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Soft Law in International Investment Law and Arbitration

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Abstract

In the more recent decades, international investment law (“IIL”) and arbitration have been going through a process of recalibration prompted by both the intensification of cross-border capital flows and the States’ growing concerns over the potential restraints IIL may impose upon the pursuit of public interests. The present contribution will pay attention to a specific feature that can be observed within these developments, i.e. the role played by soft law in investment arbitration and, more generally, under IIL, also with a view to assessing the impact on the formation of binding international law of instruments formally devoid of normative force within the international legal order. After an introduction (Section 1), the contribution is articulated into four sections. Section 2 will first define the field of investigation. The case law of investment tribunals and the treaty practice under the more recent IIAs will be then explored as to the reliance on soft law instruments for the purposes of settling procedural (Section 3) and substantive issues (Section 4). Some final remarks will close (Section 5).

Keywords

soft law – international investment law – international investment adjudication

1 Introduction

In the more recent decades, international investment law (“IIL”) and arbitration have been going through a process of recalibration prompted by both the intensification of cross-border capital flows and the States’ growing concerns

over the potential restraints IIL may impose upon the pursuit of public interests.

On the one hand, it can be observed that the number of international investments agreements (“IIAs”) has steadily grown, totalling more than 2500 treaties in force to date.¹ IIAs have been concluded between States at different stages of economic development, representing opposing interests as capital importing or capital exporting countries. However, an increasing number of treaties have also been negotiated between States with similar economic characteristics, simultaneously interested in both promoting the penetration of domestic enterprises into foreign markets and attracting foreign capital into the national economy.

At the same time, the more recent treaty practice reveals that IIA negotiations are also being informed by non-economic concerns. In general terms, the overall aim is to avoid that compliance with the obligations on the promotion and protection of foreign investments improperly restrains the regulatory space wherein States may define and pursue societal policies according to their own scale of values and priorities.

Similar trends can be observed also in the field of investment arbitration. The number of claims submitted to international or domestic institutions for the settlement of investment disputes has grown. Since 1972, more than 800 cases have been raised before the International Centre for Settlement of Investment Dispute (“ICSID”),² with a striking increase since the 1990s onwards.³ ICSID tribunals have rendered more than 350 awards, mostly after 2010 and in response to the submission of treaty-based claims. Some of these cases have proved to be highly sophisticated, in particular when the fulfilment of societal interests by the host State was at stake. The workload for investment arbitration institutions has therefore been increasing, in terms of both the number of cases and the intricacy of the procedural and substantial argumentations submitted by the parties.

The present contribution will pay attention to a specific feature that can be observed within these developments, i.e. the role played by soft law in investment arbitration and, more generally, under IIL, also with a view to assessing the impact on the formation of binding international law of instruments formally devoid of normative force within the international legal order. The following sections will first define the field of investigation (Section 2). The case law of investment tribunals and the treaty practice under the more recent IIAs will be then explored as to the reliance on soft law instruments for the purposes of settling

1 See <<https://investmentpolicy.unctad.org/international-investment-agreements>>.

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), 18 March 1965, entered into force 14 October 1966.

3 See ICSID, *The ICSID Caseload – Statistics*, Issue 2021-1.

procedural and substantive issues that may arise during arbitral proceedings (respectively, Sections 3 and 4). Some final remarks will close (Section 5).

2 Scope of Research

The emergence of a growing number of non-binding instruments has stimulated a lively debate among international law scholars on three main issues: first, whether “soft law” could be deemed to exist and be relevant within the international legal order; second, which instruments are covered under its umbrella; finally, what is the actual and potential role of soft law in the regulation of inter-State relations.

This debate evolved in the formulation of three different positions.⁴ Some authors exclude the existence of soft law. As positive legal scholars, they claim that law is by definition binding.⁵ In his seminal article of 1983, Prosper Weil argued that the term soft law may be used with regard to provisions set by formal and compelling sources of international law, in case they are vague in their content and wording.⁶ On the contrary, norms included in non-binding resolutions of international organizations or adopted as the final act of intergovernmental conferences are deemed to be neither soft law, nor hard law: “they are simply not law at all” and do not constitute formal sources of legal norms.⁷ It is admitted that they can prepare or accelerate the formation of new rules of international law,⁸ that they can create expectations of compliance by the parties,⁹ or that they can provide guidelines for the interpretation of formal sources of international law.¹⁰ But, in any case, they remain “*dans le monde de l’infrajuridique*”, of the “near law”.¹¹

4 See TRAMONTANA, “Il soft law e la resilienza del diritto internazionale”, *Ars Interpretandi*, 2017, p. 43 ff., pp. 45–48. For a thorough analysis of the scholarly debate on soft law, see FARAJADO, “Soft Law”, *Oxford Bibliographies*, 30 January 2014 (doi: 10.1093/obo/9780199796953-0040).

5 See D’ASPREMONT, “Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de justice”, *Revue belge de droit international*, 2003, p. 86 ff.

6 See WEIL, “Towards Relative Normativity in International Law?”, *American Journal of International Law*, 1983, p. 413 ff., p. 414.

7 *Ibid.*, footnote 7 and p. 417. See also, *ID.*, “Le droit international en quête de son identité”, *RCADI*, 1992, Vol. 237, p. 11 ff., p. 242.

8 WEIL, *cit. supra* note 6, pp. 416–417.

9 WEIL, *cit. supra* note 7, pp. 236–238.

10 See D’ASPREMONT, “Softness in International Law: A Self-Serving Quest for New Legal Materials”, *European Journal of International Law*, 2008, p. 1075 ff., p. 1082. A different stance is taken by KLABBERS, “The Redundancy of Soft Law”, *Nordic Journal of International Law*, 1996, p. 167 ff., pp. 178–179.

11 WEIL, “Le droit international”, *cit. supra* note 7, pp. 232 and 243.

A second strand of legal analysis departs from the binary distinction between normative and non-normative instruments. Under this sociological approach, the formal sources of international law enumerated in Article 38 of the Statute of the International Court of Justice (“ICJ”) do not give a full picture of the instruments capable of addressing States’ behaviour. The juxtaposition between normative and non-normative rules is more blurred than presumed by positivist scholars. According to this school of thought, legal normativity is a matter of degree with varying scales. As affirmed by Richard R. Baxter, referring also to non-binding instruments enacted by international conferences and intergovernmental organizations and to hortatory provisions set out in treaties, “different norms carry a variety of differing impacts and legal effects”.¹² It is thus recognized that international law also includes soft, non-binding norms, to the extent they are apt to shape States’ behaviour as much as binding rules established under international agreements or customary international law.¹³

According to a third stream of analysis, the distinction between normative (binding) and non-normative (non-binding) international rules cannot be denied and, hence, soft law is not part and parcel of the international legal order. However, soft law is deemed to play a role within it.¹⁴ Indeed, it may partake in the process of formation of new customary rules of international law, provide evidence of existing customary rules,¹⁵ be incorporated in international

12 BAXTER, “International Law in ‘Her Infinite Variety’”, *International and Comparative Law Quarterly*, 1980, p. 550 ff., p. 563.

13 See GUZMAN and MEYER, “International Soft Law”, *Journal of Legal Analysis*, 2010, p. 171 ff., p. 175, and ID., “Soft Law”, in KONTOROVICH and PARISI (eds.), *Economic Analysis of International Law*, Cheltenham (UK), Northampton, MA (USA), 2016, p. 123 ff.

14 See, for instance, BOYLE, “Some Reflections on the Relationship of Treaties and Soft Law”, *International and Comparative Law Quarterly*, 1999, p. 901 ff.; PAUWELYN, “Is It International Law or Not, And Does It Even Matter?”, in PAUWELYN, WESSEL and WOUTERS (eds.), *Informal International Lawmaking*, Oxford, 2012, p. 125 ff., pp. 153–157.

15 For instance, with respect to the United Nations (UN) General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/RES/2625(XXV) (1970), see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, ICJ Reports, 1986, p. 14 ff., para. 188: “The Court has [...] to be satisfied that there exists in customary international law an *opinion juris* as to the binding character of [the] abstention [from the use of force]. This *opinion juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625(XXV) [...] The effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reinterpretation or elucidation’ of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions themselves”.

treaties,¹⁶ represent a preliminary step for the conclusion of an international treaty, or be resorted to for the purposes of interpreting binding international legal provisions.¹⁷

Against this framework, the purpose of this contribution is to assess whether and to what extent soft law has entered into international investment law and adjudication. As a preliminary matter, it is necessary to clarify what is meant by soft law in the following analysis. As can be inferred from the foregoing, soft law is a multi-faceted concept that is applied to a variety of instruments and there is no clear consensus as to its definition. For our purposes, soft law is meant to include instruments that fall outside the sources of international law recalled in Article 38 of the ICJ Statute and devoid as such of binding force towards the States (or their nationals) they are addressed to.¹⁸ Some of these instruments are elaborated by the States themselves, for instance as an outcome of international conferences, others are adopted by or within the framework of intergovernmental organizations or by treaty bodies. Instruments generated by actors lacking international legal personality will also be considered, in order to gauge also the import in interstate relations of regulations proposed by private non-State actors.¹⁹

16 *Ex multis*, see Art. 2(6) of the Agreement on Technical Barriers to Trade of the World Trade Organization (“WTO”), 15 April 1994, entered into force 1 January 1995, laying down a presumption of legitimacy under WTO law for domestic regulations which are in accordance with relevant international standards.

17 On the weight of the Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev 1 (1992), for the purposes of interpreting WTO agreements, see Appellate Body Report, *United States – Shrimp*, adopted on 6 November 1998, WT/DS58/AB/R, para. 168.

18 While it is generally accepted that the conception of law embodied in Art. 38 of the ICJ Statute does not include additional sources whose normative character is widely recognized (e.g., binding resolutions of international organizations or unilateral acts of States – *Nuclear Tests (Australia v France)*, Judgment of 20 December 1974, ICJ Reports, 1974, p. 253 ff., para. 43), these instruments will not be covered in the following analysis in view of their binding legal effects towards States.

19 The academic debate on IIL has been devoting a growing attention to the precedential value of arbitral awards. Notwithstanding their non-binding nature but for the parties in dispute, they will not be covered in the following analysis. This is not to deny that the case law has become a crucial reference point for understanding the substance of rights and obligations under IIAs. However, its consideration would open the Pandora’s box of the role of precedent in investment arbitration and, more generally, in international adjudication, an issue that is beyond the scope of the present contribution. See SCHILL, “Ordering Paradigms in International Investment Law: Bilateralism-Multilateralism-Multilateralization”, in DOUGLAS, PAUWELYN and VIÑUALES (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice*, Cambridge, 2014, p. 109 ff., p. 122–129; GRISEL, “The Sources of Foreign Investment Law”, *ibid.*, p. 213 ff., pp. 223–233.

The role of soft law in the international investment regime can be addressed according to a three-pronged approach. First, the content of soft law deserves consideration. Indeed, the practice shows that these instruments have been resorted to in view of defining both procedural and substantive issues arisen during arbitration proceedings. This distinction is the main framework of the proposed analysis: indeed, Section 3 will explore how procedural soft law has entered into investment law and arbitration, while Section 4 will focus on substantive soft law. However, two additional perspectives can be identified, relating respectively to the aim underlying the use of soft law and to the role of the disputing parties. Indeed, it will also be surveyed whether in investment arbitration soft law is relied on as applicable law or merely for the purpose of interpreting applicable law. This final remark opens to the issue of the autonomy of the parties, and of whether soft law is considered only when the parties agreed upon it as applicable law or referred to it in their pleadings, or also on the basis of an autonomous determination by the arbitral tribunal, irrespective of the positions represented before it. Indeed, while it is a general principle that an international court or tribunal may not rule on questions that have not been submitted to it (*ne ultra petita*), it is also accepted, according to the principle *jura novit curia*, that in the exercise of its power to decide over all the aspects of a claim a tribunal is not bound to the legal arguments advanced by the parties. Against this backdrop, however, the judicial and arbitral case law shows that the application of the *jura novit curia* principle is subject to some conditions, mainly the respect of the boundaries of the *petitum* and applicable law and, procedurally, of a right of the disputing parties to express their positions.²⁰

3 Procedural Soft Law

3.1 *The Practice Under Investment Arbitration*

It is an undisputed principle that arbitral proceedings are governed by the rules agreed by the parties. In parallel, predetermined rules of procedure can become binding when a dispute is raised before a pre-established institution. For instance, in the field of investment arbitration, the ICSID Administrative Council has the mandate to adopt the discipline on procedural issues, complementary to the general provisions set out in the 1965 Convention.²¹ Accordingly,

²⁰ See TANZI, "On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings", *Leiden Journal of International Law*, 2021, p. 57 ff.

²¹ ICSID Convention, *cit. supra* note 2, Art. 6(1)(c).

unless the parties agree otherwise, the ICSID Arbitration Rules apply to any arbitral proceeding instituted under the aegis of this organization.²² Similarly, the procedural rules of arbitral institutions such as the International Chamber of Commerce, the London Chamber of International Arbitration, and the Stockholm Chamber of Commerce become binding for the parties that resort to them.²³ The same conclusion applies in case the parties have agreed to subject their arbitration to the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules.²⁴

Yet, arbitration rules are far from offering an exhaustive discipline, since every potential procedural situation can hardly be envisaged in advance. In case a procedural issue arises, it is not to be excluded that the parties may disagree on a possible solution. In view of facilitating the smooth functioning of proceedings, usually tribunals are entrusted with the power to decide over the conduct of arbitration.²⁵ In this context, investment tribunals rely also on soft law instruments in view of filling the gaps of applicable procedural rules or defining their content when they are open to different interpretations. The main reference points are found in the Rules on the Taking of Evidence in International Arbitration or in the Guidelines on Conflicts of Interest in International Arbitration approved by the International Bar Association (“IBA”).²⁶ Even though non-normative,²⁷ both are used by arbitrators as a guide for the exercise of their powers, even in the absence of specific treaty language in this regard.

The IBA Rules on the taking of evidence have gained a widespread recognition in investment arbitration, not only when the parties had expressly agreed on them.²⁸ Indeed, the procedural order adopted after consultations with the

22 *Ibid.*, Art. 44. See <<https://icsid.worldbank.org/resources/rules-and-regulations/convention/arbitration-rules>>.

23 See KAUFMAN-KOHLER, “Soft Law in International Arbitration: Codification and Normativity”, *Journal of International Dispute Settlement*, 2010, p. 1 ff., p. 6.

24 Available at: <<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>>.

25 For instance, according to Art. 44 of the ICSID Convention, *cit. supra* note 2, if any question of procedure arises which is not covered by the Convention itself, the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide upon it. See also Rule 19 of the ICSID Arbitration Rules (“The Tribunal shall make the orders required for the conduct of the proceeding”).

26 For both texts, see <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

27 This feature is expressly acknowledged by the two texts: see para. 2 of the Rules on the taking of evidence, and para. 6 of the introduction to the Guidelines on conflicts of interest.

28 Agreement by the parties was expressed, for instance, in *Methanex v. United States of America*, Final Award on Jurisdiction and Merits of 3 August 2005, Part II, Chapter B, para. 10

parties in the first stage of the proceedings with the purpose of detailing the applicable procedure commonly recalls the Rules, in full or with respect to some specific provisions included therein. The incorporation of this soft law instrument is guided by different terms: the Rules can be set as binding upon the parties,²⁹ or it is established that they shall guide or provide guidance to the tribunal³⁰ or that the tribunal “may seek guidance from”, without being bound by them.³¹ Even in case the applicable procedural rules are formulated in hortatory terms, in the event an issue pertaining to the submission of evidence becomes the object of disagreement, it is common practice by the tribunals to settle it according to the IBA Rules.³² While it is undoubtful that, by means of incorporation, in these cases the IBA Rules apply as “hard law”, this widespread practice shows how this instrument has been gaining a general acceptance as an international standard. Therefore, even in the absence of procedural rules expressly referring to the IBA Rules or without the *ex ante* agreement between the disputing parties, they could be applied by tribunals on their own motion.³³

and *Grand River Enterprises Six Nations v. United States of America*, Award of 12 January 2011, para. 32.

- 29 For instance, see *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Procedural Order No. 1 of 26 February 2014, para. 15.4.
- 30 *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Procedural Order No. 1 of 16 October 2014, para. 24.1.
- 31 *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 1 of 13 June 2017, para. 1.4.
- 32 *Alghanim case*, *cit. supra* note 30, Procedural Order No. 4 of 17 December 2015, where according to the Tribunal its power to pronounce over the production of documents from third parties stems directly from the 2010 IBA Rules. See also *Interocean Oil case*, *cit. supra* note 29, Procedural Order No. 4 of 20 April 2016: in this case, the Tribunal partially accepted the requests by the claimant on the production of documents on the basis of the standards set in the 2010 Rules. See KAUFMAN-KOHLER, *cit. supra* note 23, p. 16; SCHILL, “Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law”, in D’ASPROMONT and BESSON (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford, 2017, p. 1095 ff., p. 1111; ALVAREZ, “Reviewing the Use of ‘Soft Law’ in Investment Arbitration”, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper no. 18–46, p. 28; VEEDER, “Procedural Soft Law in International Arbitration”, Max Planck Encyclopedia of International Procedural Law, 2019, para. 62; PALOMBINO, “L’uso del *soft law* nell’arbitrato sugli investimenti”, in MANTUCCI (ed.), *Trattato di diritto dell’arbitrato, Vol. XIII, L’arbitrato negli investimenti internazionali*, Napoli, 2020, p. 1231 ff.
- 33 See *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 5 of 19 March 2003: the Tribunal pronounced according to the IBA Rules, as envisaged by the applicable arbitration rules, but it further

With regard to the IBA Guidelines on conflicts of interest, the parties challenging an arbitrator or seeking the annulment of an award commonly rely on them.³⁴ However, the practice by the ICSID tribunals seems to be more heterogeneous than for the IBA Rules on evidence. One possible reason lies in the fact that the 1965 Convention includes specific provisions on disqualification of arbitrators.³⁵ Indeed, according to Article 57 disqualification may be proposed on account of “a manifest lack of the qualities” required for appointment (i.e. high morality, recognized competence, and independence)³⁶ or ineligibility under the standards set forth in Articles 37 to 40. These very broad terms have eased inconsistent interpretations of the threshold to be applied with respect to disqualification requests based on the lack of independence and impartiality.³⁷

In some decisions on disqualification it has been expressly affirmed that IBA Guidelines “are not law for ICSID tribunals”,³⁸ that “they are not part of the legal bases” to pronounce over challenges against an arbitrator.³⁹ Unless the disputing parties agreed on their application,⁴⁰ or have explicitly relied on them during the challenge procedure,⁴¹ in most cases the primacy of the

added that “in any event” this instrument reflects “the current practice in international arbitration” (para. 7).

34 FACH GÓMEZ, *Key Duties of International Investment Arbitrators*, Cham, 2019, p. 81. See also IBA Conflicts Committee, *The IBA Guidelines on Conflicts of Interest in International Arbitration. The First Five Years 2005–2009*, 2010, p. 31.

35 See FRY and STAMPALIJA, “Forged Independence and Impartiality: Conflict of Interest of International Arbitrators in Investment Disputes”, *Arbitration International*, 2014, p. 89 ff.

36 ICSID Convention, *cit. supra* note 2, Art. 14(1).

37 See KINNEAR and NITSCHKE, “Disqualification of Arbitrators under the ICSID Convention and Rules”, in GIORGETTI (ed.), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*, Leiden, Boston, 2015, p. 34 ff., p. 51–60; CLEIS, *The Independence and Impartiality of ICSID Arbitrators*, Leiden, Boston, 2017, p. 31 ff.; MALINTOPPI and YAP, “Challenges of Arbitrators in Investment Arbitration. Still Work in Progress?”, in YANNACA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd ed., Oxford, 2018, p. 152 ff., pp. 155–158.

38 *Conoco Phillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator of 27 February 2012, para. 59.

39 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator of 12 August 2010, para. 37.

40 See *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator of 8 December 2009.

41 See *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Decision on the Proposal

standards set forth under Article 57 has been affirmed, even though it was acknowledged that the IBA instrument could serve as “useful references”.⁴² In *Total S.A. v. Argentine Republic*, the Tribunal held that, notwithstanding being a “very useful tool”, reflecting a transnational consensus, the IBA Guidelines were “merely indicative and not binding”.⁴³ Hence, the disqualification request was scrutinized exclusively on the basis of the ICSID regime.⁴⁴

Contrary to the practice followed by other arbitral institutions,⁴⁵ ICSID bodies confronted with an allegation of conflict of interest have seldom relied on the Guidelines.⁴⁶ However, in *Alpha Projektholding GmbH v. Ukraine*, it was admitted that, while not determinative, the IBA instrument reflects a legitimate concern on the kind of disclosures due by arbitrators and, accordingly, the decision was also based upon it.⁴⁷ In particular, the Tribunal underlined that since its adoption, this instrument has been “widely used as a catalogue of the bases for challenges as well as for the parameters of an arbitrator’s duty of disclosure”.⁴⁸

3.2 Further Developments

The practice examined in the previous section has had some influence within the current debates over a modernization of the investment arbitration procedure.

In 2016 ICSID launched the process for amending its Arbitration Rules. In the dialogue between the Secretariat and the member States and among members, the IBA instruments have also been taken into express consideration. Under the latest proposals, it is projected that ICSID tribunals will hold a first

for Disqualification of Professor Brigitte Stern of 9 June 2005, paras. 78–79 (where, however, the unchallenged arbitrators underlined the high level of acceptance enjoyed by the IBA Guidelines in international arbitration, including investment arbitration).

42 *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal of 4 February 2014, para. 78.

43 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on the Proposal to Disqualify Teresa Cheng of 26 August 2015, para. 98.

44 *Ibid.*, para. 99.

45 See *National Grid plc v. The Argentine Republic*, Decision on the Challenge to Mr Judd L. Kessler of 3 December 2007, rendered by the London Court of International Arbitration.

46 *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator of 12 November 2009, para. 24; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of 25 June 2008, para. 69.

47 *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Proposal for Disqualification of an Arbitrator of 19 March 2010, para. 66.

48 *Ibid.*, para. 56.

session with the disputing parties to decide on the procedure to be applied. Among the issues to be addressed, new Rule 29 numbers also the scope, timing and procedures for the production of documents.⁴⁹ In the 2018 commentary to this provision, express reference is made to a decision over whether these issues should be governed by the IBA Rules on the taking of evidence.⁵⁰ As regards possible disputes among the parties over the production of documents, the new Rule 37 does not define whether they should be settled on the basis of the IBA Rules, even though during the amendment process it has been acknowledged that ICSID tribunals have been guided by them.⁵¹

On their part, the Guidelines on conflicts of interest have inspired the introduction of new provisions on third-party funding in favour of the disputing parties (new Rule 14). While this practice is not prohibited, parties would be obliged to notify to the ICSID Secretary-General any relevant information concerning funds received for the pursuit or defence of the proceeding.⁵² As stated in the 2018 commentary, the aim is to align ICSID Arbitration Rules with soft law instruments, including the IBA Guidelines and the procedural rules approved by arbitration institutions.⁵³

Along these developments, we also observe that the more recent negotiations on IIAs show States' willingness to govern in detail the arbitral procedures, circumscribing the autonomy of both the parties and tribunals to decide over matters covered by the IBA instruments. This new practice can be considered as a reaction to the criticism raised against investment arbitration, and the alleged lack of independence and impartiality by arbitrators.⁵⁴ However, two different trends can be discerned.

Some latest IIAs or model treaties contain the obligation for tribunal members to comply with the IBA Guidelines on conflicts of interest: reference can here be made to Article 8.30(1) of the Comprehensive and Economic Trade Agreement between the European Union and its member States and Canada ("CETA").⁵⁵ The same approach is followed also in the 2015 Norwegian Draft

49 ICSID, *Proposals for Amendment of the ICSID Rules*, Working paper #4, Volume 1, February 2020 (hereinafter, "ICSID 2020"), p. 303 ff.

50 ICSID, *Proposals for Amendment of the ICSID Rules – Working Paper*, Volume 1, 2 August 2018 (hereinafter, "ICSID 2018"), p. 173, para. 361.

51 *Ibid.*, p. 98, para. 423.

52 ICSID 2020, *cit. supra* note 49, p. 294.

53 ICSID 2018, *cit. supra* note 50, p. 135, para. 253.

54 MALINTOPPI and YAP, *cit. supra* note 37.

55 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 30 October 2016, provisionally entered into force 21 September 2017. Similarly, the obligation to "comply with internationally recognised standards or guidelines regarding direct or indirect conflicts

Model Agreement, where ICSID tribunals called to settle investment disputes are bound to comply with the Guidelines to decide over the disqualification of arbitrators.⁵⁶ In some cases, however, the attribution of binding force to the Guidelines is regarded only as an intermediate step in view of the adoption of a code of conduct by the relevant treaty bodies,⁵⁷ where issues pertaining to conflict of interest and disclosure obligations upon arbitrators can in principle be ruled according to the specific features of the IIA at hand.⁵⁸ In the alternative, some IIAs include a code of conduct regulating ethics requirements for arbitrators, complementary to the IBA Guidelines.⁵⁹

A more proactive stance can be inferred from those IIAs or model Bilateral Investment Agreements (“BITS”) where no reference is made to the IBA Guidelines. In this case the interested parties decided to agree also on ethical issues, annexing to the IIA a code of conduct for arbitrators or including in the operative part of the IIA provisions on their independence, impartiality, and duties of disclosure. For instance, this practice is followed by the European Union in the recent investment agreements (not yet entered into force) with Singapore and Vietnam.⁶⁰ A common feature of the EU investment protection

of interest, such as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration” is set in para. 3(e) of the 2019 Code of Conduct on Investor-State Dispute Settlement Under Chapter 9 Section B (Investor-State Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) concluded between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, 8 March 2018, entered into force 30 December 2018, available at: <https://www.mti.gov.sg/Improving-Trade/Free-Trade-Agreements/CPTPP>. The Code of Conduct is available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/isds_code_conduct-rdei_code_conduite.aspx?lang=eng.

56 See Art. 15 of the Norwegian model. Under the same terms, see also the Netherlands model investment agreement 2019 (Art. 20(6)), the Belgium-Luxembourg Economic Union Model BIT 2019 (Art. 19, section G, para. 6), the Slovak Model BIT 2019 (Art. 18(4)) and the provision on the composition of the tribunal included in the Colombia Model BIT 2017 (para. 3(c)). These texts are available at: <https://investmentpolicy.unctad.org>.

57 See, for instance, CETA, *cit. supra* note 55, Art. 8.30(1) and Art. 8.44(2); see also Art. 2(6) of the 2019 Netherlands Model BIT.

58 The Code of conduct for CETA arbitrators has been adopted by the Committee on Services and Investment on 29 January 2021 (available at: https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159403.pdf).

59 See for instance, Art. 20 and Annex I of the Belgium-Luxembourg Economic Union Model BIT 2019 or Art. 18(4) of the Slovak Model BIT.

60 See Art. 3.11(1) and Annex 7 of the Investment Protection Agreement between the European Union and its Member States, of the one part, and Singapore, of the other part, 19 October 2018, not yet in force; and Art. 3.40(1) and Annex 11 of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist

agreements is that they provide for the establishment of permanent tribunals for the settlement of disputes between a foreign investor and the host State: it seems that an overarching concern during negotiations has been to dispose at intergovernmental level on the requirements for the new judges.⁶¹

To some extent, these latest developments witness two apparently divergent needs. On the one hand, the increase in the number of disqualification procedures⁶² may have persuaded States to confer binding force to international standards such as the IBA Guidelines, which could then serve as applicable law in case the independence and impartiality of arbitrators is put into question. In these cases, initially conceived as a soft law instrument, once incorporated in an IIA the Guidelines would operate as hard law. At the same time, the appropriateness of the IBA Guidelines for the settlement of investment disputes seems to be challenged. As observed by some authors, one of their most relevant aspects is that they were drafted by experts in both international commercial arbitration and international investment arbitration,⁶³ in view of their potential application in both areas.⁶⁴ However, it has also been claimed that they fall short of capturing the peculiarities of investment arbitration⁶⁵ and of the public issues necessarily linked to treaty-based claims, in view of the potential impact of tribunals' awards on the pursuit of regulatory goals in nationally sensitive areas.⁶⁶

4 Substantive Soft Law

Investment arbitral tribunals decide the merits of their cases predominantly according to international law.⁶⁷ The arbitration and the applicable law clauses

Republic of Viet Nam, of the other part, 30 June 2019, not yet in force. See also the Art. 14(15) and Annex I to the Italy Model BIT 2020 (available at: <<https://investmentpolicy.unctad.org>>).

61 For a critique to the EU approach, see KRAJEWSKI, *Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective*, Bruxelles, 2014, p. 18.

62 CLEIS, *cit. supra* note 37, p. 5. See also DAELE, *Challenge and disqualification of arbitrators in international arbitration*, Alphen aan den Rijn, 2012, p. 455 ff.

63 FRY and STAMPALIJA, *cit. supra* note 35, p. 259.

64 See para. 5 of the introduction to the Guidelines.

65 CLEIS, *cit. supra* note 37, pp. 168–169.

66 FRY and STAMPALIJA, *cit. supra* note 35, p. 260.

67 On the interaction between international law and party autonomy, see SPIEREMANN, "Applicable Law", in MUCHLINSKI, ORTINO and SCHREUER (eds.), *The Oxford Handbook of International Investment Law*, Oxford, 2008, p. 89 ff.

included in IIAs usually provide that claims shall be decided on the basis of the IIA at issue, other treaties concluded between the parties and general rules of international law. Similarly, according to Article 42(1) of the 1965 Convention, ICSID tribunals are mandated to decide disputes also on the basis of rules of international law “as applicable”.

Against this background, the case law shows that soft law instruments are invoked by the parties and *amici curiae* or are referred to by investment tribunals also with respect to substantive issues arising from the claim.⁶⁸ In particular, soft law has been considered with regard to issues of jurisdiction and to the merits of the dispute, in the latter case for ascertaining the existence and content of customary rules of international law (coherently with the case law of other international courts and tribunals) or for the interpretation of the IIA at hand. As observed, references to “substantive” soft law may serve as a lever for a recalibration of investment law and its interaction with competing rights and interests, including the protection of human rights or of the environment.⁶⁹ Prospectively, its importance could increase in view of some developments in the more recent IIAs.

4.1 *Soft Law as an Instrument to Settle Issues of Jurisdiction*

For an investment arbitral tribunal to hear a case, the conditions set for its jurisdiction must be satisfied. In particular, in treaty-based arbitration, the claim must be made in connection with an investment covered by the IIA at issue. In this respect, a so-called “legality requirement” may be laid down, whereby the standards of protection agreed in the IIA apply to investments made in accordance with the law of the host State,⁷⁰ with the consequence that an

68 On the use of non-binding instruments on human rights, see KUBE and PETERSMANN, “Human Rights Law in International Investment Arbitration”, *Asian Journal of World Health*, 2016, p. 65 ff., pp. 80–86; MARCOUX, “Informal instruments to impose human rights obligations on foreign investors: An emerging practice of legality?”, *Leiden Journal of International Law*, 2021, p. 109 ff.

69 See JACOB and SCHILL, “Going Soft: Toward a New Age of Soft Law in International Investment Law?”, *World Arbitration and Mediation Review*, 2014, p. 1 ff. On the scholarly debate over the relationship between IIL and international human rights law, see KRAJEWSKI, “Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-making Practice”, *Yearbook in International Investment Law and Policy*, 2017, p. 177 ff.

70 See CARLEVARIS, “The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals”, *Journal of World Investment and Trade*, 2008, p. 35 ff.; POLKINGHORNE and VOLKMER, “The Legality Requirement in Investment Arbitration”, *Journal of International Arbitration*, 2017, p. 155 ff.; CHAISSE, “Plea of Illegality: Investment Arbitration”, *Max Planck Encyclopedia of International Procedural Law*, 2020.

investment tribunal is barred from exercising its jurisdiction if this condition is not fulfilled. According to some scholars, the legality requirement applies with reference to human rights obligations set out under the domestic law of the host State, or even in their absence, to the extent the investment has been made in violation of international human rights law,⁷¹ including peremptory customary rules of international law.⁷² Precisely the existence of these rules could be ascertained by investment tribunals also on the basis of key soft law instruments, depending on the weight they can be given as an expression of relevant practice or *opinio juris* within the international community.⁷³

However, the case law does not provide useful indications in this regard. In *Copper Mesa v. Ecuador*, an objection to jurisdiction was raised by the respondent on the ground that the claimant was responsible for severe breaches of international law and principles on corporate social responsibility (“CSR”), including the UN Global Compact⁷⁴ and the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (“OECD”).⁷⁵ However, after having requalified this issue as an admissibility matter, the Tribunal did not rule over the weight to be accredited to soft law on the ground that the lawfulness of the claimant’s behaviour had been challenged only after the commencement of the proceeding, and not when the investment was made.⁷⁶

In the absence of a legality requirement in the relevant IIA, for its supporters, there is margin to assess whether reference can be made to the controversial

71 DE BRANDEBERE, *Human Rights and International Law*, Grotius Centre Working Paper Series, No. 2018/075, 2018, p. 15.

72 DUMBERRY and DUMAS-AUBI, “When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration”, *Journal of World Investment and Trade*, 2012, p. 349 ff., pp. 364–366. See also KRAJEWSKI, “A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application”, *Business and Human Rights Journal*, 2020, p. 105 ff., p. 127.

73 BJORKLUND, “Assessing the effectiveness of soft law instruments in international investment law”, in BJORKLUND and REINISCH (eds.), *International Investment Law and Soft Law*, Cheltenham (UK), Northampton, MA (USA), 2012, p. 52 ff., p. 61.

74 See <<https://www.globalcompact.org>>.

75 *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award of 15 March 2016, para. 5.29. For the OECD Guidelines, as updated in 2001, see OECD, *OECD Guidelines for Multinational Enterprises*, Paris, 2011.

76 *Copper Mesa* case, *cit. supra* note 75, paras. 5.61–5.64. For a critique, see VIÑUALES, “Investor Diligence in Investment Arbitration: Sources and Arguments”, *ICSID Review*, 2017, p. 346 ff., p. 359–360.

unclean hands doctrine.⁷⁷ The rationale could be found in an *obiter dictum* included in the award in the *Phoenix Action v. Czech Republic* case:

“The ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investment in pursuance of torture or genocide or in support of slavery or trafficking of human organs”.⁷⁸

Accordingly, breaches of fundamental rules of international law would in any case exclude the jurisdiction of an investment tribunal. An implicit reference to soft law instruments has been read in the *obiter dictum*, on the ground that it is hard to identify international “hard” law imposing upon non-State actors the prohibition to perpetrate some of the mentioned practices.⁷⁹

4.2 *Soft Law as Instruments to Identify the Existence and the Scope of Customary Rules of International Law Applicable to the Dispute*

As mentioned above, soft law has entered into investment case law also in the analysis of the merits of the claims before arbitral tribunals, through the relevant treaty clauses providing for the application of international law to the dispute. On this basis, non-binding instruments have been relied on for a number of purposes, in particular in order to ascertain the existence of general rules of international law to be then applied to decide on the merits of the case or to interpret the IIA at stake.⁸⁰

77 KUBE and PETERSMANN, *cit. supra* note 68, p. 97. See DUMBERRY and DUMAS-AUBI, *cit. supra* note 72.

78 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 78. See also *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, paras. 123–124.

79 ALVAREZ, *cit. supra* note 32, p. 31.

80 The clause on applicable law has been restrictively interpreted in *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order no. 2 of 26 June 2012: “the reference to ‘such rules of international law as may be applicable’ in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs”. The Tribunal was deciding over the admissibility of *amici curiae* briefs arguing, also on the basis of the UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (2007) (approved with 4 votes against and 11 abstentions), that both disputing parties had incurred into a breach of the rights of indigenous people under international law (*ibid.*, paras. 25 and 58). However, the Tribunal observed that this matter was unrelated with the object of the dispute, since the respondent had not submitted a defence focused on its obligations towards the indigenous peoples under international law (*ibid.*, paras. 57 and 59).

In particular, the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001 by the UN International Law Commission (“ILC”), together with their commentaries, have offered the legal basis for deciding over issues that did not find proper regulation in IIAs, pertaining to the existence of or the justification for an unlawful conduct by the respondent State. These issues include the attribution to the respondent of the conduct of public corporations⁸¹ or the irrelevance of domestic law for affirming the unlawfulness under international law of the challenged measures.⁸² In a number of cases raised against Argentina, the respondent has invoked the state of necessity under Article 25 of the Draft Articles to justify the violation of the IIAs at hand: notwithstanding the inconsistencies between the diverse awards rendered in the so-called Argentina saga, and the annulments that have been disposed for some of them, ICSID tribunals have never put into question that Article 25 is declaratory of a customary rule of international law⁸³ (nor has this point ever been contested in annulment decisions).

The reference to soft law instruments to acknowledge the existence and content of customary rule of international law is also a feature of some awards rendered in contract-based arbitration. In this regard, a leading case is the *Texaco* dispute.⁸⁴ The sole arbitrator regarded as a sufficient criterion for the “internationalization” of the contract between the disputing parties the reference in the clause on applicable law to both “principles of international law”

81 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009, para. 113. In a footnote, the Tribunal underlines that the ILC Draft Articles “are widely regarded as expressing current customary international law”.

82 *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award of 30 June 2009, para. 165. Reference was made to Art. 3 of the ILC Draft Articles, to conclude that a violation of the 1958 New York Convention could be affirmed, notwithstanding Bangladesh had not yet adopted the required domestic implementing legislation.

83 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 315. See also *L G&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 245; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, para. 303; *Sempre Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para. 344; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, para. 168. This case law is aligned with *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, ICJ Reports, 1997, p. 7 ff., where the ICJ contended that the conditions laid down in what would then become Art. 25 of the ILC Draft Articles “reflect customary international law” (para. 52).

84 *California Asiatic Oil Company and Texaco Overseas Petroleum Company v. Libyan Arab Republic*, Award on the Merits of 19 January 1977, International Legal Materials, 1977, p. 3 ff.

and “general principles of law”.⁸⁵ Accordingly, in order to ascertain the scope of the right to nationalize conferred upon States under general international law, he relied also on the 1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources.⁸⁶ In view of its voting conditions and by stating “the existence of a right on which the generality of the States had expressed agreement”, the Resolution was deemed as reflecting the state of existing customary law in the field of nationalizations.⁸⁷

Investment tribunals have relied on soft law instruments also for interpretative purposes, when called on to determine the scope and content of the standards of protection foreign investor enjoy under an IIA. In some cases, the potential weight of soft law has been argued in the defences submitted by the respondent State, in particular where a violation of the fair and equitable treatment was claimed against it. According to established case law, while preserving the power of the host State to pursue domestic policy concerns in the exercise of its power to regulate, this standard of protection precludes, *inter alia*, arbitrary measures that run counter the “legitimate expectations” of foreign investors.⁸⁸ In *South American Silver v. Bolivia*, the respondent was of the view that the 1988 BIT concluded with the United Kingdom had to be construed according to the 2007 UN General Assembly Declaration on the Rights of Indigenous Peoples and that the standards of protection of foreign investments should have been interpreted also taking into consideration the UN Guiding Principles on Business and Human Rights⁸⁹ and the OECD Guidelines on Multinational Enterprises, viewed as applicable businesses practices and “evidence of international public order”.⁹⁰ The Tribunal rejected this line of argument as, in its opinion, Bolivia had not properly justified why rules that do not constitute customary international law should be applied to the merits

85 *Ibid.*, para. 40 ff.

86 *Ibid.*, para. 80 ff. The Resolution is in UN Doc. A/RES/1803(XVII) (1962) (approved with 2 votes against and 12 abstentions).

87 Texaco case, *cit. supra* note 84, para. 87.

88 For a detailed illustration of the content of the fair and equitable treatment (“FET”) standard, see *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 154. See also *Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-04, Partial Award of 17 March 2006, para. 300. See PALOMBINO, *Fair and Equitable Treatment and the Fabric of General Principles*, Den Haag, Berlin, 2018.

89 See the annex to RUGGIE, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31 (2011).

90 *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award of 22 November 2018, paras. 195, 199–200.

of the case.⁹¹ It is worth underlying that even in the absence of a provision on applicable law in the BIT, the Tribunal had held that the claim should also be decided according to customary international law. Nevertheless, it did not exercise its judicial authority to assess whether the instruments invoked by Bolivia had triggered the formation of a general rule of international law on the protection of the rights of indigenous peoples.

An opposite conclusion was reached in *Philip Morris v. Uruguay* where the challenged measures had been adopted according to the Framework Convention on Tobacco Control concluded in 2003 under the aegis of the World Health Organization (“WHO”) and, more importantly, the Guidelines on implementation adopted in 2008 by the Convention’s governing body.⁹² This peculiar configuration of the relevant legal framework allowed the Tribunal to conclude that Uruguay had not breached the fair and equitable treatment clause included in the 1991 BIT with Switzerland since it had acted drawing upon the Guidelines.⁹³ The existence of an undisputable link between the challenged measures and the soft instrument at issue raised no doubt on whether the Guidelines could be used to affirm the legitimacy of the conduct by Uruguay.

This case law witnesses a growing concern by States for their own societal interests, such as the protection of indigenous peoples in the *South America Silver* case or the protection of human health in *Philip Morris*. In some cases, similar issues have also been represented to assert the existence of obligations upon foreign investors in the performance of their economic activities that tribunals had to take into proper consideration. Indeed, if the legality requirement under an IIA applies exclusively to the “making” of the investment, it was not excluded that issues pertaining to its management and operation can nevertheless be heard and determined by investment tribunals, provided that the conditions for the exercise of their jurisdiction are fulfilled.⁹⁴ Against this background, in *Urbaser v. Argentina*, soft law instruments have been referred to hold that international law obligations apply also with respect to foreign investors.⁹⁵

The case arose by a complaint submitted by a Spanish investor (a shareholder of an Argentinian company holding a concession for the supply of

91 *Ibid.*, para. 218.

92 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016.

93 *Ibid.*, paras. 393–396.

94 See HOFFMANN, “Chapter 36: Counterclaims”, in KINNEAR et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, Alphen aan den Rijn, 2015, p. 505 ff.

95 *Urbaser case*, *cit. supra* note 39, Award of 8 December 2016.

water and sewage services) contending the violation by Argentina of the 1991 BIT concluded with Spain. During the proceedings the respondent submitted a counterclaim alleging the breach by the investor of its obligations under the concession contract, in particular the failure to make an investment so as to make it possible to guarantee the enjoyment of the human right to water by the population of the area interested by the concession. Once satisfied that the broadly formulated arbitration clause of the BIT justified its jurisdiction on the counterclaim,⁹⁶ and that the relevant clause on applicable law allowed to ground any decisions not only on the BIT, but also on “general principles of international law”,⁹⁷ the Tribunal examined whether private corporations are under human rights obligations as a matter of international law and whether an obligation as to the right to water and sanitation applied to the claimant as held by Argentina.

The award relied heavily on soft law instruments. In the first place, the Tribunal paid attention to UN Guiding Principles on Business and Human Rights as the “basic document” for international law standards on corporate social responsibility and human rights commitments to be complied with in businesses’ operations.⁹⁸ However, since this and other initiatives were deemed as insufficient “to oblige corporations to put their policies in line with human rights law”,⁹⁹ other instruments were referred to: the 1948 UN Universal Declaration of Human Rights,¹⁰⁰ whose Article 30 was interpreted as imposing also upon multinational corporations a duty not to act in disregard of human rights; the 2010 UN General Assembly Resolution on the Right to Water and Sanitation,¹⁰¹ where it is recognized that the right to clean and safe drinking water is essential for the full enjoyment of all human rights; a general comment by the UN Committee on Social, Economic and Cultural Rights acknowledging the importance of the right to water and sanitation for the effective enjoyment of the right to an adequate standard of living under the 1966 International Covenant;¹⁰² the International Labour Organization (“ILO”) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,¹⁰³ according to which all parties concerned by the document should respect the 1948 Universal Declaration and the corresponding

96 *Ibid.*, paras. 1135–1155.

97 *Ibid.*, paras. 1182–1192 (in particular, para. 1189).

98 *Ibid.*, para. 1195.

99 *Ibid.*

100 UN Doc. A/RES/217(III)A (1948) (approved with 8 abstentions).

101 UN Doc. A/RES/64/292 (2010) (approved with 41 abstentions)

102 General Comment No. 15, UN Doc. E/C.12/2002/11 (2002).

103 Available at: <<https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm>>.

international covenants. Against this background, the Tribunal concluded that “the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parties, public and private parties, not to engage in activity aimed at destroying such rights”.¹⁰⁴

Besides the conclusions on the merits of the counterclaim¹⁰⁵ and the criticisms raised also on the deployment of soft law,¹⁰⁶ this award stands out for two reasons: it provides the first, and up to now only attempt where the issue of investors’ human rights obligations in the operation of an economic activity has been decided on the basis of international law;¹⁰⁷ furthermore, soft law instruments have been extensively taken into consideration for the purposes of determining that international human rights obligations may be incumbent also upon private corporations and that both the ICSID Convention and the BITs have to be construed in harmony with them.¹⁰⁸

4.3 *Development in the Recent IIAs*

IIL is undergoing an evolution also in response to the criticism of its alleged favour towards the protection of investors’ rights rather than the preservation of States’ regulatory leeway in the fulfilment of public policy objectives. Some of the more recent evolutions that can be observed in treaty practice are prompted by the United Nations Conference on Trade and Development (“UNCTAD”) since 2015: with the purpose of operationalizing the principle of sustainable development within the framework of international investment law, UNCTAD suggests four areas of improvement for IIAs, inspired also by soft law instruments which, in its opinion, are contributing to expand the universe

¹⁰⁴ *Urbaser case*, Award *cit. supra* note 95, para. 1199.

¹⁰⁵ The Tribunal accepted that the human right to water is recognized under international law, with States bearing the primary responsibility to guarantee it to all persons living under their jurisdiction (*ibid.*, para. 1205). However, an obligation under international law to respect the right to water is not incumbent also upon private companies providing water services (*ibid.* paras. 1208 and 1212). It could arise under the legal and regulatory environment under which the investor is authorized to operate (*ibid.*, para. 1209), but, according to the Tribunal, in the instant case the concession contract contained no similar obligation (*ibid.* paras. 1211–1220).

¹⁰⁶ See ALVAREZ, *cit. supra* note 32, pp. 41–47; KRAJEWSKI, *cit. supra* note 72, pp. 123–125.

¹⁰⁷ Counterclaims have been submitted also with respect to environmental damages committed by the foreign investor, alleging the violation of domestic law, rather than of international law: see RUDALL, “The Tribunal with a Toolbox: On *Perenco v Ecuador*, *Black Gold and Shades of Green*”, *Journal of International Dispute Settlement*, 2020, p. 485 ff. Adherence to international environmental law was only hinted to in *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, para. 738, where the Tribunal did not discuss it for procedural reasons (*ibid.*, para. 745).

¹⁰⁸ *Urbaser case*, Award *cit. supra* note 95, para. 1200.

of codes and standards that govern the behaviour of corporate investors.¹⁰⁹ Notwithstanding their non-binding character, these standards concern directly or indirectly international investment, and so policy-makers are encouraged to take them into proper consideration in the negotiations for IIAs.¹¹⁰

More recently, IIAs have been aligned with some of the major concerns voiced by States, intergovernmental organizations or other public or private institutions in soft law instruments. This treaty practice is also the result of the conclusion of preferential agreements on trade and investment including specific provisions on sustainable development, aiming at fostering the contribution of strengthened economic relations to its fulfilment. A variety of approaches can be observed.

Some agreements refer to soft law instruments in their preamble, with the purpose of positioning the new treaty regime within the general political cooperation among the parties or of identifying critical issues which merited attention during the negotiations. As an example of the first approach the new EU trade and investment agreements can be recalled, in whose preambles the parties reaffirm their commitment to fundamental rights and freedoms enshrined in the 1948 Universal Declaration of Human Rights.¹¹¹ The growing concern over the impact of the business activities carried out by foreign investors on the domestic communities of the host State has triggered the inclusion of more specific preambular language encouraging corporations to respect internationally recognized standards on corporate social responsibility.¹¹²

Furthermore, it is not unusual to find references to soft law instruments in the operative part of IIAs, even though with varying degrees of commitment by the parties. Indeed, some texts recall in general terms declarations issued by

109 UNCTAD, *Investment Policy Framework for Sustainable Development*, Genève, 2015, p. 10.

110 UNCTAD, *UNCTAD's Reform Package for the International Investment Regime*, Genève, 2018, p. 85.

111 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 6 October 2010, entered into force 13 December 2015 (hereinafter "EU-South Korea"); CETA, *cit. supra* note 55; Economic Partnership Agreement between the European Union and Japan, 17 July 2018, entered into force 1 February 2019 (hereinafter "JEEPA"); Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, 30 December 2020, entered into force 1 May 2021 (hereinafter, "EUUK-TCA"). See also the preambles of the IIAs concluded by the EU and its member States with Singapore and Vietnam, *supra* note 60, and of the more recent Comprehensive Agreement on Investment between the EU and China (available at: <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>>).

112 See the preamble of CETA, where an express reference is made to the OECD Guidelines for Multinational Enterprises.

intergovernmental organizations,¹¹³ or lay down the agreement between the parties to promote and respect individual rights (in particular labour rights) stated in international resolutions, in particular the 1998 ILO Declaration on Fundamental Principles and Rights at Work.¹¹⁴ A differed level of commitment is expressed in provisions whereby the parties agree to encourage corporations acting within their territories or subject to their jurisdiction to respect internationally recognized standards on corporate social responsibility¹¹⁵ or to voluntarily uptake relevant practices on CSR.¹¹⁶ In some cases, the relevant standards are identified by reference to a number of instruments, including the OECD Guidelines, the UN Global Compact, the UN Guiding Principles and the ILO Tripartite Declaration. A similar provision is included in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), with the caveat that the Contracting Parties merely reaffirm the importance of a voluntary implementation of international standards (without any commitment on their part to promote it) and make clear that these standards are relevant for each State to the extent it endorses or supports them.¹¹⁷ The different level of economic development of the parties to the Trans-Pacific Partnership may justify the weakness of this provision in terms of legal bindingness, but to the detriment of a shared acceptance of soft law instruments which meet a widespread support within the international community.

A higher degree of innovation is found in some recent IIAs requiring foreign investors to follow a given standard of behaviour. For instance, the BIT concluded in 2018 between Brazil and Ethiopia compels foreign investor to “strive to achieve” the highest possible contribution to the sustainable development of the host State, through the adoption of socially responsible practices based on the OECD Guidelines, as may be applicable on the parties (Article 14(1)).¹¹⁸

113 CETA, *cit. supra* note 55, Art. 22.1(1); JEEPA, *cit. supra* note 111, Art. 16.1(1); EU-UK TCA, *cit. supra* note 111, Art. 8.1(1), and Art. 1 in Section IV, Sub-section I of the Comprehensive Agreement on Investment between the EU and China, *cit. supra* note 111.

114 CETA, *cit. supra* note 55, Art. 23.3(1); EU-South Korea, *cit. supra* note 111, Art. 13.4(3). The text of the ILO Declaration is available at: <<https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>>.

115 CETA, *cit. supra* note 55, Art. 22.3(2)b; 2015 Norway model BIT (draft), Art. 31 (available at: <<https://investmentpolicy.unctad.org>>).

116 See Art. 2(2) of Section IV, Sub-section I of the agreement with China, *cit. supra* note 111.

117 See Arts. 9.17 and 17.9 of the CPTPP, *cit. supra* note 55. See also Art. 14.17 of the 2019 United States-Mexico-Canada Agreement, 30 November 2018, entered into force 1 July 2020 (available at: <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>>).

118 With some minor differences, this treaty practice is followed by Brazil in the IIAs concluded after the adoption of its model BIT in 2015, including the BIT with India signed in January 2020. The texts are available at: <<https://investmentpolicy.unctad.org>>.

While formulated in binding terms (“Investors and their investment shall”), the provision will most probably have a limited practical importance, as it merely imposes a best effort obligation upon investors (“strive to achieve”). However, it confirms the weight of the OECD Guidelines in addressing CSR issues in IIAs and, at the same time, the inclination of developing countries to recognize that the implementation of international standards within their territory cannot overlook their economic specificities. On its part, the Italian BIT model 2020 does not exclude that negotiations with third States can also cover obligations upon foreign investors. Indeed, even though not a master of clarity, an optional clause compels foreign investors to abide by the legislation of the host State, including “relevant national and international standards of corporate governance”.¹¹⁹

Hortatory language is partially left aside in the BIT concluded between Morocco and Nigeria in 2016. Indeed, while according to its Article 24(2) foreign investors are simply exhorted to apply the ILO Tripartite Declaration, Article 18(3) requires them in prescriptive terms to act in accordance with the 1998 ILO Declaration on labour rights.

Finally, specific provisions concerning the behaviour of the foreign investors are included also in the discipline on enforcement. In this respect, reference can be made to the 2019 model BIT of the Netherlands, whereby in deciding on the compensation for the damage, an investment tribunal is expected to take into account non-compliance by the investor with the commitments arising under the UN Guiding Principles and the OECD Guidelines. This approach draws inspiration from the cases (including the above-mentioned *Urbaser v. Argentina* and *Copper Mesa v. Ecuador*) where the damages awarded to investors were reduced or excluded on the ground that the investors had contributed to the loss it suffered by not displaying the expected due diligence in the operation of its business activities.¹²⁰ The Dutch model BIT prompts a considerable expansion of the scope of investors’ diligence, on the assumption that adherence to soft law instruments could reduce any potential damage. This

119 The reference to international CSR standards is included in a provision subjecting foreign investors to the domestic law of the host State in the management and operation of their investment. It leaves a certain degree of uncertainty on whether the international standards are relevant as such or only to the extent they have been incorporated into the domestic law.

120 See VIÑUALES, *cit. supra* note 76, pp. 364–366; KRAJEWSKI, *cit. supra* note 72, pp. 125–126; ZARRA, “International Investment Treaties as Source of Human Rights Obligations for Investors”, in BUSCEMI et al. (eds.), *Legal Sources in Business and Human Rights. Evolving Dynamics in International and European Law*, Leiden, Boston, 2020, p. 52 ff., pp. 62–64.

matter could be particularly crucial when domestic legislation or regulation has been adopted by the host State consistently with soft law instruments.¹²¹

5 Final Remarks

The present contribution has focused on the use of soft law both in the investment arbitration and in the more recent treaty practice under IIAs. As a general conclusion, it is clear these instruments have entered the international investment regime with regard to the determination of both procedural and substantive issues.

With regard to procedural soft law, arbitration rules deriving from the consent of the parties or set by arbitral institutions can hardly offer an exhaustive discipline on any procedural matters that may arise during the proceedings. In order to fill the gaps, tribunals are conferred the power to decide over the conduct of the proceedings. It can be noted that in the exercise of this authority investment tribunals rely on soft law, such as the IBA Rules on the taking of evidence. The widespread practice and the general recognition that this instrument has gained in investment arbitration would support its use also in the absence of an *ex ante* agreement between the disputing parties, once the latter have been given the opportunity to express their position. On the contrary, the analysis of the practice on the second IBA instrument taken into consideration, the Guidelines on conflicts of interest, has shown that ICSID tribunals have resorted to them in an extremely limited number of cases. They were mostly considered irrelevant or a mere source of inspiration for arbitrators. A possible justification lies in the fact that the ICSID Convention sets out specific rules on disqualification of arbitrators, whose primacy has been affirmed, and in the observation that as an instrument elaborated within an epistemic community of business professionals with a focus on commercial arbitration, the IBA Guidelines fall short of capturing the public and collective interests which can be involved in investment arbitration.

This consideration can also explain the steps undertaken for the “hardening” of the IBA instruments. According to the more recent proposal for amendments

¹²¹ A similar argumentation was proposed in a partially dissenting opinion accompanying the award rendered in *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, where the behavior of the investors was assessed against the ILO Convention No. 169 on Indigenous and Tribal Peoples, 27 June 1989, entered into force 5 September 1991: according to the arbitrator, even though it does not bind private corporations, the Convention was not without significance or legal effects for them (para. 10), on the ground of “domestic law of Peru or otherwise” (para. 12).

to the ICSID Arbitration Rules, reliance on the IBA Rules on the taking of evidence is among the issues that could be discussed by tribunals with the disputing parties at the beginning of the proceeding; however, even acknowledging their weight in the case law, it is not projected that disputes on the submission of evidence will be resolved on their basis. With regard to the Guidelines on conflicts of interest, the more recent negotiations and BIT models seem not to exclude reliance on them. However, in some cases the attribution of binding force is regarded only as an intermediary step in view of the approval of a code of conduct for the arbitrators appointed under the IIA. But it can also be found that the parties to an IIA have deemed appropriate to agree over ethical issues for arbitrators at the treaty level, in particular where the establishment of a permanent investment tribunal is provided for. This trend evidences a predisposition to dictate at the intergovernmental level the requirements for judges' (or *ad hoc* arbitrators') independence and impartiality.

Substantive soft law has entered investment arbitration in order to address both issues of jurisdiction and the merits of the claim. The case law considered in this contribution has shown that, notwithstanding the absence of treaty language expressly referring to it, both disputing parties and tribunals have relied on it with the purpose to affirm the existence of customary rules of international law or to interpret the IIA at hand. However, a clear path cannot be discerned, except when use is made of soft law instruments generally accepted as reflecting the status of customary international law (as in the case of the ILC Draft Articles on the international responsibility of States or some UN General Assembly resolutions concerning foreign investments): the criticisms raised against the approach followed by the Tribunal in *Philip Morris v. Uruguay* in the interpretation and deployment of soft law instruments and the reluctance in *South American Silver v. Bolivia* to exercise judicial authority to assess the existence of customary rules illustrate the legal obstacles that can be met in importing non-binding instruments into the international investment regime.

Nevertheless, the evolutions in the more recent IIAs witness a recognition by States of the weight soft law may have on the relationships between foreign investors and host State. The reference into IIAs' preambles to matters in respect of which a growing consensus has emerged or is emerging within the international community (e.g. sustainable development), to "international recognized standards" recalled in general terms or to specific soft law instruments (e.g. the OECD Guidelines on Multinational Enterprises) will enhance the legitimacy and legal authority of interpretations of the relevant substantive treaty clauses on the basis also of soft law instruments, as part of the context of the IIA under Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. While IIAs would maintain their character as instruments for the promotion

and protection of international capital flows, the social dimension of foreign investments and their impact over the communities in the host States would also come under their scope. A strengthened role of soft law instruments for interpretative purposes arises in the IIAs where they are recalled in the operative part.¹²² However, as mentioned above, in the treaty practice it can also be found that the parties to an IIA decide over a discipline concerning the operation of foreign investments, beside a legality requirement over their establishment. They may agree on encouraging the respect of soft law instruments by corporations acting within their territories, or impose upon foreign investors the obligation to act in accordance with them. In practice, these clauses can mean that investors could hardly challenge under the IIA domestic measures adopted with the purpose of implementing those instruments or expect that they can manage their business activities below the standards provided for therein.¹²³ Moreover, when investors are bound under the IIA to comply with these standards, as in the case of the 2016 BIT between Morocco and Nigeria, the submission of counterclaims is clearly facilitated.¹²⁴

Which conclusions can be drawn from the practice under the international investment regime about the role of soft law instruments into the international legal order? First, the importance of instruments adopted by private non-State actors is not refuted in the practice of investment tribunals, creating expectations by the interested parties that they can be relied on in their submissions and in final decisions or awards. However, more recently, States have not failed to admit the potential pitfalls of these instruments, establishing at treaty level their control on the arbitral procedural rules. To some extent, the IBA instruments contribute to the conclusion of a more extensive discipline on arbitral procedures within IIAs. With regard to substantive soft law instruments, they can represent a stepping stone for the recognition that some common concerns generally accepted within the international community have significance also for international investments. Their transformation into hard law through incorporation within IIAs enhances their weight on the interpretation of standard protection clauses, while at the same time strengthening the protection of host States' interests against unsuitable investors' behaviour.

122 See KRAJEWSKI, *cit. supra* note 72, p. 129.

123 VIÑUALES, *cit. supra* note 76, p. 355.

124 See DE BRANDEBERE, *cit. supra* note 71, p. 12.