standard)[174].

Respondent sustained that the denial of permit was a control measures necessary for public interest reasons (*i.e.,* environment and public health protection) in a highly regulated sector[175].

The Tribunal concluded that the reasons for the refusal to renew the authorization were not related to environment and public health protection but rather for social-political pressure[176]. To reach such conclusion, the Tribunal applied the proportionality test, with the objective of verifying whether the public interest measures were proportional to the measures adopted by the State in relation to the investment[177].

The Tribunal also indicated that Claimant's operations "never compromised the ecological balance, the protection of the environment or the health of the people"[178] and that the infringements committed by Claimant could be remedied by minor penalties[179].

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[170] *Gold Reserve v. Venezuela* Award, p. 150.
[171] *Gold Reserve v. Venezuela* Award, p. 170.
[172] *Tecmed v. Mexico* Award, p. 9.
[173] *Tecmed v. Mexico* Award, p. 10.
[174] *Tecmed v. Mexico* Award, pp. 10-11.
[175] *Tecmed v. Mexico* Award, p. 12 and p. 35.
[176] *Tecmed v. Mexico* Award, pp. 51-52.
[177] *Tecmed v. Mexico* Award, pp. 46-47.
[178] *Tecmed v. Mexico* Award, p. 59.
[179] The infringements alleged by Respondent were the reasons which led Respondent to deny the renewal of the authorization: "(i) the Landfill was only authorized to receive waste from agrochemicals or pesticides or containers and materials contaminated with such elements; (ii) PROFEPA's delegates in Sonora had informed, in the official communication dated November 11, 1998, that the waste confined far exceeded the landfill limits established for one

For similar reasons, the Tribunal concluded that Respondent violated the FET standards. In this regard, the Tribunal stressed once again that the reasons which led to the refusal of permit were of social and political nature and not related to environmental and health protection[180]. Moreover, the Tribunal indicated the lack of transparency in Respondent's actions[181].

2.2.2.7. Argentinian Cases on Water Sector

Five Argentinian cases concerning investors acting in the water and sewage sector were analyzed in this research: *Impregilo v. Argentina*, *SAUR v. Argentina, AWG v. Argentina (Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina)*, *Suez and Interagua v. Argentina*, *Azurix v. Argentina*.

All these disputes are related to concessions of water and sewage affected by the economic crisis in Argentina. In 1980s, the government of Argentina decentralized water and sewage services and transferred such functions to provincial authorities[182]. Following the decentralization, different provinces of Argentina decided to privatize such services and organized bidding processes for concessions[183].

Investors from various countries participated in the bidding processes promoted by different provinces and acquired concessions to provide water and sewage.

After the political and economic crisis that started in Argentina in 1999, the Argentinian government started to adopt several measures preventing these investors from charging the tariffs as agreed in the concession agreements. One of these measures was the enactment of the Emergency Law[184] which altered the legal exchange rate which was previously established as of one-peso equal to one-dollar. This significantly impaired the revenues of investors, which were

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of the Landfill's active cells, cell No. 2; (iii) the Landfill temporarily stored hazardous waste destined for a place outside the Landfill, acting as a «transfer center», an activity for which the Landfill did not have the required authorization; Cytrar was requested on October 16, 1997 to file reports in connection with this activity, but to date the relevant authorization had not been issued; and (iv) liquid and biological-infectious waste was received at the Landfill, an activity that was prohibited and that amounted to a breach of the obligation to notify in advance any change or modification in the scope of the Permit, and to unauthorized storage at the Landfill of liquid and biological-infectious waste". See *Tecmed v. Mexico* Award, p. 36.

[180] *Tecmed v. Mexico* Award, p. 62.

[181] *Tecmed v. Mexico* Award, p. 65.

[182] *Suez and Interagua v. Argentina* Award, p. 9.

[183] This happened, for instance, with the Province of Buenos Aires (see *Impregilo v. Argentina* Award, p. 6, *AWG v. Argentina* Decision on Liability, p. 10 and *Azurix v. Argentina* Award), Santa Fe (see *Suez and Interagua v. Argentina* Award, p. 10) and Mendoza (see *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 13).

[184] Federal Law No. 25,561 on 6 January 2002.

obliged to charge their tariffs in pesos (this process was known as the "*pesification*") according to the current (and non-favorable) exchange rate and had their tariffs frozen[185].

The Argentinian State also adopted further measures, such as the determination that investors were not allowed to suspend the supply of water to customers which had not paid their bills[186], and other measures which hindered investors from applying the tariff regime established in the concession contract[187]. Moreover, after all the problems faced with the crisis, the concessions were terminated and transferred to other corporations[188]

Almost all claims brought by investors under such disputes relate to the alteration of the tariff regime following the termination of the concession. Such claims were generally brought by investors under the clauses on prohibition of expropriation, FET and FPP standards, and non-discrimination[189].

The State of Argentine responded to investors' claims alleging that the measures were taken in the context of a systematic and serious crisis, which affected nationals and foreigners, and were necessary to restructure the economy[190]. Respondent also contended that treaties on human rights providing for the right to water should be taken into account in this case[191] and brought the state of necessity and police powers doctrines[192].

Decisions of the arbitral tribunals had some variations among themselves but all of them concluded that the FET standard was violated for several reasons: violations of the investors' legitimate expectations that the State would not modify the legal framework in an unreasonable manner[193], failure to restore a reasonable equilibrium in the concessions[194], lack of a diligent, equal,

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[185] See *Impregilo v. Argentina* Award, p. 14; *Suez and Interagua v. Argentina* Award, p. 16; *AWG v. Argentina* Decision on Liability, pp. 18-20, *Azurix v. Argentina* Award, pp. 21-24.
[186] See *Impregilo v. Argentina* Award, p. 15.
[187] *Azurix v. Argentina* Award, pp. 24-38.
[188] *Suez and Interagua v. Argentina* Award, p. 17, *Impregilo v. Argentina* Award, p. 20; SAUR v. Argentina Award on Jurisdiction and Liability, pp. 59-60, *AWG v. Argentina* Decision on Liability, p. 21.
[189] See *Suez and Interagua v. Argentina* Award, p. 38; *SAUR v. Argentina* Award, p. 68; *AWG v. Argentina* Award, p. 45; *Azurix v. Argentina* Award, pp. 11-12.
[190] See *Impregilo v. Argentina* Award, p. 46.
[191] See *Impregilo v. Argentina* Award, p. 49.
[192] See *Suez and Interagua v. Argentina* Award, p. 38.
[193] See *Impregilo v. Argentina* Award, p. 68; *Suez and Interagua v. Argentina* Award, pp. 76-78*; AWG v. Argentina* Award, p. 96.
[194] See *Impregilo v. Argentina* Award, p. 74.

and respectful treatment to investors[195], and the imposition of obstacles to the charge of tariffs by investors following the termination of the concessions[196].

In addition to the FET violation, the *SAUR v. Argentina* tribunal concluded that the intervention in investor's business, termination of the concession and transfer to another corporation constituted a direct expropriation of the investment[197], which was unlawful due to the lack of compensation[198]. Further, the *Azurix v. Argentina* tribunal decided that, besides the FET, the FPS standard was also violated[199]. Unlike the other disputes[200], the tribunal understood in the *Azurix v. Argentina* case that the FPS clause was not restricted to physical security and that FET and FPS were interrelated. Therefore, having seen that Respondent was found to have breached the FET standard, FPS was also violated[201].

None of the Tribunals accepted the state of necessity doctrine brought by the Respondent[202]. The *Impregilo v. Argentina* Award, for instance, indicated that the state of necessity was no exception to State's obligations under the BIT:

> "The Arbitral Tribunal is satisfied that the economic crisis in Argentina in 2002 could be regarded as a political-economic occurrence similar to a national emergency and that Article 4 of the BIT is therefore applicable to the situation. **It notes, however, that Article 4 provides for no exception from the obligations of the State in whose territory an investment was made but merely gives the investor a right to national treatment and most-favored-nation treatment in respect of damages.**
>
> The Arbitral Tribunal thus notes that the Contracting Parties, when concluding the BIT, had national emergencies and similar occurrences in mind but considered that no special regulations were necessary apart from a rule that an investor protected under the BIT would not be treated less favorably than other national or international investors. Consequently, the Parties did not find it necessary to provide in the BIT for any exception from each Contracting Party's obligations under the BIT.

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[195] *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 137.
[196] *Azurix v Argentina* Award, pp. 135-136.
[197] *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 109.
[198] *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 114.
[199] All the other tribunals did not find that the measures taken by the government were a substantial deprivation of claimants' investments and therefore concluded that there was no direct or indirect expropriation. See *Suez and Interagua v. Argentina* Award, p. 45; *AWG v. Argentina* Decision on Liability, p. 59; *Azurix v Argentina* Award, p. 116; See *Impregilo v. Argentina* Award, pp. 66-67.
[200] Claims of violation of the FPS clause were either not analyzed by the Tribunal (because it had already concluded that there was a violation of FET standards) or not accepted for the interpretation that such clause is related only to the exercise of due diligence with respect to physical injury and does not extend to encompass maintenance of a stable legal and commercial environment. See *Impregilo v. Argentina* Award, p. 75; *Suez and Interagua v. Argentina* Award, p. 62; *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 139; AWG v. Argentina, p. 68.
[201] *Azurix v Argentina* Award, pp. 145-146.
[202] See *Suez and Interagua v. Argentina* Award, p. 91; A*WG v. Argentina* Award, p. 103; *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 124; *Impregilo v. Argentina* Award, p. 80.

> The Tribunal thus cannot accept the Respondent's interpretation, which goes against the plain meaning of the text, **and agrees with Impregilo that Article 4 applies to measures adopted in response to a loss, not to measures that cause a loss**. The plain meaning of the provision is that the standards of treatment of the BIT – national and most-favored-nation treatment – have to be applied when a State tries to mitigate the consequences of a situation of war or other emergency"[203]. (emphasis by the author).

The *Impregilo v. Argentina* Award has also analyzed whether the state of necessity doctrine could be invoked by Respondent under art. 25 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) but concluded that this was not applicable as well for Argentina itself contributed to the economic crisis[204].

The police powers doctrine when brought by Respondent was also not accepted. In *Suez and Interagua v. Argentina*, the Tribunal indicated that the police powers doctrine was not applicable in claims other than expropriation:

> "While this Tribunal does not pronounce on the legal authority of the Draft, it does acknowledge that States have a legitimate right to exercise their police powers to protect the public interest and that the doctrine of police powers, as the above-quoted excerpt from the Draft clearly states, has been particularly pertinent in cases of expropriation where tribunals have had to balance an investor's property rights with the legitimate and reasonable need for the State to regulate. Those cases and the police powers doctrine are inapplicable in the present dispute because the Tribunal has already ruled that the Claimants have not suffered an expropriation because they have not been deprived of their property rights by Argentina's measures.
>
> The police powers doctrine is a recognition that States have a reasonable right to regulate foreign investments in their territories even if such regulation affects investor property rights. In effect, the doctrine seeks to strike a balance between a State's right to regulate and the property rights of foreign investors in their territory. However, **the application of the police powers doctrine as an explicit, affirmative defense to treaty claims other than for expropriation is inappropriate, because in judging those claims and applying such principles as full protection and security and fair and equitable treatment, both of which are considered in subsequent sections of this Decision, a tribunal must take account of a State's reasonable right to regulate. Thus, if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate.** Consequently, for that same tribunal to make a subsequent inquiry as to whether that same State has exceeded its legitimate police powers would require that tribunal to engage in an inquiry it has already made. In short, a decision on the application of the police powers doctrine in such circumstance would be duplicative and therefore inappropriate."[205] (emphasis by the author)

Furthermore, some of the tribunals analyzed the relation between investment agreements and human rights protection. The *Suez and Interagua v. Argentina* Tribunall, for example, when

[203] *Impregilo v. Argentina* Award, pp. 75-76.
[204] *Impregilo v. Argentina* Award, p. 80.
[205] *Suez and Interagua v. Argentina* Award, pp. 52-53,

evaluating the FET standard, ruled on the need to establish a balance between the right to regulate and investors' legitimate expectations but concluded that Argentina did not act in accordance with the established legal framework and committed an abuse of regulatory discretion[206]:

> "In interpreting the concept of fair and equitable treatment, the Tribunal must also bear in mind that the Concession by its terms was subject to the regulatory authority of the Province, which had a reasonable right to regulate. **Thus in interpreting the meaning of "just" or "fair and equitable treatment" to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with Argentina's and particularly the Province's right to regulate the provision of a vital public service**. As the Saluka tribunal stated, "[t]he determination of a breach of Article 3.1 by the Czech Republic [which required fair and equitable treatment of investors] therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other." What this means in the context of the present case is that the legitimate and reasonable expectations of the investors in APSF must have included the expectation that the Provincial government would exercise its legitimate regulatory interests with respect to the APSF Concession throughout the period of thirty years and in response to unpredictable circumstances that might arise during that time.
>
> **There is no question that under the legal framework Argentina and the Province had the right to regulate the activities of the Concession concerning a broad range of matters, including the tariff structure, investment standards, and performance. But APSF and the Claimants, as participants in any regulated industry, had the legitimate expectation that the Argentine authorities would exercise that regulatory authority and discretion within the rules of the detailed legal framework that the Province had established for the Concession.** But when faced with the crisis, Santa Fe refused to do so. It still refused once the crisis had abated. Indeed, it enacted various measures directing the regulatory authorities not to respect important elements of the legal framework"[207]. (emphasis by the author)

In the *SAUR v. Argentina* case, the Tribunal evaluated how treaties on human rights should be considered in investment arbitrations and concluded that human rights and investors' rights operate in distinct spheres:

> "But these prerogatives are compatible with the rights of the investors to receive the protection offered by APRI. **The fundamental right to water and the right of the investor to receive the protection offered by APRI operate in different spheres: the concessionary company of a first need public service is in a dependency situation with the public administration, which has special powers to guarantee by means of sovereignty the fundamental right to water, but the exercise of such powers is not absolute, and shall be combined with the respect for the rights and guarantees granted to the foreign investor**, in accordance with APRI. If the public authorities decide to expropriate the investment, give the investor an unfair and inequitable treatment and deny full protection and security, all of these in violation of APRI, the investor has the

[206] *Suez and Interagua v. Argentina* Award, p. 81.
[207] *Suez and Interagua v. Argentina* Award, pp. 80-81.

> right to be indemnified in the terms established by the treaty" [208]. (free translation and emphasis by the author)

Similarly, the *AWG v. Argentina* tribunal stressed that human rights treaties do not trump over investment agreements:

> "The third condition for the defense of necessity: Treaty obligation does not exclude necessity defense. The texts of the three BITs in question do no specifically exclude or allow the admissibility of a defense of necessity. The LG&E case, upon which Argentina relies, involved the application of the U.S.-Argentina BIT which contained a clause stating that nothing in the treaty precluded a Contracting Party from taking "…measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of own essential security interests" None of the three BITs applicable to the present cases contains such a "non-precluded measures clause." **Argentina and the amicus curiae submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive**. Thus, as discussed above, Argentina could have respected both types of obligations. Viewing each treaty as a whole, the Tribunal does not find that any of them excluded the defense of necessity. Therefore, Argentina must be deemed to have satisfied the third condition for the defense of necessity" [209] (emphasis by the author)

Argentina requested annulment of all these awards but none of them were accepted[210].

2.2.2.8. Argentinian Cases on Electricity Sector

[208] The award is originally in Spanish: "Pero estas prerrogativas son compatibles con los derechos de los inversores a recibir la protección ofrecida por el APRI. El derecho fundamental al agua y el derecho del inversor a la protección ofrecida por el APRI, operan sobre planos diferentes: la empresa concesionaria de un servicio público de primera necesidad se halla en una situación de dependencia frente a la administración pública, que dispone de poderes especiales para garantizar el disfrute por la soberanía del derecho fundamental al agua; pero el ejercicio de esos poderes no es omnímodo, sino que debe ser conjugado con el respeto a los derechos y garantías otorgados al inversor extranjero en virtud del APRI. Si los poderes públicos deciden expropiar la inversión, dar al inversor un trato injusto o inequitativo o negarle la protección o plena seguridad comprometidas, todo ello en violación del APRI, el inversor tendrá derecho a ser indemnizado en los términos que el Tratado le reconoce". *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 93.

[209] AWG v. Argentina Decision on Liability, pp. 102-103.

[210] More information available at UNCTAD. *Investment Policy Hub – Investment Dispute Settlement Navigator*. Available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement?status=100>. Access on 21st September 2020.

Disputes involving the electricity sector in Argentina examined in the present research were *EDF and others v. Argentina*, *El Paso v. Argentina*[211] and *National Grid v. Argentina*. Like water and sewage services, the electric power sector was also privatized in Argentina around the 1990s.

These disputes also arose due to certain measures adopted by the State of Argentina to cope with the crisis, especially the enactment of the Emergency Law which provided that the exchange rate would be determined by market forces ("*pesification*") and of the Emergency Tariffs Measures that resulted in the freezing of tariff rates[212].

Respondent alleged that such measures were necessary to guarantee the free enjoyment of basic human rights "such as, *inter alia*, the right to life, health, personal integrity, education, the rights of children and political rights", and that these were threatened "by the socio-economic institutional collapse suffered by the Argentine Republic, where tens of people lost their lives, the right to health, to personal integrity, to work and safety"[213].

The claims brought under the BITs were similar to those in the disputes involving the water sector: direct and indirect expropriation, violations of FET and FPS standards, breaches of national treatment and MFN clauses and, in some cases, allegations of violations of the concession agreement under the umbrella clause of the BIT[214].

In all disputes, the tribunals decided that there was a violation of the FET standard generally because of Respondent's to reestablish the economic equilibrium of the concession agreement within a reasonable time[215], breach of Claimant's legitimate expectations, fundamental changes to the legal framework and, in the *National Grid* case, the requirement made by the State that Claimants renounced its legal remedies as condition for renegotiation of the concession[216].

With respect to the breach of Claimant's expectations, the *El Paso v. Argentina* Tribunal acknowledged that the investors' legitimate expectations must be balanced with the State's right to regulate its economy in the public interest:

> "This means also, secondly, that legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations than can be deduced from the circumstances and with due regard to the rights of the State. In other

[211] The *El Paso v. Argentina* is related in fact to both the electricity and to the oil and gas sector as the relevant corporation produces oil and generates electric power. See *El Paso v. Argentina* Award, p. 12.
[212] See *EDF and others v. Argentina* Award, pp. 31-35; *El Paso v. Argentina* Award, pp. 23-24.
[213] *EDF and others v. Argentina* Award, p. 43.
[214] See *EDF and others v. Argentina* Award, p. 27; *National Grid v. Argentina* Award, pp. 18-25*; El Paso v. Argentina* Award, pp. 64-134.
[215] *EDF and others v. Argentina* Award, pp. 235-236.
[216] *National Grid v. Argentina* Award, p. 72.

> words, **a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest** (…)"[217].

In the *El Paso* case, the Tribunal concluded that none of the measures individually (including the *pesification*) amounted to a violation of the FET clause but all of them together represented a "creeping violation of the FET standard"[218]. According to *the El Paso* Tribunal, the measures adopted by the Argentinian government altered the "entire legal setup for foreign investments"[219] which breached the investors legitimate expectations.

None of the expropriation claims were accepted by the tribunals, which understood that there was no formal transfer of Claimant's ownership and no substantial deprivation of Claimant's investments[220].

The application of the umbrella clause was accepted in the *EDF and others v. Argentina* dispute. Claimant required the application of the MFN clause to incorporate the "umbrella clauses" from other BITs (Argentina-Luxembourg and Argentina-Germany BITs). The Tribunal accepted such request and concluded that Argentina was obliged under the BIT to abide to its obligations under the concession agreement – and failed to do so by freezing tariffs and adopting further measures to cope with the crisis[221].

The *EDF and others* Tribunal recognized the relevance of human rights law to investment law but understood that none of the measures adopted by Respondent were necessary to guarantee human rights:

> "**The Tribunal does not call into question the potential significance or relevance of human rights in connection with international investment law**. However, regardless of any political wisdom in a temporary *pesification* or provisional freeze of tariffs during the period of crisis, no showing has been made that Argentina was not able to comply with the relevant treaty provisions later, through a rectification of the economic equilibrium which had been disrupted by the Emergency Measures.
> The imbalance of EDEMSA's economic equilibrium, as compared with the Claimants' legitimate expectations pursuant to the Currency Clause, persisted beyond the end of the third quarter 2002, when economic indicators in Argentina showed a stable trend toward recovery. See Claimants' Post-Hearing Brief on the Merits, at paragraph 179 (citing to Arriazu's Supplementary Expert Report, at paragraphs 100-109).
> **In short, no evidence persuades the Tribunal that Respondent's failure to re-negotiate tariffs in a timely fashion, so as to re-establish the economic equilibrium to**

[217] *El Paso v. Argentina* Award, p. 128.
[218] *El Paso v. Argentina* Award, p. 189.
[219] *El Paso v. Argentina* Award, p. 189.
[220] *EDF and others v. Argentina* Award, p. 258; El Paso v. Argentina Award, p. 87 and p. 103; *National Grid v. Argentina* Award, p. 58 and p. 61.
[221] *EDF and others v. Argentina* Award, pp. 224-235.

> **which Claimants were entitled under the Concession Agreement's Currency Clause, was necessary to guarantee human rights**"[222]. (emphasis by the author)

The FPS standard was only deemed as breached by the *National Grid* Tribunal, which decided that the FPS clause is not limited to physical security and is linked to FET standards[223].

Finally, like the cases concerning the water sector, the state of necessity doctrine was not applied by any tribunal due to the understanding that Argentina contributed to the crisis[224]. In the *El Paso* case there was a discussion on the maintenance of public order as well and one of the arbitrators had a different understanding on Argentina's allegedly contribution to its own situation[225].

2.2.2.9. Argentinian Cases on Gas Sector

The disputes involving public service providers in Argentina in the gas sector that were analyzed in the present research are: *LG&E v. Argentina*, *Sempra v. Argentina*, *CMS v. Argentina* and *Enron v. Argentina*.

Like measures taken in other public service sectors (*i.e.,* water and electricity), the gas sector was affected by the enactment of the Emergency Law, which led to the *pesification* and freezing of tariff rates[226].

Here, the claims brought by the Claimants were the same as in the water and electric power sectors: breach of clauses of the concession contract which incorporated the BITs due to the umbrella clauses, violation of FET and FPS standards, expropriation of Claimants' investments and adoption of discriminatory and arbitrary measures[227].

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[222] *EDF and others v. Argentina* Award, pp. 219-220.
[223] *National Grid v. Argentina* Award, p. 77.
[224] See *EDF and others v. Argentina* Award, p. 270; *National Grid v. Argentina* Award, p. 109.
[225] *El Paso v. Argentina* Award, p. 246.
One of the arbitrators in this case (Arbitrator Stern) disagrees with such conclusion that Argentina contributed to the crisis. She also indicated that the measures adopted by Argentina were adequate and necessary to cope with the crisis: "Moreover, according to Arbitrator Stern, the measures adopted were necessary to prevent the crisis from resulting in anarchy and social disintegration and they constituted a suitable means to overcome the chaos. It should also be recorded that the policies followed by Argentina before the crisis were generally supported by the World Bank and that the measures taken to address the crisis had the support and encouragement of the IMF". *El Paso v. Argentina* Award, p. 248.
[226] *LG&E v. Argentina* Decision on Liability, pp. 18-19; *Sempra v. Argentina* Award, p. 23; *CMS v. Argentina* Award, pp. 16-21.
[227] *LG&E v. Argentina* Decision on Liability, pp. 20-21; *Sempra v. Argentina* Award, p. 24; *CMS v. Argentina* Award, p. 27; *Enron v. Argentina* Award, p. 28.

Respondent alleged that such measures were taken to protect its economic interests and protect the health, safety and security of the Argentine State and its people[228].

The conclusions of the tribunals here were very similar to those in the water and electric power sectors as well. In all cases, the FET standard was found to be broken mostly because of the understanding that Argentina completely dismantled the legal framework established to attract foreign investors[229]. In this regard, the *CMS* Tribunal indicated that although the legal framework cannot be frozen it cannot be dispensed as well, given that the law on FDI has been developed to avoid such effects:

> "It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither it is a question of whether the framework can be dispensed when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects[230]."

All tribunals found also that the State of Argentina committed violations of its contractual obligations protected by the umbrella clause under the BITs[231].

None of the tribunals decided that the clause on prohibition of expropriation was violated, since expropriation requires either a formal transfer of property to the State (in case of direct expropriation) or a substantial deprivation of the investment (indirect expropriation)[232]. Further, no arbitrary or discriminatory treatment by the Argentine State was found - the tribunals concluded that the measures adopted were neither focused on foreign investors nor manifestly arbitrary, disrespecting the rule of law[233]. Additionally, the tribunals did not accept the allegations of violations of the FPS standard, which was mostly understood to be restricted to the investment physical security[234].

As for Argentina's pleas of emergency and of state of necessity, most of the tribunals understood that no liability exemption was due since the public order clause is not self-judging and

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[228] *LG&E v. Argentina* Decision on Liability, p. 65; *Sempra v. Argentina* Award, pp. 96-98; *CMS v. Argentina* Award, pp. 28-31.
[229] *LG&E v. Argentina* Decision on Liability, p. 42; *Sempra v. Argentina* Award, p. 89; *CMS v. Argentina* Award, p. 82; *Enron v. Argentina* Award, pp. 75-80.
[230] *CMS v. Argentina* Award, p. 81.
[231] *Enron v. Argentina* Award, pp. 86-88; *LG&E v. Argentina* Decision on Liability, p. 53; *Sempra v. Argentina* Award, p. 93; *CMS v. Argentina* Award, pp. 86-88.
[232] *LG&E v. Argentina* Decision on Liability, pp. 60-61; *Sempra v. Argentina* Award, pp. 83-84; *CMS v. Argentina* Award, p. 77; *Enron v. Argentina* Award, pp. 75-80.
[233] *LG&E v. Argentina* Decision on Liability, p. 50. Similar conclusions were reached by the other tribunals: *Sempra v. Argentina* Award, p.94; *CMS v. Argentina* Award, pp. 83-86; *Enron v. Argentina* Award, pp. 88-90.
[234] *Enron v. Argentina* Award, pp. 90-91; *Sempra v. Argentina* Award, p. 95.

because Argentina contributed to the crisis[235]. The *LG&E* Tribunal, however, recognized state of necessity in Argentina from 1 December 2001 and ended on 26 April 2003[236] and decided that Argentina should be exempted from liability in this period. In this case, the Tribunal understood that "Claimants have not proved that Argentina has contributed to cause the severe crisis faced by the country"[237].

In the cases involving the gas sector, the annulment requests made by Argentina generally succeeded. The Sempra was annulled for excess of powers[238]; the CMS was partially annulled with respect to the conclusions of the tribunal on the umbrella clause and contractual violations allegedly committed by Respondent for failure of the Tribunal do state reasons in this regard[239]; and the Enron award was partially annulled regarding the conclusions of the Tribunal on the plea of emergency and the state of necessity[240].

2.2.2.10. Urbaser v. Argentina

The *Urbaser* case was the only dispute involving the water sector in Argentina which was decided in favor of no party (*i.e.,* violation of BIT found but no compensation awarded) rather than in favor of the investor. The facts of this dispute are very similar to those of the other cases involving the water sector and the main issues debated by the tribunal arose from the enactment of the Emergency Law.

Nonetheless, the *Urbaser* Tribunal conducted some different analysis, particularly with respect to the FET standard, which made it reach different conclusions. The Tribunal evaluated if the FET standard was breached by Argentina when i) adopting emergency measures to cope with the crisis; ii) attempting the renegotiate the contract; and iii) terminating the contract[241].

In summary, the Tribunal concluded that the emergency measures negatively affected the equilibrium of the contract, but do not raise liability given that they were promulgated in 2002 in a situation of state of necessity[242]. The (failed) attempts to renegotiate the contract however

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[235] *Sempra v. Argentina* Award, p. 104; *CMS v. Argentina* Award, p. 108; *CMS v. Argentina* Award, pp. 95-96; *Enron v. Argentina* Award, pp. 98-99; *Enron v. Argentina* Award, pp. 101-107.
[236] *LG&E v. Argentina* Decision on Liability, p. 80.
[237] *LG&E v. Argentina* Decision on Liability, p. 77.
[238] *Sempra v. Argentina*, Decision on the Argentine Republic's Application for Annulment of the Award.
[239] *CMS v. Argentina*, Decision of the Ad Hoc Committee on The Application for Annulment of The Argentine Republic, pp. 25-26.
[240] *Enron v, Argentina*, Decision on the Application for Annulment of the Argentine Republic.
[241] *Urbaser v. Argentina* Award, p. 167.
[242] *Urbaser v. Argentina* Award, p. 189.

amounted to a violated of the FET standards according to the tribunal, since Respondent did not act in a transparent manner with the investor[243]. As for the termination of the contract, the tribunal understood that no breach of the FET standard was found, having seen that they referred only to contractual disputes[244].

Notwithstanding the violation found with respect to the renegotiations of the contract, the tribunal concluded that even the "standard of fair and equitable treatment cannot provide redress where the failure of the Concession is predominantly to the failure on part of Claimants to make the required investment"[245] and hence decided that no compensation for such violation was due.

Another particularity of this dispute is the counterclaim brought by Respondent. Respondent presented a counterclaim and claimed damages for Claimant's failure to administrate the concession and implement its investment in order to provide access to water to the population[246].

When evaluating Respondent's counterclaim, the Tribunal ruled on important issues involving international human rights and investment law and indicated that the right to water is not a duty that should be born solely by the State:

> "On a preliminary level, **the Tribunal is reluctant to share Claimants' principled position that guaranteeing 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**. When extended to human rights in general, this would mean that private parties have no commitment or obligation for compliance in relation to human rights, which are on the States' charge exclusively.
> A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals. A simple look at the MFN Clause of Article VII of the BIT shows that the Contracting States accepted at least one hypothesis where investors are entitled to invoke rights resulting from international law (in addition to the rights resulting from Article X). If the BIT therefore is not based on a corporation's incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations.
> **The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce**. This standard includes 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. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though

[243] *Urbaser v. Argentina* Award, p. 225.
[244] *Urbaser v. Argentina* Award, p. 253-255.
[245] *Urbaser v. Argentina* Award, p. 226.
[246] *Urbaser v. Argentina* Award, pp. 308-310.

> 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[247]". (emphasis by the author)

Notwithstanding that, the Tribunal indicated that the "mere relevance of this human right under international law does not imply that AGBA and its shareholders were holding corresponding obligations equally based on international law"[248]. Further, the Tribunal concluded that "Respondent's compliance with its primary responsibility to ensure the area's population's right to water was not a governmental primary focus and can therefore not be retained as a corresponding obligation on behalf of the Concessionaire"[249]. Therefore, the Tribunal dismissed Respondent's counterclaim.

2.2.2.11. Preliminary Conclusion

As seen, socio-economic issues have already arisen in different contexts under investment arbitrations. There are though some common points in the disputes analyzed.

First, the socio-economic rights that were debated in almost all cases are related either to **protection of health or welfare of the population in the host-State** – including indigenous communities. Although the key words "water" and "health", along with explicit references to "human rights", were used in the research made to select cases for analysis, no dispute which debated other sorts of rights (*e.g.,* labor rights) were found.

Second, socio-economic rights were always **brought by States** either as a defense to the allegations made by investors or as a counterclaim.

Third, the main clauses under which socio-economic issues were debated are the **prohibition of expropriation (particularly indirect expropriation), the FET and FPS standards, and the umbrella clause**. In some disputes, the national treatment and MFN clauses were also discussed. Further, States usually relied on the public order/essential security clauses (particularly in the Argentina cases) to raise discussions on the need to protect socio-economic rights of its population.

The most common violation found by Tribunals in the cases investigated were related to the **FET standard.** Such standard was found to be violated in all cases awarded in favor of investor,

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[247] *Urbaser v. Argentina* Award, pp. 316-317.
[248] *Urbaser v. Argentina* Award, p. 322.
[249] *Urbaser v. Argentina* Award, p. 325.

except for the *Bear Creek Mining v. Peru*, where the Tribunal concluded that an expropriation occurred and hence did not evaluate other alleged violations. Tribunals generally concluded that FET standard was violated because of lack of transparency and/or consistency, as well as breach of investors' legitimate expectations.

There seems to be a consent among arbitral Tribunals on the concept of the FET standard, but not on when and whether a compensation should be awarded for such a violation. This was the reason why the *Urbaser Tribunal* came to a different conclusion than the other disputes involving the water sector in Argentina. The threshold applied by the *Urbaser Tribunal* to investigate whether a FET violation took place was basically the same as others (and it was found to be breached for lack of transparency), but a different threshold was applied to evaluate the compensation awarded. Unlike the other Tribunals of disputes involving the water sector in Argentina, *Urbaser Tribunal* concluded that no compensation was due because the investor failed to implement its investment and provide access to water to the Argentinian population.

Fourth, in almost all cases analyzed, expect for the *Phillip Morris v. Uruguay* (and partially in the *Urbaser v. Argentina* case), the Tribunals **did not accept the State's arguments on the need to protect socio-economic rights of its population**. Out of the 19 cases analyzed, 17 were decided in favor of investors mostly because of violations of the FET standard.

The table below summarizes the conclusions about the cases hereby investigated, and points out the violations raised and found by the arbitral Tribunals:

Table 3 – Evaluation of Selected Awards

Case	Decided in Favor of Whom?	Which Violations Affecting Protection of Socio-Economic Rights Were Mainly Raised?	Which Violations Were Found by the Tribunal?
Phillip Morris v. Uruguay	State	i) Prohibition of Expropriation ii) FET	No violation was found. Tribunal found that adoption of relevant regulations by Uruguay was a valid exercise of State's powers aimed to protect public health and did not alter Respondent's framework and therefore did not violate Claimant's legitimate expectations.
Bear Creek Mining v. Peru	Investor	i) Prohibition of Expropriation ii) FET iii) FPS	Respondent indirectly expropriated Claimant's investments because there was no causal link between Claimant's activities and issuance of Decree that derogated Claimant's authorization to operate in the

			area. Other claims were not analyzed by Tribunal for indirect expropriation was already found.
Copper Mesa v. Ecuador	Investor	i) Prohibition of Expropriation ii) FET iii) FPS iv) National Treatment	The Tribunal concluded that Respondent expropriated Claimant's investments and violated the FET standard for acting in an arbitrary manner, with violation of due process and no payment of compensation (with respect to certain concessions). The Tribunal also recognized Claimant's contributory negligence and assessed Claimant's injury on 30 per cent regarding one specific concession.
Crystallex v. Venezuela	Investor	i) Prohibition of Expropriation ii) FET iii) FPS	Tribunal did not find that the simple denial of permit constitutes a violation of the prohibition of expropriation clause, but due to the lack of compensation found that Respondent indirectly expropriated Claimant's investment. FET standard was also found to be violated because of Respondent's arbitrary conduct, lack of transparency and consistency.
Gold Reserve v. Venezuela	Investor	i) Prohibition of Expropriation ii) FET iii) MFN	The The Tribunal concluded that the denial of permits and termination of concessions by Respondent were political, and that Respondent violated FET standard for acting with lack of transparency, consistency, and good faith in dealing with the investor.
Tecmed v. Mexico	Investor	i) Prohibition of Expropriation ii) FET iii) FPS	The Tribunal found that Respondent expropriated Claimant's investments and violated FET standard because Claimant's investments never compromised the environment of health of the people affected and its actions could be remedied by minor penalties. FET standard was found to be violated also because of lack of transparency.
Argentinian Cases on Water Sector	Investor	i) Prohibition of Expropriation ii) FET iii) FPS iv) Non-Discrimination	All Tribunals concluded that the FET standard was violated for several reasons: violations of the investors' legitimate expectations that the State would not modify the legal framework in an unreasonable manner, failure to restore a reasonable equilibrium in the concessions, lack of a diligent, equal, and respectful treatment to investors, and the imposition of obstacles to the charge of tariffs by investors following the termination of the

			concessions. The *SAUR v Argentina* Tribunal also found that termination of the concession and transfer to another corporation constituted an indirect expropriation. And the *Azurix v. Argentina* Tribunal found a breach of the FPS standard as well.
Argentinian Cases on Electricity Sector	Investor	i) Prohibition of Expropriation ii) FET iii) FPS iv) Non-Discrimination v) Umbrella Clause	In all disputes, the Tribunals decided that there was a violation of the FET standard generally because of Respondent's to reestablish the economic equilibrium of the concession agreement within a reasonable time. In the *EDF and others v. Argentina* dispute, the Tribunal also applied the MFN clause to incorporate umbrella clauses from other BITs and consequently concluded that the Argentinian Government violated its obligations under the concession agreement by freezing tariffs and adopting further measures to cope with the crisis. FPS standard was found to be violated only by the National Grid Tribunal.
Argentinian Cases on Gas Sector	Investor	i) Prohibition of Expropriation ii) FET iii) FPS iv) Non-Discrimination v) Umbrella Clause	In all disputes, the FET standard was found to be broken mostly because of the understanding that Argentina completely dismantled the legal framework established to attract foreign investors. All tribunals found also that the State of Argentina committed violations of its contractual obligations protected by the umbrella clause under the BITs.
Urbaser v. Argentina	No Party	i) Prohibition of Expropriation ii) FET iii) Non-Discrimination	Tribunal found that the FET standard was breached since Respondent did not act in a transparent manner with Claimant when renegotiating the contract. No compensation however was awarded for the Tribunal understood that no redress is due when failure is predominantly related to Claimant's failure to make the required investment.

The findings of the present analysis are in line with the criticism made to investment agreements (particularly BITs) by developing countries, which claimed that such treaties threated the **regulatory powers** of host-States.

David M. Trubek explains that different countries in the global south have been rethinking the commitments made in the 1990s with respect to BITs especially because of the treat posed to their regulatory powers:

> "Many factors explain this rethink. To a degree, it is part of a general shift by both governments and industry. North and South, away from an unqualified embrace of globalization. **Probably the biggest driver has been reactions to a raft of decisions by arbitrators who have used often vague language in treaties to craft rulings that pose a threat to the regulatory autonomy of host countries**. These include use of the concept on "indirect expropriation" to challenge regulatory actions that investors claimed significantly diminished the value of their investments. Concepts of "fair and equitable treatment" and "full and protection and security" were given expansive readings. MFN clauses were used to expand coverage in unexpected ways. Many cases of this type were brought and arbitrators awarded damage in several. Even when the claim was dismissed, the litigation was costly for the host country. It was feared that the whole process was chilling the exercise of regulatory power"[250]. (emphasis by the author).

In addition to the restriction posed to regulatory powers of State countries, the present analysis also shows that foreign investors may directly impact protection and respect for social and economic rights. This means that investors may impair the protection of these rights by host-States and may as well take actions that result in disrespect for socio-economic rights of the population of the host-States. And this is one of the reasons why protection and respect for socio-economic rights should be considered in investment agreements.

2.3. INVESTMENT AND HUMAN RIGHTS ARE COMPLEMENTARY AND REINFORCING MATTERS

As observed in the foregoing topic, protection of human rights, particularly of socio-economic rights, have already clashed with the foreign direct investment system in different occasions. This clash, by itself, should already be sufficient to justify the recalibration of investment agreements with human rights protection.

In this sense, article 28 of the Universal Declaration of Human Rights states that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

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[250] TRUBEK, David M. *Foreign Investment, Development Strategies, and the New Era in International Economic Law*. In. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 294.

Investment agreements are part of the present international economic order and, hence, must be adequately drafted and negotiated in order to ensure compliance with people's rights and freedoms.

This is not, however, the only reason why human rights, and more specifically socio-economic rights, should be taken into account when States enter into investment agreements. The promotion of protection and respect for socio-economic rights under investment agreements can have positive effects for both social and economic development.

Foreign direct investment is usually seen as negative from the human rights perspective and human rights are deemed as an obstacle to investment. Both ideas are misleading. FDI may contribute to economic development[251] and, consequently, to the promotion of human rights[252], provided that is based on the notion of sustainable development. Sustainable development, by its turn, cannot be achieved without the protection and promotion of human rights.

To better understand why human rights and investment shall be seen as complementary and reinforcing instruments it is important to comprehend the notion of sustainable development and its main aspects.

The idea of sustainable development started to be debated around the 1980s. One of the first documents that brought a definition for sustainable development was published in 1987: The Report of the World Commission on Environment and Development, also known as Brundtland Commission. It defined sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs[253].

In 1992, in the Rio Declaration on Environment and Development ("1992 Rio Declaration"), a more complete concept of sustainable development was established. As elucidated by Alberto do Amaral Jr[254]., the Rio Declaration established the substantive and procedural

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[251] As explained in Chapter 1, this can occur mainly because of technology and capital transfer, and employment increase.

[252] OECD has already shown that foreign investment may contribute to economic development. *Foreign Direct Investment for Development – Maximising Benefits, Minimising Costs*. OECD, 2002. Available: <https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf>. Access on October 18, 2018.

[253] The report continues explaining that sustainable development contains s: "*It contains within it two key concepts: (i) the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and (ii) the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs".* UNITED NATIONS. *Report of the World Commission on Environment and Development: Our Common Future*. Full report available at: http://www.un-documents.net/our-common-future.pdf. Access: June 22, 2019, p. 41.

[254] AMARAL Jr., Alberto. *Comércio Internacional e a Proteção do Meio Ambiente*. 1st Ed. São Paulo: Editora Atlas, 2011, p. 60.

elements of sustainable development. The substantive elements are those mentioned in Principles 3 to 8 of the Declaration and consist mainly in:

> "[T]he sustainable use of natural resources, the integration between the environment protection and economic development, the right to development and the promotion of equity in the distribution of resources among the present generation and between the present and future generation"[255].

The procedural elements are determined by Principles 10 and 17 of the Declaration, and respectively refer to the participation of all concerned citizens, at all levels, in decisions involving environmental issues and to the obligation to undertake environmental impact assessment for all activities that may negatively impact the environment.

As observed, the first documents that brought up the notion of sustainable development focused on the intergenerational concept and on environment protection.

Over time, this concept evolved and became wider. The Plan of Implementation of the World Summit on Sustainable Development of 2002 indicates the current three pillars of sustainable development: economic development, social development and environmental protection. Such pillars are interdependent and reinforce each other[256].

In a similar way, Jeffrey Sachs asserts that the most recent notion of sustainable development involves three complex systems: the world economy, the global society and the Earth's physical environment. Further, Sachs defends that there are four objectives liked to sustainable development: "economic prosperity; social inclusion and cohesion; environmental sustainability; and good governance by major social actors, including governments and business"[257].

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[255] Free translation of the following excerpt: "(…) *a utilização sustentável dos recursos naturais, a integração entre a proteção do meio ambiente e o desenvolvimento econômico, o direito ao desenvolvimento e a busca de equidade na alocação dos recursos entre os membros da geração atual, bem como entre a geração presente e a geração futura*". AMARAL Jr., Alberto. *Comércio Internacional e a Proteção do Meio Ambiente*. 1st Ed. São Paulo: Editora Atlas, 2011, p. 60.

[256] This new notion was mentioned again in the Rio + 20 Summit. The outcome document of the Conference mentions that: "We also reaffirm the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth". UNITED NATIONS. *The Future We Want: Outcome Document of the United Nations Conference on Sustainable Development*. Rio de Janeiro, Brazil, 20–22 June 2012. Available at: <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf>. Access on June 23, 2019, p. 1.

[257] SACHS, Jeffrey. *The Age of Sustainable Development*. New York: Columbia University Press, 2015, p. 21.

This new concept of sustainable development, based on the three dimensions, was reflected in the UN Sustainable Development Goals ("SGDs") for 2030. The 2030 SGDs were defined in 2015 and, as mentioned by the UN itself, represent an "ambitious, universal and holistic agenda"[258].

The SGDs include 17 different, but interrelated, goals. These are: (i) no poverty; (ii) zero hunger; (iii) good health and well-being; (iv) quality education; (v) gender equality; (vi) clean water and sanitation; (vii) affordable and clean energy; (viii) decent work and economic growth; (ix) industry, innovation and infrastructure; (x) reduce inequalities; (xi) sustainable cities and communities; (xii) responsible consumption and production; (xiii) climate action; (xiv) life below water; (xv) life on land; (xvi) peace, justice and strong institutions; (xvii) partnership for the goals.

As seen, over time, the notion of sustainable development was broadened and entails now the pillar of social development, which is precisely why the promotion and protection of human rights is essential to the development of countries. The SGSs themselves include several goals that are directly related to FDI, such as the need to promote decent work and economic growth, industry, innovation and infrastructure, reduction of inequalities and gender equality. These are all goals that depend on the activities of national and multinational corporations and, therefore, should be addressed by investment agreements.

The idea of an integrated notion of social and economic development is defended by several development scholars.

Daren Acemoglu and James A. Robinson contend that the creation of inclusive institutions is essential for economic growth for it enhances redistribution of wealth and allows creative destruction.

In the book *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*[259], the scholars show how countries as the United States, England, Australia, and South Korea managed to develop by means of creation of inclusive institutions, whereas countries that maintained extractive institutions, such as North Korea, Zimbabwe, and Argentina, did not develop from both the social and economic standpoint.

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[258] United Nations Development Programme. Sustainable Development that leaves no on behind. Available at: http://www.undp.org/content/undp/en/home/sustainable-development.html. Access on June 23, 2018.

[259] ACEMOGLU, Daron. ROBINSON, James A. *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. New York: Crown Publishers, 2012.

According to Acemoglu and Robinson, growth under extractive institutions does not allow for creative destruction and innovation and, consequently, is not sustainable[260].

Further, the authors explain that countries which experienced growth under such circumstances frequently face great political instability, since under extractive institutions there is no redistribution of wealth and growth benefits only a small part of the population. This makes extractive societies politically unstable, leading eventually to a collapse[261].

Once wealth is distributed, a virtuous circle emerges, since inclusive economic institutions lead to greater participation of different sectors of the society in the political field, creating then inclusive political institutions. As explained by Acemoglu and Robinson, this "makes it more difficult for a small elite to crush the masses rather than to give in to their demands, or at least to some of them"[262]. Thus, inclusive economic institutions enhance the creation and inclusive political institutions and vice-versa.

Amartya Sen supports a similar position and advocates for an "integrated approach to economic and social development", which he indicates that was championed particularly by Adam Smith[263].

Sen defines development as "the process of expanding human freedom"[264]. He defends that freedom is central for development, since it is both the principal end and the principal means of development – this is what he calls respectively as the constitutive and instrumental roles of freedom[265].

According to Amartya Sen, freedom is an end in itself, and its instrumental role does not reduce its importance as the principal end of development. This means that freedom should be sought irrespectively of the positive effects it may have to development and economic growth[266].

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[260] The authors develop the idea on the importance of creative destruction and innovation along the book, including when analyzing the situation in Argentina. See ACEMOGLU, Daron. ROBINSON, James A. *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. New York: Crown Publishers, 2012, p. 385.
[261] This idea on the importance of redistribution of wealth is also investigated along the book, including with respect to the history of the Maya Population. See ACEMOGLU, Daron. ROBINSON, James A. *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. New York: Crown Publishers, 2012, pp. 143-149.
[262] ACEMOGLU, Daron. ROBINSON, James A. *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. New York: Crown Publishers, 2012, p. 314.
[263] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, p. 294.
[264] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, p. 36.
[265] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, p. 36.
[266] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, pp. 38-39.

Notwithstanding that, the author recognizes the importance of the instrumental roles of freedom and divides instrumental freedoms into five main types: i) political freedoms; ii) economic facilities; iii) social opportunities; iv) transparency guarantees; and v) protective security[267].

With regards specifically to the second (economic facilities) and third (social opportunities) types, which are closely related to the present research, Sen explains how the distribution of wealth and the access to education and health care enhance development, as they enlarge the participation of the population in economic and political activities[268]. In this respect, Sen mentions Brazil as an example of country in which the lack of social opportunities represented a barrier to development[269].

He also explains later how the vision of human capital (which is basically the notion that people with better health and education contribute more to the economic system) differs from the idea of human capabilities – which is the one that he defends. Sen contends that the notion of human capabilities sees the freedom of people as an end in itself but recognizes its indirect role to economic production:

> "In looking for a fuller understanding of the role of human capabilities, we have to take note of:
>
> i) Their direct relevance to the well-being and freedom of people;
> ii) Their indirect role through influencing social change; and
> iii) Their indirect role through influencing economic production"[270].

The idea of human capabilities and its relation to the promotion of economic production and development is also developed by ***Martha Nussbaum***. Similar to Amartya Sen, Nussbaum defends that individuals[271] have value for their own sake and that larger systems should be used as support for individual lives[272].

Notwithstanding that, Nussbaum recognizes the interdependence of capabilities[273] and the existence of fertile capabilities, such as education and ownership, which are the "opportunities

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[267] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, p. 38.
[268] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, p. 38.
[269] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, p. 45.
[270] SEN, Amartya Kuman. *Development as Freedom*. 1st Ed. New York: Alfred A. Knopf, Inc, 1999, p. 296.
[271] In this regard, she refers to sentient individuals in general, *i.e.*, animals and humans. NUSSBAUM, Martha C. *Creating Capabilities: The Human Development Approach*. Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2011, p. 165.
[272] NUSSBAUM, Martha C. *Creating Capabilities: The Human Development Approach*. Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2011, p. 165.
[273] Martha Nussbaum provides a list of ten Central Capabilities: i) life; ii) bodily health; iii) bodily integrity; iv) senses, imagination and thought; v) emotions; vi) practical reason; vii) affiliation; viii) other specifies (i.e. relation of human beings with other species, such as animals and plants); iv) play; x) control over one's environment. NUSSBAUM,

which generate other opportunities"[274]. Nussbaum also explains the notion of corrosive disadvantage, which is a "type of capability failure that lead to failure in other areas"[275].

The capability approach developed by Martha Nussbaum reiterates the idea that human capabilities are not isolated from each other and are mutually reinforcing[276]. Thus, if human capabilities are the principal end of development, capabilities should be equally and strongly promoted to achieve development.

As seen, there are different views supporting the integrated approach of social and economic development (without mentioning the need for environmental protection, which is not the objective of this research), either by means of stressing the importance of creating inclusive institutions or by defending the human capabilities perspective, which puts has the human being as central to the notion of development.

In this context, it is not possible to dissociate investment from human rights. Investment and human rights shall not be considered as separate, but rather as complementary and reinforcing issues for they have the same ultimate objective, *i.e.,* the promotion of (sustainable) development.

As seen in Chapter 1 above, if responsibly promoted, FDI may enhance innovation and industrial development – which, by its turn, may create more jobs and reinforce human rights. In the same way, human rights ensure the redistribution of wealth and allow for creative destruction – which boosts industrial and economic development. For this reason, it is crucial to rebuild the FDI system having human rights, including socio-economic rights, as one of its main pillars.

To achieve sustainable development, economic and social development should be regarded as interdependent and mutual reinforcing matters. This cannot be accomplished without developing new models of investment agreements that properly consider and address human rights issues.

In this respect, John Ruggie asserts that investment agreements are the point of entry for multinational corporations in foreign States and may cause human right issues if States are prevented from creating new domestic human rights legislation under penalty of being sued by the

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Martha C. *Creating Capabilities: The Human Development Approach*. Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2011, p. 33-34.

[274] NUSSBAUM, Martha C. *Creating Capabilities: The Human Development Approach*. Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2011, p. 98.

[275] NUSSBAUM, Martha C. *Creating Capabilities: The Human Development Approach*. Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2011, p. 99.

[276] NUSSBAUM, Martha C. *Creating Capabilities: The Human Development Approach*. Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2011, p. 98.

investor. Ruggie also comments on the problem of fragmentation in international law[277], which, in his view, is even more problematic in the investment field, since institutions and authorities that commonly deal with investment are not the same as those responsible for human rights. Investment Agreements would of course not by themselves resolve the whole problem of fragmentation in international law, but they could be a useful tool for harmonizing both systems.

If adequately designed, investment agreements may be a mechanism for promoting human rights at the international level, especially in less developed and developing countries and/or weak and failed States. Such countries face serious problems with human rights abuses either by virtue of the absence of such laws in their territories or because of non-compliance and/or difficulties in enforcement of human rights laws[278].

As demonstrated with further details in the following Chapter, the existing mechanisms on Human Rights and Business (*i.e.,* the UN Respect and Remedy Framework, the UN Guiding Principles and the Organization for Economic Co-operation and Development – OECD's Guidelines on Multinational Corporations) do not completely address this issue, as they consist in simple recommendations and guidelines on how States and corporations should promote human rights[279]. The international binding treaty on the activities of transnational corporations that is currently being discussed under the UN has also been subject to criticism for transferring to

[277] The positive and negative aspects of fragmentation of international law are very well described in the following article: PETERS, Anne. "The refinement of international law: from fragmentation to regime interaction and politization". Oxford University Press and New York University School of Law, 2017, Vol. 15, No. 3.671-704.
[278] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 35.
[279] To solve this problem, scholars have proposed different solutions. David Kinley proposes the creation of a sort of international legal regime that would make corporations directly liable for human rights breaches at the international level. John Ruggie, which developed the UN Framework and Guiding Principles, also recognizes that human rights abuses are likely to occur where "human rights regime cannot be expected to function as intended, such as armed conflicts or other areas of heightened risk". He suggests then the creation of a legal instrument that would help clarifying standards for corporate responsibility for human rights abuses. Check: KINLEY, David. *Civilising Globalisation: Human Rights and the Global Economy*. 1st Ed. Cambridge: Cambridge University Press, 2009; RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 200.

enterprises all responsibility for human rights protection and respect[280] and for not resolving the problem with legal fragmentation[281].

Therefore, by now there are no international instruments adequately addressing promotion, compliance, and enforcement of human rights in situations where the human rights system is undeveloped. Investment Treaties could operate as tools for promoting human in such circumstances by: (i) bringing international human rights standards to States where legislation on this matter is still underdeveloped; (ii) making corporations conscious and responsible for human rights when conducting their activities abroad; and (iii) raise awareness of home and host-States about their human rights obligations, including the obligation to monitor corporations operating in their territories and jurisdictions in order to prevent violations.

[280] BUSINESS AND INDUSTRY ADVISORY COMMITTEE; FOREIGN TRADE ASSOCIATION; INTERNATIONAL CHAMBER OF COMMERCE; THE GLOBAL VOICE OF BUSINESS. *UN Treaty Process on Business and Human Rights: Response of the international business community to the "elements" for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. 20 October 2017. Available at:https://cdn.iccwbo.org/content/uploads/sites/3/2017/10/business-response-to-igwg-draft-binding-treaty-on-human-rights.pdf. Access on: September 16, 2018.

[281] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 95, pp. 60-68

3. HOW TO PROMOTE PROTECTION AND RESPECT FOR SOCIO-ECONOMIC RIGHTS UNDER INVESTMENT AGREEMENTS?

Based on the analysis conducted in the foregoing Chapters –dedicated at understanding **why** socio-economic rights should be considered in investment agreements, this Chapter has the purpose of clarifying **how** these rights should be considered in investment agreements.

To do that, this Chapter will firstly analyze the relevant international instruments on human rights and business[282] and particularly those offering guidance on corporate responsibility to respect human rights, *i.e.,* the UN Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises. Such guidelines are relevant, because they provide practical guidance on how States and corporations should promote human rights (including socio-economic rights) with respect to businesses activities. This analysis will identify the main aspects that States should consider when regulating the entrance of foreign investors in their territories.

Moreover, initiatives that have already been developed by the international community to address human rights issues under investment law will also be investigated. This includes mainly the analysis of new investment agreement models created by other countries (such as India, the Netherlands, and the Morocco-Nigeria BIT model)[283], and the evaluation of models and frameworks proposed by international organizations (including the UNCTAD Policy Framework for Sustainable Development).

Finally, the Chapter suggests criteria for evaluating whether an investment treaty enhances protection and respect for socio-economic rights and shows what is the importance of including such provisions in investment treaties and not leaving the matter for tribunals' interpretation.

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[282] Instruments analyzed here provide for a comprehensive analysis of the business and human rights, corporate social responsibility, and responsible business conduct issues. Some scholars explain the difference between these concepts and indicate that CSR is frequently related to philanthropy, while business and human rights is focused on corporate accountability and responsible business conduct refers to the incorporation of best practices into the enterprises' activities. For more information see RAMASARTRY, Anita. *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*. University of Washington, Legal Studies Research Paper n. 2015-39, Journal of Human Rights, pp. 237-259, 2015.

[283] Brazilian CFIAs will be analyzed in the following and final Chapter.

3.1. INTERNATIONAL INSTRUMENTS ON BUSINESS AND HUMAN RIGHTS, CSR, AND RESPONSIBLE BUSINESS CONDUCT

Human rights protection system has focused for a long time on States, which were both the main violators and guardians of human rights. This concept started to change in the last decades. Globalization created new circumstances causing uncertainty as for whom should be responsible for human rights violations and under what jurisdiction. This is the case, for instance, of abuses committed in global value chains and/or by multinational corporations in foreign territory.

These questions have started to be more intensively debated from the 1990s on. Different efforts to regulate these issues have arisen, including voluntary initiatives and soft law instruments.

This topic explains some of the most relevant and recent efforts to regulate human rights protection in relation to business activities: i) the United Nations Guiding Principles on Business and Human Rights; ii) the OECD Guidelines for Multinational Enterprises; and iii) the draft treaty on business and human rights, currently under debate in the United Nations.

Based on that, it aims to understand what States' and corporations' obligations are when it comes to human rights. Further, the topic also explores how a binding treaty would change the current structure of rules on the matter.

3.1.1. UN Guiding Principles on Business and HR

The first effort to establish legally binding international human rights standards for enterprises under the UN occurred in the late 1990s, when the UN started to discuss the Norms on the Responsibilities of Transnational Corporations (the "Norms"). The Norms consist in a proposal of treaty text developed by an expert subsidiary body of the United Nations Commission. They proposed that international law should impose human rights standards on States and enterprises and that the UN should be responsible for monitoring companies all over the world. In 2003, the Norms were submitted to the UN Commission of Human Rights but were not approved.

In this scenario, the UN decided to create a special mandate for an expert, which would have the task of identifying and clarifying standards and best practices for business with respect to human rights. The UN then appointed John Ruggie, a Professor at Harvard's Kennedy School, as

the "special representative on the issue of human rights and transnational corporations and other business enterprises"[284].

During his mandate (from 2005 to 2011), John Ruggie concluded that neither treaties nor voluntary corporate responsibility approach could properly fill in the "gaps" on human rights and business. In view of that, he developed a "common global normative platform and authoritative policy guidance as a basis for making cumulative step-by-step progress without foreclosing any other promising longer-term developments"[285]: The Protect, Respect and Remedy Framework ("Framework") and the Guiding Principles, published in 2011.

The Framework and Guiding Principles follow the transnational governance model, combining public governance (laws, regulations, institutions), corporate governance (risk management and integrated business system, albeit separate legal personality) and civil governance (pressure by civilians by means of lawsuits and other mechanisms)[286].

The Framework's main purpose is to identity what should be done with respect to Business and Human Rights. Complementarily, the Guiding Principles' objective is to establish how the aims posed by the Framework should be accomplished. Both the Framework and the Guiding Principles are structured in three main pillars: State's duty to protect[287], the corporate responsibility to respect and access to remedy[288].

3.1.2. OECD Guidelines for Multinational Enterprises

Further to the UN efforts to create guidance for enterprises and States on human rights and business, the OECD has also developed Guidelines for Multinational Enterprises, another very

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[284] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. xviii.
[285] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 81.
[286] RUGGIE, John Gerard; SHERMAN, John F. *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*. The European Journal of International Law, Vol. 28, No. 3, 2017, p. 926.
[287] The States' duty to protect encompasses at least two obligations: the obligation to refrain from violating human rights of persons within the respective State's jurisdiction and the obligation to ensure that the rights holders effective enjoy and realize such rights. Ruggie stresses that, whilst the State duty to protect is an obligation of conduct not of result, the State may be held liable for enterprises' human rights violations if they fail to take appropriate measures to prevent, investigate, punish and remedy such abuse.
[288] The Framework provides that States must ensure access to effective judicial remedy within their territory and/or jurisdiction and should endeavor efforts to reduce legal and practical barriers that could undermine it. RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, pp. 107-112.

important international instrument on corporate social responsibility. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises.

The OECD Guidelines for Multinational Enterprises are "recommendations addressed by governments to multinational enterprises operating in or from adhering countries"[289]. The Guidelines establish non-binding principles and standards for responsible business conduct according to applicable laws and internationally recognized standards[290]. Although they encompass voluntary principles and standards to be followed by enterprises, adhering countries are bound to implement the Guidelines[291]. Further, some of the issues covered by the Guidelines are regulated by national law or international commitments – which make these specific commitments legally binding[292].

The OECD Guidelines were, however, not always as comprehensive as they are today. The first version of the OECD Guidelines was adopted in 1976 and originally focused on "general policies, disclosure of information, competition, financing, taxation, employment and industrial relations, and science and technology"[293].

Environmental issues were firstly introduced to the OECD Guidelines in 1991, but the real change occurred in the 2000 update. The latter broadened the scope of the Guidelines by embracing new provisions on sustainable development, corporate governance, child labor, environmental protections, bribery, and consumer protection, among others[294].

Another important aspect of the OECD Guidelines is the creation of National Contact Points (NCP). In 1979, the NCP system was created to serve as a point for promoting the OECD Guidelines and discussing issues related to it. At that time, the creation of the NCP was not biding to the parties. In the 1984 version, creating an NCP became legally binding to member States[295].

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[289] OECD Guidelines for Multinational Enterprises, 2011, p. 3.
[290] OECD Guidelines for Multinational Enterprises, 2011, p. 3.
[291] OECD Guidelines for Multinational Enterprises, 2011, Preface, p. 13.
[292] OECD Guidelines for Multinational Enterprises, 2011, Preface, p. 17.
[293] FOORT, Sander Van't. *The History of National Contact Points and the OECD Guidelines for Multinational Enterprises*. Journal of the Max Planck Institute for European Legal History, 2017, pp. 195-2014. P. 198.
[294] FOORT, Sander Van't. *The History of National Contact Points and the OECD Guidelines for Multinational Enterprises*. Journal of the Max Planck Institute for European Legal History, 2017, pp. 195-2014. P. 204.
[295] Chapter I (Concepts and Principles) of the OECD Guidelines establish that: "Governments adhering to the Guidelines will implement them and encourage their use. They will establish National Contact Points that promote the Guidelines and act as a forum for discussion of all matters relating to the Guidelines. The adhering Governments will also participate in appropriate review and consultation procedures to address/issues concerning interpretation of the Guidelines in a changing world". OECD Guidelines for Multinational Enterprises, 2011, I (Concepts and Principles). 5, p. 18.

It should also be noted that originally the OECD Guidelines contained provisions solely directed to corporations' direct activities. Over time, acts of business partners became relevant under the OECD Guidelines as well.

The 2000 version provided that corporations should encourage their business partners to respect the Guidelines. This applied, however, only to business partners that had a connection with the company involved (investment nexus), which considerable weakened the application of OECD Guidelines.

This was altered by the 2011 version by establishing that multinational enterprises are recommended to prevent and mitigate any potential adverse impacts directly linked to their activities, products, or services[296]. Another novelty brought by the 2011 edition was the inclusion of a whole human rights chapter[297].

In 2011, when the updated Guidelines were adopted, the adhering states agreed on a Declaration on International Investment and Multinational Enterprises, recognizing the importance of international investment to development and of international cooperation for economic, social, and environmental progress:

> "- That **international investment is of major importance to the world economy, and has considerably contributed to the development of their countries**;
> - That multinational enterprises play an important role in this investment process;
> - That **international co-operation can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic, social and environmental progress**, **and minimise and resolve difficulties which may arise from their operations;**
> - That the benefits of international co-operation are enhanced by addressing issues relating to international investment and multinational enterprises through a balanced framework of interrelated instruments;"[298]. (emphasis by the author)

As explained in the previous Chapters of this dissertation, FDI may enhance development if promoted alongside with other measures aimed at wealth distribution and human development, and if investors respect human rights and environmental laws. The latter is the reason why the OECD Guidelines and the UN Guiding Principles play an important role when dealing with foreign investors and investment agreements: they establish a practical guidance on measures that investors must take to ensure that their business is being responsibly promoted. This will be further explored in the following topic.

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[296] OECD Guidelines for Multinational Enterprises, 2011, II. General Policies, A.12.
[297] OECD Guidelines for Multinational Enterprises, 2011, II. Human Rights.
[298] OECD Guidelines for Multinational Enterprises, 2011, p. 7.

3.1.3. Corporate Responsibility

When it comes to human rights protection and respect, corporate responsibility entails the obligation of enterprises to respect human rights laws and promote compliance with human rights while performing its activities.

John Ruggie asserts that companies' duty to respect human rights means "not to violate them, to not facilitate or otherwise be involved in their violation. And it entails a collective responsibility to address harms that do arise"[299].

Ruggie also affirms that companies are subject to two distinct external governance systems: the legal system and a non-state-based system grounded in relations with stakeholders. The first concerns the State and legal norms and the second the social norms. Corporations, therefore, always need a legal and a social license to operate - and both have the power to directly impact their activities.

In his book *Just Business – Multinational Corporations and Human Rights*, John Ruggie mentions a very interesting case which shows the importance of social licenses "granted" to enterprises: the case of Shell in Nigeria[300]. Shell held an oil concession in Ogoniland, a tribal area in Nigeria. For many years, Shell exploited oil and caused environmental damage in the area (mostly land and water pollution), without any compensation to the local community. After the community started to complain, Shell tried to make some investments in the territory, such as the building of schools and clinics. Such investment, however, benefited only some groups, alienating the rivals. This gave rise to a civil movement and huge protests against Shell took place. Shell lost its social license, had to suspend its activities temporarily and was never able to fully resume it. Some years later, the Nigerian Government revoked the company's legal license.

The obligation to respect, therefore, is complex and does not simply include the obligation to comply with legal norms. Enterprises need to promote compliance with human rights while performing its activities. Moreover, the Framework and the OECD Guidelines endorsed the idea of noninfringement of rights. This includes not only the consequences of the enterprise's own activities, but also of any third parties associated with these activities.

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[299] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 95.
[300] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, pp. 9-14.

Corporations' obligations are not simply to comply with human rights, but also to prevent, mitigate and remedy violations of human rights by itself and by other entities/enterprises associated with it. To do that, corporations must develop some mechanisms, such as human rights commitment policies, due diligence processes and the creation of company level grievance mechanisms.

Under the Guiding Principles, corporations' human rights obligations are established in the second and third parts, which concern the obligation to respect and access to remedy. In summary, enterprises have the following obligations: (i) to respect human rights and develop a strong human rights commitment (Guiding Principle n. 16); (ii) to conduct human rights due diligence to identify, prevent, mitigate and address human rights issues (Guiding Principle n. 17); and (iii) to remedy human rights impacts (Guiding Principle n. 22). These obligations comprise not only the activities of the company itself, but also of the whole corporate group and supply chain.

Differently from the UN Guiding Principles, the OECD Guidelines contain provisions addressed only to multinational corporations and, hence, do not refer to the State's obligation to protect.

The OECD Guidelines are divided between two parts: i) recommendations for responsible business conduct; and ii) implementation procedures of the OECD Guidelines. The OECD recommendations for responsible business conduct comprise provisions on general policies, disclosure of information, human rights, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition, and taxation. The Human Rights Chapter makes explicit reference to the UN Guiding Principles on Business and Human Rights[301].

[301] The first commentary of the Chapter provides that "This chapter opens with a chapeau that sets out the framework for the specific recommendations concerning enterprises' respect for human rights. It draws upon the United Nations Framework for Business and Human Rights 'Protect, Respect and Remedy' and is in line with the Guiding Principles for its Implementation". OECD Guidelines for Multinational Enterprises, 2011, IV. Human Rights, Commentary n. 36, p. 31.

The first and most basic obligation of corporations is to **ensure compliance with human rights laws**[302], particularly domestic law[303]. Enterprises need to take positive actions to ensure that human rights law is not violated by their activities. This should be done by means of developing a consistent and strong **human rights policy*[304]*,** providing for (i) a commitment to respect human rights; (ii) a human right due diligence process; and (iii) a process to enable remediation in case of abuses[305].

The UN Guiding Principles[306] establish that human rights policies shall define what are the corporations' human rights expectations with respect to their personnel, business partners and other parties linked to their operations. Human rights policies shall be senior level approved, informed by relevant expertise, made publicly available and reflected in other operational policies and procedures*[307]*. It is also important that human rights policies (as well as all other corporate policies) are constantly revised. Otherwise, they may become outdated and unable to address the real issues[308].

The main purpose of human rights policies is, thus, to serve as an instrument for embedding human rights commitment through the enterprise and business partners[309], and enhancing a human rights respect culture.

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[302] It is not necessary (and, in certain circumstances, not even recommendable) to include a complete list of which human rights need to be respected by the respective enterprise(s). John Ruggie claims that an exhaustive list of rights is not recommendable, as human rights are constantly changing. According to Ruggie, the core of such list is already contained in the International Bill of Human Rights and in the International Labor Organization Declaration on Fundamental Principles and Rights at Work. Therefore, reference to such instruments would be adequate and sufficient. See RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 97.

[303] The OECD Guidelines establish that respecting domestic law is the first obligation of enterprises, and that the Guidelines do not substitute domestic law. If there is any conflict between national law and the Guidelines, the enterprise should "seek ways to honor such principles and standards to the fullest extent which does not pace them in violation of domestic law". OECD. *Guidelines for Multinational Enterprises*, 2011, I. Concepts and Principles, 2, p. 17.

[304] OECD Guidelines for Multinational Enterprises, 2011, IV (Human Rights).4, p. 31.

[305] UNITED NATIONS. *General Assembly Report, Companion Note I*, 2018.

[306] Guiding Principle n. 16.

[307] Guiding Principle n. 16. Guiding Principles on Business and Human Rights, 2011, p. 16; OECD Guidelines for Multinational Enterprises, 2011, IV. Human Rights, Commentary n. 44, p. 33.

[308] In this sense, the OECD Guidelines indicate that "Enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all rights should be the subject of periodic review. Depending on circumstances, enterprises may need to consider additional standards". OECD. *Guidelines for Multinational Enterprises*, 2011, IV. Human Rights, Commentary n. 40, p. 32.

[309] UNITED NATIONS. *General Assembly Report, Companion Note I*, 2018.

In case of multinational companies, it is fundamental that the same level of human rights commitment is adopted by the whole group[310]. However, this does not necessarily mean that the policy must be the same for all corporations of the group. Depending on the location of certain affiliates (for instance, if affiliates are in developing/less developed countries and/or countries with different cultures), human rights policies may have to be adapted to address particular issues and needs that will arise in that specific area[311]. The level of human rights protection must be the same for the whole group, meaning that human rights must be equally respected by all enterprises. Nonetheless, policies need to be shaped according to the local needs to properly promote human rights protection and respect.

Although it is fundamental that human rights policies are senior level approved, local leaders and employees, which will be responsible for implementing and monitoring policies, must participate in the discussions and development of such commitments and processes. Otherwise, there is a risk of the policy being uncapable of adequately addressing the real problems faced in that specific region, by that community. When necessary, participation of other stakeholders (such as NGOs and civil society) in the development of human rights policies should also be enabled and promoted. This is particularly important in sectors where the local community is directly affected by the activities of the corporation, such as the extractive sector (oil, gas, and mining).

The development of a strong human rights commitment policy is the first step to create a human rights respect culture within corporations. Such policies need to include provisions as well on an adequate and ongoing **due diligence process*[312]***.

According to the UN Guiding Principles, the process of due diligence has two main purposes: (i) to identify and permit remediation of existing violations of human rights; and (ii) to

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[310] In this sense, the OECD Guidelines indicate that: "The Principles call on the board of the parent entity to ensure the strategic guidance of the enterprise, the effective monitoring of management and to be accountable to the enterprise and to the shareholders, while taking into account the interests of stakeholders. In undertaking these responsibilities, the board needs to ensure the integrity of the enterprise's accounting and financial reporting systems, including independent audit, appropriate control systems, in particular, risk management, and financial and operational control, and compliance with the law and relevant standards". OECD Guidelines for Multinational Enterprises, 2011, II. General Policies, Commentary n. 8, p. 22.

[311] In developing and less developing countries, corporations may face problems with language and cultural barriers, for instance, which demand development of a better communication with local community. Another issue that needs to be considered is in countries where the Corporation is located in a region of conflict between rival tribes (as was the case with Shell, mentioned in the previous topic). In this case, human rights policies need to be implemented in a manner that does not cause (even) more conflict.

[312] UN Guiding Principle n. 17; OECD. *Guidelines for Multinational Enterprises*, 2011, II. General Policies, Commentary n. 14, p. 25.

identify potential risks and permit their prevention and/or mitigation[313]. The OECD Guidelines entails a similar provision and identifies due diligence as the process through which enterprises "can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-marking and risk management systems"[314]. Having the purpose of identifying, preventing and mitigating risks, due diligence is an "on-going exercise", since human rights risks change over time[315].

Due diligence process, as part of corporation's obligation to respect, is not related to the legal license that companies need to operate, but rather with the social license[316].

Although due diligence process may be useful for companies to manage their own commercial risks, this is not its main purpose. Human rights due diligence should neither be confused with a risk management process[317] nor with a process to discharge the corporation from liability[318]. Albeit corporations may use due diligence process to show that they took every reasonable step to prevent human rights abuses, due diligence process by itself does not automatically absolve corporations from liability[319].

Furthermore, having seen that the purpose of due diligence process is to permit identification of human rights impacts to specific people, such process does not only comprise the corporation's own activities but any activities that may be directly linked to its operations. This means that corporations should also conduct due diligence to identify existing human rights abuses and/or potential human rights risks directly related to their activities but caused by third parties[320].

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[313] Prevention is the process aimed at preventing the cause of the harm, while mitigation is the process which aims diminishing the extent and gravity of the harm in case it eventually occurs.
[314] OECD Guidelines for Multinational Enterprises, 2011, IV. Human Rights, item 5, p. 31.
[315] OECD Guidelines for Multinational Enterprises, 2011, IV. Human Rights, Commentary n. 45, p. 34.
[316] RUGGIE, John Gerard; SHERMAN, John F. *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*. The European Journal of International Law, Vol. 28, No. 3, 2017, pp. 923-924.
[317] RUGGIE, John Gerard; SHERMAN, John F. *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*. The European Journal of International Law, Vol. 28, No. 3, 2017, 923-924.
[318] This idea is reinforced by the OECD Guidelines which define the due diligence process as: "(...) due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included with broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse effects related to matters covered by the Guidelines". OECD Guidelines for Multinational Enterprises, 2011, p. 23.
[319] Guiding Principle n. 17. Guiding Principles on Business and Human Rights, 2011, p. 19.
[320] In this context, the OECD Guidelines establish that enterprises which have a large number of suppliers are encouraged to identify general areas where risk of adverse impact is most relevant and based on that prioritize suppliers for due diligence. OECD Guidelines for Multinational Enterprises, 2011, II. General Policies, Commentary n. 16, p. 24.

According to Ruggie and Sherman[321], there are three types of situations that may trigger corporate responsibility for human rights abuses and, therefore, require due diligence as a means of identifying, preventing, and mitigating such impacts: i) where the enterprise directly causes or may cause human rights impact; ii) where the enterprise contributes or may contribute to a human rights violation; iii) where human rights violations, albeit not committed and/or "enhanced" by the corporation, are directly linked to its operations[322].

Depending on the level of involvement of the enterprise with the human right abuse *(i.e.*, whether it caused, contributed, and was linked with the abuse), the measure to be taken varies. According to the OECD Due Diligence Guidance for Responsible Business Conduct[323], if the enterprise identifies an abuse or risk which it has *caused*, the adequate measure is remediation or prevention/mitigation; if the enterprise has *contributed* with the abuse/risk, it should cease or prevent contribution and/or use its leverage to mitigate impacts. Leverage is the enterprise's influence and "ability to effect change in the wrongful practices of an entity that causes a harm"[324]; finally, if the abuse or risk is directly linked with the enterprise, it should use leverage to "force" remediation, prevention and/or mitigation of the impact[325].

The situation where the human rights abuse (or potential abuse) is directly linked with the enterprise is probably the most complex one. It is difficult to determine whether the corporation should take any action in this circumstance and, if positive, which measure should be taken. To assess corporations' responsibility in these cases, one should look at the criteria provided by the Guiding Principles, which establishes that corporate responsibility will depend on: (i) the enterprise's leverage over the third party; in other words, the influence the enterprise has over the third party's actions (ii) how crucial the relationship is to the enterprise; (iii) the severity of the abuse; and (iv) whether terminating the relationship would by itself have negative human rights consequences.

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[321] RUGGIE, John Gerard; SHERMAN, John F. *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*. The European Journal of International Law, Vol. 28, No. 3, 2017, p. 927.

[322] The OECD Due Diligence Guidance for Responsible Business Conduct provides that "linkage" is "defined by the relationship between the adverse impact and the enterprise's products, services or operations through another entity. OECD Due Diligence Guidance for Responsible Business Conduct, 2018, p. 71.

[323] OECD Due Diligence Guidance for Responsible Business Conduct, 2018, p. 72.

[324] Guiding Principle n. 17. *Guiding Principles on Business and Human Rights*, 2011, p. 21.

[325] This standard has been adopted by some multi-stakeholder initiatives, such as the Initiative for Responsible Mining, which has, in its Standard for Responsible Mining, a chapter exclusively dedicated to the due diligence process. See: IRMA. *Standard for Responsible Mining*. IRMA-STD-001, 2018, p. 27.

One should bear in mind that the due diligence does not automatically discharge liability in any circumstance, irrespectively of whether the abuse was caused, contributed, or directly linked with the corporation's activities[326]. The obligation to conduct due diligence is different and separate from the corporation's responsibility for human rights abuses. The latter will be "commensurate with, and proportional to, its [the corporation's] involvement in the harm", regardless of previous conduction of any due diligence process[327].

Due diligence is, thus, a fundamental mechanism that companies need to carry out, but is should always be implemented in parallel with other tools, including the creation of company level grievance mechanisms, which will be discussed in the following topic.

In addition to the creation of due diligence processes, whenever corporations have found that they caused or contributed to a human rights abuse, they should provide for or cooperate with **remediation through legitimate process**. Such remediation should not only be provided by judicial mechanisms, but corporations should create non-state based operational level grievance mechanisms to make remediation faster and more effective. Non-State-based grievance mechanisms may be administered by an enterprise alone, by an industry association or together with other stakeholders[328].

Company-level grievance mechanisms are of particular importance in case of multinational companies, given the difficulty of bringing judicial cases against such enterprises at both the host and home State levels. In this sense, John Ruggie highlights that "home states fear disadvantaging "their" corporations; and host states often resist it on the principle of noninterference in their

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[326] Some authors claim that the corporate responsibility for abuses committed by other entities requires the element of "fault", while the responsibility for abuses caused by the corporation itself does not. Therefore, the conduction of due diligence for other enterprises would somehow "discharge" liability. John Ruggie, however, does not agree with that and asserts that corporate responsibility is always commensurate with the corporate's involvement in the harm. See: BONNITCHA, Jonathan; MCCORQUODALE, Robert. *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*. The European Journal of International Law, Vol. 28, n. 3, 2017. RUGGIE, John Gerard; SHERMAN, John F. *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*. The European Journal of International Law, Vol. 28, No. 3, 2017

[327] RUGGIE, John Gerard; SHERMAN, John F. *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*. The European Journal of International Law, Vol. 28, No. 3, 2017, p. 927.

[328] Guiding Principle n. 28. *Guiding Principles on Business and Human Rights*, 2011, p. 31; OECD Guidelines for Multinational Enterprises, 2011, IV. Human Rights, Commentary n. 46, p. 34.

domestic affairs"[329]. Therefore, grievance mechanisms at the company's operational level could make remedy faster and more effective.

Company-level grievance should only be an early-stage recourse and is not adequate by itself to solve all kinds of disputes/abuses. Operational-level grievance mechanisms should, of course, be without prejudice to other mechanisms, including state-based judicial and non-judicial means of accessing justice (including the Specific Instances procedures before the OECD NCP).

All these mechanisms should always be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning[330]. In addition, company-level mechanisms should be based on engagement and dialogue, which means that all stakeholders involved should be constantly consulted[331].

There are two specific concerns that should be taken into account while drawing the corporate-level grievance mechanisms. The first one is the prevention of any sort of retaliation. This may be done by permitting the filing of anonymous claims[332] and ensuring that such claims will be addressed as adequately as the non-anonymous ones. Another alternative is the creation of an independent and autonomous body to analyze and address the human rights claims.

A second concern is that corporations cannot be entitled to determine at their sole discretion when and how abuses will be remedied. Remediation should be based on objective criteria established in advance (*i.e.*, prior to the advent of the conflict). Multi-stakeholder mechanisms (which include participation of civil society, NGOs, etc.) may be of particular importance in these situations, as they could serve as a means of enhancing the establishment of fair and adequate criteria for remediation.

International organizations may also serve as supervision bodies to ensure that remedy is adequately being provided by corporations. This is the role, for instance, of the OECD National Contact Points. Governments adhering to the OECD Guidelines for Multinational Enterprises

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[329] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013.
[330] Guiding Principle n. 30. *Guiding Principles on Business and Human Rights*, 2011, pp. 33-34.
[331] Guiding Principle n. 30, h). *Guiding Principles on Business and Human Rights*, 2011, p 34.
[332] Although the Guiding Principles do not expressly encourage the filing of anonymous claims, it establishes that "confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary". *Guiding Principles on Business and Human Rights*, 2011, p. 35. Moreover, some multi-stakeholder initiatives based on the Guiding Principles highlight the importance of guaranteeing the filling of anonymous claims. See: IRMA. *Standard for Responsible Mining*. IRMA-STD-001, 2018, p. 31.

should set up NCPs, which shall contribute to the resolution of issues arising from the non-observance of the Guidelines.

There is also a further concern, which is harder to be solely addressed at the corporate level. It is the situation where corporations refuse to comply with their commitments and do not provide adequate remedy. At the non-State operational level, the only "consequence" for non-compliance would be damage to the corporations' reputation, which may however not be sufficient in certain situations[333]. In these circumstances, the more appropriate (and possibly only) alternative would be resorting to judicial remedy - which may, however, be time and cost consuming.

It is important to notice though that this sort of problem is relevant mostly in cases of non-State based grievance mechanisms. The situation may be slightly different in case of State-based non-judicial mechanisms, which are non-judicial grievance systems designed, supported, and organized by the State (*e.g.,* OECD NCP) [334].

Judicial and non-judicial, as well as State based and non-State based mechanisms, complement each other. On one hand, judicial mechanisms may be "stronger" in terms of enforcement but are more difficult to access and may be slow depending on the circumstances. On the other hand, non-judicial mechanisms are more rapid and accessible, but may be insufficient or ineffective in case they are not adequately designed and/or in case there are no "enforcement" mechanisms (which is highly likely in case of non-State based mechanisms).

3.1.4. How can States Enhance Corporate Social Responsibility?

As explained above, the issue of human rights and business is complex and cannot be adequately addressed by single and separate actions of States or corporations. Actions need to be taken jointly by both States and corporations. This is the reason why the UN Guiding Principles on Business and Human Rights is divided in three pillars: i) the obligation of States to protect human

[333] This was the case of a State-based non-judicial mechanism created by the Government of Canada, the "Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector". In the first claim brought to the Counsellor, the Corporation involved withdrew from the process and refused to provide any remedy. See: COUMANS, Catherine. *Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms*. UBC Law Review, Vol. 45:3, 2012.

[334] One example is the withdrawn of financial and/or non-financial services by the Government, as it was proposed (but unfortunately not accepted) in the CSR Strategy for the Canadian International Extractive Sector. See: COUMANS, Catherine. *Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms*. UBC Law Review, Vol. 45:3, 2012, p. 671.

rights; ii) the corporations' obligations to respect human rights; and iii) both States' and corporations' obligations to remedy.

The abovementioned pillars are interdependent and reinforce each other. Therefore, the responsibility for promoting businesses fully compliant with human rights and which promote their activities in a manner to enhance protection and respect for socio-economic rights is both from the States and corporations.

Under the UN Framework and Guiding Principles, the *State duty to protect* comprises at least two obligations: (i) to refrain from violating human rights of persons within the respective State's jurisdiction, and (ii) to ensure that rights' holders effective enjoy and realize such rights. To comply with the latter, States must ensure that all entities under their territories and/or jurisdictions respect human rights.

Whilst the duty to protect is an obligation of conduct not of result, under the Framework and Guiding Principles structure, States may be held liable for enterprises' human rights violations if they fail to take appropriate measures to prevent, investigate, punish, and remedy such abuse[335].

To ensure that all entities under its territory and/or jurisdiction comply with human rights, States should at least: i) clearly set out expectations on human rights for corporations under its territories and jurisdictions[336]; ii) and provide adequate and effective regulations[337], meaning enacting and enforcing laws, providing guidance to corporations on how to respect human rights, and encouraging the report by enterprises on how human rights are being addressed by them.

In some specific situations, adoption of additional measures by States may be required. This happens, for instance, in the case of corporations owned, controlled, or directly linked to the government. In these cases, States have greater responsibility and should ensure the creation of adequate human rights policies and human rights due diligence by the respective corporation[338].

Additional measures may be necessary as well when States privatize services that impact upon the enjoyment of human rights (*e.g.,* provision of water, health, and education), or in conflict-affected areas[339].

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[335] According to the commentary to the Guiding Principle I.A.1, "States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent investigate, punish and redress private actors' abuse". United Nations, Guiding Principles on Business and Human Rights, p. 3.
[336] Guiding Principle I.2.
[337] Guiding Principle I.3.
[338] Guiding Principle I.4
[339] Guiding Principle n. I.7

States, therefore, need to play an active role in ensuring compliance with human rights by enterprises. As stressed above, this should be done with respect to corporations under their territories and jurisdictions, meaning that home-States also have duties in relation to their corporations operating abroad. Accordingly, in 2011, the UN Committee on Economic, Social and Cultural Rights issued a statement on States' obligations regarding corporations' activities stating that:

> **"Protecting rights** means that States Parties effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations. As the Committee has repeatedly explained, **non-compliance with this obligation can come about through action or inaction**. It is of the utmost importance that States parties ensure access to effective remedies to victims of corporate abuse of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means. **States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant**"[340]. (emphasis by the author)

Further, it is important to note that the UN Committee on Economic, Social and Cultural Rights issued a General Comment in 2017 giving further details on States' obligation with respect to socio-economic rights protection and promotion. This General Comment establishes that States' have the obligation to respect, protect and fulfill socio-economic rights[341].

The OECD Guidelines, albeit addressed to corporations, contain some guidance on how Governments can act to ensure compliance with human rights by corporations as well.

> "The common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise. In working towards this goal, governments find themselves in partnership with

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[340] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL. Committee on Economic, Social and Cultural Rights. *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*. 2011. Available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMKOgNxs%2FCpnVM8K6XpeNimFvrj%2F4tQZvhH%2BXM9vEaJmHSX3FSXAcTmJ%2BWc3iPSLafnoFpGQ9KIHCXooWHCPCpQt#:~:text=The%20Committee%20reiterates%20the%20obligation,the%20context%20of%20corporate%20activities.>. Access on April 30th, 2021.

[341] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL. Committee on Economic, Social and Cultural Rights. *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*. 2017. Available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y>. Access on April 30th, 2021.

> the many businesses, trade unions and other non-governmental organisations that are working in their own ways toward the same end. Governments can help by **providing effective domestic policy frameworks** that include stable macroeconomic policy, nondiscriminatory treatment of enterprises, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration. Governments can also help by **maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective**. Governments adhering to the Guidelines are committed to continuous improvement of both domestic and international policies with a view to improving the welfare and living standards of all people"[342].

As observed, OECD recommendations for States are similar to those offered by the UN Framework and Guiding Principles: States should enact and enforce laws and encourage corporations to maintain effective policies on human rights protection.

3.1.5. The Draft Treaty on Business and Human Rights

In addition to the abovementioned instruments, an international legally binding instrument on transnational corporations and business enterprises with respect to human rights is currently under debate in the United Nations. Although the treaty is not in force yet, its analysis is relevant, as the present research for it clarifies States' and corporations' obligations in relation to human rights.

Discussions around such treaty started in 2014 when the United Nations Human Rights Council in Geneva adopted a resolution establishing an open-ended intergovernmental working group (IGWG), chaired by Ecuador, with the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. This decision was based on the following acknowledgement: i) States hold the primary responsibility for promoting and protecting human rights; and ii) enterprises have the obligation to respect human rights and have the capacity to "foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights"[343].

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[342] OECD. *Due Diligence Guidance for Responsible Business Conduct*, 2018, I. Concepts and Principles. 5, p. 18.
[343] UNITED NATIONS GENERAL ASSEMBLY. Human Rights Council. *Twenty-sixth session. Agenda item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*. A/HRC/26/L.22/Rev.1. 25 June 2014. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement. Access on 22nd May 2021.

Since then, three versions of the treaty have already been prepared: the zero draft (2018), the revised draft (2019), and the second revised draft (2020). These revisions resulted in relevant changes to the treaty draft.

The first revision in 2019 brought at least two relevant modifications. The first one was the extension of the application of the treaty to all business corporations – and not only to transnational companies[344]. The second one was the inclusion of an explicit reference to the UN Guiding Principles, making it clear that the binding treaty does not aim to replace the Guiding Principles but rather complement them[345].

The second revised draft did not bring considerable additions or deletions but made important wording changes that resulted in a more coherent and well-organized document[346].

The statement of purpose of the second revised draft indicates that the binding treaty has four objectives:

> "a. To **clarify and facilitate effective implementation of the obligation of States to respect, protect and promote human rights** in the context of business activities, as well as the responsibilities of business enterprises in this regard;
> b. To **prevent the occurrence of human rights abuses** in the context of business activities;
> c. To ensure **access to justice and effective remedy** for victims of human rights abuses in the context of such business activities;

[344] Art. 3.1 of the first revised draft established that: "1. This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character". The language of such article was then changed in the second revised draft to: "1. Unless stated otherwise, this (Legally Binding Instrument) shall apply to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character". As seen, the binding treaty shall apply to all business enterprises.
See United Nations. *Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*. OEIGWG Chairmanship Revised Draft 16.7.2019. Available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>. Access on 23rd May 2021.
United Nations. *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*. OEIGWG Chairmanship Second Revised Draft 06.08.2020. Available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>. Access on 23rd May 2021.

[345] ABREU, Camila Manfredini de. *Towards Effective Remedies for Violations of Human Rights by Corporations: Lessons from The Fundão Case*. Master Thesis. University of Amsterdam, 2020, p. 15.

[346] LOPEZ, Carlos. *Symposium: The 2nd Revised Draft of a Treaty on Business and Human Rights–Moving (Slowly) in the Right Direction*. OpinioJuris, September 2020. Available at: <https://opiniojuris.org/2020/09/07/symposium-the-2nd-revised-draft-of-a-treaty-on-business-and-human-rights-moving-slowly-in-the-right-direction/#:~:text=A%20second%20revised%20Draft%20of,Rights%20Council%20resolution%2026%2F9>. Access on 23rd May 2021.

> d. To facilitate and strengthen **mutual legal assistance and international cooperation** to prevent human rights abuses in the context of business activities and provide access to justice and effective remedy to victims of such abuses". (emphasis by the author)

The binding treaty is structured in a manner that does not exclude States' responsibilities for protecting human rights but indirectly clarifies corporations' obligations and expectations in the field. For instance, article 6.2 establishes that States shall require enterprises to conduct human rights *due diligence*. Corporations are, therefore, not directly but indirectly obliged to implement due diligence mechanisms by the treaty.

The draft treaty addresses the three pillars of the UN Framework and Guiding Principles: protect, by determining what States must do to ensure that corporations in fact comply with human rights, respect, by indirectly indicating measures that corporations shall take to be human rights compliant, and access to remedy by determining that victims shall have access to courts in the State where the corporation (including its associated entities) or the victims are domiciled.

If eventually approved, the binding treaty may be a relevant instrument to promote protection and respect for human rights in relation to business activities, and complement the guidance already established by the UN Framework and Guiding Principles.

Notwithstanding that, the real effectiveness of the treaty is still in question. John Ruggie explains in his book "Just Business – Multinational Corporations and Human Rights" why he did not exercise his mandate in the United Nations to the creation of a binding treaty. Among other reasons, he mentions that human rights treaties are not always effective, are difficult to enforce and do not resolve the problem with legal fragmentation[347].

Therefore, even if approved, the binding treaty will most likely not resolve the business and human rights issue – for which, as sustained by Ruggie, there is no "silver bullet"[348] to solve. The recalibration between investment and human rights protection will still be relevant specially to avoid problems with legal fragmentation.

3.2. HOW THE INVESTMENT SYSTEM IS BEING REDESIGNED?

As seen in the previous topic, there is an urgent need for a more balanced investment regime – regardless of whether a binding treaty on business and human rights is approved or not.

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[347] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 95, pp. 60-68

[348] RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013, p. 95, p. 37.

Different efforts to create such a balanced system have occurred in the past year. This includes both instruments and guidelines published by international organizations (*e.g.,* UNCTAD's Investment Policy Framework for Sustainable Development) and new investment treaty models adopted by different countries.

The creation of a new generation of investment policies is marked by three main factors, as stressed by UNCTAD:

> "Broadly, "new generation" investment policies are characterized by (i) a recognition of the role of **investment as primary drive 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 share recognition of the need to improve the effectiveness of policies to promote and facilitate investment"[349]. (emphasis by the author)

Investment treaties, therefore, should no longer be designed to protect and attract investors bur rather to promote sustainable development. This topic explores how this can be done and seeks to understand how this affects protection and promotion of socio-economic rights.

3.2.1. UNCTAD's Investment Policy Framework for Sustainable Development

The UNCTAD's Investment Policy Framework for Sustainable Development is a comprehensive set of Core Principles for Investment Policymaking aimed at guiding Governments and policy makers from a sustainable development perspective at three different levels: i) when preparing national investment policies; ii) when designing international investment agreements; and iii) when promoting investment in sectors related to sustainable development goals[350]. For providing such guidance, the Framework first identifies **challenges** related to these three areas.

The challenges recognized with respect to **national investment policy** are: i) integrating investment policy in development strategy, ii) incorporating sustainable development objectives in investment policy, and iii) ensuring investment policy relevance and effectiveness[351].

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[349] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 17.
[350] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 7.
[351] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 18.

As for **international investment agreements**, challenges identified are i) strengthening the development dimension of investment agreements, ii) balancing rights and obligations of states and investors, and iii) managing the complexity of investment treaties[352].

These challenges are then divided into specific issues: the first one entails safeguarding policy space and making investment promotion provisions consistent with sustainable development goals; the second one comprises both including provisions on investors' responsibilities in investment treaties and building on corporate social responsibility (CSR) principles; the third one encompasses dealing with gaps, overlaps and inconsistencies in international investment agreements (including dispute settlement issues) and ensuring effective interaction and coherence with other public policies and systems[353].

Finally, the policy challenges pointed out with respect to **investment promotion in sustainable development related sectors** are: i) resolving policy tensions associated with private sector engagement; ii) finding mechanisms to overcome inadequate risk-return ratios; and iii) preparing for more demanding investment promotion and facilitation[354].

After recognizing main challenges with respect to each area, the Framework then indicates the core **principles guiding national and international investment policies**. These principles are: i) policy coherence; ii) public governance and institutions; iii) dynamic policy making; iv) balanced rights and obligations; v) right to regulate; vi) openness to investment; vii) investment protection and treatment; viii) investment promotion and facilitation; ix) corporate governance and responsibility; and x) international cooperation.

The three foregoing areas identified challenges and principles are interrelated[355]. This means that they should all be jointly addressed to achieve a foreign investment regime consistent with sustainable development goals. However, having seen that the purpose of this research is to analyze whether the Brazilian CFIA model promotes and protects socio-economic rights, UNCTAC's guidance and principles concerning investment treaties are the most relevant here.

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[352] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 19.
[353] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 19.
[354] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 23.
[355] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 25.

When referring specifically to international investment agreements, UNCTAD's Framework points out three policy challenges levels that all countries need to face[356]. First, defining the strategic approach to international agreements (*i.e.,* deciding whether to enter into such agreements or not, whether to reform its model of investment agreements, and how to manage the interaction between international agreements and national laws and other international treaties). Second, designing investment agreement provisions in a manner that properly addresses the challenges identified above. And third, building a multilateral consensus on investment policy (as well as enhancing international cooperation), which would contribute to address some overlaps and inconsistencies of the system, as well as to avoid a "race to the bottom" in regulatory standards and "race to the top" in incentives to investors[357].

Although all these challenges are fundamental to achieving an adequate international investment agreement model, the second level *(i.e.,* designing agreements duly addressing sustainable development) is the one which closely connects to the present research.

The UNCTAD's Framework identifies three different "areas of evolution" in the design of investment agreements.

The first one refers to **incorporating concrete commitments to facilitate and promote investment for sustainable development**. This includes measures to be taken by the host-State (*e.g.,* adoption of investment facilitation measures) and by host and home States jointly (*e.g.*, collaboration for promoting technical assistance and capacity-building initiatives)[358].

The second area of evolution involves **balancing investors and States' rights and obligations**. For doing that, UNCTAD's Framework proposes two different approaches. The first approach involves including provisions on investors' obligations, especially the obligation to comply with national and international law and/or to endeavor best efforts to comply with commonly recognized international standards. The second approach refers to ensuring State's policy space, mainly by clarifying vague provisions (such as the FET standard) and clearly indicating exceptions and reservations to protections granted to investors.

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[356] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 72.
[357] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 16.
[358] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 77.

The third area of evolution corresponds to **reforming the investor-State dispute settlement (ISDS) system**. This means creating alternative methods of dispute resolution and/or improving ISDS provisions to protect States from unjustified liabilities and excessive procedural costs.

The UNCTAD Framework also provides for further examples on how to develop these three areas of evolution in specific clauses of investment treaties. Some of the clauses stressed by UNCTAD as "problematic" from the sustainable development perspective are also those identified in the case analysis made in Chapter 2, *i.e.,* the FET standard and the notion of indirect expropriation.

With respect to the FET standard, UNCTAD Framework recommends clarifying the scope of the FET standard to an exhaustive list of State's obligations or excluding the clause. As for indirect expropriation, UNCTAD's recommendation is also to clarify the concept and to introduce criteria to distinguish between indirect expropriation and legitimate regulation[359] that does not require compensation[360].

As seen, UNCTAD Framework is a comprehensive guidance on how to create an international investment system capable of promoting sustainable development. It recommends many other measures to be taken by States[361], some of which are not mentioned herein, given that they relate to other aspects of development and the present research is focused only on protection and promotion of social and economic rights in the CFIA model. As previously mentioned,

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[359] In this regard, UNCTAD Framework clarifies that not all "discriminatory" measures taken by States in relation to foreign investors should be considered protectionist measures: "From a development perspective this approach is clearly unsatisfactory: measures taken for legitimate public policy objectives, relevant and proportional to those objectives and taken in compliance with relevant international instruments, should not be considered protectionist". UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 15.

[360] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 83.

[361] One interesting measure proposed by UNCTAD Framework is the establishment of special and differential treatment clauses in case of investment agreements concluded between developed and developing countries: "For example, lower levels of obligations for developing countries could be achieved through (i) developed-focused exceptions from obligations/commitments; (ii) best endeavour commitments for developing countries; (iii) asymmetrically phased implementation timetables with longer time frames for developing countries; (iv) a development-oriented interpretation of treaty obligations by arbitral tribunals. Best endeavour commitments by more advanced countries could, for example, relate to: (i) technical assistance and training (e.g. assisting in the handling of ISDS cases or when putting in place appropriate domestic regulatory systems to ensure compliance with obligations); (ii) promotion of the transfer/dissemination of technology; (iii) support and advice for companies from developing countries (e.g. to become outward investors or adopt CSR standards); (iv) investment promotion (e.g. provide outward investment incentives such as investment guarantees, tax breaks)". UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 81.

however, human rights and the three pillars of sustainable development (*i.e.,* economic, social, and environmental development) are interdependent and cannot be individually achieved. Therefore, UNCTAD's guidance on all areas are relevant for countries that wish to achieve an investment system that protects human rights and promotes sustainable development.

3.2.2. New Investment Agreement Models

Aside from international organizations' guidance on new investment agreement models (as UNCTAD Framework) different countries have started to develop new investment agreement models with a sustainable development approach[362]. The purpose of this topic is to understand how agreements celebrated by other countries[363] have been dealing with different features of investment agreements from the sustainable development and particularly socio-economic rights protection standpoint.

Based on the information provided by the literature, these treaty models herein mentioned are those that contain provisions reinforcing States' policy space to adopt socio-economic measures, establishing investors' obligations, and referring to positive measures to be adopted by investors to guarantee compliance with human rights. These measures, as discussed above, are fundamental for developing an investment agreement model capable of protecting socio-economic rights.

This is not an exhaustive investigation and does not have the objective of evaluating whether the treaties mentioned herein are adequate to protect and promote socio-economic rights. It is merely illustrative and has the purpose of understanding different design options of investment agreements' clauses from the socio-economic rights protection standpoint.

3.2.2.1. Scope

Some treaties have been adopting different definitions of investment scope under investment agreements that directly or indirectly affects protection and respect for socio-economic rights.

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[362] It should be noted that not all new investment agreements follow this trend. As explained by Fábio Morosini and Michelle Ratton, new preferential trade agreements (containing investment chapters) promoted particularly by the USA and the European Union are part a neoliberal agenda and are aimed at advancing property rights of investors. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, pp. 13-16.

[363] The Brazilian CFIA model will be investigated in the next Chapter.

Scope provisions typically entail requirements on compliance with national laws by investors[364]. The EU-Vietnam Investment Protection Agreement, for instance, defines covered investment as "an investment by investor of a Party in the territory of the other Party, in existence as of the date of entry into force of this Agreement or made or acquired thereafter, that has been made in accordance with the other Party's applicable law and regulations"[365].

Another example is the Colombia-United Arab Emirates BIT which established that the agreement is applicable to investments: "made thereafter in the territory of a Contracting Party in accordance with the law of the latter by responsible investors of the other Contracting Party[366]".

In addition to restrictions to investment scope, other treaties (such as the Morocco BIT model) exclude investors that did not comply with domestic law from the investor-State dispute settlement system[367].

Certain agreements comprise further provisions on *treaty scope*[368] that may be relevant for ensuring States' policy space. India's BIT model, for example, indicates that the treaty shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, provided that it is consistent with the parties' obligations before the WTO[369]. Such is relevant to guarantee Indian Governments flexibility in providing access to medicine to its population[370].

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[364] GAUKRODGER, David. *Business Responsibilities and Investment Treaties*. OECD, Working Papers on International Investment, 2021/02. Available at: < https://dx.doi.org/10.1787/4a6f4f17-en>. Access on 15th May 2021, p. 100.
This working paper also clarifies that in some treaties minor breaches are not excluded from investment/treaty coverage. GAUKRODGER, David. *Business Responsibilities and Investment Treaties*. OECD, Working Papers on International Investment, 2021/02. Available at: <https://dx.doi.org/10.1787/4a6f4f17-en>. Access on 15th May 2021, p. 101.

[365] EUROPEAN COMISSION. *EU-Vietnam Investment Protection Agreement*. Chapter 1. Available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>. Access on 15th May 2021.

[366] Emphasis by the author. See UNCTAD. *Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates*. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5728/download>. Access on 15th May 2021.

[367] GAUKRODGER, David. *Business Responsibilities and Investment Treaties*. OECD, Working Papers on International Investment, 2021/02. Available at: <https://dx.doi.org/10.1787/4a6f4f17-en>. Access on 15th May 2021, p. 101-102.

[368] It is not a novelty for investment agreements to include provisions clarifying that the issuance of compulsory licenses in relation to intellectual property rights are outside the scope of the *expropriation clause*. See Art. 11.6., Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, 2011. Available at: < https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/797/download>. Access on 16th May 2021.

[369] GOVERNMENT OF INDIA. Model Text for the Indian Bilateral Investment Treaty, 2015. Available at: <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>. Access on 15th May 2021.

[370] ALMEIDA, Luana. *Searching for balance: an analysis of Brazil's and India's most recent investment-related instruments*. Master Thesis. Maastricht University, Faculty of Law, August 2018, pp. 23-24.

3.2.2.2. National Treatment and Most Favored Nation

National treatment and most favored nation provisions have also been altered by some treaties mostly with the objective of ensuring policy space.

The Indian BIT Model[371], for instance, clarifies that no State shall accord any less favorable treatment to foreign investors, *in like circumstances*, than the treatment provided to its own investors. The text then clarifies that the notion of "in like circumstances" depends on the "totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives"[372].

South Africa has also limited the application of the national treatment clause. The country has adopted in 2015 the "Protection of Investment Act" aiming to replace bilateral investment treaties with domestic laws establishing rights and obligations of States and investors[373]. The relevant Act does expressly state that the national treatment provision shall not exclude any treatment, preference of privilege resulting from taxation, government procurement process, subsidies or grants, any law or measure that has the purpose of achieving equality in South Africa, or any special advantage accorded with the purpose of assisting development of small and medium business and new industries.

Both countries (India and South Africa) have entirely excluded the most favored nation provision from their models. In the case of India, as explained by Fábio Morosini and Michelle Ratton, such exclusion was a direct reaction to the *White Industries* case, which allowed for an Australian investor to be accorded a protection granted under the BIT with Kuwait[374].

3.2.2.3. Expropriation

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[371] Fábio Morosini and Michelle Ratton indicate that this new approach seems to be a direct respect to the White Industries case, in which India had its regulatory space challenged. See BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, p. 27.

[372] GOVERNMENT OF INDIA. *Model Text for the Indian Bilateral Investment Treaty*, 2015. Available at: <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>. Access on 31st May 2021.

[373] As further explained by Fabio Morosini and Michelle Ratton, South Africa decided to regulate foreign investment by means of domestic legislation, instead of renewing and/or entering into new BITs. This decision was taken mainly because of the "country's objective of redressing the legacy of apartheid rule, which deprived South African of land ownership". See BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, pp. 20-21.

[374] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, p. 28.

As seen in Chapter 2, indirect expropriation (along with FET standard, explored in the following topic) has been one the most controversial clauses in investment disputes, allowing for investors' claims questioning States' policy space.

Considering that, new investment agreements have started to comprise more detailed expropriation clause with the purpose of restricting the notion of indirect expropriation.

Fábio Morosini and Michelle Ratton point out that the USA pioneered such initiatives when it became a major destination of FDI[375]. The authors explain that Annex B to the 2004 US BIT Model "created objective criteria for evaluating whether an indirect expropriation has occurred and provided an important carve-out to safeguard the environment and public health"[376]. This new provision was maintained in the US BIT Model of 2012[377].

The Indian BIT Model entails a similar provision. Article 5 contains a detailed definition of what represents expropriation and determines that non-discriminatory measures designed and applied to protect legitimate public interest or public purpose objectives[378] (*e.g.*, public health, safety, and the environment) shall not constitute expropriation[379]. Further, the expropriation clause may not be discussed in investment tribunals without exhaustion of local remedies[380].

Another approach adopted by countries such as South Africa and Brazil (as explained in the following Chapter) is the exclusion of the concept of indirect expropriation[381].

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[375] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, p. 30.
[376] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, p. 30.
[377] Annex B of 2012 US BIT Model contains interesting provisions aiming to ensure States' policy space. Its item 2 determines that an action cannot constitute expropriation unless if "interferes with a tangible or intangible property right or property interest in an investment". Further, item 4 (b) establishes that "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". See UNITED STATES TRADE REPRESENTATIVE (USTR). *U.S. Model Bilateral Investment Treaty.* Available at: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. Access on: June 21, 2019.
[378] Some authors claim that such a broad exception may be overly restrictive. See BUSER, Andreas. *Recalibrating Policy Space in Bilateral Investment Treaties: Is There a Common B(R)ICS Approach?* BRICS Investment Law Conference, held at Xiamen University (China), November 2017, p. 27.
[379] Art. 5.5, Indian BIT Model.
[380] Art. 5.6.
[381] REPUBLIC OF SOUTH AFRICA. Government Gazette, Vol. 606, Cape Town, 15 December 2015, No. 39514. Act No. 22 of 2015: Protection of Investment Act, 2015. Available at: https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf. Access on 31st May 2021.

Additionally, investment agreements have also started to detail clauses on compensation to be paid to investors in case of indirect expropriation and expressly allow for counterclaims when investors do not comply with their obligations. This issue will be explored in item 3.2.2.6 below.

3.2.2.4. FET and FPS standards

As seen in the case analysis of Chapter 2, the FET standard is one of the clauses which raised more investor claims affecting or somehow related to socio-economic rights. This occurs mainly because the FET standard contains a very broad language allowing for a different range of claims (from violations to due process of low to non- compliance with investors' legitimate expectations).

The FPS standard has also allowed for broader interpretation in certain disputes, in which the tribunal understood that the protection granted by such clause was not limited to physical security.

Some new investment agreements models have adopted different strategies to address this issue.

The India BIT model, for example, makes no explicit reference to the FET standard, but rather contains a provision (article 3.1) on investors' treatment determining that no State shall subject investors to measures that constitute violations of customary international law (*i.e.,* denial of justice, fundamental breach of due process, targeted discrimination on manifestly unjustified grounds, and manifestly abusive treatment)[382]. There is no reference, therefore, to legitimate expectations of investors, which usually allows for broad interpretations by investment tribunals. As for the FPS standard, the India BIT model limits its application to physical security of investments (article 3.2)[383].

Other countries, such as South Africa (and Brazil, as it will be seen in the following Chapter) have excluded FET or FPS standards from their models[384].

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[382] GOVERNMENT OF INDIA. *Model Text for the Indian Bilateral Investment Treaty*, 2015. Available at: <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>. Access on 15th May 2021.

[383] GOVERNMENT OF INDIA. *Model Text for the Indian Bilateral Investment Treaty*, 2015. Available at: <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>. Access on 15th May 2021.

[384] REPUBLIC OF SOUTH AFRICA. Government Gazette, Vol. 606, Cape Town, 15 December 2015, No. 39514. Act No. 22 of 2015: Protection of Investment Act, 2015. Available at: https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf. Access on 31st May 2021.

Another approach is the one brought by the Investment Agreement for the Common Market for Eastern and Southern Africa Investment Area (COMESA Agreement[385]). There is explicit reference to which makes explicit refence to the FET standard, but article 14.3. suggests the adoption of special and differential treatment for less developed and developing countries[386].

3.2.2.5. Emergency, Necessity and Public Order

Investment agreements have traditionally contained clauses on public and general exceptions. However, as seen in the case analysis made in Chapter 2 of the present research, this has not prevented investment tribunals from concluding that States were violating their obligations when taking measures to ensure protection of socio-economic rights in times of severe crisis.

Some new investment agreement models have started to include clarifications on such provisions. The Indian BIT Model, for example, clarifies that when evaluating the concept of necessity, a tribunal shall consider "whether there was no less restrictive alternative measure reasonably available to a Party"[387].

3.2.2.6. Investors' Obligations and Corporate Social Responsibility

In addition to excluding non-compliant investors from treaty and/or investment protection (as explained in the foregoing topics), some treaties contain more detailed provisions on investors obligations either with hard or soft language.

The Morocco-Nigeria BIT entails a comprehensive provision on investors' obligations with binding language, determining that investors shall: i) maintain an environmental management system; ii) uphold human rights in the host state; iii) act in accordance with core labor standards; iv) not operate investments in a manner that violates international environmental, labor or human rights obligations to which the host and/or home states are parties; v) meet or exceed national and

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[385] The COMESA Agreement is referred in the UNCTAD Framework as an example of investment agreement that imposes direct obligations on investors and applies special and differential treatment. See UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, pp. 77-81.

[386] Article 14.3. provides that: "For 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. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context". IISD. *Investment Agreement for the COMESA Common Investment Area*. Available at: https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf. Access on 15th May 2021.

[387] GOVERNMENT OF INDIA. *Model Text for the Indian Bilateral Investment Treaty*, 2015. Available at: <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>. Access on 16th May 2021.

internationally accepted standards on corporate governance; and vi) maintain local community liaison processes[388]. The BIT also provides that investors shall be subject to civil actions for liability in the judicial process of their home states for acts that lead to significant damage, personal injuries, or loss of life in the host state[389].

The COMESA Agreement establishes that States may use as a defense, counterclaim, right of set off or other similar claim the fact that an investor has not respected its obligations under the Agreement, including obligations to comply with domestic law or that it has not taken all reasonable steps to mitigate possible damages[390].

Similarly, the Netherlands BIT Model determines that an investment tribunal when deciding on the amount of compensation is expected to take in account non-compliance by the investor with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines[391].

Some investment agreements have also started to incorporate clauses with soft language on corporate social responsibility and responsible business conduct. Different approaches have been adopted.

The Additional Protocol to the Framework Agreement of the Pacific Alliance, for example, establishes that the Parties (home and host States) shall encourage investors in their territories or jurisdictions to incorporate best practices on corporate social responsibility, and refers to the OECD Guidelines for Multinational Enterprises[392]. As seen, this is a clause directed at States and not at investors.

A similar approach is adopted by the Investment Agreement Between the Government of Canada and the Government of the Republic of Côte D'Ivoire, which also contains a clause stating

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[388] Arts. 18-19, Morocco-Nigeria BIT. See UNCTAD. *Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco-Nigeria BIT)*. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>. Access on 16th May 2021.

[389] Article 20, Morocco-Nigeria BIT.

[390] Article 28.9, COMESA Agreement. See IISD. *Agreement for the COMESA Common Investment Area*. Available at: https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf. Access on 15th May 2021.

[391] Article 23, Netherlands Model Investment Agreement.

[392] UNCTAD. *Protocolo Adicional Al Acuerdo Marco de La Allianza Del Pacífico*. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2940/download. Access on 15th May 2021.

that States should encourage enterprises to incorporate internationally recognized standards of corporate social responsibility[393].

The India BIT Model contains a shorter CSR clause, also with soft language, but addressed to investors. Article 12 determines that investors operating in the territory of each party shall "endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies"[394]. There is no explicit reference to the OECD Guidelines or to the UN Guiding Principles on Business and Human Rights, but the clause mentions "statements of principle that have been endorsed or are supported by the Parties"[395].

3.2.2.7. Dispute Settlement

The investor-State dispute settlement system has been largely criticized and considered by certain countries as a mechanism restricting policy space[396]. Because of that, in addition to all the changes indicated above, some new investment agreements model started to develop new dispute settlement mechanisms.

The Indian BIT Model, for example, comprises an article (art. 15) establishing the conditions precedent to submitting a claim to arbitration, which are basically exhausting all local remedies.

South Africa, by its turn, has developed a hybrid dispute settlement model, combining mediation, local courts, and arbitration. There is no requirement, however, to exhaust local remedies prior to requesting an investor-State arbitration with the Government of South Africa – provided that the latter consents to do so[397].

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[393] Agreement Between the Government of Canada and the Government of the Republic of Côte D'Ivoire for the Promotion and Protection of Investments. Available at: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ivory_coast-cote_ivoire/fipa-apie/index.aspx?lang=eng#a15>. Access on 15th May 2021.

[394] GOVERNMENT OF INDIA. Model Text for the Indian Bilateral Investment Treaty. Available at: <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>. Access on 15th May 2021.

[395] GOVERNMENT OF INDIA. Model Text for the Indian Bilateral Investment Treaty. Available at: <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>. Access on 15th May 2021.

[396] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, p. 35.

[397] For more details see BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South: An Introduction*. New York: Cambridge University Press, 2018, pp. 39-40.

3.3. HOW PROTECTION AND PROMOTION OF SOCIAL AND ECONOMIC RIGHTS AFFECT INVESTMENT LAW?

As demonstrated in the foregoing topics, there are different international instruments providing guidance on how multinational enterprises should consider human rights issues. Further, there are models of investment agreements to be followed when designing an investment regime aimed at promoting sustainable development – which necessarily includes protecting and promoting socio-economic rights.

There remains, however, two questions to be answered: i) what is in fact necessary to enhance protection and respect for socio-economic rights under investment agreements? and ii) is it necessary to address this issue under investment agreements? Why not leaving this matter solely for tribunals' interpretation, given that States are bound to human rights treaties?

Concerning the first question, based on all foregoing investigations *(*particularly. the case analysis made in Chapter 2, the guidance on human rights and business provided by the UN and OECD, the challenges identified by UNCTAD Investment Framework for Sustainable Development with respect to investment agreements[398], and all model agreements analyzed), one may conclude the following.

Frist, enhancing protection of socio-economic rights under investment agreement means ensuring regulatory space of States. It is important to bear in mind that the notion of protection used here is the one provided by the UN Framework and Guiding Principles on Business and Human Rights. in practice, this means that States need to ensure that they are taking all measures to guarantee that corporations are not violating socio-economic rights and are adequately providing services necessary for effective implementation of such rights (if that is the case)[399]. To adequately comply with such obligations, States need to at least have regulatory space under investment agreements.

Second, enhancing respect for socio-economic rights under investment agreements means ensuring that investors have the obligation to respect at least domestic law, and are duly

[398] Such challenges are already mentioned in topic 3.2.1 above and correspond to: i) strengthening the development dimension of international investment agreements; ii) balancing rights and obligations of states and investors; iii) managing the systemic complexity of the international investment agreement regime.

[399] As already indicated above, this includes at least the obligation of States to clearly set out expectations on human rights for corporations under its territories and jurisdictions; ii) and provide adequate and effective regulations, meaning enacting and enforcing laws, providing guidance to corporations on how to respect human rights, and encouraging the report by enterprises on how human rights are being addressed by them.

incentivized to follow the best standards on corporate social responsibility. In other words, respecting socio-economic rights does not merely imply a negative obligation of corporations not to violate them, but rather the obligation to take positive measures to ensure that violations are duly prevented, mitigated, and remedied. This makes it necessary that investment agreements contain at least clear provisions on investors' obligations and on adequate CSR standards.

In summary, an investment agreement that is adequate from the socio-economic rights perspective must: i) ensure regulatory space of States; ii) entail clear investors obligations to comply with domestic law; iii) contain clear guidance on positive measures to be adopted by investors on corporate social responsibility. Moreover, States have the duty to ensure that such obligations and expectations of investors are followed in practice.

As for the second question (*i.e.,* why addressing socio-economic rights issues in investment agreements and not leaving them solely for tribunals' interpretations), based on all investigations made in this research, there are at least two main reasons for addressing socio-economic rights in investment agreements.

The first one is legal certainty. It is true that different investment tribunals have considered the need for protecting socio-economic rights – even in cases where the investment agreements did not contain explicit reference to this matter. The conclusions of the tribunals, however, have varied a lot.

In the *Phillip Morris v. Uruguay* case, for instance, the Tribunal concluded that the regulatory measures adopted by the States were reasonable, adopted in good faith to protect public health and, hence, did not amount to any breach of Uruguay's obligations (including the FET standard) under the investment agreement[400].

The conclusions of the tribunals in the Argentinian cases (especially in the water sector) were quite the opposite. Tribunals recognized that Argentina was facing a severe economic crisis and had the obligation to guarantee access to water to its population[401] but concluded that the Argentinian State abused of its regulatory discretion and violated several provisions of the investment agreements – particularly the FET standard[402].

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[400] *Philip Morris v. Uruguay* Award, pp. 111-126.
[401] This happened, for instance, in the *Suez and Interagua v. Argentina* Award, p. 81.
[402] *Impregilo v. Argentina* Award, p. 68 and p. 74; *Suez and Interagua v. Argentina* Award, pp. 76-78*; AWG v. Argentina* Award, p. 96, *SAUR v. Argentina* Award on Jurisdiction and Liability, p. 137, *Azurix v Argentina* Award, pp. 135-136.

The decision of the Tribunal in the *Bear Creek Mining v. Peru* case is also relevant. The Tribunal recognizes that the investors could have taken further actions to obtain its social license to operate but concludes that this does not exclude or reduce States' responsibility in this case[403].

It is clear, therefore, that without adequate provisions clarifying what measures are legitimate to ensure States' regulatory powers and what are investors' obligations in terms of socio-economic rights, there is no legal certainty and no guarantee that investment tribunals will come to balanced and similar conclusions.

It is important to bear in mind as well that even in cases where states win the dispute (such as the *Philip Morris v. Uruguay* case) or in situations where an award is annulled (as took place in some Argentinian cases), the arbitral proceedings may still be very onerous for states[404].

In fact, there are situations in which regulatory measures taken by States are not legitimate and may have been taken only for protectionist purposes. This research has not the purpose of identifying which measures where legitimate or not but rather pointing out that arbitral decisions in this matter are not following the same path and, hence, there is no legal certainty in terms of policy space for regulating socio-economic rights issues if this is not duly considered in investment agreements.

In this sense, UNCTAD's Investment Framework for Sustainable Development stresses that, from a development perspective, the challenge is defining boundaries in terms of legitimacy, relevance, and proportionality to distinguish between "measures taken in good faith for the public good and measures with underlying discriminatory objectives"[405].

In this context, Nicolás Perrone also explains how CSR clauses can facilitate consideration of non-economic values in the context of investment arbitrations by altering the notion of investors' legitimate expectations:

> "The increasing number of CSR rules can have important effects on the IIR. In interpretative terms, the existence of these standards can facilitate the consideration of

[403] *Bear Creek Mining v. Peru* Award, pp. 136-140.
[404] In this context, UNCTAD's Investment Framework for Sustainable Development indicates that "The strength of IIAs in granting protection to foreign investors has become increasingly evident through the number of ISDS cases brought over the last decade, most of which are directed at developing counties. Host countries have faced claims of up to $114 billion and awards of up to $50 billion. Added to these financial liabilities are the costs of procedures, all together putting a significant burden on defending countries and exacerbating the concerns related to policy space". UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 79.
[405] UNCTAD. *Investment Policy Framework for Sustainable Development*. 2015. Available at: <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>. Access on 27th June 2021, p. 15.

> non-economic values in the context of investment arbitrations. Thus, for instance, CSR rules may influence the existence of foreign investor legitimate expectations in an agriculture project. These rules may include concrete responsible investment standards in the set of circumstances that need to be taken into consideration by a foreign investor when deciding to invest. At the treaty-drafting level, there has been a gradual inclusion of environmental and human rights references in the treaties that is consistent with the increasing use of CSR. Having these references in the treaties does improve the situation of non-economic goals, but the actual effects will depend on interpretation, in particular, of the balancing techniques"[406].

As explained by Nicolás Perrone, designing investment agreements with clear clauses on policy space, investors' obligations and CSR clauses does not exclude the need of investment tribunals applying adequate interpretative and balancing techniques in eventual disputes. Such clauses, nonetheless, improve the "situation of non-economic goals" and, consequently, increase legal certainty in the field.

The second reason why socio-economic rights should be addressed in the text of investment agreements is because this is fundamental for signaling Governments' expectation to attract responsible investors.

Clauses on investors' obligations and expectations, even with soft law language, play an important role, which is to signal what are the Government's expectations with respect to foreign investment. This may have not an immediate and direct effect but can contribute to make investors conscious about their obligations and enhance the creation of other laws in the future.

As explained by Curtis Milhaupt and Katharine Pistor, law has four different functions: protection, coordination, signaling and enhancing credibility. Thus, although investment tribunals are in principle not a forum for discussing eventual violations of socio-economic rights by investors[407], and soft law clauses may not be enforceable, including CSR clauses and any other clause on investors' obligations in investment agreements has an important signaling function.

This may be particularly relevant for States that are not known for having sustainability concerns yet but are willing to change this scenario. In the *Methanex* case, the arbitral Tribunal concluded that the investor could not have a legitimate expectation of stability of environmental regulation in California, a State known for having a high concern for the protection of the environment and of sustainable development[408].

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[406] PERRONE, Nicolás M. *The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?* Indiana Journal of Global Legal Studies, July 2016, p. 15.

[407] This may happen in the case of counterclaims, but, in theory, investment tribunals are destined to decide upon claims brought by investors.

[408] *Methanex v. USA* Award, para. 9.

Therefore, including such provisions in investment treaties has a signaling function. This is relevant for Tribunals when evaluating investors' legitimate expectation (which increases legal certainty, as explained above) and may as well play a role in increasing awareness of on responsible business conduct and attracting responsible investors.

4. DOES THE CFIA ENHANCE PROTECTION AND RESPECT FOR SOCIO-ECONOMIC RIGHTS?

Having seen why and how investment and human rights should be considered within investment agreements, the Brazilian CFIA model is now investigated.

The first part of this last Chapter presents a historical overview of Brazilian investment agreements, including the signature and non-ratification of BITs in the 1990s and the creation of the CFIAs in 2015.

After this first assessment, the CFIA model is analyzed to verify whether it enhances protection and respect for socio-economic rights. To do that, two evaluations are made: i) the texts of the CFIAs are examined to identify provisions related to socio-economic rights protection and promotion (*i.e.*, regulatory space, and provisions on investors obligations and corporate social responsibility); ii) institutional mechanisms created or related to CFIAs (*i.e.*, Ombudsman of Direct Investment and OCDE National Contact Point) were investigated to understand how CSR obligations are being considered in practice.

4.1. A BRIEF HISTORICAL OVERVIEW OF BRAZIL'S POSITION IN RELATION TO INVESTMENT TREATIES

As demonstrated in the previous Chapters, the BIT model, largely adopted by developed and developing countries in 1990s, does not properly address several issues that both affect and are affected by investment. Brazil was (and remains) one of the main critics to such system. Although Brazil signed BITs with 13 countries in the 1990s, none of them were ratified by the Brazilian Congress[409].

According to the Brazilian Ministry of Foreign Affairs (*Ministério das Relações Exteriores*), the BIT model restricted regulatory space of States and established a more favorable

[409] As presented by Fábio Morosini and Michelle Ratton, only six BITs in fact made it to the Congress. See BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 239.

treatment to foreign than to national investors. Additionally, investment arbitration has a very high economic and political cost, imposes too onerous indemnifications, and lacks transparency[410].

The literature has already pointed out different reasons for the non-ratification of BITs by Brazil.

Michelle Ratton and Fábio Morosini explain that there were *normative* and *material* factors justifying Brazil's resistance towards BITs.

As sustained by the authors, **normative factors** were related to four discourses:

> "There were four types of normative discourses that challenged BITs' rationale in Brazil: first, resistance from left-wing parties to **excessive protection of private interests**; second, **the lack of trust on the capacity of BITs to attract investments** to Brazil; third, **certain BITs provisions would require constitutional reform**, and, fourth, the **low profile that international negotiations had in the Brazilian political debate at the time**"[411]. (emphasis by the author)

Specifically with respect to the provisions of the BITs, Vera Thorstensen, Alebe Linhares Mesquita and Vivian Rocha Gabriel indicate that the Brazilian Congress has pointed out mainly five concerns with respect to BITs: i) the definition of the term "investment" was too broad; ii) the MFN, National Treatment and Fair and Equitable Treatment clauses; iii) the prohibition of expropriation was against the Brazilian Constitution, which allows expropriation in cases of social interests; iii) the term and termination clause, which allowed Brazil to terminate the Treaty only with a 10-year notice; iv) the dispute settlement/arbitration clause[412].

Michelle Ratton and Fábio Morosini affirm that the most problematic provisions from the Brazilian Congress standpoint were compensation for expropriation and investor-state arbitration. According to the authors, this was justified for three main reasons. First, because BITs established that payment for expropriation of land for agrarian reform should be made in convertible and freely transferable currency; Brazilian Constitution, on the other hand, determines that such payment should be made by means of agrarian reform debt securities retrievable in up to twenty years.

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[410] Ministério das Relações Exteriores. *Acordo de Cooperação e Facilitação de Investimentos*. Available at: http://www.itamaraty.gov.br/pt-BR/politica-externa/diplomacia-economica-comercial-e-financeira/15554-acordo-de-cooperacao-e-facilitacao-de-investimentos>. Access on: September 15, 2018.

[411] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. New York: Cambridge University Press, 2018, p. 240.

[412] THORSTENSEN, Vera Helena; MESQUITA, Alebe Linhares; GABRIEL, Vivian Daniele Rocha. *A Regulamentação Internacional do Investimento Estrangeiro: Desafios e Perspectivas para o Brasil*. São Paulo: VT Assessoria Consultoria e Treinamento Ltda, 2018, p. 61

Second, the notion of indirect expropriation was considered as a threat to Brazil's regulatory space. Third, investor-state arbitration was considered a contravention of the principle of exhaustion of local remedy and an advantage to foreign in relation to national investors[413].

Material factors, as sustained by Michelle Ratton and Fábio Morosini, consisted of four main elements as well:

> "The material aspects that supported resistance can be summarized in four main elements: the **time-lapse for ratification of international agreements**; the **lack of constituencies supporting the BITs**; the **deficient articulation between the executive and the legislative branches** at that point; and **investment-friendly reforms that could be taken at the domestic level through minor reforms**, instead of approving BITs that would require major constitutional reforms"[414]. (emphasis by the author)

In this regard, Leany Lemos and Daniela Campello explain that, until de 1990s, Latin American countries were generally the most reactive to liberalization and protection of FDI:

> "The region had been strongly influenced by the Calvo Doctrine, which determined that foreigners should receive the same treatment as domestic investors, and should therefore be subject to national regulation and courts (Baker 1999). Not surprisingly, no country in Latin America signed the International Court on the Settlement of Investment Disputes (ICSID) Convention by the time of its establishment in 1965[415]".

As pointed out by the authors, less than three decades later, however, all major Latin American countries had joined the ICSID, and concluded BITs – Brazil was no different than that and signed several BITs.

At that time, Brazil celebrated BITs as a means of signaling receptiveness towards foreign investment[416]. This was seen as fundamental for Brazil's international competitiveness in view of

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[413] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 241.

[414] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 242.

[415] LEMOS, Leany; CAMPELLO, Daniela. *The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation*. Princeton University, April 1, 2013. Available at SSRN: http://ssrn.com/abstract=2243120. Access on June 04th, 2021, p. 6.

[416] LEMOS, Leany; CAMPELLO, Daniela. *The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation*. Princeton University, April 1, 2013. Available at SSRN: http://ssrn.com/abstract=2243120. Access on June 04th, 2021, p. 8.

the transition to capitalism of former communist countries and China[417]. The vast privatization process in Argentina was also considered as a justification for the conclusion of BITs by Brazil to attract foreign investors[418].

Leany Lemos and Daniela Campello argue that the main reason for the non-ratification of BITs by Brazil was an increasing lack of commitment by the Brazilian Executive with the treaties[419]. BITs faced a strong opposition in the Brazilian Congress (particularly by the Labor Party), but the authors show that this was not the main reasons for the non-enactment. Rather, according to the research conducted by them, the Brazilian Executive had other priorities at that time:

> **"Executive's lack of resolve** It is important to stress that BITs comprised one initiative among many policies designed to attract foreign investment in the 1990s. They were part of a policy bundle advanced by a number of different actors in the executive, in the context of an encompassing liberalization project. This highlights an important aspect that is frequently overlooked in the literature on treaty enactment – the executive is not a single, unitary actor, and understanding how BITs were sponsored within the executive branch is key to explaining non-ratification.
> We are not arguing here that BITs were a case of executive turf, but of different priorities assigned in distinct executive agencies to a specific policy. Whereas BITs were a pressing issue for diplomats — as all treaties and agreements are since they embody the costs of time and resources allocated to negotiation and signing—, we find no evidence that they were a priority for the "hard" areas of the Cardoso government: the Finance Ministry, the Central Bank or the Casa Civil, this one the centre of presidency´s articulation and negotiation"[420].

Due to all these criticism and resistance against BITs, Brazil developed a new model of Investment Agreements, *i.e.*, the Agreements on Cooperation and Facilitation of Investment (CFIAs). The first Agreement was signed in 2015 and there are currently fourteen CFIAs signed mainly with partners in Africa and Latin America[421].

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[417] LEMOS, Leany; CAMPELLO, Daniela. *The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation*. Princeton University, April 1, 2013. Available at SSRN: http://ssrn.com/abstract=2243120. Access on June 04th, 2021, p. 8.
[418] LEMOS, Leany; CAMPELLO, Daniela. *The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation*. Princeton University, April 1, 2013. Available at SSRN: http://ssrn.com/abstract=2243120. Access on June 04th, 2021, p. 8.
[419] LEMOS, Leany; CAMPELLO, Daniela. *The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation*. Princeton University, April 1, 2013. Available at SSRN: http://ssrn.com/abstract=2243120. Access on June 04th, 2021, pp. 22-27.
[420] LEMOS, Leany; CAMPELLO, Daniela. *The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation*. Princeton University, April 1, 2013. Available at SSRN: http://ssrn.com/abstract=2243120. Access on June 04th, 2021, p. 24.
[421] As mentioned in the methodology description above, until the present date, Brazil signed CFIAs with the following countries: i) Angola; ii) Colombia; iii) Chile; iv) Ecuador; v) Ethiopia; vi) Guyana; vii) India; viii) Malawi; ix) Mexico; x) Morocco; xi) Mozambique; xii) Suriname: xiii) United Arab Emirates.

As explained by Fábio Morosini and Michelle Ratton, the reason for the development of a new investment agreement model by Brazil is not related to the general understanding that developing countries celebrate investment treaties to attract foreign investors, but rather to the fact that Brazil has become a capital export country in the last years[422]. This is proved by the fact that the two first CFIAs signed were with countries where Brazilian companies were strongly investing: Mozambique and Angola[423].

The referred authors also indicate normative and material aspects justifying the creation of the CFIA model. Normative factors are related to the political orientation when CFIAs were created: a developmental state, willing to promote South-South cooperation. Material aspects refer to the increasing interest of Brazilian multinational corporations to export capital, and the development of state apparatus to support private sector's interests[424].

4.2. THE CFIA MODEL

The CFIA model was built under three pillars: i) risk mitigation; ii) institutional governance; and iii) thematic agendas for promoting cooperation and facilitation of investments[425].

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[422] The authors show that Brazil has always adopted different strategies when regulating investment: "In the 1960s and 70s, the country's participation in the movement that gave rise to the New International Economic Order (NEO) was ambivalent. Brazilian diplomacy sent mixed signals to the world and did not side with the developing countries or developed world. In the 1990s, when Latin America countries were 'competing for capital' through bilateral investment agreements, Brazil resisted ratifying such treaties. Confident about its domestic reforms, Brazil maintained its position among the top recipients of FDI throughout the 1990s and the first decade of the 2008". BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 220-221. In this regard, it is also important to recall that Brazil, albeit never ratifying any BIT, still is one of the countries with the greatest rate of FDI inflows, as already mentioned above. See: WORLD BANK. *Foreign Direct Investment, net inflows*. Available at: <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?most_recent_value_desc=true>. Access on 28th March 2021.

[423] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 246.

[424] According to the authors, these are: Brazilian National Development Bank, the Brazilian Guarantees Agency, the Brazilian Trade and Investment Promotion Agency and the Brazilian Cooperation Agency. See BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 246-250.

[425] Brazilian Ministry of Economy (*Ministério da Economia*). *Acordos de Cooperação e Facilitação de Investimentos – ACFI: Apresentação Geral do Modelo Brasileiro de Acordos de Investimentos*. Available at <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/negociacoes-internacionaiss/negociacoes-internacionais-de-investimentos/nii-acfi>. Access on 05th June 2021.

According to the Ministry of Economy, the **risk mitigation pillar** is reflected in measures established by CFIAs that reduce investors' risk exposure, hence avoiding situations that could lead to disputes before the host-State. Such measures are clauses on non-discrimination, transparency, prohibition of direct expropriation, and compensation when applicable[426].

As opposed to BITs, CFIAs contain clauses that protect foreign investment without compromising State's ability to regulate. CFIAs, for instance, do not entail FET or FPS provisions – which, as demonstrated in Chapter 2, are very controversial in terms of ensuring States' policy space and ensuring protection of socio-economic rights.

Another very important feature of the CFIAs, also aimed at promoting risk mitigation, are the corporate social responsibility clauses. Such clauses provide in summary that investors should "endeavor their best efforts" to promote sustainable development, respect human rights (generally as established by the international obligations assumed by the host State) and develop practices and corporate governance.

The purpose of such CSR clauses it to promote sustainable development, by means of encouraging investors to develop standards of social, environmental, and corporate responsibility. According to the former Ministry of Industry, Foreign Trade and Services (MDIC), this contributes to qualifying investments and increasing the benefits generated by sustainable development to the local community and the host-State[427].

The **institutional governance pillar** refers to the two institutions created by the CFIAs: Focal Points (or Ombudsman of Foreign Direct Investment) in each member-State and the Joint Committee.

Further, as explained by Michelle Ratton and Fábio Morosini this was the official discourse when Brazil launcher the CFIA model. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 223.

[426] Brazilian Ministry of Economy (*Ministério da Economia*). *Acordos de Cooperação e Facilitação de Investimentos – ACFI: Apresentação Geral do Modelo Brasileiro de Acordos de Investimentos*. Available at <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/negociacoes-internacionaiss/negociacoes-internacionais-de-investimentos/nii-acfi>. Access on 05th June 2021.

[427] Ministry of Industry, Foreign Trade and Services (*MDIC*). *Acordos de Cooperação e Facilitação de Investimentos – CFIA*. Available at: http://www.mdic.gov.br/index.php/comercio-exterior/negociacoes-internacionais/218-negociacoes-internacionais-de-investimentos/1949-nii-CFIA. Access on: September 15, 2018.

Brazilian Ministry of Economy explains that the Focal Point (or Ombudsman) acts as a facilitator in the technical relation between investors and the governments of the host-countries[428].

In Brazil, the Ombudsman of FDI is under the structure of the Executive Secretariat of the Brazilian Chamber of Foreign Trade *(Secretaria Executiva da Câmara de Comércio Exterior – SECAMEX)*[429]. Since 2019, CAMEX has broadened the role of the Ombudsman. Now it is also responsible for assisting all foreign investors in Brazil (and not only those covered by the CFIAs) and for support Brazilian investors abroad[430].

The Joint Committee, by its turn, is composed of governmental representatives of both member-State. Its purpose is to monitor the implementation of the CFIA, share investment opportunities, coordinate thematic agendas and mainly acting to prevent controversies and promote amicable solutions of eventual disputes involving the treaties[431].

Such institutional mechanisms also serve the purpose of preventing controversies and mitigating risks, having seen that CFIAs do not provide for investor-State arbitration as BITs do. The Joint Committee works at the State-to-State level and the Ombudsmen is responsible for receiving consultations requests and inquiries from investors. As a last resort measure, the Agreements permit State-to-State arbitration[432].

Michelle Ratton and Fábio Morosini point out that transparency mechanisms of the CFIA serve to improve institutional governance and to mitigate risk as well. CFIAs establish that each party shall "employ its best efforts to publish all regulation that may affect the commitments

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[428] Brazilian Ministry of Economy (*Ministério da Economia*). *Acordos de Cooperação e Facilitação de Investimentos – ACFI: Apresentação Geral do Modelo Brasileiro de Acordos de Investimentos*. Available at <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/negociacoes-internacionaiss/negociacoes-internacionais-de-investimentos/nii-acfi>. Access on 06th June 2021.

[429] CAMEX's role as Ombudsman is explained at CAMEX's website, available at: <http://www.camex.gov.br/investimentos/ombudsman-de-investimentos-diretos-oid>. Access on September 15, 2018.

[430] More information available is available at the Ministry of Economy's website: <http://oid.economia.gov.br/pt> Access on: June 09, 2019.

[431] Brazilian Ministry of Economy (*Ministério da Economia*). *Acordos de Cooperação e Facilitação de Investimentos – ACFI: Apresentação Geral do Modelo Brasileiro de Acordos de Investimentos*. Available at <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/negociacoes-internacionaiss/negociacoes-internacionais-de-investimentos/nii-acfi>. Access on 05th June 2021.

[432] Fábio Morosini and Michelle Ratton Badin note that, although State-to-State arbitration is authorized, it shall not be the "foremost mechanism for settling disputes". BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *The Brazilian Agreement on Cooperation and Facilitation of Investments (CFIA): A New Formula for International Investment Agreements?* International Institute for Sustainable Development – Investment Treaty News. Available at: <https://www.iisd.org/itn/en/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/>. Access on: June 27th, 2021.

established by the agreement and to allow a responsible opportunity for those interested to voice their opinion about the proposed measures"[433].

Finally, the ***cooperation and facilitation pillar*** is translated into the thematic agendas. As explained by the Brazilian Ministry of Economy, such thematic agendas are determined according to the interests of the parties in areas that may enhance a more favorable investment environment, and that are aligned with the national development strategy[434].

Michelle Ratton and Fábio Morosini explain that CFIA's main declared purpose is to promote investment facilitation and cooperation[435] – as opposed to BITs which had the main objective of protecting foreign investors.

The authors also mention that most of the thematic agendas are concerned with market access and comprise programs and measures related to environmental licenses and certifications, visa policy and regularity of flights[436]. Such agendas also translate some of the developing countries claims with respect to investment treaties:

> "Such agendas also revive developing country claims for technology transfer, capacity building and other developmental gains from foreign investment. In addition, they express the understanding that the benefit to the home country must come not only from exporting capital, but also from the overall impact that the investment will have on the host country, such as employment of local labour. In this sense, the ACFI model aims at advancing symmetry beyond formal rules, and its design has taken into account the domestic policy needs of both capital-importing and-exporting countries"[437].

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[433] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 227.

[434] Brazilian Ministry of Economy (*Ministério da Economia*). *Acordos de Cooperação e Facilitação de Investimentos – ACFI: Apresentação Geral do Modelo Brasileiro de Acordos de Investimentos*. Available at <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/negociacoes-internacionaiss/negociacoes-internacionais-de-investimentos/nii-acfi>. Access on 05th June 2021.

[435] The authors refer to an interview with two governmental officials that leaded the conceptualization of the CFIAs (Daniel Godinho and Carlos Márcio). They affirmed that the "Brazilian model is based on the long-term notion of States cooperation to promote reciprocal investments". BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 224.

[436] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 224., p. 225.

[437] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*.

CFIA's most relevant provisions are explored below with further details. As described in the methodology section above, fourteen CFIAs were analyzed. To facilitate the understanding of the investigation made herein, the table below presents the CFIAs analyzed and their respective dates of signature.

Table 4 – CFIAs Analyzed and Date of Signature

N.	CFIA	Date of Signature	In force?
1	Brazil- Mozambique	30th March 2015	No
2	Brazil-Angola	01st April 2015	Yes (enacted by Decree nº 9.167/2017)
3	Brazil-Mexico	26th May 2015	Yes (enacted by Decree nº 9.498/2018)
4	Brazil-Malawi	25th June 2015	No
5	Brazil-Colombia	09th October 2015	No
6	Brazil-Chile	23rd November 2015	No
7	Brazil-Peru	29th April 2016	No
8	Brazil-Ethiopia	11th April 2018	No
9	Brazil-Suriname	02nd May 2018	No
10	Brazil-Guyana	13th December 2018	No
11	Brazil-United Arab Emirates	15th March 2019	No
12	Brazil-Morocco	13th June 2019	No
13	Brazil-Ecuador	25th September 2019	No
14	Brazil-India	25th January 2020	No

In previous research, CFIAs have already been divided into generations. Michelle Badin, Daniel Tavela and Mário Alfredo de Oliveira, for instance, in 2017, divided Agreements into two generations: i) the first generation that comprises agreements signed with least developed countries in Africa; and ii) the second generation which corresponds to CFIAs signed with countries in Latin America[438].

In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 225.

[438] BADIN, Michelle Ratton Sanchez; LUIS, Daniel Tavela; OLIVEIRA, Mario Alfredo de. *A proposal for reflection on ACFIs: To what extent the most favored national treatment can undermine the political strategy on which ACFIs are based on?* Brazilian Journal of International Law. ISSN 2237-1036. Vol. 14, n. 2, 2017, p. 162.

For the present research, CFIAs were not generally split into groups, but rather analyzed individually and, when applicable, divided into categories according to the provision analyzed. This was done because certain agreements signed by Brazil (especially the most recent ones) entail particularities relevant for the present investigation, even in case of agreements that adopt a very similar general structure. This makes it difficult to separate CFIAs into general groups for the purposes of the present investigation, that is, understanding how socio-economic rights are considered in such agreements.

When analyzing CFIAs' texts, the main points analyzed were those indicated in Chapter 3 as fundamental for developing investment agreements that adequately promote protection and respect for socio-economic rights. This means, whether the agreement: i) ensures regulatory space of States; ii) entails clear provisions on investors obligations; iii) contains clear guidance on positive measures to be adopted by investors on corporate social responsibility; and iv) duly reinforces home and host States' obligations to ensure that investors in its territory or jurisdiction comply with national and international laws on socio-economic rights.

4.2.1. Preamble

The preambles of the CFIAs generally contain provisions relevant for the protection and promotion of socio-economic rights by stressing the importance of investment for the promotion of sustainable development.

Preambles of CFIAs signed with Angola, Mozambique, Malawi, Colombia, Chile, Ecuador, Mexico, Morocco, Ethiopia, and Peru[439] all recognize "the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development"[440].

[439] The Agreement with Peru also refers to economic integration and trade liberalization, given that it was incorporated by Brazil-Peru Economic-Commercial Expansion Agreement.

[440] There are some language variations, but this is what is provided by all CFIAs herein mentioned. CFIAs with Colombia, Mexico and Morocco contain additional provisions. CFIA with Colombia also refers to transfer of technology, which, as demonstrated in the foregoing Chapters, is fundamental when promoting investments that in fact boost development. It also contains an additional provision declaring that States are seeking that its investors maintain a responsible business conduct and contribute to sustainable development of both parties. The Agreement with Mexico, by its turn, first recognizes the need to protect and promote foreign investment and then refers to the provision highlighted above. CFIA with Morocco stresses in its preamble the need to consider the "importance of promoting sustainable investment and transfer of technology and know how to achieve the objectives of sustainable development and growth".

Another approach is the one brought by CFIAs with Guyana, Suriname, and United Arab Emirates. These Agreements contain a simpler provision on the matter recognizing "the essential role of investment in promoting sustainable development".

The Agreement signed with India adopts different and unique language. It recognizes that the cooperation and facilitation of investments stimulates mutually beneficial business activities, to the development of economic cooperation between the parties and the promotion of sustainable development, including of poverty reduction.

As observed, language of such provisions in the preambles vary considerably but all of them refer to the notion of sustainable development. Having seen that the consideration of preambles is a general rule for interpretation of treaties, as determined by Art. 31.2 of the Vienna Convention on the Law of Treaties, the reference to such concept in all CFIAs signed until the present date shows Brazil's intention to conclude investment agreements that will promote sustainable development and are not solely headed at investors' protection.

One further aspect of CFIAs' Preambles that is relevant for the present research as well is that all of them make some sort of reference to policy space, autonomy to regulate on investment, implement public policies, and regulate on public interest. Language varies depending on the treaty, but this provision is somehow entailed in all preambles[441]. The CFIA with Colombia adopted an interesting language on this issue that deserves attention – it recognizes "the right of the Parties to regulate investments carried in their territories to achieve legitimate objectives related to public policies, such as health, safety, environment, among others".

As concluded above in relation to sustainable development, the presence of provisions on regulatory autonomy in all CFIAs preambles (albeit with language variations) is a strong indication that no CFIA should be interpreted as to restrict Brazil's (or any Party's) policy space.

4.2.2. Investors' Protection

As previously mentioned, CFIA model's main concern is not protection of foreign investment but rather promotion of investment cooperation and facilitation. This is why, as opposed

[441] For instance, CFIAs with Mozambique, Angola, Malawi, Guyana, Ethiopia, United Arab Emirates, and Suriname reaffirm the regulatory autonomy and the faculty of each party to implement public policies. CFIA with Chile, by its turn, recognizes the right of the parties to adopt rules related to investments conducted in their territories, to achieve legitimate public policy purposes. CFIA with Mexico entails a similar provision but explicitly recognizes the rights of the parties to adopt new regulations on investment with the purposes of meeting national policy objectives.

to BITs that contained several clauses on investors protection (*e.g.*, FPS and FET standards, umbrella clauses, etc.), CFIAs generally entail only non-discrimination clauses, *i.e.*, national treatment and most favored nation[442].

Michelle Ratton and Fábio Morosini explain that this approach (*i.e.*, restricting investment protection to MFN and NT standards) has the purpose of safeguarding Brazil's regulatory space[443]. In fact, as seen in the previous Chapters, FET and FPS standards, as well as umbrella clauses, are problematic when it comes to guaranteeing States' policy space.

National treatment and most favored nation clauses are addressed in at least *four* different general manners by CFIAs – except for the CFIA with India which does not make any reference to MFN standard[444] (according to the new Indian BIT model, described in Chapter 3 above).

First, CFIAs with Angola and Mozambique[445] contain a general provision on "treatment to investors and investments", establishing that each party shall grant to foreign investors equal treatment in relation to national investors (NT) and investors from other countries (MFN). Both Agreements exclude from such clause benefits granted under customs unions and double taxation agreements[446], and stress that no provision in the agreement may be interpreted to restrict fair and equal taxation as determined by each party's legislation[447].

The second shape of non-discrimination clauses is brought by the CFIAs signed with Chile, Peru, Ecuador, Suriname, Guyana, United Arab Emirates and Ethiopia. These Agreements entail separate clauses on national treatment and most favored nation, and expressly refer to such standards[448] - as opposed to the CFIAs with Angola and Mozambique which contain provisions with such content but do not expressly mention "national treatment" or "most favored nation". Such agreements, aside from excluding from the MFN clause benefits granted under trade and

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[442] Scholars have criticized this restriction from the investors' protection standpoint. See COSTA, José Augusto Fontoura; GABRIEL, Vivian Danielle Rocha. *A proteção dos investidores nos Acordos de Cooperação e Favorecimento de Investimentos: Perspectivas e Limites*. Revista de Arbitragem e Mediação, Vol. 49, 2016.
[443] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 228.
[444] Art. 5 of the CFIA with India deals solely with national treatment.
[445] Such provision corresponds to Article 11 of both Agreements.
[446] Angola CFIA, Art. 11.4; Mozambique CFIA, Art. 11.4 and 11.5.
[447] Angola CFIA, Art. 11.5; Mozambique CFIA, Art. 11.6.
[448] Such provisions are reflected in Articles 5 and 6 of CFIAs herein mentioned.

customs union agreements, indicate that such standard shall not apply to any provisions on dispute settlement[449].

The third path followed by CFIAs to address NT and MFN is the one used in the Agreements with Colombia, Morocco, Mexico, and Malawi. They contain NT and MFN provisions within a "non-discrimination" clause, without making explicit reference to such standards[450]. The exceptions brought by such clauses are similar to those of the foregoing groups: benefits granted under trade agreements and customs union, provisions on dispute settlement, taxation (in the case of the agreement with Morocco), and agreements on double taxation (in the case of the CFIAs with Malawi and Mexico). The CFIA with Morocco also contains an exception related to governmental subsidy[451].

The variation of the language of MFN clauses raises concerns on whether provisions from other agreements could apply to investors from countries with whom Brazil has signed CFIAs. Michelle Ratton, Daniel Tavela and Mario Alfredo de Oliveira have analyzed this issue particularly from the standpoint of the CFIA between Brazil and Chile[452].

In summary, considering that the CFIA with Chile makes explicit reference to MFN standard and, particularly, contains the language "and other investment arrangements" under the MFN, the authors have concluded that: i) it is unlikely that an investor is able to argue that it is entitled to investor-State arbitration based on such provisions from other treaties signed by Chile; ii) such language, however, may allow the "importation" of substantial protection clauses from other treaties, *e.g.* FET, protection against indirect expropriation, etc.

As pointed out by the authors themselves[453], a complete analysis of this issue would require an analysis of all CFIAs, and other investment agreements signed by countries with whom Brazil has signed investment treaties. Given that the purpose of this research is not to evaluate the risks posed by the MFN clauses under CFIAs, this analysis is also not conducted herein.

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[449] These provisions are entailed by Art. 6.3 of all CFIAs investigated.
[450] Such clauses are reflected in Article 5 of the CFIAs with Mexico, Morocco and Colombia, and Art. 10 of the CFIA with Malawi.
[451] These exceptions are reflected in Art. 5.3 of the Agreements with Mexico and Colombia, Art 5.5. of the Agreement with Morocco, and Art. 10.6 and 10.7 of the CFIA with Malawi.
[452] BADIN, Michelle Ratton Sanchez; LUIS, Daniel Tavela; OLIVEIRA, Mario Alfredo de. *A proposal for reflection on ACFIs: To what extent the most favored national treatment can undermine the political strategy on which ACFIs are based on?* Brazilian Journal of International Law. ISSN 2237-1036. Vol. 14, n. 2, 2017, pp. 160-179. Pp. 173-174.
[453] BADIN, Michelle Ratton Sanchez; LUIS, Daniel Tavela; OLIVEIRA, Mario Alfredo de. *A proposal for reflection on ACFIs: To what extent the most favored national treatment can undermine the political strategy on which ACFIs are based on?* Brazilian Journal of International Law. ISSN 2237-1036. Vol. 14, n. 2, 2017, pp. 160-179. P. 172.

However, the referred investigation made by the authors is already sufficient to indicate that certain language comprised by MFN clauses in some CFIAs (particularly those of the second group indicated above[454]) may allow investors to claim that they are entitled to other substantive protections (*e.g.*, FET standard) that have already allowed for restriction of States' regulatory space. Such claims, however, would most likely not be discussed under an investor-State tribunal, which considerably diminishes the risk of having protection of socio-economic rights impaired by CFIAs.

Finally, it is important to note that, although Brazil's strategy when creating CFIAs was limiting investor protection to MFN and NT standards, more recent CFIAs have started to include detailed clauses on investment treatment. Most of these clauses expressly exclude the possibility of interpretation according to FET and FPS standards[455]. The CFIA with India, however, comprehends a detailed provision on investment treatment determining that based on "the applicable rules and customs of international law as recognized by each of the Parties and their respective national law", no Party shall subject investors to measures that constitute in denial of justice, breach of due process, discrimination, abusive treatment, and discrimination related to law enforcement (including physical security)[456]. Such a detailed clause was most likely because of the new Indian BIT Model (described in Chapter 3), that makes no explicit reference to FET or FPS standards but contains provisions on investors' treatment. Unlike other CFIAs that entail similar provisions, CFIA with India has no clause expressly excluding application of FET or FPS standards.

Although it is very difficult to sustain that such provision could be interpreted as FET or FPS standard (since at least Brazil has been a persistent objector[457]), scholars have already argued that the reference to "customary international law" allows for the incorporation of FET standard[458].

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[454] As explained by Michelle Ratton, Daniel Tavela and Mario Oliveira, these agreements are the closest to BITs, given that they establish the need for equal treatment, establish standards for defining discrimination, determine situations in which equal treatment needs to be guaranteed, and provides exceptions. See BADIN, Michelle Ratton Sanchez; LUIS, Daniel Tavela; OLIVEIRA, Mario Alfredo de. *A proposal for reflection on ACFIs: To what extent the most favored national treatment can undermine the political strategy on which ACFIs are based on?* Brazilian Journal of International Law. ISSN 2237-1036. Vol. 14, n. 2, 2017, pp. 160-179. P. 170.

[455] See Arts. 4 of CFIAs with UAE and Suriname.

[456] Art. 4, CFIA with India.

[457] Persistent objectors are States that have constantly objected to an customary international law rule during its formation and therefore are not subject to it. CRAWFORD, James. *Browlie's Principles of Public International Law*. 8th Ed. UK: Oxford University Press, 2012, p. 28.

[458] See ALVAREZ, José E. *The Public International Law Regime Governing International Investment*. 1st Ed. The Hague: Hague Academy of International Law, 2011, p. 171.

Irrespectively of whether such a risk in fact exists or not, the fact is that the CFIA with India has the closest provision to FET/FPS among all CFIAs signed by then and does not explicitly exclude the application of such standards. And this is certainly a different approach brought by the Agreement.

4.2.3. Expropriation

As explained by Michelle Ratton and Fábio Morosini, there are two initiatives promoted to address issues arising out of expropriation clauses (particularly indirect expropriation) in investment agreements: "one is to circumscribe and limit their application to certain situations, and the other is to create carve-outs"[459]. According to the authors, CFIAs have adopted both strategies.

In fact, all CFIAs exclude indirect expropriation and establish exceptions to the expropriation clause. There are, however, some variations in the text of the expropriation clauses.

CFIAs with Mozambique, Angola, Mexico, Colombia, and Morocco contain a general provision on expropriation[460] and make no reference to the notion of "indirect expropriation"[461]. Some of these Agreement, however, explicitly exclude from the expropriation some measures that could be claimed as acts of "indirect expropriation". CFIAs with Colombia and Morocco, for instance, determine that the expropriation clause does not apply to the issuance of licenses granted in relation to intellectual property rights[462].

CFIAs with Chile, Peru, Ethiopia, Suriname, Guyana, United Arab Emirates, Ecuador, and India, on the other hand, comprise explicit provisions excluding indirect expropriation[463]. Some of these Agreements (*i.e.*, those signed with Suriname, Guyana, UAE, and India), even name the Articles on the matter as "Direct Expropriation".

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[459] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 229.

[460] CFIA with Malawi also entails a more general provision but it refers to the word "direct" in art. 8.2, which leads to the interpretation that it expressly excludes indirect expropriation.

[461] Such provision is reflected in Art. 9 of CFIAs with Mozambique and Angola, Art. 6 of CFIAs with Morocco Mexico and Colombia, and Art. 7 of CFIA with Ecuador.

[462] This is entailed in Art. 6.2 of CFIA with Morocco and Art. 6.7 of CFIA with Colombia.

[463] Such provisions are entailed in Art. 7 of CFIAs with Chile, Peru, Ethiopia, Suriname, Guyana, UAE, and Ecuador.

All CFIAs exclude from expropriation clauses measures taken for "public purpose or necessity or when justified by a social interest"[464] or simply for "public purposes"[465]. Overall, expropriation clauses do not contain detailed provisions on legitimate regulatory measures that may be adopted by States[466]. Some Agreements, however, comprise general clauses on States' policy space on environment, labor, and health[467], and on general and security exception clauses[468].

It is important to note that the Agreement with Morocco was signed in 2019, after the Agreement with Chile was signed, back in 2015. This is relevant because the CFIA with Chile was the first one to include an explicit exclusion of indirect expropriation clause, and this was seen by the literature as a sign that Brazil would start to include such provision in all CFIAs[469].

The text differences pointed-out above raise the question of whether indirect expropriation is in fact excluded from all CFIAs or only from CFIAs that expressly do so. In this regard, Vivian Rocha, when analyzing CFIAs' expropriation clauses, sustains that the first Agreements that contained a broad and general provision on the matter covered both types: direct and indirect expropriation[470].

One may conclude, thus, that Agreements that do not exclude indirect expropriation cover this type of protection. This is a particular concern when interpreting the language of the most recent treaty that adopted such strategy, *i.e.,* the CFIA with Morocco. It provides that "No Party shall take against investments from the other Party **measures** of nationalization or expropriation" (free translation and emphasis by the author). The term "measures" is then defined by Art. 3 of the relevant CFIA: "any measure adopted by a Party directly linked to the investment, in the form of law, regulation, procedure or administrative decision, or any practice that has such effect over the

[464] This is the language reflected in CFIAs with Colombia, Ethiopia, Suriname, Guyana, and Ecuador.
[465] See CFIAs with Mozambique, Angola, Mexico, Malawi, and Chile.
[466] CFIA with India contains a clause under the Expropriation article establishing that "non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article". It is interesting to note, however, that the CFIA with India restricts expropriation to the direct type. Therefore, this clause's application seems to be limited.
[467] This is the case in CFIAs with Chile, Peru, Colombia, Suriname, Ethiopia, Guyana, UAE, Ecuador, and India.
[468] See CFIAs with Mexico, Chile, Peru, Colombia, Suriname, Ethiopia, Guyana, UAE, Ecuador, Morocco, and India.
[469] See BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 229.
[470] GABRIEL, Vivian Danielle Rocha. Expropriação indireta nos acordos de investimento. Tese de Doutorado, Universidade de São Paulo, Faculdade de Direito, São Paulo, 2019, p. 213.

investment". This may be an indication that indirect expropriation is in fact be covered by this Agreement.

Nonetheless, it should by highlighted that CFIA with Morocco entails a clear provision establishing that nothing in the Agreement shall be interpreted as to prevent any Party from taking measures necessary to protect public order, public health, or the environment, provided that measures are not adopted in a discriminatory, abusive or unjustified manner[471]. This mitigates the risk of having States' regulations on public interest questioned by investors.

The purpose of this research is not to interpret all CFIAs texts and conclude which Agreement might allow for claims related to regulatory measures taken by the States, but rather to identify if there are any provisions in the texts of such Agreements that raise a red flag in terms of protection of socio-economic rights. Based on the information stressed above, one may easily note that CFIAs language on indirect expropriation is not uniform and in certain cases may generate discussions on States' policy space[472]. And this certainly raises a red flag when considering protection and promotion of socio-economic rights.

4.2.4. Investors' Obligations and Corporate Social Responsibility

CFIAs generally contain two sorts of provisions on investors' obligations: i) those stressing the obligation of investors to respect domestic law; and ii) clauses on corporate social responsibility with a best-efforts approach.

Concerning the first kind of provision, Michelle Ratton and Fábio Morosini argue that unlike BITs, CFIAs "have elected domestic regulation as the main source to govern international investment"[473]. In fact, one of the first Agreements signed, *i.e.*, CFIA with Angola, establishes that all definitions brought by it shall be interpreted according to the parties' internal legal order.

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[471] Art. 4.6.

[472] Érika Capella Fernandes and Jete Jane Fiorati consider that the general provisions on expropriation in Brazilian CFIAs is a flaw, given that the notion of indirect expropriation is much more complex than direct expropriation, and the best way to mitigate uncertainty around the issue is to clearly regulate it. See FERNANDES, Érika Capella. FIORATI, Jete Jane. *Os ACFIs e os BITs assinados pelo Brasil: Uma análise comparada.* RIL Brasília a. 52 n. 208 out./dez. 2015, p. 247-276. Available at: <https://www2.senado.leg.br/bdsf/bitstream/handle/id/517706/001055994.pdf?sequence=1&isAllowed=y>. Access on 09th June 2021.

[473] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 225.

Moreover, several CFIAs entail provisions on investors' obligations to comply with national law. CFIA with Malawi, for instance, determines that investments and investors are subject to the legal order of the host-state and, hence, no clause of the Agreement shall be used with the purpose of not complying with legislation in force[474]. CFIAs with Suriname, Guyana, United Arab Emirates, and India comprehend a clause establishing that investors shall comply with all laws, regulations, guidelines, and policies concerning the establishment, acquisition, management, operation, and disposition of investments[475]. CFIA with Ecuador brings a different approach to this matter – although not related to protection of socio-economic rights. It contains a clause on "denial of benefits", which determines that States may deny benefits to investors that have proven to have incurred in corruption acts.

As for the CSR clauses, all CFIAs comprehend provisions on the matter. In the first two Agreements signed (*i.e,* CFIAs with Mozambique and Angola), such provisions were reflected in an Annex to the Agreement. The other CFIAs included CSR provisions in their text[476].

CSR clauses generally establish that investors shall endeavor best efforts to: i) contribute to the economic social and environmental progress, aiming at sustainable development; ii) respect human rights in accordance with the obligations and commitments assumed by the host-States; iii) encourage local capacity building through close cooperation with the local community; iv) encourage the creation of human capital, especially by creating employment opportunities and facilitating workers' access to training; v) refrain from seeking or accepting exemptions not established in host-States laws on human rights, environment, health, security, work, tax, financial incentives, or any other issues; vi) support and advocate for good corporate governance principles, and develop and apply good corporate governance practices; vii) develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which their operations are conducted; viii) promote knowledge of and the workers' adherence to the corporate policy, through appropriate dissemination of the relevant policy, including professional training programs; ix) refrain from discriminatory or disciplinary action against employees who submit grave reports about practices that violate law or

[474] Art. 8.1, Brazil-Malawi CFIA.
[475] This is reflected in Art. 14 of CFIAs with Suriname, Guyana, UAE, and Art. 11 of the CFIA with India.
[476] Albeit bringing such clauses to the main text of the Agreement signals that States are willing to give it more importance, this should not make a big difference when interpreting the CSR clauses, having seen that Art. 31.2 of the VCLT establishes that the context for the purposes of the interpretation of a treaty shall comprise the text, preamble and annexes.

corporate policy; x) encourage, whenever possible, business associates, including service providers and outsources, to implement the same principles of business conduct; xi) refrain from any undue interference with local political activities.

The foregoing text has some small variations between agreements, but it is comprised by all CFIAs signed until now. Some Agreements, nonetheless, include additional provisions. CFIA with Mozambique, for instance, comprehends two additional provisions: the first establishing that investors shall respect human rights and sustainable development and encourage the use of technologies that do not harm the environment; the second determining that investors must follow laws on health, security, and environment and the commercial and industrial labor standards[477]. Additional provisions are also comprised in the CSR clause firmed with Morocco, stressing that investors must enhance transparency of its activities in the fight against corruption, refrain from offering any undue advantages and adopt internal ethical and conformity mechanisms with the objective of preventing and detecting corruption[478].

Irrespectively of any differences, all CSR clauses entailed by CFIAs have a very similar language to the OECD Guidelines for Multinational Enterprises. In fact, three of the Agreements signed (those with Chile, Ethiopia, and UAE) make explicit reference to the OECD Guidelines in the CSR clause[479].

This is most likely the reason why such provisions have a voluntary and soft-law character – they are based on OECD Guidelines that, as seen in Chapter 3 above, are voluntary principles that reflect best practices in terms of responsible business conduct[480]. The soft-law nature of these clauses, justified or not, may reduce its effectiveness, especially in cases of CFIAs that do not contain other clauses on investors' obligations and/or States' duties to protect the environmental and social aspects.

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[477] Annex 2, i) and v), CFIA with Mozambique.
[478] Art. 13.2, g), h), i), CFIA with Morocco.
[479] This is also the conclusion reached by Luana Almeida. See ALMEIDA, Luana. *Searching for balance: an analysis of Brazil's and India's most recent investment-related instruments*. Master Thesis. Maastricht University, Faculty of Law, August 2018, p. 34.
[480] Nitish Monebuhurrun criticizes the soft-law character of CSR clauses and argues that such obligations are already binding according to Brazilian law and, therefore, should not be handled with a soft-law nature in CFIAs. See MONEBHURRUN, Nitish. *A Inclusão da Responsabilidade Social Das Empresas Nos Novos Acordos de Cooperação e de Facilitação dos Investimentos do Brasil: Uma Revolução*. Revista de Direito Internacional (Brazilian Journal of International Law) – Crônicas do Direito Internacional dos Investimentos. ISSN 2237-1036. Vol. 12, N. 1, 2015, pp. 33-38.

Additionally, most of the CSR clauses in the CFIAs are solely directed to investors and not to States. The only exceptions are the CFIA with Colombia, Chile, and Peru. The Agreement with Colombia instead of indicating that investors shall endeavor best efforts to implement the measures described above, provides that each Party shall seek that its investors operating in its territories and/or under its jurisdiction follow the principles and standards indicated above. Similarly, CFIAs with Chile and Peru, prior to establishing investors' best-efforts obligations, establish that the Parties recognize the importance of encouraging companies operating in its territory and/or jurisdiction to implement sustainability practices and hence foster host-State development.

All other CSR clauses are solely directed at investors. This may be considered a positive aspect at first glance, but its effects may be limited in practice. If only investors are deemed to have social obligations, States may feel entitled to leave human rights promotion solely to corporations and claim that compliance with corporate social responsibility standards is not of their concern anymore[481].

CFIAs' CSR clauses represent an important progress as they enhance corporate governance, risk mitigation, and make investors more conscious about their social and environmental obligations.

However, their soft law nature[482], combined with the absence of a final mechanism for resolving disputes in certain cases and the fact that most of them are headed only at investors, may impair the CSR clause's ability to in fact promote human rights.

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[481] John Ruggie concludes in its book "Just Business" that there is no "silver bullet" for addressing the problem of human rights and business. This means that corporate initiatives have always to be taken together with State action to avoid corporations to use corporate initiatives to promote themselves and "pick point" which the measures they want to implement. Although Ruggie's analysis was conducted in a different context (he was analyzing voluntary corporate initiatives and not CSR clauses in investment agreements), it also applies to investment agreements, since the CSR clauses are directed solely to corporations, disregarding the States' (home and host States) obligations to incentivize corporations to respect human rights, monitor their activities and promote human rights in their territories. RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. 1st Ed. New York: W.W. Norton & Company, Inc, 2013.

[482] Even with a soft law nature, CSR clauses play an important role, which is to signal what are the Government's expectations with respect to foreign investment. This may have not an immediate and direct effect but can certainly contribute to make investors conscious about their obligations and enhance the creation of other laws in the future. As already mentioned above, Curtis Milhaupt and Katharina Pistor affirm that law has four different functions: protection, coordination, signaling and enhancing credibility. Thus, although soft law clauses may not serve directly for the purposes of protecting human rights, they have an important signaling function. See MILHAUPT, Curtis J.; PISTOR, Katharina. *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World*. Chicago: University of Chicago Press, 2010. Chapter 2 - Rethinking the Relation between Legal and Economic Development.

Finally, it should be noted that there is an additional aspect of certain CFIAs that reinforces the CSR clause – but does not completely resolve the issue arising from the lack of language referring to States' obligations in the CSR clause, as further explored in the following topic. CFIAs with Chile, Peru, Colombia, Suriname, Ethiopia, Guyana, UAE, Ecuador, and India[483] entail a clause (generally called Provisions on Environment, Labor and Health) determining that: i) nothing in the Agreement shall be interpreted to prevent one party from taking any measure deemed as appropriate to guarantee that investment activities are conducted in accordance with environmental, labor or health legislation; ii) that the Parties recognize that it is not adequate to encourage investment by reducing environmental, labor or health requirements. Most of the Agreements establish that in case of any disputes with respect to the latter provision consultations may be requested[484].

Aside from ensuring States' regulatory space (as described in the expropriation topic), this provision is relevant for it partially brings the notion of the State's duty to protect human rights by not encouraging any investments that violates environmental and human rights (including socio-economic rights) laws.

4.2.5. Dispute Settlement

As already introduced above, dispute settlement in CFIAs is focused on dispute prevention and "operate at three interrelated levels"[485]: i) the Ombudsman or Focal Points, ii) the Joint-Committee, and iii) State-State arbitration, as a last resource mechanism.

Clauses covering these three levels vary from Agreement to Agreement and have considerably evolved over time. In other words, more recent CFIAs contain more detailed provisions on dispute settlement (particularly on State-State arbitration) when compared to the first CFIAs signed.

CFIAs' provisions on **Ombudsman/Focal Point** role are quite similar. They generally provide that the Ombudsman shall provide support to investments and investors in its territory and

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[483] See Art. 22 CFIA with India, Art. 15, CFIA with Colombia, Art. 12, CFIA with Peru, Arts. 17 of CFIAs with Ecuador, Chile, UAE, Suriname, and Guyana.
[484] This is contained in all CFIAs above mentioned, except for the Agreements with Chile and Peru.
[485] BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 232.

particularly to i) follow the Joint Committees' recommendations and interact with the Focal Point of the other Party; ii) adequately address requests, enquires, suggestions or complaints from the other Party or from investors; iii) prevent controversies, in collaboration with relevant governmental authorities and relevant private entities; iv) time and properly render information on regulatory and other issues related to investment; v) report its activities and actions to the Joint Committee.

CFIAs with Guyana and Peru contain two additional provisions on Ombudsman's role. CFIA with Guyana determines that the Ombudsman, aside from supporting investors, is also responsible for the administration and monitoring of the agreement's implementation[486]. The Agreement with Peru when specifying the Ombudsman's role determines that it should exchange information with the Focal Point from the other Party on subjects related to investment to improve investments' climate[487].

With respect to the **Joint Committee,** CFIAs provisions generally converge. The Joint's Committee is responsible for the administration of the Agreement and especially to i) monitor the implementation and execution of the agreement; ii) discuss investment-related issues and disseminate opportunities on investment expansion; iii) coordinate the implementation of the cooperation and facilitation agendas; iv) consult with the private sector and civil society when relevant; v) seek to amicably resolve controversies.

CFIA with Morocco contains an additional provision that is particularly relevant from the socio-economic rights standpoint. It establishes that the Joint Committee's role to monitor implementation of the Agreement includes issues related to corporate social responsibility, preservation of the environment, health and public security, respect for human right, including labor rights, and fight against corruption[488].

CFIAs provisions on **dispute prevention and settlement** are those that vary the most from agreement to agreement. CFIAs with Mozambique, Angola, and Malawi include a more generic provision on dispute prevention and settlement and simply determine that if the Joint Committee is not able to settle an eventual dispute, Parties may resort to State-State arbitration[489].

[486] Art. 19.1., CFIA with Guyana.
[487] Art. 16.7, c), CFIA with Peru.
[488] Art. 14, 4, a), CFIA with Morocco.
[489] Art. 15.6, CFIAs with Mozambique and Angola, Art. 13.6, CFIA with Malawi.

The other Agreements entail detailed provisions on disputes settlement, determining how eventual State-State arbitrations should occur. CFIAs that comprehend such detailed clauses establish that the purpose of the arbitration is to bring the contested measures into conformity with the agreement. However, most of these Agreements determine that the arbitral tribunals may also award compensation for damages caused by the contested measure and the State that receives such compensation shall then transfer it to the relevant investors[490].

Another relevant difference in the detailed dispute settlement provisions from the socio-economic rights perspective concerns the exclusion of certain clauses from arbitration scope. Clauses on CSR, environment, labor, and health are excluded from the arbitration clause by the CFIAs with Chile, Peru, Colombia, Ecuador, Ethiopia, Suriname, Guyana, UAE, and India[491]. CFIAs with Guyana, Suriname, UAE, and India exclude the clause on compliance with domestic law as well.

4.2.6. Preliminary Conclusion: CFIAs Texts

Based on the foregoing Chapters, particularly on the case analysis made in Chapter 2, and the guidance brought by the UN Guiding Principles on Business and Human Rights, OCDE Guidelines for Multinational Corporations and UNCTAD's Framework, one may sustain that an investment agreement enhances protection and respect for socio-economic rights if:

i) It adequately ensures States' **regulatory space**. As demonstrated in the case analysis of Chapter 2 the most problematic investment treaties' provisions, that means the clauses that have mostly allowed investors to contest regulatory measures adopted by States, were prohibition of indirect expropriation, the FET and FPS standards, and the umbrella clause.

ii) It entails clear provisions on **investors obligations** to comply with domestic law and guidance on positive measures to be adopted by investors **on corporate social responsibility.**

iii) It reinforces **home and host States' obligations** to ensure that investors in its territory or jurisdiction comply with national and international laws on socio-

[490] CFISs with Colombia, Mexico, Suriname, Guyana, UAE, Ethiopia, Ecuador, and Morocco.
[491] In this regard, it is important to note that CFIAs with Mexico Morocco do not exclude CSR clause but exclude the clause on security exception from the arbitration clause.

economic rights. This includes adoption of the necessary measures to duly prevent and mitigate violations.

Bearing such criteria in mind, the conclusions on the wording of the CFIA model are the following.

With respect to **regulatory space**, the CFIA model stresses States' regulatory space and, in principle, restricts investor protection to national treatment and most-favored-nation treatment, not including other protections such as indirect expropriation, FET and FPS, or umbrella clauses.

Nonetheless, as seen in the investigation made above, some concerns arise out of the language variation in certain agreements: i) CFIAs that expressly refer to the MFN standard (*e.g.*, CFIA with Chile) might allow the application of other substantive clauses on investors', particularly protection based on investment treaties concluded by other countries; ii) albeit the CFIA model generally excludes FET treatment, the Agreement with India contains a provision that it quite close to such standard and does not explicitly exclude its application; iii) not all CFIAs explicitly exclude indirect expropriation and the wording of such clause in some agreements (*e.g.*, CFIA with Morocco) might allow the application of such protection to investors; iv) although CFIAs do not allow investor-State arbitration, some Agreements permit award for damages (to be then transferred to investors), which deepens the foregoing concerns.

By pointing out the issues above, the intention is not to sustain that an eventual arbitral tribunal could determine that certain regulatory measures taken by a State violated a certain CFIA– this may in fact not occur given that most CFIAs contain exception clauses and other provisions reinforcing States' policy space. The foreign concerns are rather indications that the language of the Agreements could be improved in some points to avoid debate on policy space, having seen that this was one of the main concerns of the Brazilian Government when developing this new investment agreement model and because, as demonstrated in this research, arbitrations are overall cost and time consuming for States even when they end up as winners.

As for provisions on **investors' obligations and corporate social responsibility**, several CFIAs entail clauses establishing investors' protection and all of them comprise CSR clauses. This is certainly a positive aspect of this new investment agreement model, but there are certain aspects that could be refined as well.

First, the inclusion of a specific clause on investors seems to be a welcome development brought by new CFIAs, but some Agreements exclude the clause from the arbitration scope. This

may prevent violations of domestic law by investors to be analyzed by tribunals as counterclaims and may impair that an eventual compensation is calculated considering the effects of such violation (as allowed by some new BITs models). In this regard, the CFIA with Ecuador contains an interesting provision on denial of benefits to investors' that have proven to have incurred in corruption acts. It would be interesting if new CFIAs considered extending such provision at least to investors that have proven to have incurred in gross human rights violations.

Second, CSR clauses, albeit based on the OECD Guidelines for Multinational Enterprises, do not refer to important mechanisms suggested by the Guidelines to ensure an adequate conduct with respect to human rights by multinational corporations. As demonstrated in Chapter 3, enterprises need to take positive actions to ensure that human rights law is not violated by their activities and develop a consistent and strong **human rights policy,** providing for (i) a commitment to respect human rights; (ii) a human right due diligence process; and (iii) a process to enable remediation in case of abuses. CFIAs refer to several obligations that investors must take when performing their activities that are generally related to the enterprises' commitment to respect human rights. The Agreements do not mention however the recommendations that companies create mechanisms for human right's due diligence or processes to enable remediation in case of abuses. This would be particularly important given that such measures are positive actions that investors can take and that are extremely important to prevent and mitigate eventual human rights abuses.

Finally, concerning **home and host-States' obligations**, another aspect of CSR clauses that could be improved and is that it generally refers only to investors' obligations (except for the Agreements with Colombia, Chile, and Peru). This can reduce the impact that CFIAs might have on attracting and ensuring responsible business conduct of investors, given that both host and home States' role in protecting human rights is fundamental for ensuring compliance with human rights by enterprises, as indicated both the UN Guiding Principles and Human Rights and the OECD Guidelines for Multinational Enterprises.

Based on the guidance provided by such instruments, CSR clauses should be directed at investors and at home and host-States. Investors should have the obligation to adopt such standards when conducting their activities, and home and host States should have the obligation to ensure that investors in their territory and jurisdiction follow such standards. Such obligations comprise the adoption of positive measures by investors (*i.e.,* commitment to comply with human rights and

development of due diligence and remedy mechanisms) and by States (*i.e.*, developing effective domestic policy frameworks and mechanisms for monitoring investors' activities).

Finally, it is important to clarify that the soft-law character of CSR clause may in fact impair its effectiveness. On the other hand, it would be difficult to include such a detailed clause with a binding language, particularly because it is based on the OECD Guidelines – a non-binding international instrument. An interesting approach to address this concern may be to ensure that all CFIAs contain: i) clear provisions on compliance with domestic law (which generally comprise most of the commitments brought by CSR clauses) that could be discussed in arbitration; and ii) a CSR clause with soft-law wording but with clear provisions on positive measures that could be taken by States and investors to ensure compliance with human rights.

4.3. INVESTMENT OMBUDSMAN AND NCP IN BRAZIL

In addition to analyzing CFIAs wording, interviews were also conducted to better understand how socio-economic aspects are being considered by the institutional organs created by or related to the CFIAs. This refers to: i) the Ombudsman on Direct Investment, created by CFIAs but then extended to all foreign investors in Brazil; ii) the OECD's National Contact Point, which, albeit not directly related to the CFIAs, seeks to implement the OECD Guidelines- that, as seen above, was the basis for the CSR clauses in the CFIAs.

It should be noted that this research has not the purpose of investigating CFIAs' implementation. Nonetheless, having seen the soft-law language of the CSR clauses, it is important to understand how they are being considered by the Brazilian Government. This is relevant for verifying whether such clauses were simply vague and non-enforceable commitments inserted in the CFIAs or whether they are being deemed as a priority by the institutions related to the CFIAs.

4.3.1. FDI Ombudsman

As mentioned in the CFIAs wording examination above, the Ombudsman was created as the first level of dispute prevention and settlement by the new Brazilian model. In Brazil, the Ombudsman is the Executive Secretariat of the Brazilian Chamber of Foreign Trade (SECAMEX). Since 2019, CAMEX has broadened the role of the Ombudsman. It is now responsible for assisting

all foreign investors in Brazil (and not only those covered by the CFIAs) aside from supporting Brazilian investors abroad[492].

The structure and functions of the FDI Ombudsman (*Ombudsman de Investimentos Diretos – OID*) in Brazil are defined by Decree n. 8.863 of 28th September 2016. Art. 2 of such Decree establishes that the OID role is to support foreign investors, by answering consultation requests (*consultas*) e solving inquiries (*questionamentos*) brought.

Article 4 of Decree n. 8.863/2016 then provides further details on the Ombudsman's role in Brazil. It determines that the OID shall: i) support and assist foreign investors to clarify consultations and recommend solutions to the inquiries received; ii) support and assist Brazilian investors doing business abroad, especially in countries with whom Brazil has CFIAs in force; iii) prepare regular reports of the activities performed by the OID and by the National Committee of Investment (*Comitê Nacional de Investimentos – Coninv*) and, if necessary, propose to CONINV measures related to promotion and facilitation of investments; iv) participate in the CFIAs Joint Committees' meetings; v) interact with Ombudsman/Focal Points from other countries; v) publish investment opportunities and render information about investment policies; vi) propose to the relevant organs or entities of the public administration improvements in the national legislation in cases where this is the recommendation to an inquiry presented by investors; vii) timely and easily provide to investors any relevant public information; viii) when necessary, visit investors in Brazil or abroad; and ix) maintain constant dialogue with the relevant authorities about the issuance of licenses and permits necessary for investments in Brazil.

As seen, the activities perfumed by the Ombudsman in Brazil are focused on supporting foreign investors in Brazil or to Brazilian investors abroad. There is no provision in Decree n. 8.863/2016 referring to the role of the Ombudsman in answering requests and consultations brought by the countries with whom Brazil has CFIAs in force – which is defined as part of the Ombudsman's role by CFIAs[493].

Furthermore, as indicated above, albeit CSR clauses are excluded from the arbitration scope of CFIAs, but, in theory, may be discussed by other governmental institutions created by the CFIA,

[492] More information available is available at the Ministry of Economy's website: <http://oid.economia.gov.br/pt> Access on: June 09, 2019.
[493] See Arts. 5.4, CFIAs with Angola and Mozambique; Art. 4.4, CFIA with Malawi; Art. 15.3, CFIAs with Mexico and Morocco; Arts. 19.2 CFIA with Chile; Art. 2.16.7, CFIA with Peru; Art. 19.2, CFIA with Ecuador; Arts. 19.4, CFIAs with Guyana, Suriname, and UAE; Art. 18.2, CFIA with Ethiopia; Art. 14.4, CFIA with India.

i.e., the Ombudsman and the Joint Committee[494]. In Decree nº 8.863/2016, there is nothing preventing nor encouraging Ombudsman to deal with CSR issues. In theory, if CSR related issues are brought to the OID by means of consultations or inquiries, they will be addressed by such institution.

To better understand how this works in practice, Ricardo Figueiredo de Oliveira, the Division Chief of Foreign Investments Ombudsman in Brazil[495] was interviewed. Ricardo Oliveira is an officer of the Undersecretariat of Foreign Investments, which is part of the Executive Secretariat of the Brazilian Chamber of Foreign Trade. It is important to bear in mind that the Ombudsman also participates in Joint Committees' meetings and, hence, information about activities of the Committees that have already been constituted (*i.e.*, under CFIAs with Angola and Mexico) was also collected.

Ricardo de Oliveira started the interview explaining the Ombudsman role in Brazil. He pointed out that the Ombudsman performs a very different activity from the OECD National Contact Point (explored in the following topic), and that the Ombudsman's role is focused on facilitation of investments and support of foreign investors in Brazil, by answering consultations requests and inquiries. Ricardo recognized that there is a certain interaction between the Ombudsman's and NCP's activities, and he brought up his participation in OECD's investments meetings, but still stressed that the scope of action of the two organs considerably differ.

As for the investors' consultations and inquiries, Ricardo de Oliveira indicated that until now, 12 inquiries have already been resolved in the following areas: 5 related to tax issues, 1 about administrative proceedings and 6 on other diverse topics. Regarding consultations, 11 have already been answered: 5 about administrative issues, 3 on financial matters, 1 on labor law, 1 on tax law, and 1 on other diverse issues.

As seen, socio-economic rights issues are not commonly brought by investors to the Ombudsman, but there has already been one consultation about labor laws – which is comprised by the notion of social rights. Ricardo informed that when consultations or inquiries involve issues

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[494] This is also indicated by Michelle Ratton and Fábio Morosini. See BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio. *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (CFIAs)*. In. BADIN, Michelle Ratton Sanchez; MOROSINI, Fabio; (Ed.). *Reconceptualizing International Investment Law from the Global South*. 1st Ed. New York: Cambridge University Press, 2018, p. 231.

[495] As described in the methodology section above, interview was by videoconference on June 02nd, 2021. Interview guides used during the videoconferences are attached to this research in Appendix II.

related to socio-economic rights, other organs are consulted. For example, in this consultation related to labor laws, the Secretariat of Labor (also part of the Ministry of Economy) assisted in the consultation answer.

He also argued that, in his understanding, the idea of protection and respect for socio-economic rights is generally not applicable to investors' consultations and inquiries. According to him, the Ombudsman's objective is to assist investors, differently from the OECD NCP, which has the purpose of supporting communities/people affected by multinational corporations' activities.

Notwithstanding that, as mentioned during the interview, eventual issues involving investment cooperation, such as the harmonization of best practices (including from a socio-economic rights perspective) for investors in a specific sector, could be discussed in the Joint Committees – albeit this has not occurred yet, given that the Committees were recently constituted[496]. Furthermore, the Joint Committee could discuss and try to solve any problems involving protection of socio-economic rights with respect to investors' activities.

With respect to eventual communications with States or Focal Points from other countries, Ricardo de Oliveira explained that the Ombudsman's communicates directly with the investor, never with the home-State. According to him, the only situation in which the Ombudsman could contact the home-State is when a Brazilian investor has any sort of problems in the country where it is investing, and the Ombudsman from such State is not proving adequate support – he stressed, however, that this has not taken place yet.

[496] As informed by Ricardo Oliveira, the first meetings of the Angola and Mexico Committees have occurred to develop the internal regulations for the committees' functioning.

4.3.2. OECD National Contact Point

The Brazilian National Contact Point for Responsible Business Conduct[497] (NCP) is a collegiate body, coordinated by the Ministry of Economy[498], responsible for promoting the OECD Guidelines for Multinational Enterprises (Guidelines) in Brazil[499].

The current constitution of the NCP was established by Decree n. 9.874 of 27th June 2019. According to Article 2 of the referred Decree, the NCP's role is to: i) act as an instance for governance and advise for the promotion and implementation of the OECD Guidelines; ii) raise awareness and encourage the implementation of the OECD Guidelines for Multinational Corporations by conducting activities that involve representatives of the business community, labor organizations, civil society, and NGOs; iii) follow the practical application of the OECD Guidelines for Multinational Corporations, by scheduling meetings with representatives of the business community and civil society, to identify potential risks related to responsible business conduct and discuss actions and orientations aligned with OECD's Guidelines; iv) analyze the allegations of non-compliance with OECD guidelines[500]; v) cooperate with National Contact Points

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[497] The term "responsible business conduct" is commonly used by OECD, while "corporate social responsibility" is generally used by the UN. In theory, the two terms refer to the same obligations. The NCP however indicates in its Procedure Manual that CSR is sometimes associated with "philanthropic actions": "1.6. Unlike the concept of Corporate Social Responsibility (often associated with philanthropic actions unconnected with the company's operations), RBC is broader as it emphasizes the integration of responsible practices into internal operations and all their business relationships and supply chains". See BRAZILIAN NATIONAL CONTACT POINT (PONTO DE CONTATO NACIONAL). Procedure Manual for Specific Instances. Brasília: PCN, 2020. Available at: https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/camex/pcn/produtos/outros/procedure-manual-ncp-brazil.pdf. Access on 15th June 2021.
In the present research, eventual differences between the two terms (corporate social responsibility and responsible business conduct) were not analyzed, given that this is a complex debate that demands further investigation. Moreover, considering that the language used in CSR clauses in CFIAs is similar to OECD's Guidelines (although the names of the clauses refer to CSR), both terms are used here as synonyms. In other words, CSR is not used in this research to indicate activities focused only on philanthropic actions, but rather on the incorporation of responsible business conduct standards into investors' activities.
Notwithstanding that, considering the NCP itself points out in its Procedure Manual that CSR is sometimes associated with philanthropic actions, one may conclude that the Brazilian Government should endeavor better efforts to harmonize the language used in CFIAs with the one used by other related organs.

[498] Article 3, *caput* and § 2º, Decree n. 9.874/2019.

[499] Although not a Member of the OECD, it is an active non-member State and is seeking its accession. During the interviews, the Undersecretariat of Foreign Investment also mentioned that the implementation of the OECD Guidelines in Brazil is important for expanding the participation of Brazilian corporations abroad. For more information on Brazil's participation in OECD see OECD. *Brazil and the OECD*. Available at: <https://www.oecd.org/brazil/brazil-and-oecd.htm>. Access on 15th June 2021.

[500] This corresponds to the specific instances' procedures. For more information: BRAZILIAN NATIONAL CONTACT POINT (PONTO DE CONTATO NACIONAL). Procedure Manual for Specific Instances. Brasília: PCN, 2020. Available at: https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/camex/pcn/produtos/outros/procedure-manual-ncp-brazil.pdf. Access on 15th June 2021.

in other countries with respect to subjects covered by the OECD Guidelines; vi) follow OECD's discussions on the implementation of the Guidelines and eventual supplementary negotiations and, adopt, when applicable, the instruments that Brazil accepts.

In summary, activities performed by NCP correspond to ensuring an effective implementation of the Guidelines in Brazil. This should be done mainly by raising awareness on the OECD Guidelines, establishing an effective communication with the private sector and civil society, and conducting specific instances proceedings, where the NCP receives allegations from interested parties on violations of the Guidelines by multinational corporations operating in Brazil.

As already clarified above, the NCP bears no direct relation to the CFIAs. However, its activities are extremely relevant for the implementation and CSR clauses in Brazil, having seen that such clauses were developed based on the OECD Guidelines (and some of them even refer to such instrument). It was no coincidence that the Ombudsman's representative, during his interview, stressed several times that monitoring of activities of multinational corporations from the socio-economic rights perspective was part of the NCP's role.

Therefore, to understand how compliance with socio-economic rights by foreign investors (from countries with whom Brazil has CFIAs or not) is handled by the Brazilian Government, interviews with the following representatives of the NCP from the Ministry of Economy[501] were conducted: i) Marcio Luiz de Freitas Naves de Lima, the Undersecretariat of Foreign Investments; and ii) Hevellyn Menezes Albres, General Coordinator of Investment Attraction[502]. Both Márcio Lima and Hevellyn Albres are officers of the Undersecretariat of Foreign Investment, which, by its part, is under the structure of the Executive-Secretariat of the Brazilian Chamber of Foreign Trade.

The main purpose of the interview was to understand if and how the NCP is actively ensuring the implementation of the Guidelines in Brazil, in addition to receiving and conducting specific instances proceedings – a procedure which is already detailly regulated[503].

The first question asked to the representatives of the NCP was what was, in their view, the biggest challenge in implementing OECD Guidelines in Brazil. From their perspective, the main

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[501] As indicated by Article 3, § 2º, Decree n. 9.874/2019, the Undersecretariat of Foreign Investment (Marcio Luiz de Freitas Naves de Lima) is responsible for coordinating the NCP.

[502] As described in the methodology section above, interview was by videoconference on June 02nd, 2021. Interview guides used during the videoconferences are attached to this research in Appendix II.

[503] See BRAZILIAN NATIONAL CONTACT POINT (PONTO DE CONTATO NACIONAL). Procedure Manual for Specific Instances. Brasília: PCN, 2020. Available at: https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/camex/pcn/produtos/outros/procedure-manual-ncp-brazil.pdf. Access on 15th June 2021.

challenge is to conciliate the numerous and time-consuming activities necessary for implementing the OECD Guidelines under the current structure. The NCP is responsible for promoting the Guidelines, conduction all specific instances proceedings[504], coordinating policy coherence, and performing several activities necessary for maintaining a relationship with OECD. According to the officers interviewed, this is a complaint of several NCPs around the world.

When asked about which activities are conducted by the NCP to promote the OECD Guidelines in Brazil, Márcio de Lima and Hevellyn Albres indicated five different fields of action: i) the creation and maintenance of a website with instructions on the Guidelines; ii) promoting and participating in national and international events to raise awareness on the Guidelines and disseminate the NCP's work; iii) establishing partnerships to disseminate the Guidelines and NCP; iv) disseminating the Guidelines within the Government, particularly in the National Committee of Investment (CONINV); v) maintaining an effective relationship with OECD.

The representatives of the NCP have informed that they do not have a specific mandate or sufficient resources for directly conducting risk assessment or due diligence activities, but that they take indirect measures to actively identify risks involving foreign investors. The participation of Brazil in the Responsible Business Conduct in Latin America and the Caribbean Project is an example. This is a project promoted jointly by OECD, UN, and ILO to review policies of responsible business conduct in the participating countries, evaluate due diligence measures in high-risk sectors (*e.g.*, agrarian, textile, and financial sector), and then recommend measures to be adopted by corporations to address the identified risks[505].

Another example is the communication established with other organs involved in international transactions or big investment projects. The OECD Guidelines, for example, were included as due diligence criteria for obtaining the Export Credit Insurance granted by the Federal Government[506].

Marcio Lima also mentioned that the Undersecretariat of Foreign Investments is seeking to expand and deepen communications with other organs (*e.g.*, the Ombudsman for FDI and the

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[504] According to the officers interviewed, Brazilian NCP is one of the 5 NCPs in the world that has the biggest number of specific instances.

[505] For more information see: OECD. *Promoting Responsible Business Conduct in Latin America and the Caribbean*. Available at: https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/camex/financiamento-ao-comercio-exterior/conformidade-no-sce. Access on 15th June 2021.

[506] For more information, visit: Ministry of Economy. *Conformidade no SCE*. Available at: https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/camex/financiamento-ao-comercio-exterior/conformidade-no-sce. Access on 15th June 2021.

Brazilian Trade and Investment Promotion Agency - *Agência Brasileira de Promoção de Exportações e Investimentos – APEX*), to ensure that OECD Guidelines are used as criteria for due diligence or other risk management proceedings when applicable.

When asked about current interactions between the NCP and the Ombudsman, the representatives of NCP explained that, *a priori*, the two organs function in a separate manner. Until now, there are certain limited activities (mostly promotion ones) that are jointly performed by the two structures. An example mentioned were roadshows conducted in 2019 to disseminate the Ombudsman and NCP mechanisms. The NCP representatives have also mentioned that there is a coordination between the two organs by means of the focal points network of the Ombudsman, a network of several governmental entities that compose the Ombudsman in Brazil[507], and that coordination is also facilitated by the fact that the two organs are under the same organ (the Executive-Secretariat of the Brazilian Chamber of Foreign Trade). According to them, there is an intention to intensity communication and collaboration between the Ombudsman and NCP in the next months.

Finally, NCP clarified that the Government is currently discussing a National Plan for Responsible Business Conduct (*Plano Nacional de Ação para Conduta Empresarial Responsável*), which is focused on ensuring and accelerating the implementation of the OECD Guidelines particularly by means of proposing new public policies in Brazil[508]. The Plan should be concluded by August 2022.

4.3.3. Preliminary Conclusion: Ombudsman and NCPs Roles

Based on all information collected during the interviews and on the Decrees regulating the Ombudsman's and NCP's role in Brazil, one may conclude the following.

First, as for the **Ombudsman's** role in Brazil, it does not completely reflect the CFIAs wording. The Ombudsman's activities in Brazil are mostly aimed at assisting investors in a reactive manner – that means, after presentation of an investor request. CFIAs, however, generally establish that the Ombudsman shall respond to consultations and inquiries from investors and States[509].

[507] As provided by Article 3, IV, of Decree n. 8.863/2016.
[508] The Plan was approved by means of CONINV Resolution n. 2, of 22nd December 2020.
[509] See Arts. 5.4 CFIAs with Mozambique and Angola, Art. 4.4 CFIA with Malawi, Art. 17.4 CFIA with Colombia, Art. 16.7 CFIA with Peru, Art. 19.4 CFIAs with Chile, Guyana, Suriname, UAE, Art. 19.2 CFIA with Ecuador, Art. 15.4 CFIAs with Mexico and Morocco, Art. 18.2 CFIA with Ethiopia, Art. 14.4 CFIA with India.

Moreover, as described above, the Ombudsman is the first level of dispute prevention and settlement and, hence, is generally responsible for preventing disputes[510]. CSR clauses are part of the CFIAs system on dispute mitigation and prevention and hence should be considered during the Ombudsman's activities.

From the interview, it was possible to observe that the Ombudsman in Brazil generally understands that corporate social responsibility issues are not relevant for its work and would be more related to the NCP's activities. CFIAs, however, entail a CSR clause based on the OECD Guidelines. Therefore, the Ombudsman (which is the closest channel to foreign investors in the host-States) should seek to conduct further activities (for instance, providing guidance to investors in Brazil on CSR) to enhance and encourage its implementation- this applies both to foreign investors in Brazil and Brazilian investors abroad[511]. If this is not considered a priority by all institutions created by CFIAs, CSR clauses may end up being dead letter.

Second, the **NCP** has been conducting an important work in Brazil to promote the OECD Guidelines, but based on the information collected, it was possible to observe that few active and positive actions are taken by the organ. The NCP is generally focused on specific instances proceedings in Brazil and on certain projects conducted along with the OECD. Limited actions (mostly events) are taken to promote the application of the OECD Guidelines by multinational corporations in Brazil. These activities are all of great importance to the Guidelines' implementation but may not be sufficient to actually encourage observance of responsible business conduct principles in Brazil's territory and jurisdiction.

As mentioned by the NCP's representatives in the interview, this most likely occurs because the NCP is responsible for taking several time-consuming measures and does not have a sufficient large personnel structure for performing all necessary activities.

Finally, based on the information collected, one may conclude that **coordination between the two organs should be improved**. Albeit some promotion activities have already been jointly conducted, the Ombudsman and NCP are two separate structures which do not interact much to

[510] In this regard, it should be recalled that certain CFIAs establish further roles for the Ombudsman. As already described above, CFIA with Guyana determines that the Ombudsman, aside from supporting investors, is also responsible for the administration and monitoring of the agreement's implementation. The Agreement with Peru when specifying the Ombudsman's role determines that it should exchange information with the Focal Point from the other Party on subjects related to investment to improve investments' climate.

[511] Some CFIAs even stress host and home-States responsibility for encouraging corporate social responsibly. See CFIA with Colombia, Art. 13.

ensure a responsible business conduct by foreign investors in Brazil or Brazilian investors abroad. The Ombudsman's representative stressed several times during the interview that his work bears no direct relation to the NCP and is solely promoting at assisting investors. This should be reconsidered having seen that CSR clauses compose the CFIAs' strategy for preventing disputes and the Ombudsman is part of this dispute prevention system.

CONCLUSION

Traditional investment treaties models have been subject to strong criticism in the last decade, including their real capacity of actually contributing to an increase in FDI inflows and boosting development. As pointed out in this research, this is in fact not a guarantee offered by investment treaties, since development requires redistribution of wealth and protection of social and environmental rights in the host countries. Therefore, although the celebration of investment agreements and the presence of foreign investors may in fact foster development, other factors need to be considered in its design and implementation to ensure that they will contribute to it – especially if the purpose of the treaty is to promote sustainable development.

Socio-economic rights are certainly one of the other factors that should be considered, having seen that their protection is constantly affected by corporations' activities. In Brazil, socio-economic rights (which are converted by human rights treaties) are incorporated into the legal regime in the same level as constitutional amendments. Hence, their protection and promotion are deemed as fundamental for the Brazilian State.

As observed in the investigations conducted in this research, protection and respect for socio-economic rights bear close relation to investment treaties for two main reasons: **i)** measures taken by States to ensure their protection have already been questioned by investor-State tribunals, particularly by certain protections granted to investors (*i.e.*, FET and FPS standards, indirect expropriation, and the umbrella clause); **ii)** investment treaties are the point of entry for multinational corporations in States and, hence, are an important mechanism for ensuring respect for socio-economic rights by foreign investors.

Based on all investigations made in this research, one may conclude that for ensuring protection and respect for socio-economic rights investment treaties should: **i)** safeguard States' regulatory space, that means securing that States can take the necessary enforcement measures and provide the relevant services for effective implementation of such rights; **ii)** ensure that investors have the obligation to respect (at least) domestic law, and are duly encouraged to follow the best standards on corporate social responsibility – which includes the adoption of positive measures for preventing and mitigating violations; **iii)** reinforce home and host States' obligations to ensure that investors in its territory or jurisdiction comply with national and international laws on socio-economic rights and that violations are duly prevented and mitigated.

The CFIA model was evaluated based on such criteria for evaluating whether it enhances protection and respect for socio-economic rights and the conclusions were the following.

First, with respect to **regulatory space**, the CFIA model stresses States' regulatory space and, in principle, restricts investor protection to national treatment and most-favored-nation treatment. However, the wording of certain agreements raise concerns because: **i)** there is a variation in the language of MFN clauses, which might allow application of further protections to investors; **ii)** the provisions on prohibition of expropriation also vary and raise doubts as to whether indirect expropriation is excluded from all agreements; **iii)** the Indian model entails a provision similar to FET, which may generate debate on Brazil' intention to exclude such standard from all CFIAs; **iv)** some CFIAs allow for award for damages in the case of State-State arbitration, which is not a problem in itself but deepens the foregoing concerns.

As for provisions on **investors' obligations and corporate social responsibility**, several CFIAs entail clauses establishing investors' protection and all of them comprise CSR clauses. The real effectiveness of such provisions, however, comes into question mainly because: **i)** such provisions are excluded from the arbitration scope by several CFIAs; **ii)** albeit CSR clauses are based on the OECD Guidelines, some important mechanisms suggested by the Guidelines are not comprised by the clauses (*e.g.*, human right's due diligence, creation of grievance mechanisms, etc.). The soft-law character of CSR clause may also impair its effectiveness, but it would be difficult to include such a detailed clause with a binding language, particularly because such clause is based on the OECD Guidelines (a non-binding international instrument).

Concerning **home and host-States' obligations**, CSR clause generally refers only to investors' obligations (except for the Agreements with Colombia, Chile, and Peru). This can reduce the impact that CFIAs might have on attracting and ensuring responsible business conduct of investors, having seen that the business and human rights agenda needs to be promoted by States and corporations jointly.

Furthermore, as observed in the interviews conducted, the CSR clauses do not seem to be a priority of the Brazilian Government nowadays. The Ombudsman's representative interviewed stressed that the institution's main role is to support investors, and not directly verifying or encouraging responsible business conduct standards.

The OECD's NCP, on the other hand, has been working on important measures to encourage the observance of the OECD Guidelines in Brazil, but with very limited resources to ensure conduction of all activities required by the Guidelines.

There seems also to be a weak coordination between the two organs. Although some promotion activities have already been jointly conducted, the Ombudsman and NCP do not interact much to ensure a responsible business conduct by foreign investors in Brazil or Brazilian investors abroad. The Ombudsman's representative mentioned several times during the interview that his work bears no direct relation to the NCP and is solely promoting at assisting investors.

If Brazil's priority is to promote sustainable development by means of the presence of foreign investors (as indicated in the CFIAs preambles), then this needs to be the focus of all measures adopted: from to design of the text to the agreements' implementation. Including provisions such as CSR clauses is certainly relevant, but this needs to be remined and considered by the governments after the agreements' signature as well.

In light of the foregoing, one may conclude that CFIA model may be a good mechanism (and is certainly better than original BITs) for enhancing protection and respect for socio-economic rights, but some concerns need to be addressed for ensuring that all CFIAs signed are actually capable of promoting protection and respect for socio-economic rights. All CFIAs should: **i)** be in fact designed to avoid and prevent disputes concerning States' regulatory space; **ii)** provide for clear investors' obligations; **iii)** entail clear home and host-State's obligations to promote protection and respect for socio-economic rights. If these points are not properly considered, there is a risk that the CFIAs cause similar problems than those generated by BITs and some of its provisions (*e.g.*, CSR clauses) end up as dead letter.

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APPENDIX I

Cases Decided in Favor of State				
Number	**Year of Initiation**	**Short Case Name**	**Explicit Reference to "Human Rights"?**	**Debate on Socio-Economic Rights?**
1	2018	Almasryia v. Kuwait	No	No
2	2018	Doutremepuich v. Mauritius	No	No
3	2018	Seo v. Korea	No	No
4	2017	Cementos v. Cuba	Award not available	Award not available
5	2017	CMC v. Mozambique	No	No
6	2016	Albacora v. Ecuador	Award not available	Award not available
7	2016	Deripaska v. Montenegro	Award not available	Award not available
8	2016	Evrobalt and Kompozit v. Moldova	Award not available	Award not available

9	2016	Heemsen v. Venezuela	Yes	No Reference to human rights is only made with respect to the discussion on the possibility of an individual bringing a claim against a State under international law.
10	2016	Italba v. Uruguay	No	No
11	2015	Álvarez y Marín Corporación and others v. Panama	No	No
12	2015	Anglia v. Czech Republic	Yes	No Reference to human rights is simply made with respect to certain cases which established that arbitral awards are considered property under international law.
13	2015	Belegging-Maatschappij “Far East” v. Austria	Award not available	Award not available
14	2015	Belenergia v. Italy	Yes	No Reference to human rights is simply made to the European Convention on Human Rights on retroactivity issues. Health is mentioned as a valid exception under public interest goals as well but there is no debate on the right to health.
15	2015	Busta v. Czech Republic	Yes	No Reference to human rights is made with respect to the jurisprudence of the European Court of Human Rights on the possibility of conducting parallel arbitration proceedings. There are references to safety and health of investor's warehouse, which was allegedly expropriated by the State, but there is debate neither on public purpose exception nor on right to health.
16	2015	Capital Financial Holdings v. Cameroon	No	No

17	2015	Clorox v. Venezuela	No	No Health (*salud*) is once mentioned in the arguments presented by Venezuela, which claims that the investor would have compromised the health of its workers, but the argument is not developed and there is no discussion on the right to health.
18	2015	Cortec Mining v. Kenya	No	No Water is mentioned in the description of certain facts (as claimants provided, for instance, water pumps at community water points) but there is no debate on the right to water.
19	2015	Fin.Co.Ge.Ro v. Romania	Award not available	Award not available
20	2015	García Armas and others v. Venezuela	No	No
21	2015	IMFA v. Indonesia	Award not available	Award not available
22	2015	Mağdenli v. Kazakhstan	Award not available	Award not available
23	2015	Medusa v. Montenegro	Award not available	Award not available
24	2015	MMEA and AHSI v. Senegal	No	No
25	2015	Rawat v. Mauritius	No	No

26	2015	SGRF v. Bulgaria	Award not available	Award not available
27	2015	Stadtwerke München and others v. Spain	No	No
28	2015	Way2B v. Libya	Award not available	Award not available
29	2014	A11Y v. Czech Republic	No	No The State adopted regulatory measures which provided subsidies to persons with health impairment. Claimant alleged that the adoption of such measures constituted an indirect expropriation. There was however no debate on the duty of the State to promote the right to health and tribunal concluded that there was no expropriation for other reasons.
30	2014	Aleksandrowicz and Częścik v. Cyprus	Yes	No Reference to human rights is simply made to art. 1 of the European Convention on Human Rights and the protection of investment against uncompensated expropriations.
31	2014	Alpiq v. Romania	Award not available	Award not available
32	2014	Anglo American v. Venezuela	No	No
33	2014	Ansung Housing v. China	No	No
34	2014	Aven and others v. Costa Rica	Yes	

				No Health and water are mentioned but under the debate of environmental concerns.
35	2014	Ballantine v. Dominican Republic	No	No There is discussion on the threats posed to water by the investment, but the effects of such risks were environmental (impact on the ecosystem and biodiversity). There is no debate on the right to access to water.
36	2014	Besserglik v. Mozambique	No	No
37	2014	Blusun v. Italy	Yes	No Reference to human rights is simply made to indicate that human rights courts (among others) have been applying the proportionality criterium.
38	2014	CEAC v. Montenegro	Yes	No Reference to human rights is made only to indicate a case filed before the European Court of Human Rights and related to the present dispute.
39	2014	Corona Materials v. Dominican Republic	Yes	No Reference to human rights is made only to the Inter-American Convention on Human Rights and the obligation to respond to all petitions received by the concerned parties. There is discussion on eventual impacts of investors' project in water in the region, but the debate is related to environmental concerns.
40	2014	EuroGas and Belmont v. Slovakia	No	No
41	2014	Krederi v. Ukraine	Yes.	No Reference to human rights is made to a decision of the European Court of Human Rights determining that deprivation of property as a result of technical breach of the public body's internal decision-making process is contrary to art. 1 of the European Convention on HR.

42	2014	LDA v. India	No.	No
43	2014	Saab v. Cyprus	Award not available	Award not available
44	2014	Tallinn v. Estonia	No	No There is a discussion on tariffs on water, since the investor is a company in the water/sewage sector, but there is no debate on the right to access to water whatsoever.
45	2014	Uzan v. Turkey	Award not available	Award not available
46	2014	WNC v. Czech Republic	No	No
47	2013	Achmea v. Slovakia (II)	Yes.	No Reference is made only to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the ban on profits. Further, albeit the sector involved is the health insurance one, there is no debate on the right to health.
48	2013	Alghanim v. Jordan	No	No
49	2013	Almås v. Poland	No	No
50	2013	Antaris and Göde v. Czech Republic	No	No

51	2013	Eli Lilly v. Canada	No	No
52	2013	Erhas and others v. Turkmenistan	Award not available	Award not available
53	2013	Europa Nova v. Czechia	No	No
54	2013	EVN v. Bulgaria	Award not available	Award not available
55	2013	I.C.W. v. Czechia	No	No
56	2013	Isolux v. Spain	No	No
57	2013	JSW Solar and Wirtgen v. Czech Republic	No	No
58	2013	Juvel and Bithell v. Poland	Award not available	Award not available
59	2013	KBR v. Mexico	Award not available	Award not available

60	2013	Marfin v. Cyprus	Yes	No Reference to human rights is only made in the context of reference to the ICJ's decision on Nicaragua v. United States case.
61	2013	Photovoltaik Knopf Betriebs v. The Czech Republic	No	No
62	2013	Poštová banka and Istrokapital v. Greece	No	No
63	2013	RECOFI v. Viet Nam	Award not available	Award not available
64	2013	Seventhsun and others v. Poland	Award not available	Award not available
65	2013	Spentex v. Uzbekistan	Award not available	Award not available
66	2013	Transglobal v. Panama	No	No
67	2013	Tvornica Šećera v. Serbia	Award not available	Award not available
68	2013	van Riet v. Croatia	Award not available	Award not available

69	2013	Voltaic Network v. Czechia	No	No
70	2012	Accession Mezzanine v. Hungary	No	No
71	2012	Allawi v. Pakistan	Award not available	Award not available
72	2012	Apotex v. USA (III)	Yes	Yes There is discussion on certain measures taken by Respondent in order to protect the health of its population.
73	2012	Blue Bank v. Venezuela	No	No
74	2012	Bogdanov v. Moldova (IV)	Yes	No Reference is made to a previous decision of the European Court of Human Rights, which concluded that Respondent had breached its obligations under international law.
75	2012	Charanne and Construction Investments v. Spain	Yes	No Reference is made to a claim submitted by Claimant to the European Court of Human Rights in parallel to the relevant arbitration.
76	2012	Churchill Mining and Planet Mining v. Indonesia	No	No
77	2012	Emmis v. Hungary	No	No

78	2012	Enkev Beheer v. Poland	Yes	No Reference is made to art. 1 of Protocol 1 of the European Convention of Human Rights which rules on lawful deprivation (the Tribunal compares this provision with the prohibition of expropriation).
79	2012	Fabrica de Vidrios v. Venezuela	No	No Respondent alleged certain violations of claimant of the law on working conditions, but the tribunal declared that it had no jurisdiction to judge upon the dispute. Therefore, there is no debate on socio-economic rights.
80	2012	Grupo Francisco v. Equatorial Guinea	No	No
81	2012	Guardian Fiduciary v. Macedonia	No	No
82	2012	IGB v. Spain	No	No
83	2012	Lao Holdings v. Laos (I)	No	No
84	2012	Mercer v. Canada	No	No
85	2012	Orascom v. Algeria	No	No
86	2012	Ping An v. Belgium	Yes	No Reference to human rights is contained in a passage of the Mavrommatis decision mentioned in the award and refers to retroactivity issues.

87	2012	Progas Energy v. Pakistan	Award not available	Award not available
88	2012	Sana Consulting v. Russia	Award not available	Award not available
89	2012	Sanum Investments v. Laos (I)	No	No
90	2012	State Enterprise v. Moldova	No	No
91	2012	Supervision v. Costa Rica	No	No
92	2012	Transban v. Venezuela	No	No
93	2012	Veolia v. Egypt	Award not available	Award not available
94	2011	Al Tamimi v. Oman	Yes	No Reference to human rights is made only to contend that a case brought by Claimant should not be taken into consideration as it refers to moral damages awarded in the context of human rights violations.
95	2011	Burimi v. Albania	Yes	No Reference to human rights is made only in a letter sent to Respondent which mentioned the European Court of Human Rights.

96	2011	Detroit International v. Canada	No	No
97	2011	Dialasie v. Viet Nam	Award not available	Award not available
98	2011	Fraport v. Philippines (II)	No	No The "Boundary Waters Treaty" is mentioned several times but there is no debate on the right to water.
99	2011	Gambrinus v. Venezuela	No	No
100	2011	Highbury International v. Venezuela	No	No
101	2011	Levy and Gremcitel v. Peru	No	No
102	2011	Mamidoil v. Albania	Yes	No Reference is made to a case filed by Claimant before the European Court of Human Rights to complain about arbitrariness of and discrimination by Albanian court decisions.
103	2011	Mesa Power v. Canada	No	No Public health is mentioned to stress the importance of permits but there is no debate on the right to health whatsoever.
104	2011	National Gas v. Egypt	No	No

105	2011	Nova Scotia Power v. Venezuela (II)	No	No
106	2011	Philip Morris v. Australia	No	No There is a debate on Respondent's Tobacco Control Act and the introduction of plain packaging but this was not debated by the Tribunal, which concluded that it was precluded from exercising jurisdiction over the dispute.
107	2011	Rafat v. Indonesia	No	No
108	2011	Renco v. Peru (I)	No	No
109	2011	Ryan and others v. Poland	No	No
110	2011	Tulip Real Estate v. Turkey	No	No
111	2011	Vigotop v. Hungary	No	No
112	2010	Allard v. Barbados	No	No There is a factual dispute on whether there was such a degradation of the environment as to render the operation as an ecotourism attraction (investment) impossible or financially unsustainable justifying closure. The aspects discussed are, thus, environmental.

113	2010	Beijing Shougang and others v. Mongolia	No	No Environmental and socio concerns were brought by Respondent as a justification for the alleged expropriation, but the Tribunal concluded that it lacked jurisdiction. Therefore, this award was not analyzed.
114	2010	Convial Callao v. Peru	No	No
115	2010	De Levi v. Peru	No	No
116	2010	Dede v. Romania	No	No
117	2010	İçkale v. Turkmenistan	No	No
118	2010	Kılıç v. Turkmenistan	Yes	No. Reference to human rights is made with respect to the lack of due process and fair trials in Turkmenistan.
119	2010	McKenzie v. Viet Nam	Award not available	Award not available
120	2010	Metal-Tech v. Uzbekistan	No	No
121	2010	Minnotte and Lewis v. Poland	No	"Right to health" or "access to water" not found. "Health" mentioned several times in the award, however, since claimant produces blood plasma.

122	2010	Philip Morris v. Uruguay	Yes.	Yes Case refers to the "human rights to health".
123	2010	RSM v. Grenada	No	No
124	2010	SCB v. Tanzania	No	No
125	2010	ST-AD v. Bulgaria	Yes	No. Reference to human rights is made only with respect to the prohibition on expropriation.
126	2009	Apotex v. USA (II)	No	No. "Right to health" or "access to water" not found. "Imminent hazard to public health" is mentioned only to give examples of situations under which Abbreviated New Drug Application could be denied.
127	2009	Cesare Galdabini v. Russia	Award not available	Award not available
128	2009	Commerce Group v. El Salvador	No	No
129	2009	ECE v. Czech Republic	No	No
130	2009	EURAM Bank v. Slovakia	Yes	No Reference to human rights is made only to compare the protection granted by the European Court of Human Rights to BIT's protection against expropriation.

131	2009	Global Trading v. Ukraine	No	No
132	2009	H&H v. Egypt	No	No
133	2009	Iberdrola Energía v. Guatemala (I)	No	No
134	2009	ICS v. Argentina (I)	Yes	No Reference to human rights is made only with respect to prescription of claims and consent issues.
135	2009	KT Asia v. Kazakhstan	Yes	No Reference to human rights is made only to violations of due process and arbitrariness issues.
136	2009	Pac Rim v. El Salvador	Yes	No Rights to health, water are food are mentioned but only as examples of human rights to be protected by the State.
137	2009	Reinhard Unglaube v. Costa Rica	No	No Health is mentioned but only as an example of public purpose in another case cited.
138	2009	Ulysseas v. Ecuador	No	No
139	2009	Vöcklinghaus v. Czech Republic	No	No
140	2008	Alapli v. Turkey	No	No

141	2008	Alps Finance v. Slovakia	No	No
142	2008	Apotex v.USA (I)	No	No
143	2008	Austrian Airlines v. Slovakia	No	No
144	2008	Bosh v. Ukraine	Yes	No Reference is simply made to another request filed by investor before the European Court of Human Rights.
145	2008	Caratube v. Kazakhstan	No	No
146	2008	GEA v. Ukraine	No	No
147	2008	HICEE v. Slovakia	No	No
148	2008	InterTrade v. Czech Republic	No	No
149	2008	Malicorp v. Egypt	No	No
150	2008	Mercuria Energy v. Poland	Award not available	Award not available

151	2008	Murphy v. Ecuador (I)	No	No
152	2008	Nova Scotia Power v. Venezuela (I)	No	No
153	2008	TRACO v. Poland	Award not available	Award not available
154	2008	Turkcell v. Iran	Award not available	Award not available
155	2007	Adria Beteiligungs v. Croatia	Award not available	Award not available
156	2007	AES v. Hungary (II)	No	No
157	2007	Anderson v. Costa Rica	No	No
158	2007	CIM v. Ethiopia	Award not available	Award not available
159	2007	Electrabel v. Hungary	No	No
160	2007	Europe Cement v. Turkey	Yes	

				No Reference is only made to simultaneous claim brought before the European Court of Human Rights.
161	2007	Frontier v. Czech Republic	No	No
162	2007	Gallo v. Canada	No	No
163	2007	Hamester v. Ghana	Yes	No Reference to human rights is made only in a passage of the ICJ Case Nicaragua v. USA cited in the award.
164	2007	Invesmart v. Czech Republic	No	No
165	2007	Kaliningrad v. Lithuania	Award not available	Award not available
166	2007	Liman Caspian Oil v. Kazakhstan	No	No
167	2007	Pantechniki v. Albania	No	No
168	2007	Saba Fakes v. Turkey	No	No
169	2007	Toto v. Lebanon	No	No
170	2007	TS Investment v. Armenia	Award not available	Award not available

171	2006	Azpetrol v. Azerbaijan	Yes	No Reference to human rights is made only in a letter which mentions the possibility of challenging the award before the European Court of Human Rights.
172	2006	Cementownia v. Turkey (I)	Yes	No Reference is made only to a simultaneous claim filed before the European Court of Human Rights.
173	2006	Libananco v. Turkey	Yes	No Reference to human rights is only made in a witness statement which refers to a case of the European Court of Human Rights.
174	2006	Merrill & Ring v. Canada	Yes	No Reference to human rights is made only to refer to the minimum standard of treatment (of investors).
175	2006	Nations Energy v. Panama	Yes	No Reference is made only to the Inter-American Convention on Human Rights and nationality issues.
176	2006	Oostergetel v. Slovakia	Yes	No Reference is made only to access to justice and due process of law.
177	2006	Phoenix Action v. Czech Republic	Yes	No Reference is made to general and "most fundamental rules" of human rights (i.e. prohibition of torture, genocide, slavery, trafficking of human organs).
178	2006	Romak v. Uzbekistan	No	No
179	2006	Roussalis v. Romania	Yes	Yes Respondent alleges that Claimant breached health and safety laws, and there is a debate on food regulation.
180	2005	AHCA v. Congo	Award not available	Award not available

181	2005	Amto v. Ukraine	Yes.	No Reference to human rights is made with respect to the parallel proceedings submitted to the European Court of Human Rights. Health is mentioned in a Resolution published by Respondent which, according to Claimant, affected its investments, but there is no discussion on the right to health.
182	2005	Bayview v. Mexico	Yes	No Although right to water is mentioned there is no debate on access to water and the Tribunal concluded that it lacked jurisdiction.
183	2005	Binder v. Czech Republic	No	No
184	2005	Bogdanov v. Moldova (II)	No	No
185	2005	Canadian Cattlemen v. USA	No.	No Health is only mentioned with respect to animal and plant health and when referring to a provision of the NAFTA Agreement.
186	2005	Daimler v. Argentina	Yes	No Right to health is mentioned only as example of a public order measure. Further, albeit this case involves the State of Argentina after the crisis, it does not debate the protection of socio-economic rights, but rather the right of the State to regulate its economy.
187	2005	EDF v. Romania	Yes	No Human rights are only generally mentioned in an allegation made by claimant indicating that Respondent's sanctions would violate human rights.
188	2005	EMELEC v. Ecuador	No	No

189	2005	EMV v. Czech Republic	No	No
190	2005	Helnan v. Egypt	No	No Health is only mentioned in an inspection note, but there is no debate on right to health in this case.
191	2005	HEP v. Slovenia	No	No
192	2005	LESI v. Algeria	No	No Hydric resources are mentioned since it is related to the investor's activity, but there is not discussion on right to water.
193	2005	MHS v. Malaysia	No	No
194	2005	Mytilineos v. Serbia (I)	Award not available	Award not available
195	2005	Parkerings v. Lithuania	No	No
196	2005	TSA Spectrum v. Argentina	No	No
197	2004	Berschader v. Russia	No	No
198	2004	Grand River v. USA	Yes	

				Yes Reference to human rights is made in general with respect to the economic rights of indigenous population (investor is indigenous), and to public health concerns.
199	2004	Jan de Nul and and Dredging International v. Egypt	Yes	No Reference to human rights is only made in a passage of the ICJ USA v. Nicaragua case.
200	2004	Telenor v. Hungary	No	No
201	2004	Ulemek v. Croatia	Award not available	Award not available
202	2004	Vannessa Ventures v. Venezuela	No	No
203	2004	Vieira v. Chile	No	No There is only reference to "water" (*agua*, in Spanish) because the claim involves a debate on the place permitted for fishing activities.
204	2004	Wintershall v. Argentina	No	No There is only one reference to "public health", which is made generally to exemplify exceptions to investor's protection.
205	2003	Bayindir v. Pakistan	No.	No The word "health" is mentioned only in a witness statement but there is no debate on the right to health.
206	2003	Encana v. Ecuador	Yes	No Reference is simply made to art. 1 of the Additional Protocol to the European Convention on Human Rights and the collection of taxes.

207	2003	Fraport v. Philippines (I)	No.	No Words "health" and "water" are mentioned in passages of documents of the State of Philippines, but there is no discussion on the right to health or to water.
208	2003	Glamis Gold v. USA	No.	No Public health is mentioned as one justification for the adoption of certain regulations by the State, but the debate is focused on environment and culture protection.
209	2003	Inceysa v. El Salvador	No	No
210	2003	Industria Nacional de Alimentos v. Peru	No	No
211	2003	Joy Mining v. Egypt	No	No
212	2003	L.E.S.I. v. Algeria	No	No There are several mentions to "water", since the investment relates to the construction of a dam to provide drinking water for the city of Algiers, but there is no debate on the right to water.
213	2003	MCI v. Ecuador	Yes	No Reference to human rights is made only with respect to the notion of a continuing act from a succession of acts attributable to a State.
214	2003	Metalpar v. Argentina	No	No
215	2003	Plama v. Bulgaria	No	No

216	2002	Ahmonseto v. Egypt	Award not available	Award not available
217	2002	Champion Trading and Ameritrade v. Egypt	No	No
218	2002	Chemtura v. Canada	No	Yes Public health issues are mentioned and debated.
219	2002	Fireman's Fund v. Mexico	Yes	No Reference to human rights is only contained in a footnote which refers to the notion of proportionality according to the European Court of Human Rights.
220	2002	GAMI v. Mexico	No	No
221	2002	Nagel v. Czech Republic	No	No
222	2002	Salini v. Jordan	No	No The word "water" is mentioned several times since the case involves the development of water resources but there is no discussion on the right to water.
223	2002	Soufraki v. UAE	No	No
224	2002	Thunderbird v. Mexico	No	No

225	2002	Tokios Tokelés v. Ukraine	Yes	No Reference to human rights is only mentioned in the statement of facts when explaining the history of Ukraine.
226	2001	CCL Oil v. Kazakhstan	No	No
227	2001	F-W Oil v. Trinidad & Tobago	No	No
228	2001	Noble Ventures v. Romania	No	No
229	2000	ADF v. USA	No	No Case involves discussions on the US Clean Water Act but there is no debate on the right to water.
230	2000	Generation Ukraine v. Ukraine	No	No
231	2000	Mihaly v. Sri Lanka	No	No
232	2000	RFCC v. Morocco	No	No
233	2000	UPS v. Canada	No	No
234	2000	Waste Management v. Mexico (II)	No	No

235	2000	Yaung Chi v. Myanmar	No	No
Cases Decided in Favor of No Party				
Number	**Year of Initiation**	**Short Case Name**	**Explicit Reference to "Human Rights"?**	**Debate on Socio-Economic Rights?**
1	2015	B3 Croatian Courier v. Croatia	Award not available	Award not available
2	2013	Cervin and Rhone v. Costa Rica	No	No
3	2012	MNSS and RCA v. Montenegro	Yes	No Reference to human rights is made only to indicate that even human rights may be waived.
4	2012	Swissbourgh and others v. Lesotho	Award not available	Award not available
5	2011	Agility v. Pakistan	Award not available	Award not available
6	2011	Al Warraq v. Indonesia	Yes	No The debate is around civil and political rights, such as the presumption of innocence and right to be informed.
7	2010	AES v. Kazakhstan	No	Yes There is a discussion on the duty of the State to protect public health.

8	2010	Bosca v. Lithuania	No	No
9	2008	Al-Bahloul v. Tajikistan	No	No
10	2007	Urbaser and CABB v. Argentina	Yes	Yes Right to access to water is discussed.
11	2006	Nordzucker v. Poland	Yes	No Human rights are mentioned only with respect to the European Court of Human Rights and retroactivity issues.
12	2006	Rompetrol v. Romania	Yes	No Human rights are mentioned only to discuss adequate standard of treatment of investments.
13	2005	Biwater v. Tanzania	Yes	Yes Right to water and health are debated.
Cases Decided In Favor of Investor				
Number	**Year of Initiation**	**Short Case Name**	**Explicit Reference to "Human Rights"?**	**Debate on Socio-Economic Rights?**
1	2017	Magyar Farming and others v. Hungary	No	No Health is mentioned only as an example of justification for measures annulling the rights of investors.
2	2016	Cengiz v. Libya	Award not available	Award not available

3	2016	Glencore International and C.I. Prodeco v. Colombia (I)	No	No
4	2016	Grot and others v. Moldova	Award not available	Award not available
5	2016	Kunsttrans v. Serbia	Award not available	Award not available
6	2016	Oschadbank v. Russia	Award not available	Award not available
7	2015	9REN Holding v. Spain	No	No Health is mentioned in the context of tax issues. No debate on the right to health.
8	2015	Aktau Petrol v. Kazakhstan	Award not available	Award not available
9	2015	CEF Energia v. Italy	No	No
10	2015	Cube Infrastructure v. Spain	No	No
11	2015	Dayyani v. Korea	Award not available	Award not available
12	2015	Everest and others v. Russia	Award not available	Award not available

13	2015	Foresight and others v. Spain	No	No
14	2015	Greentech and NovEnergia v. Italy	No	No
15	2015	Hydro and others v. Albania	Award not available	Award not available
16	2015	JKX Oil & Gas and Poltava v. Ukraine	Award not available	Award not available
17	2015	KCI v. Gabon	Award not available	Award not available
18	2015	Manchester Securities v. Poland	Award not available	Award not available
19	2015	Novenergia v. Spain	No	No
20	2015	OperaFund and Schwab v. Spain	Yes	No Reference to human rights is made only in footnotes and when referring to the European Court of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms. Public health is mentioned as an example of justification which justifies margin of appreciation of national agencies.
21	2015	SolEs Badajoz v. Spain	No	No

22	2015	Stabil and others v. Russia	Award not available	Award not available
23	2015	Ukrnafta v. Russia	Award not available	Award not available
24	2014	Bear Creek Mining v. Peru	Yes	Yes There is debate on the right to health of the population of the host-State.
25	2014	City-State v. Ukraine	Award not available	Award not available
26	2014	Flemingo DutyFree v. Poland	No	No
27	2014	Horthel and others v. Poland	Award not available	Award not available
28	2014	InfraRed and others v. Spain	Award not available	Award not available
29	2014	Masdar v. Spain	Yes	No Reference to human rights is made only in a passage cited in the award. There is no debate on human rights, right to health, access to water whatsoever.
30	2014	NextEra v. Spain	No	No
31	2014	Olin v. Libya	No	No The word "water" is mentioned to indicate water cuts in

				Claimant's facilities etc., but there is no debate on the right to access to water.
32	2014	PL Holdings v. Poland	No	No
33	2014	Sodexo Pass v. Hungary	Award not available	Award not available
34	2014	Trinh and Bin Chau v. Viet Nam (II)	Award not available	Award not available
35	2014	Unión Fenosa v. Egypt	No	No The importance of water and sewage services in mentioned in a reference to the *Impregilo case*, but there is no discussion on the right to water.
36	2014	Zelena v. Serbia	Award not available	Award not available
37	2013	Antin v. Spain	No	No
38	2013	Beck v. Kyrgyzstan	Award not available	Award not available
39	2013	De Sutter and others v. Madagascar (I)	Award not available	Award not available
40	2013	Edenred v. Hungary	Award not available	Award not available

41	2013	Eiser and Energía Solar v. Spain	No	No
42	2013	Güneş Tekstil and others v. Uzbekistan	Award not available	Award not available
43	2013	Houben v. Burundi	No	No
44	2013	Karkey Karadeniz v. Pakistan	Yes	No Reference to human rights is made with respect to some cases brought by the parties to the proceedings, since the dispute involves the apprehension of a vessel by the State of Pakistan.
45	2013	Mytilineos v. Serbia (II)	Award not available	Award not available
46	2013	OKKV v. Kyrgyzstan	Award not available	Award not available
47	2013	RREEF v. Spain	No	No
48	2013	Sorelec v. Libya	Award not available	Award not available
49	2013	South American Silver v. Bolivia	Yes	Yes There is debate on the right to health and other fundamental rights of indigenous people.
50	2013	Stans Energy v. Kyrgyzstan (I)	No	No

51	2013	UP and C.D Holding v. Hungary	Yes	Yes There is debate on the concept of public purpose and health concerns.
52	2013	Valores Mundiales and Consorcio Andino v. Venezuela	No	No
53	2013	Windstream Energy v. Canada	No	Yes There is a discussion on access to fresh water.
54	2013	WWM and Carroll v. Kazakhstan	Award not available	Award not available
55	2012	Dan Cake v. Hungary	Award not available	Award not available
56	2012	García Armas and García Gruber v. Venezuela	No	No
57	2012	Gavazzi v. Romania	No	No Health issues are mentioned only to give examples of situations in which moral damages were awarded.
58	2012	Gavrilovic v. Croatia	Yes	No Reference is simply made to a case of the European Court of Human Rights. The word "water" is mentioned several times, since the dispute is related to the Water Act 1990, but there is no debate on the right to water.
59	2012	Rusoro Mining v. Venezuela	Yes	

				No Reference to human rights is only made in a passage of a case cited in a footnote.
60	2012	Saint-Gobain v. Venezuela	No	No
61	2012	Tenaris and Talta v. Venezuela (II)	No	No
62	2012	Tethyan Copper v. Pakistan	Yes	Yes There is debate on certain measures which could affect the health of the community.
63	2012	UAB v. Latvia	No	No Word "water" is mentioned several times, since the dispute involves a corporation which provides hot water. However, there is no discussion on the right to access to water.
64	2011	Al-Kharafi v. Libya and others	No	No
65	2011	Arif v. Moldova	Yes	No Reference to human rights is only made in the context of the parallel proceedings before the European Court of Human Rights.
66	2011	Baggerwerken v. Philippines	Award not available	Award not available
67	2011	Belokon v. Kyrgyzstan	No	No
68	2011	Copper Mesa v. Ecuador	Yes	

				Yes Respondent alleges that it took some measures contested by Claimant in order to protect the health of its population.
69	2011	Crystallex v. Venezuela	Yes	Yes There is debate on the impacts of the investor's project to water management and social issues of indigenous communities.
70	2011	Gamesa v. Syria	Award not available	Award not available
71	2011	Garanti Koza v. Turkmenistan	No	No
72	2011	Khan Resources v. Mongolia	No	Yes Respondent justifies expropriation based on health standards.
73	2011	Koch Minerals v. Venezuela	No	No
74	2011	Longreef v. Venezuela	Award not available	Award not available
75	2011	Murphy v. Ecuador (II)	No	No
76	2011	OIEG v. Venezuela	No	No Respondent alleges that the investor had breached its law on working conditions but this is not brought as a (counter)claim to the arbitral proceedings.
77	2011	Oxus Gold v. Uzbekistan	No	No Words "health" and "water" are mentioned in documents cited in

				the award but there is no discussion on the right to health or to water.
78	2011	Tenaris and Talta v. Venezuela (I)	No	No
79	2010	Awdi v. Romania	Yes	No Reference to human rights is made with respect to compensation and retroactivity issues.
80	2010	Border Timbers and others v. Zimbabwe	Award not available	Award not available
81	2010	British Caribbean Bank v. Belize	No	No
82	2010	Energoalians v. Moldova	Yes	No Reference to human rights is made in the context of the notion of International minimum standard
83	2010	Flughafen Zürich v. Venezuela	Yes	No Human rights is generally mentioned in the context of the notion of international minimum standard. Venezuela justifies the expropriation of the investment based on "bad provisions of the services", which includes security issues. The discussion however is not focused on socio-economic issues - the security issues are only generally mentioned.
84	2010	Guaracachi v. Bolivia	No	No
85	2010	Stati and others v. Kazakhstan	No	No Word "water" is mentioned several times because there was a problem with water cut in the investment but there is no discussion on the right to water.
86	2010	TECO v. Guatemala	No	No

87	2010	Tidewater v. Venezuela	No	No
88	2010	von Pezold and others v. Zimbabwe	Yes	Yes Respondent justifies its measures based on public health issues.
89	2010	White Industries v. India	Yes	No Reference to human rights is made only in the context of parallel proceedings.
90	2009	Abengoa v. Mexico	No	No Respondent made mere allegations that the investment was threatening public health, but no evidence was provided. This issue was therefore not properly discussed in the dispute.
91	2009	Bogdanov v. Moldova (III)	No	No
92	2009	Deutsche Bank v. Sri Lanka	No	No
93	2009	Dogan v. Turkmenistan	Award not available	Award not available
94	2009	EDF v. Hungary	Award not available	Award not available
95	2009	Gold Reserve v. Venezuela	Yes	Yes There is a debate on water resources management and the protection of the rights of indigenous people.

96	2009	Servier v. Poland	No	Yes There is a discussion on risks posed to public health by the investment.
97	2009	Swisslion v. Macedonia	No	No
98	2009	Teinver and others v. Argentina	Yes	No Reference is only made to the Ministry of Justice and Human Rights and the European Court of Human Rights.
99	2009	UAB v. Serbia	Award not available	Award not available
100	2009	Valle Esina v. Russia	Award not available	Award not available
101	2008	Achmea v. Slovakia (I)	Yes	Yes There is a discussion on health as Respondent alleges that it established new regulations to address inefficiencies in the health insurance system provided by investor.
102	2008	ATA Construction v. Jordan	No	No
103	2008	Burlington v. Ecuador	Award not available	Award not available
104	2008	Clayton/Bilcon v. Canada	Yes	Yes There is a discussion on health of the community affected by the investment.

105	2008	Inmaris Perestroika v. Ukraine	No	No The word "water" is mentioned several times since the case involves the activities of a ship, but there is no discussion on right to water whatsoever.
106	2008	Intersema Bau v. Libya	Award not available	Award not available
107	2008	Karmer Marble v. Georgia	Award not available	Award not available
108	2008	Marion Unglaube v. Costa Rica	No	No
109	2008	Perenco v. Ecuador	No	No Health issues are mentioned in the discussion of the environmental counterclaim brought by the State. Considering however that the focus is on environmental issues, this case was not considered for analysis.
110	2008	Remington v. Ukraine	Award not available	Award not available
111	2008	Tatneft v. Ukraine	Yes	No Reference to human rights is only made to refer to decisions of the European Court of Human Rights.
112	2007	Alpha Projektholding v. Ukraine	No	No
113	2007	ConocoPhillips v. Venezuela	No	No The word "water" is mentioned several times since the dispute involves the injection of water to increase the productivity of the wells but there is no debate on right to water, access to water whatsoever.
114	2007	Fuchs v. Georgia	No	No

115	2007	HOCHTIEF v. Argentina	No	No Public health is mentioned but only as an example of measure which does not imply "treatment less favorable". There is no debate on this matter.
116	2007	Impregilo v. Argentina (I)	Yes	Yes Human right to water is debated.
117	2007	Mobil and Murphy v. Canada (I)	No	No
118	2007	Mobil and others v. Venezuela	No	No
119	2007	RDV v. Guatemala	No	No
120	2007	Renta 4 S.V.S.A and others v. Russia	Yes	No Reference to human rights is made only in the context of the notion of "margin of appreciation" under the European Convention of Human Rights.
121	2007	SGS v. Paraguay	No	No
122	2007	Tza Yap Shum v. Peru	No	No Health issues are mentioned only to exemplify situations in which certain State measures are justified and in the context of moral damages.
123	2006	Chevron and TexPet v. Ecuador (I)	Yes	No Reference to human rights is made only to refer to the American Convention on Human Rights.

124	2006	Lemire v. Ukraine (II)	Yes	No Reference to human rights is made only in the context of the award for moral damages.
125	2006	Occidental v. Ecuador (II)	Yes	No Human rights is mentioned only to refer to decisions of the European Court of Human Rights when analyzing the principle of proportionality.
126	2006	Quiborax v. Bolivia	Yes	No Human rights is mentioned only in the context of awarding of damages for expropriation and allegedly moral damages suffered by investors.
127	2006	Sistem v. Kyrgyzstan	No	No
128	2006	Vestey v. Venezuela	No	No Health is mentioned only in a notice sent by State to investors but there is no debate in the dispute on the right to health.
129	2005	Ares and MetalGeo v. Georgia	Award not available	Award not available
130	2005	Cargill v. Mexico	No	No
131	2005	Desert Line v. Yemen	No	No Health is mentioned only in the context of awarding moral damages.
132	2005	Funnekotter v. Zimbabwe	No	No
133	2005	Hulley Enterprises v. Russia	Yes	No Reference to human rights is related to parallel proceedings

				brought to the European Court of Human Rights and investor's allegations of harassment and intimidations made by the State.
134	2005	Kardassopoulos v. Georgia	No	No
135	2005	Micula v. Romania (I)	No	No References to water are made only because the investment is a beverage business. There is no debate on right to water whatsoever.
136	2005	Pren Nreka v. Czech Republic	Award not available	Award not available
137	2005	RosInvest v. Russia	Yes	No Reference to human rights is made only with respect to certain provisions of the European Convention of Human Rights, such as the right of defense, unrelated to socio-economic issues.
138	2005	Rumeli v. Kazakhstan	Yes	No Reference to human rights is made only with respect to the independency of judiciary and bribery issues.
139	2005	Saipem v. Bangladesh	No	No
140	2005	Siag v. Egypt	No	No
141	2005	Veteran Petroleum v. Russia	Yes	No Reference to human rights is related to parallel proceedings brought to the European Court of Human Rights and investor's allegations of harassment and intimidations made by the State.
142	2005	Walter Bau v. Thailand	Yes	No Reference to human rights is made only in the context of retroactivity issues

143	2005	Yukos Universal v. Russia	Yes	No Reference to human rights is related to parallel proceedings brought to the European Court of Human Rights and investor's allegations of harassment and intimidations made by the State.
144	2004	ADM v. Mexico	Yes	No Reference to human rights is made only when discussing investors' right to claim State's responsibility for the protection of human rights in investment disputes.
145	2004	Bogdanov v. Moldova (I)	No	No
146	2004	Cargill v. Poland	Yes	No Reference is only made to the Committee on Foreign Affairs, Human Rights, Common Security and Defense of the European Parliament.
147	2004	Corn Products v. Mexico	Award not available	Award not available
148	2004	Duke Energy v. Ecuador	No	No
149	2004	Eastern Sugar v. Czech Republic	No	No
150	2004	Gemplus v. Mexico	No	No
151	2004	Mobil v. Argentina	No	No
152	2004	OKO v. Estonia	No	No
153	2004	SAUR v. Argentina	Yes	

				Yes There is a debate on the right to water and freezing of tariffs on water.
154	2004	Talsud v. Mexico	No	No
155	2004	Total v. Argentina	No	No
156	2003	ADC v. Hungary	Yes	No Reference to human rights is only made once to mention the European Court of Human Rights and compensation/expropriation issues.
157	2003	AWG v. Argentina (Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina)	No	Yes Right to water and increase of tariffs on water is discussed.
158	2003	BG v. Argentina	No	No
159	2003	Continental Casualty v. Argentina	Yes	No Health is mentioned because the investor is an insurance company but there is no debate on the right to health.
160	2003	EDF and others v. Argentina	Yes	Yes There is debate on protection of public health
161	2003	El Paso v. Argentina	Yes	Yes There is a discussion on the freezing of electricity tariffs and the right to health and welfare of the population.
162	2003	National Grid v. Argentina	Yes	

				Yes There is a discussion on the freezing of electricity tariffs and the right to health and welfare of the population.
163	2003	Petrobart v. Kyrgyz Republic	No	No
164	2003	Suez and Interagua v. Argentina	Yes	Yes There is a debate on the right to water. This award was not available but the decision on liability was considered instead.
165	2003	Suez and Vivendi v. Argentina (II) (AWG v. Argentina)	Yes (same as AWG v. Argentina (Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina)	Yes Right to water and increase of tariffs on water is discussed.
166	2002	France Telecom v. Lebanon	Award not available	Award not available
167	2002	LG&E v. Argentina	Yes	Yes There is a discussion on the right to health and welfare of the population.
168	2002	Occidental v. Ecuador (I)	No	No
169	2002	PSEG v. Turkey	No	No
170	2002	Sempra v. Argentina	Yes	Yes There is a discussion on the right to health and welfare of the population in times of crisis.

171	2002	Siemens v. Argentina	Yes	No Debate on human rights is focused on issues concerning protection of data of inhabitants
172	2001	AIG v. Kazakhstan	No	No
173	2001	Azurix v. Argentina (I)	Yes	Yes There is a debate on human rights of the population and access to water.
174	2001	CMS v. Argentina	Yes	Yes There is a debate on the socio-economic conditions of Argentina during times of crisis and the protection of the rights of the population.
175	2001	Enron v. Argentina	No	Yes There is a debate on the socio-economic conditions of Argentina during times of crisis and the protection of the rights of the population.
176	2001	Goetz v. Burundi (II)	No	No
177	2001	MTD v. Chile	No	No
178	2001	Nykomb v. Latvia	No	No
179	2000	CME v. Czech Republic	No	No
180	2000	Tecmed v. Mexico	Yes	Yes There is a discussion on the protection of public health.

Cases Settled				
Number	**Year of Initiation**	**Short Case Name**	**Explicit Reference to "Human Rights" in the Award?**	**Debate on Socio-Economic Rights?**
1	2018	HOCHTIEF v. Saudi Arabia	Award not available	Award not available
2	2017	APCL v. Gambia	Award not available	Award not available
3	2017	KazTransGas v. Georgia	Award not available	Award not available
4	2016	Darley v. Poland	Award not available	Award not available
5	2016	ENGIE and others v. Hungary	Award not available	Award not available
6	2016	Görkem Inşaat v. Turkmenistan	Award not available	Award not available
7	2016	LP Egypt and others v. Egypt	Award not available	Award not available
8	2016	TransCanada v. USA	Award not available	Award not available

9	2015	Abertis v. Argentina	Award not available	Award not available
10	2015	ArcelorMittal v. Egypt	Award not available	Award not available
11	2015	Nabucco v. Turkey	Award not available	Award not available
12	2015	Orange SA v. Jordan	Award not available	Award not available
13	2015	Paz Holdings v. Bolivia	Award not available	Award not available
14	2015	PT Ventures v. Cabo Verde	Award not available	Award not available
15	2015	Samsung v. Oman	Award not available	Award not available
16	2015	Total E&P v. Uganda	Award not available	Award not available
17	2014	Beijing Urban Construction v. Yemen	Award not available	Award not available
18	2014	Iberdrola v. Bolivia	Award not available	Award not available

19	2014	IBT Group and others v. Panama	Award not available	Award not available
20	2014	Red Eléctrica v. Bolivia	Award not available	Award not available
21	2013	Al Sharif v. Egypt (I)	Award not available	Award not available
22	2013	Al Sharif v. Egypt (II)	Award not available	Award not available
23	2013	Al Sharif v. Egypt (III)	Award not available	Award not available
24	2013	ASA v. Egypt	Award not available	Award not available
25	2013	Bryn Services v. Latvia	Award not available	Award not available
26	2013	ČEZ v. Albania	Award not available	Award not available
27	2013	Consolidated Exploration v. Kyrgyzstan	Award not available	Award not available
28	2012	Isolux v. Peru	No	No

29	2012	OTH v. Algeria	Award not available	Award not available
30	2012	Repsol v. Argentina	Award not available	Award not available
31	2012	Slovak Gas v. Slovakia	Award not available	Award not available
32	2012	Telefónica v. Mexico	Award not available	Award not available
33	2011	Abertis v. Bolivia	Award not available	Award not available
34	2011	Bawabet v. Egypt	Award not available	Award not available
35	2011	BTA Bank v. Kyrgyzstan	Award not available	Award not available
36	2011	Ekran v. China	Award not available	Award not available
37	2011	Indorama v. Egypt	Award not available	Award not available
38	2011	Loutraki v. Serbia	Award not available	Award not available
39	2011	MTS v. Turkmenistan (I)	Award not available	Award not available

40	2011	Sajwani v. Egypt	Award not available	Award not available
41	2011	Shortt v. Venezuela	Award not available	Award not available
42	2011	St. Marys v. Canada	No	No
43	2011	TPAO v. Kazakhstan	Award not available	Award not available
44	2011	Williams Companies and others v. Venezuela (I)	Award not available	Award not available
45	2010	AbitibiBowater v. Canada	No	No
46	2010	Dunkeld v. Belize (II)	Award not available	Award not available
47	2010	Oiltanking v. Bolivia	Award not available	Award not available
48	2010	Pan American v. Bolivia	Award not available	Award not available

49	2010	Universal Compression v. Venezuela	Award not available	Award not available
50	2009	Dow AgroSciences v. Canada	Award not available	Award not available
51	2009	Dunkeld v. Belize (I)	No	No
52	2009	ETI v. Bolivia (II)	Award not available	Award not available
53	2009	EVN v. Macedonia	Award not available	Award not available
54	2009	Holcim v. Venezuela	Award not available	Award not available
55	2009	Itera v. Georgia (II)	Award not available	Award not available
56	2009	Mærsk v. Algeria	Award not available	Award not available
57	2009	MTN v. Yemen	Award not available	Award not available
58	2009	Vattenfall v. Germany (I)	No	No

59	2008	AEI v. Bolivia	Award not available	Award not available
60	2008	CEMEX v. Venezuela	Award not available	Award not available
61	2008	Impregilo v. Argentina (II)	Award not available	Award not available
62	2008	iZee v. Georgia	Award not available	Award not available
63	2008	Millicom v. Senegal	Award not available	Award not available
64	2007	Abaclat and others v. Argentina	No	No
65	2007	ALAS International v. Bosnia and Herzegovina	Award not available	Award not available
66	2007	Bureau Veritas v. Paraguay	Award not available	Award not available
67	2007	Eni Dación v. Venezuela	Award not available	Award not available
68	2007	ETI v. Bolivia (I)	Award not available	Award not available

69	2007	Global Gold Mining v. Armenia	Award not available	Award not available
70	2007	Laskaridis Shipping v. Ukraine	Award not available	Award not available
71	2007	Société Générale v. Dominican Republic	Award not available	Award not available
72	2007	TCW v. Dominican Republic	No	No
73	2007	Trans-Global v. Jordan	No	No
74	2006	Barmek v. Azerbaijan	Award not available	Award not available
75	2006	Oxus Gold v. Kyrgyzstan	Award not available	Award not available
76	2006	Rail World v. Estonia	Award not available	Award not available
77	2006	Shell v. Nicaragua	Award not available	Award not available
78	2006	Técnicas Reunidas v. Ecuador	Award not available	Award not available

79	2006	Vivendi v. Poland	Award not available	Award not available
80	2005	CGE v. Argentina	Award not available	Award not available
81	2005	K+ VP v. Czech Republic	Award not available	Award not available
82	2005	Mittal v. Czech Republic	Award not available	Award not available
83	2005	Noble Energy v. Ecuador	Award not available	Award not available
84	2005	Scotiabank v. Argentina	Award not available	Award not available
85	2004	ABN Amro v. India	Award not available	Award not available
86	2004	Alstom Power v. Mongolia	Award not available	Award not available
87	2004	ANZEF v. India	Award not available	Award not available
88	2004	BNP Paribas v. India	Award not available	Award not available

89	2004	BP v. Argentina	Award not available	Award not available
90	2004	Cemex v. Indonesia	Award not available	Award not available
91	2004	CIT Group v. Argentina	Award not available	Award not available
92	2004	Credit Lyonnais v. India	Award not available	Award not available
93	2004	Credit Suisse v. India	Award not available	Award not available
94	2004	Erste Bank v. India	Award not available	Award not available
95	2004	France Telecom v. Argentina	Award not available	Award not available
96	2004	Interbrew v. Slovenia	Award not available	Award not available
97	2004	Motorola v. Turkey	Award not available	Award not available
98	2004	Offshore Power v. IndiaA	Award not available	Award not available

99	2004	RGA v. Argentina	Award not available	Award not available
100	2004	Standard Chartered Bank v. India	Award not available	Award not available
101	2004	Tembec v. USA	Award not available	Award not available
102	2004	Terminal Forest v. USA	Award not available	Award not available
103	2004	Trinh and Binh Chau v. Viet Nam (I)	Award not available	Award not available
104	2004	Western NIS v. Ukraine	Award not available	Award not available
105	2003	Aguas Cordobesas v. Argentina	Award not available	Award not available
106	2003	Bechtel v. India	Award not available	Award not available
107	2003	Camuzzi v. Argentina (I)	Award not available	Award not available
108	2003	Camuzzi v. Argentina (II)	Award not available	Award not available

109	2003	Ed. Züblin v. Saudi Arabia	Award not available	Award not available
110	2003	Eureko v. Poland	Award not available	Award not available
111	2003	Gas Natural v. Argentina	Award not available	Award not available
112	2003	Impregilo v. Pakistan (II)	Award not available	Award not available
113	2003	Miminco v. Congo	Award not available	Award not available
114	2003	Pan American v. Argentina	Award not available	Award not available
115	2003	Pioneer v. Argentina	Award not available	Award not available
116	2003	Telefónica v. Argentina	Award not available	Award not available
117	2003	Telekom Malaysia v. Ghana	Award not available	Award not available
118	2002	Aguas del Tunari v. Bolivia	Award not available	Award not available

119	2002	Canfor v. USA	Award not available	Award not available
120	2002	IBM v. Ecuador	No	No
121	2002	JacobsGibb v. Jordan	Award not available	Award not available
122	2002	SGS v. Philippines	Award not available	Award not available
123	2001	AES v. Hungary (I)	Award not available	Award not available
124	2001	Booker v. Guyana	Award not available	Award not available
125	2001	Saluka v. Czech Republic	No	No
126	2001	SGS v. Pakistan	Award not available	Award not available
127	2000	Salini v. Morocco	Award not available	Award not available
128	2000	Sancheti v. Germany	Award not available	Award not available

129	2000	UK Bank v. Russia	Award not available	Award not available

APPENDIX II

INTERVIEW GUIDE – OMBUDSMAN

PORTUGUESE VERSION

São Paulo, 26 de maio de 2021.

Ref.: Roteiro de Entrevistas para Dissertação de Mestrado de Marina Martins Martes, a ser submetida para a Faculdade de Direito da Universidade De São Paulo (USP).

Título Dissertação: *The Brazilian CFIA Model as a Means of Enhancing Protection and Respect for Socio-Economic Rights*.

Perguntas para o Ombudsman de Investimentos Diretos (OID)

1) Do site do Ombudsman de Investimentos Diretos consta que investidores podem levar consultas e questionamentos sobre diversas áreas, como tributária, trabalhista, previdenciária, financeira, administrativa, ambiental, infraestrutura e fundiária. Quais são os temas mais frequentemente levados por investidores para o OID?

2) Quando a consulta ou questionamento envolve questões relacionadas à proteção de direitos socioeconômicos (como direitos trabalhistas, direito à saúde etc.):

a) Qual o procedimento adotado pelo OID?

b) Outros órgãos são envolvidos?

c) É estabelecido algum tipo de contato com o ponto focal do país de origem do investidor?

3) O Ombudsman de Investimentos adota alguma medida preventiva quando novos investidores estrangeiros chegam ao Brasil, especialmente em casos em que o impacto das atividades do investidor sobre a comunidade próxima ao investimento pode ser maior (como projetos de infraestrutura, mineração etc.)?

4) O artigo 4º, II do Decreto nº 8.863/2016 prevê que o Ombudsman de Investimentos prestará assistência e orientação a investidores brasileiros no exterior nos casos em que exista Acordos de Investimento em Vigor.

a) Como isso é feito?

b) Que tipo de assistência e orientação é dada?

c) Sobre quais temas?

5) Há alguma interação entre o Ombudsman de Investimentos Diretos e o Poder Legislativo para garantir que questões eventualmente enfrentadas por investidores ou outras questões advindas dos Acordos de Investimento (ACFIs) sejam refletidas na legislação doméstica?

ENGLISH VERSION

São Paulo, 26th May 2021

Ref.: Interview Guide for Masters' Dissertation of Marina Martins Martes, to be submitted to the Faculty of Law of the University of São Paulo (USP).

Dissertation Title: The Brazilian CFIA Model as a Means of Enhancing Protection and Respect for Socio-Economic Rights.

Questions to the Ombudsman of Foreign Direct Investment

1) In the Ombudsman of Foreign Direct Investment's (OID) website, it is stated that investors may raise requests and inquiries on different areas, such as tax, labor, social security, financial. administrative, environment, infrastructure, and land. Which are the matters most frequently brought by investors to the OID?

2) When the request or inquiry relates to issues related to socio-economic rights protection (such as labor rights, right to health, etc.):

a) Which is the proceeding adopted by the OID?

b) Are other organs involved?

c) Is some sort of communication with the focal point/Ombudsman from the host-State established?

3) Does the OID adopt any preventive measure when new investors arrive in Brazil, especially in cases where the impact of the investors' activities on the nearby community may be higher (such as in infrastructure projects, mining, etc.)?

4) Art. 4, II of Decree 8.863/2016 establishes that the Ombudsman of Foreign Direct Investment will provide assistance and orientation to Brazilian investors abroad in cases where there are Investment Agreements in force.

a) How is this done?

b) Which sort of assistance and orientation is provided?

c) About which matters?

5) Is there any interaction between the OID and the Legislative Branch to guarantee that eventual issues faced by investors and other issues arising out of Investment Agreements (CFIAs) are reflected in domestic legislation?

INTERVIEW GUIDE – OECD NCP

PORTUGUESE VERSION

São Paulo, 17 de maio de 2021.

Ref.: Roteiro de Entrevistas para Dissertação de Mestrado de Marina Martins Martes, a ser submetida para banca examinadora da Faculdade de Direito da Universidade De São Paulo (USP).

Título Dissertação: *The Brazilian CFIA Model as a Means of Enhancing Protection and Respect for Socio-Economic Rights*.

Perguntas à Subsecretaria de Investimento Estrangeiro e ao Ponto de Contato Nacional do Brasil (PCN)

1) Quais vem sendo as maiores dificuldades enfrentadas pelo PCN na implementação das Diretrizes da OCDE?

2) Além das instâncias específicas, quais outras medidas são tomadas pelo PCN para promover a conscientização e atuar no acompanhamento da aplicação prática da implementação das Diretrizes da OCDE, como prevê o art. 2º do Decreto nº 9.874/ 2019?

3) O PCN adota medidas para proativamente identificar riscos relacionados às atividades de empresas multinacionais no Brasil e do Brasil no exterior?

4) O PCN adota alguma medida preventiva quando novos investidores estrangeiros chegam ao Brasil, especialmente em casos em que há grande impacto do investimento sobre a comunidade (como projetos de infraestrutura, mineração etc.)?

5) Como ocorre a colaboração com Pontos Focais de outros países para implementação das Diretrizes da OCDE (art. 2º, V, Decreto nº 9.874, de 27 de junho de 2019)?

a) Há algum exemplo de colaboração considerada efetiva pelo PCN?

6) Há alguma medida que o Ponto de Contato Nacional do Brasil adota para monitorar atividades de empresas brasileiras em outros países?

a) Se sim, quais medidas são essas?

7) Existe algum tipo de interação entre o trabalho feito pelo Ponto de Contato Nacional e o Ombudsman de Investimentos?

a) Se sim, quais pontos são debatidos e trocados entre os dois órgãos?

b) Há adoção de medidas conjuntas?

8) Além da possibilidade de consulta em casos específicos prevista no art. 6º do Decreto nº 9.874, de 27 de junho de 2019, há outras formas de coordenação das medidas tomadas pelo PCN e demais por outros órgãos governamentais com o objetivo de prevenir e remediar violações de direitos humanos por empresas?

9) O PCN realiza algum tipo de trabalho para incorporar as Diretrizes da OCDE na legislação doméstica brasileira?

a) Há algum tipo de interação entre o PCN e o Poder Legislativo?

10) No relatório do 2º semestre do CONIV de 2020, é mencionada a elaboração de uma minuta para constituição de um Plano Nacional de Ação para Conduta Empresarial Responsável.

a) O que é esse plano e qual o objetivo?

b) Há outras medidas que o PCN está buscando adotar para aprimorar e acelerar a implementação das Diretrizes da OCDE no Brasil?

11) A Subsecretaria de Investimento Estrangeiro realiza algum tipo de trabalho (com outros órgãos, inclusive) para medir o impacto de investimentos estrangeiros no Brasil (especialmente dos países com os quais o Brasil possui Acordo de Investimento), sob uma perspectiva de proteção de direitos socioeconômicos?

ENGLISH VERSION

São Paulo, 17th May 2021.

Ref.: Interview Guide for Masters' Dissertation of Marina Martins Martes, to be submitted to the Faculty of Law of the University of São Paulo (USP).

Dissertation Title: The Brazilian CFIA Model as a Means of Enhancing Protection and Respect for Socio-Economic Rights.

Questions to the Undersecretariat of Foreign Direct Investment and Brazilian Nacional Contact Point (NCP)

1) Which have been the biggest challenges faced by the NCP in implementing OECD's Guidelines in Brazil?

2) Aside from the specific instances, which other measures are adopted by the NCP to raise awareness and monitor the implementation of the OECD Guidelines, as determined by art. 2 of Decree n. 9.874/2019?

3) Does the NCP adopt measures to actively identify risks related to activities of multinational corporations in Brazil and from Brazil acting abroad?

4) Does the NCP adopt any preventive measure when new foreign investors arrive in Brazil, particularly in cases where there is a great impact of investors' activities in the nearby community (such as infrastructure projects, mining, etc.)?

5) How does the collaboration with Contact Points from other countries to implement OECD's Guidelines work (art. 2, V, Decree n. 9.874 of 27th June 2019)?

a) Is there any example of collaboration considered effective by the NCP?

6) Is there any measure that the Brazilian NCP adopts to monitor activities of Brazilian companies abroad?

a) If so, which are these measures?

7) Is there any sort of interaction between the work done by the NCP and the OID?

a) If so, which issues are debated and exchanged between the two organs?

b) Do these organs adopt joint measures?

8) In addition to the possibility of consultations in specific cases as provided by art. 6 of Decree n. 9.874, of 27th June of 2019, are there other forms of coordination of the measures adopted by the NCP and other governmental organs with the objective of preventing and remedying human rights violations by corporations?

9) Does the NCP conduct any kind of work to implement the OECD Guidelines in Brazilian domestic legislation?

a) Is there any interaction between the NCP and the Legislative Branch?

10) In CONIV's report of the 2nd semester of 2020, the development of a draft on the constitution of a National Plan for Responsible Business Conduct is mentioned.

a) What is the Plan and what is its objective?

b) Are there any other measures that the NCP is adopting to improve and accelerate the implementation of the OECD Guidelines in Brazil?

11) Does the Undersecretariat of Foreign Investment conduct any sort of work (including with other organs) to measure the impact of foreign investments in Brazil (especially from countries with whom Brazil has Investment Agreements), from the socio-economic rights protection standpoint?