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Enforcing Soft Law in International Investment Arbitration

Vera Korzun
University of Akron School of Law

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Vera Korzun*

ABSTRACT

Drawing examples from international environmental law, sustainable development, and corporate social responsibility, this Article examines the evolving role of international investment arbitration in the enforcement of non-binding soft law rules of international law. In doing so, the Article explains how investment tribunals can, and have been called upon to, interpret and, paradoxically, enforce soft law instruments. The Article calls for reevaluation of the nature of soft law and the role of investor-state dispute settlement in international rulemaking and enforcement. It also argues that for international environmental law and law on sustainable development, where the lack of an enforcement mechanism has long been identified as the single major weakness of the system, investor-state dispute settlement might be a viable option for increasing compliance with and enforcement of international law obligations of the sovereign states.

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* Associate Professor of Law, University of Akron School of Law. For questions and comments on earlier versions of this Article, I would like to thank participants of the 2019 Research Forum of the American Society of International Law (ASIL) held at Brooklyn Law School from November 7-9, 2019; Second Annual Chicagoland Junior Scholars Conference held at the Loyola University Chicago School of Law on September 27, 2019; the 2019 ASIL Midwest Works-in-Progress Conference held at the UIC School of Law on September 27, 2019; and the 2019 Northeast Ohio Faculty Colloquium held on November 22, 2019. I am particularly grateful to Margaret L. Moses, Jorge Contesse, Bradly J. Condon, Simon Batifort, Julian Arato, Perry S. Bechky, Joel P. Trachtman, and participants of the Akron Law's Faculty Scholarship Workshop held on October 10, 2019.

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I. INTRODUCTION

There are two sides to every story. Imagine a country with a high solar energy potential where the government seeks to develop solar power generation. To attract foreign investments, the government has signed several investment treaties where it promised foreign investors substantive protections, such as non-expropriation and fair and equitable treatment, and provided its consent to arbitration. Such consent allows a foreign investor to bring a claim for damages in investment arbitration if the host state violates its investment treaty obligations.

Imagine also that a foreign investor conducts a feasibility study and decides to invest in the solar sector in our imaginary country. Everything goes smoothly. The solar farm begins production and generates profit until one day a dispute arises, perhaps, because of the regulatory change in the renewable energy sector. The government that promised to buy the excess electricity at guaranteed prices, as part of the feed-in tariff program,[1] has since realized that it cannot afford

1. Feed-in tariff (FIT) is a policy mechanism that can be introduced by the government to encourage investments into the renewable energy sector (e.g., solar,

paying the set purchase prices. And so, the tariffs are revised, and any subsidies are abolished. As the dispute escalates, the investor brings a claim for damages in investment arbitration. The foreign investor argues that a regulatory change has substantially reduced the profitability of the investment project, effectively amounting to expropriation. And so, the foreign investor claims, it is entitled to damages based on the investment treaty. Reflecting on the role of investment arbitration in the development of renewable energy and environmental protection, the investor says that investor-state dispute settlement (ISDS) *contributes* to environmental protection and sustainable development. After all, in making its decisions to invest in the renewable industry abroad, the investor took a note and appreciated its ability to bring a claim for damages in ISDS.

On its side, the government of our imaginary country now has to defend in investment arbitration its ability to regulate for the benefit of the public at large. It argues that its domestic legislation is in line with international environmental law, including its non-binding, so-called soft law provisions.[2] Reflecting on the role of investment arbitration, the government alleges that ISDS *restricts* its ability to regulate for the benefits of the environment and sustainable development goals (SDGs).

This is the story that calls on investment tribunals to resolve regulatory disputes between foreign investors and sovereign states. In doing so, tribunals may look at soft law instruments to interpret investment treaties or to establish the formation of customary international law.[3] In addition to the interpretation of treaties, investment tribunals may also engage in the interpretation and enforcement of non-binding soft law provisions.

Soft law rules may come into consideration of investment tribunals through investment treaties, which increasingly incorporate by reference soft law instruments of international environmental law,

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wind). It typically includes a commitment to provide eligible renewable energy generators (e.g., private investors or homeowners) with access to the electric grid and to buy from them excess energy at the guaranteed purchase prices as part of the long-term contracts.

2. The term "soft law" in international law generally refers to legally non-binding and, therefore, unenforceable provisions of so-called soft law instruments, such as declarations, guidelines, memoranda of understanding, and codes of conduct, adopted by the sovereign states and international organizations. In contrast to soft law, the term "hard law" is sometimes used to refer to the binding sources of international law, such as treaties and international custom. For further discussion of the concept of soft law, including how it is being created and its role and normativity, see *infra* Part II.B.

3. *See, e.g.*, Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 432 (1991) (discussing the role of soft law in establishing *opinio juris*).

sustainable development, and corporate social responsibility.[4] Notably, among these instruments is the Rio Declaration on Environment and Development (Rio Declaration), which contains twenty-seven principles seeking to guide sovereign states in achieving sustainable development.[5] Adopted at the 1992 United Nations Conference on Environment and Development and endorsed by the UN General Assembly,[6] the declaration remains a non-binding instrument,[7] which resulted after a proposal for a binding convention—an "Earth Charter"—was specifically rejected by Group of 77 and China.[8] And so, the choice of a non-binding instrument instead of a treaty on sustainable development was deliberate to ensure greater participation of the sovereign states without exposing them to liability for violation of mandatory norms on sustainable development. Furthermore, the Rio Declaration as the soft law instrument was meant to contribute to the future development of treaty law on sustainable development.[9]

In the area of corporate social responsibility (CSR), investment treaties also call on arbitral tribunals to assess compliance of foreign investors with soft law, such as the United Nations Guiding Principles on Business and Human Rights[10] and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational

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4. *See infra* Part III (discussing various means of invoking soft law in ISDS with examples of investment arbitration cases that discussed, interpreted and/or enforced soft law as part of bringing a claim in arbitration, raising defenses and counterclaims, invoking exceptions, and allowing submissions by amicus curiae and non-disputing parties).

5. United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (June 25, 1992) [hereinafter Rio Declaration].

6. G.A. Res. 47/190, ¶ 2, Report of the United Nations Conference on Environment and Development (Dec. 22, 1992).

7. Scholars have argued that some provisions of the Rio Declaration reflected customary international law already formed at the time, while other provisions were introduced "to shape the future normative expectations." *E.g.*, Günther Handl, Introductory Note, *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992*, U.N. AUDIOVISUAL LIBR. OF INT'L L. (May 2012), https://legal.un.org/avl/ha/dunche/dunche.html [https://perma.cc/Y3CN-YWMD] (archived Oct. 12, 2022).

8. *Id.* (noting that the Rio Declaration "has served as a basic normative framework at subsequent global environmental gatherings, namely the World Summit on Sustainable Development in Johannesburg in 2002 and 'Rio+20', the United Nations Conference on Sustainable Development in 2012").

9. *See id.*

10. *See* OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RTS., U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (June 16, 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [https://perma.cc/AE33-4FH7] (archived Oct. 12, 2022) [hereinafter U.N. Guiding Principles on Business and Human Rights].

Enterprises.[11] The Dutch Model bilateral investment treaty (BIT) is the trailblazer in this regard as it instructs arbitral tribunals to "take into account" an investor's non-compliance "in deciding on the amount of compensation."[12] In other words, having established non-compliance with soft law, arbitral tribunals are to reduce the amount of damages otherwise due to a foreign investor.

Thus, paradoxically, modern investment treaties call on arbitral tribunals to interpret and *enforce* soft law and its instruments, which are non-binding and otherwise unenforceable.[13] This includes instruments adopted in instances where sovereign states have failed to agree on a binding legal instrument, such as a treaty, as was the case with the Rio Declaration. In effect, sovereign states—unable or unwilling to reach an agreement on a treaty or to develop a customary international law norm—have now transferred their lawmaking functions into the hands of investment tribunals and the costs of such lawmaking on foreign investors and host states engaged in arbitration.

This latest development in international investment treaty making has far-reaching consequences. Notably, it requires arbitral tribunals to interpret soft law and assess the conduct of foreign investors and host states as to their compliance with soft law. In the area of CSR, it may also require investment tribunals to compel foreign inves-

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11. *See* ORG. FOR ECON. COOP. AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), https://www.oecd.org/daf/inv/mne/48004323.pdf (last visited Nov. 7, 2022) [https://perma.cc/LVG6-LC5U] (archived Nov. 7, 2022) (annexed to OECD Declaration on International Investment and Multinational Enterprises, OECD) [hereinafter OECD Guidelines]. First adopted by the Governments of OECD Member countries on June 21, 1976, the OECD Declaration on International Investment and Multinational Enterprises has since been reviewed in 1979, 1984, 1991, 2000 and 2011. *See* OECD Declaration on International Investment and Multinational Enterprises, June 20, 1976, OECD/LEGAL/0144 [hereinafter OCED Declaration on International Investment and Multinational Enterprises].

12. Article 23 of the Dutch Model BIT provides that "[w]ithout prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the U.N. Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises." NETHERLANDS MODEL INVESTMENT AGREEMENT, art. 23 (Mar. 22, 2019), http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2020/05/new-model-Netherlands-BIT.pdf [https://perma.cc/HQ9H-ZMV9] (archived Oct. 12, 2022) [hereinafter Dutch Model BIT].

13. This Article uses the term "enforce" here in the sense of "compelling obedience." *See* Enforce, BLACK'S LAW DICTIONARY (11th ed. 2019). Further, as Black's Law Dictionary suggests, the term "enforce" can mean to "compel a person to pay damages for not complying with (a contract)." *Id.* In the context of international investment law and dispute settlement, such enforcement can present itself in reduction of the amount of compensation otherwise owed by the host state to a foreign investor in view of violations of the applicable investment treaty. This reduction of compensation reflects the amount of damages that the foreign investor would have to pay for non-compliance with soft law rules of international environmental law, sustainable development, and CSR.

tors to pay damages for non-compliance with the soft law provisions. In other words, arbitral tribunals are to make soft law binding on disputing parties in ISDS. Beyond the disputing parties, this practice expands normativity of soft law to future investment disputes through references and citations to prior arbitral awards in subsequent investment arbitrations.[14]

The change in the investment treaty-making practice, which now calls for incorporation of soft law instruments in investment treaties, also transforms the nature and role of soft law in international law. We are either witnessing a defeat of soft law, which may no longer exist outside of the binding treaty commitment and—at least in view of the investment treaty parties—requires incorporation by reference into investment treaties to impact foreign investors. Or we are witnessing a failure of states and international organizations who developed this soft law to follow-up on their promise to develop a binding commitment within the scope of the soft law instrument. Instead of making such binding commitments and ensuring their enforcement, sovereign states have seemingly curtailed their position to imposing binding commitments on environmental protection, sustainable development, and CSR on foreign investors *only* as part of international investment regime. Yet, provisions of these soft law instruments remain non-binding and unenforceable with regard to domestic investors and state parties themselves.

In view of these developments in treaty practice and dispute resolution, this Article argues that investment tribunals in ISDS are no longer simply "using" or "taking into account," but in fact "enforcing" soft law rules in investment arbitration. The role of ISDS has long evolved from serving merely as a dispute resolution platform for foreign investors seeking to enforce their rights under international investment law. With the help of investment law, ISDS today serves as a forum for enforcing a broad range of laws relevant to foreign investments, including the *soft law* of environmental protection, sustainable development, CSR, and domestic regulatory measures adopted in line with the state's international law obligations in these fields.[15] And so, through ISDS, arbitral tribunals have already contrib-

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14. On the role of arbitral awards in subsequent arbitrations, see *supra* notes 65–72 and accompanying text.

15. In the renewable energy generation alone, the International Centre for Settlement of Investment Disputes (ICSID) reports sixty-three arbitrations currently pending or already concluded. *See ICSID Cases Database* (2022), INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/cases (last visited Nov. 7, 2022) [https://perma.cc/52B8-N9RJ] (archived Oct. 12, 2022); *see also* Barnali Choudhury, *International Investment Law and Noneconomic Issues*, 53 VAND. J. TRANSNAT'L L. 1, 14–15 (2020) (reporting fifty-six arbitral awards issued in the period of 1992–2018 where host states or amicus curiae raised environmental or human rights issues); Kate Parlett & Sara Ewad, *Protection of the Environment in Investment Arbitration – A Double-Edged Sword*, KLUWER ARB. BLOG (Aug. 27, 2017), http://arbitrationblog.kluwerarbitration.

uted to international rulemaking and have effectively transformed ISDS into an enforcement mechanism for largely "soft law" areas of law, such as international environmental law, law on sustainable development, and rules on CSR. Paradoxically, non-binding (meaning unenforceable) soft law instruments are directly and indirectly enforced in ISDS, and the role of these instruments will only continue to grow.

This requires reconceptualizing the nature and role of soft law in international law as it can no longer be called "of no legal significance."[16] It also requires acknowledging the importance and ability of ISDS to rebalance the rights of sovereign states vis-à-vis foreign investors in international investment law, which has embraced and taken upon itself the enforcement of the rules of sustainable development, environmental protection, and CSR—the areas of law that largely were unable to build their own enforcement mechanisms (e.g., international environmental courts or specialized arbitral tribunals) or to adopt legally binding regimes of regulation (e.g., rules on sustainable development or CSR).

Drawing examples from international environmental law, sustainable development, and rules on corporate social responsibility, this Article examines the evolving role of ISDS in the enforcement of soft law instruments of international law. The Article proceeds as follows: Part II first explains the role of soft law in rebalancing international investment law and dispute resolution. It then defines "soft law" and explores its relevance for international investment law and arbitration as a substantive tool applied and enforced by investment tribunals. Finally, it reviews soft law in the two key areas, which are increasingly referred to or incorporated by reference into international investment treaties: (i) environmental protection and sustainable development, and (ii) corporate social responsibility.

Part III looks into how soft law can come into play in ISDS as part of dispute resolution between a foreign investor and a host state. It explores both direct and indirect means of invoking soft law instruments, such as: alleging violations of international investment agreements (IIAs) that refer to environmental protection, sustainable development, and CSR goals; submitting counterclaims by the host state; invoking exceptions; and allowing submissions by an amicus

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com/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/ [https://perma.cc/HBB8-TX7H] (archived Nov. 7, 2022) (noting that "more than 60 investment disputes filed since 2012 have had some environmental component"); Daniel Behn & Malcolm Langford, *Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration*, 18 J. WORLD INV. & TRADE 14 (2015).

16. Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMPAR. L.Q. 850, 860 (1989) (observing that "the process of negotiating a soft law instrument can often be as complex as lengthy as that for the negotiation of a treaty" (footnote omitted)). Chinkin further notes that the complexity and length associated with the negotiation of a soft law instrument is "inconsistent with a belief that the end result is in any event of no legal significance." *Id.*

curiae or non-disputing party. In doing so, the Article explores how investment tribunals can, and have been called upon to, interpret and enforce soft law instruments.

Part IV then explores the implications of such developments in ISDS for international environmental law, law on sustainable development, and rules on CSR. It argues that the new emerging role of ISDS in international rulemaking and enforcement of soft law instruments requires reevaluation of our stance on ISDS in the ongoing debate on the ISDS reform. It further argues that for international environmental law and law on sustainable development, where the lack of enforcement mechanism has long been identified as the single major weakness of the system, ISDS might be a viable option for increasing compliance with, and enforcement of, international law obligations of the host state. A short conclusion follows.

II. SOFT LAW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION

A. *Rebalancing International Investment Law*

International investment law and dispute settlement have become the subjects of international lawmaking and institutional reform efforts at international and regional levels.[17] The ongoing treaty revision and reform debate focuses largely on the rebalancing of international investment law and ISDS in favor of the host state.[18] As part

17. At the international level, the United Nations Commission on International Trade Law (UNCITRAL) is working on the potential reform of ISDS. *See generally* U.N. Comm'n Int'l Trade L., Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-First Session, UN Doc. A/CN.9/1086 (Dec. 13, 2021). At the regional level, the European Commission is leading the initiative to replace ISDS with a permanent Multilateral Investment Court (MIC) system. *See, e.g.*, European Commission Press Release, The Commission, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm [https://perma.cc/F4FZ-KDLY] (archived Oct. 12, 2022); European Commission Press Release, The Commission, EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396 [https://perma.cc/FX3W-XX6F] (archived Oct. 12, 2022); ISSAM HALLAK, MULTILATERAL INVESTMENT COURT: OVERVIEW OF THE REFORM PROPOSALS AND PROSPECTS (2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf (last visited Nov. 7, 2022) [https://perma.cc/XU57-YEP3] (archived Oct. 12, 2022); *see also* Cecilia Malmström, A Multilateral Investment Court: A Contribution to the Conversation About Reform of Investment Dispute Settlement, European Commission (Nov. 22, 2018), https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf [https://perma.cc/LAJ2-535Q] (archived Dec. 2, 2022) (discussing the EU position expressing dissatisfaction with modern ISDS and suggesting to replace it with an investment court system).

18. *See, e.g.*, Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461, 466 (2013) (arguing for rebalancing international investment law by allowing limited, closely related counterclaims in investment arbitration); *see also* Todd Weiler, *Balancing Human Rights and Investor*

of such rebalancing, sovereign states seek to incorporate the rights of the *host state*—the recipient of foreign investments—into the current framework of international investment law.[19] This is a particularly noticeable development in view of the traditional focus of international investment law on attracting and protecting foreign investors.[20] Most notably, recent and proposed IIAs seek to secure for the state *the right to regulate*—that is, the power to adopt and implement laws and regulations for the benefit of the public at large—without facing liability for changing regulatory regime where such changes impact foreign investors' rights.[21]

In addition to enhancing the rights of the host state in investment treaties, sovereign states seek to clarify and restrain the rights of and impose obligations on *foreign investors*.[22] Along these lines, recent investment treaties call on foreign investors to operate in compliance with international environmental law, sustainable development, labor rules and standards, human rights, and CSR.[23] In doing so, some investment treaties refer to environmental protection, sustainable de-

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Protection: A New Approach for a Different Legal Order, 27 B.C. INT'L & COMPAR. L. REV. 429, 429 (2004) (proposing to rebalance IIAs by introducing a "sort of 'counterclaim' mechanism" that would allow individuals in the host state "to bring claims against foreign investors for the violation of serious international rules by their agents or employees operating in the host country").

19. *See generally* Kabir A. N. Duggal & Laurens H. van de Ven, *The 2019 Netherlands Model BIT: Riding the New Investment Treaty Waves*, 35 ARB. INT'L 347 (2019); *see also* Marc Jacob & Stephan W. Schill, *Going Soft: Towards a New Age of Soft Law in International Law?*, 8 WORLD ARB. & MEDIATION REV. 1, 13–14 (2014).

20. *See, e.g.*, Laurence Dubin, *Corporate Social Responsibility Clauses in Investment Treaties*, INV. TREATY NEWS (Dec. 21, 2018), https://www.iisd.org/itn/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/ [https://perma.cc/DFG9-5J44] (archived Oct. 12, 2022) (noting that "clauses that impose on investors direct obligations concerning human rights, environmental protection or the international prohibition on corruption . . . oppose the primary objective of traditional investment law, which is to protect investors, and demonstrate the substantial reform movement in this area").

21. According to the United Nations Conference on Trade and Development's IIA Mapping Project, which to date includes 2,574 investment treaties, forty-five treaties include a reference to the right to regulate in their preamble (with seventeen of these treaties also including separate provisions on the right to regulate in their text, in addition to the preamble of the treaty). *See Mapping of IIA Content*, UNITED NATIONS CONF. ON TRADE AND DEV., https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping [https://perma.cc/KNF7-HEDL] (archived Oct. 12, 2022) [hereinafter UNCTAD IIA Mapping Project]; *see also* Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355 (2017) (discussing the right to regulate in international investment law, including exceptions, exclusions, and other safeguard provisions used in investment treaties to preserve the right to regulate).

22. On establishing investor obligations in investment treaties and through investment arbitration, see generally Markus Krajewski, *A Nightmare or a Noble Dream? Establishing Investor Obligations Trough Treaty-Making and Treaty-Application*, 5 BUS. & HUM. RTS. J. 105 (2020).

23. *See* discussion *infra* Part III.A.

velopment, and CSR in passing by reiterating their importance in the preamble to the treaty.[24] Other treaties contain separate provisions on these subjects and seek to impose obligations on foreign investors with reference to instruments of international environmental law, sustainable development, and CSR, such as the OECD Guidelines for Multinational Enterprises.[25]

Yet, many of the rules of international environmental law, sustainable development, and CSR that are now prominent in investment treaties, are embodied in the so-called "soft law" instruments of international law—that is, legally *non-binding* guidelines, declarations, codes of conduct, and similar sets of rules.[26] The nature and role

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24. *See, e.g.*, Agreement Between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, Geor.-Switz., pmbl., Mar. 6, 2014 (expressing state parties' determination "to encourage investors to respect internationally recognized corporate social responsibility standards and principles") [hereinafter Georgia-Switzerland BIT]; Agreement Between the Council of Ministers of the Republic of Albania and the Government of the Republic of Azerbaijan on the Promotion and Mutual Protection of Investments, Alb.-Azer., pmbl., Sept. 2, 2012 (expressing the desire of the state parties to achieve objectives of the treaty "in a manner consistent with the protection of health, safety and the environment and the promotion of sustainable development"); Agreement for the Promotion and Protection of Investment Between the Republic of Austria and the Republic of Tajikistan, Austria-Taj., pmbl., Dec. 15, 2010 ("expressing [the Contracting Parties'] belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries") [hereinafter Austria-Taj. BIT]; *see also* UNCTAD IIA Mapping Project, *supra* note 21 (covering 2,574 investment treaties, of which seventy-eight mapped treaties include in the preamble a refence to sustainable development, 143 treaties—a reference to environmental aspects (such as plant or animal life, biodiversity, climate chance), and 223 treaties—a reference to social investment aspects, including CSR).

25. OECD Guidelines, *supra* note 11. For examples of investment treaties referring to the rules of CSR, see the United States-Mexico-Canada Agreement, Can.-Mex.-U.S., art. 14.17, Nov. 30, 2018, Pub. L. No. 116-113 (reaffirming the importance for each state party to encourage enterprises operating within their territories to incorporate into their internal policies internationally recognized rules of corporate social responsibility, including, specifically, the OECD Guidelines for Multinational Enterprises) [hereinafter USMCA]; Agreement Between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership, Japan-U.K., art. 16.5, Oct. 23, 2020 (underlining the importance of corporate social responsibility, particularly internationally recognized principles and guidelines, including the OECD Guidelines for Multinational Enterprises).

26. *See, e.g.*, Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates, Braz.-U.A.E., art. 15, Mar. 15, 2019 (calling on investors and their investments "to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in the OECD Guidelines for Multinational Enterprises"); Protocol to Amend the Free Trade Agreement and the Supplementary Agreement on Trade in Services of the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, China-Chile, art. 69, Oct. 1, 2006 ("recall[ing] the Stockholm Declaration on the Human Environment of 1972, the Rio Declaration on Environment and Development of 1992, Agenda 21 on Environment and Development of 1992, the Johannesburg Plan of

of soft law in international law remains controversial, although hardly anyone would argue today that soft law is irrelevant for the international legal process because of its non-binding nature. By incorporating soft law instruments into investment treaties, sovereign states seek to harden the soft nature of these rules by making them binding on foreign investors and—depending on the nature and content of a soft law instrument and the language of the investment treaty—on sovereign state parties to the treaty.[27] Compliance with these norms may serve as a condition for granting protection to foreign investors or investments under an investment treaty.[28] Non-compliance, on the

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Implementation on Sustainable Development of 2002, the Rio+20 Outcome Document 'The Future We Want' of 2012 and the 2030 Agenda for Sustainable Development"); Dutch Model BIT, *supra* note 12, arts. 7.1–7.2 (providing that "[i]nvestors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws" and "reaffirm[ing] the importance of each Contracting Party to encourage investors . . . to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business"); *see also* Jacob & Schill, *supra* note 19, at 43 (exploring the role of soft law instruments in international investment law and observing that "soft law instruments are . . . becoming increasingly wide-spread also as regards the balancing, or re-balancing, of rights of investors and competing rights of States and their populations," as well as listing various reasons "that make soft law instruments the preferrable tool for rebalancing investor rights and public interests," such as the ability of soft law to concretize the "vague and abstractly formulated standards of investment protection").

27. *See, e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Arab Emirates, Neth.-U.A.E., art. 2, Nov. 26, 2013 (containing obligations of the state parties to promote the application of the OECD Guidelines for Multinational Enterprises to the extent that is not contrary to their domestic laws) [hereinafter Neth.-U.A.E. BIT].

28. *See, e.g.*, The Investment Promotion Act, Egypt-Mauritius, arts. 1.1, 1.3, June 25, 2014 (defining investment as "every kind of asset that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, the contribution to sustainable development, and established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party" and defining investor as "any natural person or any legal entity, that has made an investment in the territory of the other Contracting Party, provided that . . . the legal entity is constituted or otherwise duly organized in accordance with the laws of one of the Contracting Parties and has, in the territory of that Contracting Party . . . contributed to sustainable development"). In the context of reforming international investment agreements, UNCTAD considers the inclusion of "the requirements of duration and the contribution to sustainable development as characteristics of an investment . . . the most sustainable development-friendly course of actions." U.N. Conference on Trade and Development, *International Investment Agreements Reform Accelerator*, UNCTAD/DIAE/PCB/INF/2020/8 (2020). As UNCTAD explains, "[t]his approach contributes to shielding countries from suits by investors holding assets which do not advance the host State's durable development." *Id.*

other hand, may allow a host state to raise a defense or—more recently—to successfully bring a counterclaim in ISDS.[29]

Still, a mere incorporation by reference of soft law into investment treaties does not in itself offer routes for enforcement of these provisions in ISDS by the host state. The right to bring a claim in ISDS rests exclusively with foreign investors and is not available to the host state. As a result, ISDS does not allow the host state to bring a claim against a foreign investor for non-compliance with substantive rules of environmental protection and sustainable development, human rights, or CSR. And so, in a case of non-compliance by a foreign investor with a soft law instrument—made binding through incorporation by reference into an investment treaty—the host state is left with no option but to leave its claims for another day and forum.

Recognizing this weakness of the ISDS regime, in addition to changing the regulatory landscape for foreign investors, sovereign states now seek to equip arbitral tribunals with the tools of assessing an investor's conduct (including its compliance with the soft rules of environmental protection, sustainable development, and CSR) and taking it into account as part of damages calculation.[30] In this framework, it is still the foreign investor who brings a claim in ISDS, but investment tribunals (in view of host state defenses or counterclaims) are able to reduce damages owed to the foreign investor in consideration of the investor's non-compliance with the soft law provisions, which may result in environmental harm, violations of labor standards, human rights, and CSR rules. The most recent and novel approach in this regard comes from the Dutch Model BIT (2019), which directs arbitral tribunals to assess investors' conduct as to their compliance with otherwise non-binding norms of international environ-

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29. *See, e.g.*, Bjorklund, *supra* note 18, at 465 (explaining that "even if a state cannot submit a counterclaim, allegations of improper behavior on the part of an investor might help a state defend itself from the investor's claims of fair and equitable treatment violations by demonstrating that the state's conduct was warranted because of the investor's actions").

30. *See, e.g.*, Dutch Model BIT, *supra* note 12, art. 23 ("Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account noncompliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises."). I should note here that damages are the primary remedy in international investment law. They compensate the foreign investor for losses resulting from the violations of investment treaties by the host state. *See* RUDOLF DOLZER, URSULA KRIEBAUM & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 425 (3rd ed. 2022) (observing that "[i]n investment arbitration the remedy usually consists of monetary compensation"); *see also* Guillermo José Garciá Sanchez, *The Hydrocarbons Industry's Challenge to International Investment Law: A Critical Approach,* 57 HARVARD INT'L L.J. 475, 510 (2016) (noting that "[a]rbitral tribunals have issued remedies that are not monetary compensations in only two of the 228 ICSID cases in which investor won," and further observing that the "[issuance of monetary damages] has become such a common practice that commentators assume the system was designed exclusively as a compensation mechanism for the affected foreign investments [although] the opposite is true" (footnotes omitted)).

mental law and CSR and "take it into account" as part of damages calculations.[31] How exactly arbitral tribunals are to take such investors' non-compliance and factor it into the damage assessment is left to investment tribunals to decide. Yet, the idea itself is worth exploring and following up on once the Netherlands begins concluding its BITs based on the 2019 model and foreign investors start invoking these treaties in investment arbitrations.[32]

While sovereign states seek ways to rebalance international investment law and dispute resolution and engage arbitral tribunals in this transformation,[33] ISDS itself has received a fair amount of criticism in recent years. The lack of consistency and predictability of arbitral awards, double-hatting by arbitrators, forum and treaty shopping by claimants, and multinational corporations challenging government regulatory measures in investment arbitration—all have contributed to the alleged "legitimacy crisis" of ISDS.[34] This led to the ongoing work at the United Nations Commission on International Trade Law (UNCITRAL) on a possible reform of ISDS.[35] As the international legal community continues discussing the proposed institutional and treaty reforms, the time is ripe to explore the role of soft law in rebalancing international investment law, and the accompanying role of ISDS in taking into account and enforcing soft law of

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31. Dutch Model BIT, *supra* note 12, art. 23.

32. According to UNCTAD, who keeps track of the international investment agreements worldwide, as of November 2022, the Netherlands has not yet concluded any new BITs based on the 2019 model. *See International Investment Agreements Navigator*, UNITED NATIONS CONF. ON TRADE AND DEV., https://investmentpolicy.unctad.org/international-investment-agreements (last visited Nov. 7, 2022) [https://perma.cc/E4ZC-UFXR] (archived Oct. 13, 2022). As a result, there are no disputes brought under the Dutch treaty with the proposed mechanism of investor behavior assessment and damages reduction. Once the Netherlands begins signing treaties based on the new model, it will take some time for these treaties to enter into force and for foreign investors to start invoking them in ISDS. So, it may be a while before there is an arbitral decision applying the new provision of the Dutch Model BIT.

33. In addition to UNCITRAL, UNCTAD is leading a collective effort on reforming international investment law. To this end, UNCTAD prepared various guidelines, including UNCTAD's Reform Package for International Investment Regime, *infra* note 83 ("mak[ing] available a coherent, sequenced and user-friendly set of options for countries engaging in IIA reform"), and UNCTAD's *International Investment Agreements Reform Accelerator*, *supra* note 28 (seeking to "expedite the modernization of the existing stock of old-generation investment treaties" by identifying various reform goals and providing guidance and sample treaty provisions on achieving these goals).

34. The term "legitimacy crisis" as applicable to ISDS has famously been coined by Susan Franck as part of her criticism of inconsistency of awards across investment tribunals. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1568 (2005) (suggesting that contradictory awards in ISDS undermine "the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns are mismanaged").

35. *See supra* notes 15–16 and accompanying text.

international environmental protection, sustainable development, and CSR.

B. *Defining Soft Law*

Soft law is a notoriously vague concept used in international law to designate the rules of international law that are, strictly speaking, non-binding and therefore unenforceable.[36] Examples of soft law and its instruments include various guidelines, codes of conduct, common principles, policy declarations, and other instruments that, borrowing from Black's Law Dictionary, are "neither strictly binding nor completely lacking in legal significance."[37] Pierre-Marie Dupuy famously referred to soft law as an "ambiguous phenomenon" because it "is often difficult to identify clearly" what constitutes soft law, "considering its legal effects as well as its manifestations."[38]

According to Andrew T. Guzman and Timothy L. Meyer, legal scholars commonly define soft law as "a residual category . . . in opposition to clearer categories rather than on its own terms."[39] Indeed, seemingly following this approach, Dinah Shelton defines soft law as "any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior."[40] By contrast, Meyer seeks to define soft law on its own terms, referring to "those international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding

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36. *See Soft Law*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Jacob & Schill, *supra* note 19, at 4 (noting that soft law is non-binding "technically-speaking" in its orthodox sense, that is it cannot be enforced by external power); Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1(2) J. INT'L DISP. SETTLEMENT 1, 2 (2010) (stressing that "it is sufficient to bear in mind that 'soft law' norms are generally understood to be those that cannot be enforced through public force"). *But see* Timothy L. Meyer, *Soft Law as Delegation*, 32 FORDHAM INT'L L.J. 888, 890 (2008) (arguing that defining soft law as a non-binding obligation, as distinct from binding hard law, fails "to explain what is 'legal' about soft law, or in other words, what distinguishes soft law from purely political agreements").

37. *Soft Law*, BLACK'S LAW DICTIONARY (11th ed. 2019). The term "soft law instruments," which is used to define various *forms* of soft law as adopted by sovereign states at the conclusion of intergovernmental meetings, conferences, working groups, as well as by international organizations and their bodies, is narrower than the term "soft law," which in addition to soft law instruments includes other manifestations of soft law, such as prior arbitral awards invoked by the third parties to persuade arbitral tribunals in subsequent arbitrations.

38. Dupuy, *supra* note 3, at 420.

39. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2010); *see also* José E. Alvarez, *Reviewing the Use of "Soft Law" in Investment Arbitration*, 7(2) EUR. INT'L ARB. REV. 149, 152 (2018) (observing "the tendency to define soft law by the qualities that it lacks compared to positivist hard law," and further explaining that "[s]oft law is identified as *not* state-centric, *not* coercively enforced, *not* precise, and so on—without saying what soft law *is*.").

40. *See, e.g.*, Dinah Shelton, *Soft Law*, *in* THE ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68, 68 (David Armstrong ed., 2009).

obligations under either international or domestic law."[41] To distinguish soft law from other non-binding obligations, such as political agreements, Meyer further clarifies that

> the expectation [is] that a non-binding rule will be incorporated into a binding agreement, either as an interpretation of an existing binding rule (at either the domestic or international level), or through the promulgation of a new set of binding rules (again, at either the domestic or international level) based on the nonbinding rules.[42]

Talking about expectations created by soft law, Meyer echoes Dupuy, who already in 1991 argued that "soft law creates and delineates goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations."[43]

The concept of soft law did not gain immediate or uniform acceptance among legal scholars.[44] Nearly forty years ago, Prosper Weil observed that the term "soft law" is used overbroadly with regard to two different categories of rules: (i) the rules that are "imprecise and not really compelling" in practice, and (ii) the rules "of the sublegal value of some non-normative acts, such as certain resolutions of international organizations, the Helsinki Final Act, and the Stockholm Declaration on the Environment."[45] According to Weil, in contrast to the first category, the rules of the second category are "precise, yet [they] remain at the pre- or subnormative stage."[46] To avoid any confusion, Weil argued, the term "soft law" should be reserved for the

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41. Meyer, *supra* note 36, at 890; *see also* Guzman & Meyer, *International Soft Law*, *supra* note 39, at 174 (defining soft law as "those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct").

42. Meyer, *supra* note 36, at 891; *cf.* Christine M. Chinkin, *Normative Development in the International Legal System*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM, 21, 25 n.26 (Dinah Shelton ed., 2003) (observing that "acceptance of soft law forms arguably lessens the pressures upon states to conclude binding agreements" (footnote omitted)).

43. *See* Dupuy, *supra* note 3, at 428; *see also* Chinkin, *supra* note 42, at 22 (noting the importance of soft law in that it "generate[s] expectations about the future behavior and attitudes of international actors, providing a measure of stability within the evolving system while maintaining some flexibility").

44. *See, e.g.*, W. Michael Reisman, *Soft Law and Law Jobs*, 2 J. INT'L DISP. SETTLEMENT 25, 25 (2011) (arguing that "[t]he concept of soft law is a useful tool for some international law jobs but not for others," and further stating that "for those who perform the specialized jobs of international judge or arbitrator and for those who entrust their lives and treasure to them, soft law should be off-bounds"); *see also* Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L L. 381, 382–83 (1998) (arguing that "[s]oft law . . . serves no identifiable purpose. . . . [and] is, actually, detrimental."). Klabbers further opined that the term soft law is misleading "in that it suggests that law can come in varying shades: harder and softer" and "normative usage of the term 'soft law' . . . is, ultimately, undesirable." *Id.* at 285–86.

45. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414–15 n.7 (1983).

46. *Id.*

first category of rules only, because the rules in the second category are "neither 'soft law' nor 'hard law': they are simply not law at all."[47] Ten years after Weil, Dupuy again pointed to the paradoxical nature of the term "soft law," which goes against the classical view on the rules of law as mandatory—that is, hard, or else they are not law.[48] Since then, the scholarship on international soft law has greatly expanded, and the term "soft law" has firmly occupied its place in the theory and practice of international law.[49]

Legal scholars have inquired extensively into the origins, theories, creation, normativity, legal effect, form, and content of soft law.[50] Scholars largely maintain that it is the content and/or form of the norm that makes it soft.[51] Some argue that a norm can be soft because its content is too vague or provides no obligation or enforcement mechanism against a non-compliant addressee.[52] Others point out that a norm can also be soft in its form, when it is embodied in the guidelines

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47. *Id.* at 415 n.7.

48. *See* Dupuy, *supra* note 3, at 420.

49. *See generally* Chinkin, *supra* note 42, at 21–42; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Thomas W. Wälde, *International Standards in Transnational Investment & Commercial Disputes: The Role of International Standards, Soft Law, Guidelines, Voluntary and Self-Regulation in International Adjudication, Negotiation and Other Forms of Dispute Management*, 1 TRANSNAT'L. DISP. MGMT. 1, 5 (2004); Meyer, *supra* note 36, at 909–21 (offering a theory that explains motivations of sovereign states in creating soft law); Guzman & Meyer, *International Soft Law*, *supra* note 39, at 172; Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010); Kaufmann-Kohler, *supra* note 36; Reisman, *supra* note 44; INTERNATIONAL INVESTMENT LAW AND SOFT LAW (Andrea K. Bjorklund & August Reinisch eds., 2012); Jacob & Schill, *supra* note 19, at 1; Stephan W. Schill, *Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 1095 (Jean d'Aspremont & Samantha Besson eds., 2017); Alvarez, *supra* note 39.

50. *See supra* notes 36–49 and accompanying text. For an overview of the soft law literature, see also Melaku Geboye Desta, *Soft Law in International Law: An Overview*, *in* INTERNATIONAL INVESTMENT LAW AND SOFT LAW 39, 39–50 (Andrea K. Bjorklund & August Reinisch eds., 2012).

51. *See, e.g.*, Kaufmann-Kohler, *supra* note 36, at 2 (arguing that "[a] norm may be soft if its content (*negotium*) is too vague to be applied to specific facts," for instance, if the soft law instrument "only sets forth general goals and principles" and further pointing out that "soft law norms may be soft because their support (*instrumentum*) lacks binding character," which "would be the case with a recommendation or a code of conduct" (footnote omitted)).

52. *See* Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in Crafting of International Commercial Law*, 40 MICH. J. INT'L LAW 433, 434 (2019) ("[I]nternational obligation is described [in international relations and international law literature] as 'soft' either if it is imprecise, imposes no obligation, or fails to specify how these precise obligations can be enforced against non-compliant states."). Note that two other hard law sources of international law—international custom and general principles of law recognized by civilized nations—are also frequently vague. *See* Alvarez, *supra* note 39, at 152 (noting that "[m]any rules embodied in the traditional three sources of Article 38 are vague or imprecise").

or a code of conduct, which lacks a binding character.[53] Scholars have observed that the vague content and a non-binding form of soft law often coincide, but they do not have to go hand in hand.[54] For instance, they explain, a non-binding code of conduct can have precise and definite provisions, which are fitting for a binding legal instrument, such as a treaty.[55] And, vice versa, the content of many modern treaties is so soft that they do not create precise legal obligations to state parties and become a soft law instrument.[56] Overall, there is no consistency in the application of the term "soft law" among legal scholars and international law practitioners. However, they largely agree that soft law includes the non-binding rules of declarations, guidelines, and similar instruments, which Weil would consider to be of sub-normative value.[57]

1. Creating Soft Law

Soft law is the product of rulemaking by sovereign states, international organizations and their bodies, and non-state actors. As with other sources of international law, sovereign states play the leading role in creating soft law, directly or through international organizations. According to Meyer's theory of soft law, "in designing an international agreement, states will prefer soft law to hard law [such as a treaty] when the benefits from encouraging unilateral legal innovation exceed the foregone benefits from a more credible commitment."[58] States may choose different forms of soft law, including bilateral and multilateral declarations, guidelines, final acts, and accords. By their nature, these soft law instruments are "agreements" as they require negotiation, drafting, and ultimately

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53. *See, e.g.*, Kaufmann-Kohler, *supra* note 36, at 2.

54. *See* Dupuy, *supra* note 3, at 428–29 (noting that "much of 'soft' law is incorporated within 'soft' (i.e., non-binding) instruments such as recommendations and resolutions of international organizations, declarations and 'final acts' published at the conclusion of international conferences and even draft proposal elaborated by groups of experts," but further observing that the content and the form of soft law instruments are not always in perfect accordance).

55. *See id.* at 429 ("[T]here are cases where the content of a formally *non*-binding instrument has been so precisely defined and formulated that . . . some of its provisions could be perfectly integrated into a treaty." (footnote omitted)).

56. *See id.* ("[A]n increasing number of treaty provisions can be found in which the wording used is so 'soft' that it seems impossible to consider them as creating a precise obligation or burden on State parties."); *see also* Kaufmann-Kohler, *supra* note 36, at 2 (providing an example of "an international treaty which only sets forth general goals and principles, such as the UNESCO Convention concerning the protection of the world cultural and natural heritage adopted in 1972").

57. *Id*; Weil, *supra* note 45, at 414–15 n.7.

58. Meyer, *supra* note 36, at 910. Meyer further argues that "[t]his condition will hold when uncertainty over the future desirability of specific legal rules is high, or when the value of increasing the sanction for violations of a legal rule is modest." *Id.*

reaching an agreement between states and other actors in charge of their development.[59]

Another category of soft law which has experienced a rapid growth in recent years is the so-called "international legislative soft law."[60] The legislative soft law is created by international intergovernmental organizations and their bodies, such as the United Nations or the OECD, an intergovernmental organization of thirty-eight member states with a goal of promoting economic progress and international trade. The term "legislative" refers to the process of creation of such soft rules. As Guzman and Meyer describe,

> [t]hese institutions, while not commonly thought of as legislative bodies, exhibit the same basic features as domestic legislative institutions. They often divide their work into committees, they grant agenda-setting powers to key positions such as committee chairs as a way to break cycling over different alternatives, and they have voting rules they follow in the adoption of particular instruments.[61]

In addition to international governmental organizations, such as the United Nations, OECD, International Institute for the Unification of Private Law, and the Hague Conference on Private International Law, private institutions, professional and trade organizations, and nongovernmental organizations (NGOs) can create soft law.[62] Notable examples of these "private" instruments include the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration and the International Chamber of Commerce (ICC) Rules

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59. Guzman & Meyer, *International Soft Law*, *supra* note 39, at 201 (noting that "much of the soft law discussed in the literature . . . often (but not always) focuses on international agreements").

60. *See, e.g.*, *id.* at 172 (providing examples of the Universal Declarations of Human Rights, the Helsinki Final Act, the Basel Accord on Capital Adequacy, decision of the UN Human Rights Committee, and the ruling of the International Court of Justice).

61. Andrew T. Guzman & Timothy L. Meyer, *Soft Law*, *in* ECONOMIC ANALYSIS OF INTERNATIONAL LAW 123, 141 (Eugene Kontorovich & Francesco Parisi eds., 2016).

62. *See, e.g.*, Kaufmann-Kohler, *supra* note 36, at 3 (focusing in her work on "soft law made by non-state actors outside the scope of state sovereignty [as] the relevant source of soft law for international arbitration").

of Arbitration.[63] Disputing parties and arbitral tribunals frequently rely on this soft law in international commercial arbitration.[64]

Yet another category of soft law is the product of decision-making and dispute resolution processes by international courts, such as the International Court of Justice (ICJ) and investment tribunals.[65] Guzman and Meyer have called it "international common law (ICL)," defined as "nonbinding rulings or standards" issued by "international tribunals and international organizations (IOs), with the authority to speak about international legal rules."[66] In theory, such decisions and arbitral awards are only binding for the parties to a dispute and have no precedential value. In practice, as Schill observes, "[t]ribunal decisions, while de jure non-binding beyond the individual case, de facto determine how investment treaties are interpreted and investment disputes decided."[67]

In investment arbitration, disputing parties commonly invoke prior decisions of international courts and arbitral tribunals to support their claims. José Alvarez notes that "there is considerable evidence that, like it or not, publicly available ISDS rulings refer to what most commentators would consider to be soft law, and that in some cases, these references matter to the outcome."[68] Legal scholars have

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63. For the IBA Guidelines on conflicts of interest, see INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (Oct. 23, 2014), https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 [https://perma.cc/XUK2-UA8K] (archived Nov. 7, 2022) [hereinafter IBA Guidelines]. For the ICC Rules of Arbitration, see *Rules of Arbitration*, INT'L CHAMBER OF COM. (effective Jan. 1, 2021), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ [https://perma.cc/548V-AUAE] (archived Sept. 29, 2022) [hereinafter 2021 ICC Rules of Arbitration]. These arbitration rules have been adopted by the International Chamber of Commerce, the largest business organization in the world. *See also* Kaufmann-Kohler, *supra* note 36, at 3 (focusing in her work on "soft law made by non-state actors outside the scope of state sovereignty [as] the relevant source of soft law for international arbitration").

64. *See, e.g.*, IBA ARB. GUIDELINES AND RULES SUBCOMM., INT'L BAR ASS'N, REPORT ON THE RECEPTION OF THE IBA ARBITRATION SOFT LAW PRODUCTS ¶ 103 (Sept. 16, 2016), https://dernegocios.uexternado.edu.co/wp-content/uploads/sites/2/2016/09/IBAsoftlawArbproducts-ArbGuidelinesandRulesSubcommittee-2.pdf [https://perma.cc/ZH7G-Y6MR] (archived Nov. 7, 2022) (reporting that "[a]t a global level, the Guidelines were referenced in 67% of decisions resolving issues of conflicts of interest").

65. *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515, 516 (2009) (placing decisions of arbitral tribunals into the category of soft law).

66. *See* Guzman & Meyer, *International Soft Law*, *supra* note 39, at 201. *But see* August Reinisch & Andrea K. Bjorklund, *Soft Codification of International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW AND SOFT LAW 305, 310–11 (Andrea K. Bjorklund & August Reinisch eds., 2012) (acknowledging that "[w]ith the growth of an investment 'case law', the question becomes more and more acute whether a common law of investment can be ascertained and, if so, whether and to what extent it may be identified and described").

67. Schill, *supra* note 49, at 1106.

68. Alvarez, *supra* note 39, at 149–50 (footnote omitted).

supported such reliance on prior court decisions and arbitral awards.[69] For instance, August Reinisch and Andrea K. Bjorklund justified "reliance on BIT arbitral decisions—not as a binding precedent—but as part of a *de facto* case law or *jurisprudence constante*" in view of "the striking similarity between BITs . . . [that] regulat[e] common problems in a common fashion."[70] Thus, although non-binding for the third parties,[71] decisions of international courts and arbitral awards operate as soft law in international law, performing a persuasive function.[72]

2. Role and Normativity

In view of the variety of soft law instruments as to their content and form, the extent to which they are viewed as authoritative may vary greatly.[73] Yet, soft law instruments play an important role in international legal regulation and rulemaking. First, despite their non-binding character, soft law instruments may regulate the relationship and behavior of actors in international law directly. This happens when sovereign states, multinational corporations, or other actors to whom the soft law is addressed, perceive soft law as binding and comply with it voluntarily. In doing so, they may be motivated by reputational concerns and/or potential economic implications of their non-

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69. *See, e.g.*, Guzman & Meyer, *International Common Law*, *supra* note 65, at 525 (arguing that "tribunal rulings on one bilateral investment treaty . . . are central to understanding the law that applies in entirely different BITs between different parties").

70. Reinisch & Bjorklund, *supra* note 67, at 310–11 (footnote omitted).

71. *See* Guzman & Meyer, *supra* note 66, at 525 ("Though judgments of international tribunals formally have no binding effect on states that are not party to the dispute, and the principle of stare decisis does not apply in this context, they nevertheless impact perceptions about the content of international law and the attitudes and actions of states.").

72. Soft law in the form of court decisions and arbitral awards (as opposed to soft law instruments developed by states and international organizations) is excluded from further analysis in this article. The reason is that international courts and arbitral tribunals generate decisions and awards as part of dispute resolution process. In turn, disputing parties cite prior court and tribunal decisions in subsequent disputes to support their claims. As such, this category of soft law is distinct in its origin and legal impact from other soft law instruments created by agreement of sovereign states or through legislative-like processes in international organizations in place of hard international law. Although investment tribunals routinely consider prior arbitral awards and court decisions, this category of soft law is not incorporated into investment treaties to harden soft law rules of international environmental, sustainable development, and CSR. Being so distinct, it deserves a separate study.

73. *See, e.g.*, Shelton, *supra* note 40, at 68 (listing among sources of soft law "non-binding political instruments such as declarations, resolutions, and programs of action" and arguing that "state practice in recent years, inside and outside international organizations, increasingly . . . has signaled that compliance is expected with the norms that these [soft law] texts contain").

compliance.[74] In this regard, Gabrielle Kaufmann-Kohler observes that "soft law norms may exhibit varying degrees of normativity."[75] Günther F. Handl disagrees in this respect, arguing that soft law, by definition, lacks "requisite characteristics of international normativity" but is nevertheless able to produce certain legal effects.[76]

Second, soft law plays an important role in the formation of the rules of international law—both treaties and customary international law—where it may play an important role in establishing *opinio juris* and/or state practice.[77] In the area of treaty making, adoption of a soft law instrument allows sovereign states to reach a compromise regarding accepted practices and behavior where attempts to develop a binding treaty might have failed. Unsurprisingly, soft law has proliferated in the areas of international environmental law and sustainable development, business and human rights, and CSR, where sovereign states frequently cannot agree on a binding legal instrument and/or uniform legal regulation and look for less "rigid" alternatives.[78] Thereby, by contrast to international treaties and customs that ensure uniformity of the legal regulation, soft law contributes to the harmonization of international law. It does so by allowing sovereign states to

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74. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), ¶ 188 (holding, by the International Court of Justice, that "[*opinio juris*] may . . . be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions" and further noting that "[t]he effect of consent to the text of such resolutions . . . may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves").

75. Kaufmann-Kohler, *supra* note 36, at 3. Kaufmann-Kohler calls this normativity "soft" "because soft law exercises a certain influence and is regarded with deference without being perceived as mandatory in the classic sense of the word." *Id.* at 15.

76. Günther F. Handl, W. Michael Reisman, Bruno Simma, Pierre Marie Dupuy & Christine Chinkin, *A Hard Look at Soft Law*, 82 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y OF INT'L L.) 371, 371 (Apr. 20–23, 1988) ("I shall not engage in listing various nuances of the concept of [soft law]; let me just say that the concept has been used in reference to international prescriptions that are deemed to lack requisite characteristics of international normativity, but which, notwithstanding this fact, are capable of producing certain legal effects.").

77. *See, e.g.*, Dupuy, *supra* note 3, at 432 (discussing the role of soft law in establishing *opinio juris*).

78. For international environmental law, see, e.g., Dupuy, *supra* note 3, at 421 (observing that "international economic law and international law relating to the protection of the human environment are areas in which new 'soft' regulations have emerged in predominant fashion" (footnote omitted)); Kate Miles, *Soft Law Instruments in Environmental Law: Models for International Investment Law?, in* INTERNATIONAL INVESTMENT LAW AND SOFT LAW 82, 83 (Andrea K. Bjorklund & August Reinisch eds., 2012) (exploring international environmental law as "a field in which there has been a wide-ranging use of soft law instruments").

choose the acceptable level of compliance and the means of incorporating soft law requirements into their practice and domestic law.[79]

Third, international soft law may also play an important role in domestic law, providing standards for assessment of domestic law vis-à-vis the international law obligations of a sovereign state. Dupuy provided an example in the area of international environmental law, explaining that international standards based on soft law "may also effectively be taken into account by municipal judges in evaluating the legality, with regard to international law, of any internal administrative action having had or able to have some damaging impact on the environment beyond national boundaries."[80]

The exact nature and reasons for adopting soft law instruments are far beyond the scope of this research. What is clear, however, is that the body of soft law has expanded over the years and is influential in shaping expectations and actions.[81] Although it remains non-binding, soft law can no longer be discounted in international legal regulation. In the words of José Alvarez, "despite its name, soft law is anything but 'soft' in actual effect."[82]

The growing importance of international soft law is also evidenced by the increasing attempts to elevate soft law to the level of treaties in international investment law. One of the newest developments in this respect is the incorporation by reference of soft law instruments into the text of IIAs.[83] UNCTAD refers to such practice as "referencing

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79. *See, e.g.*, Kaufmann-Kohler, *supra* note 36, at 1; *see also* Reinisch & Bjorklund, *supra* note 66, at 310–11; Andrea K. Bjorklund & August Reinisch, *ILA Study Group on the Role of Soft-Law Instruments in International Investment Law* 1 (Sofia, ILA Conference, 2012) (discussing whether international investment law was "ripe to be 'codified' and, if so, whether a specific form of soft-law instrument might be particularly suitable for this task").

80. Dupuy, *supra* note 3, at 435.

81. *See, e.g.*, Guzman & Meyer, *Soft Law*, *supra* note 61, at 140 (discussing the rapid growth of "international legislative soft law"). *See generally* Ronald B. Mitchell, *International Environmental Agreements Database Project*, UNIV. OF OR. (2002–2022), https://iea.uoregon.edu/iea-project-contents (last visited Nov. 1, 2022) [https://perma.cc/7NNW-96MT] (archived Oct. 12, 2022) (reporting at least 554 "non-agreements" (e.g., declarations, memoranda of understanding, etc.) have been adopted to date in the area of international environmental law) [hereinafter *IEA Database Project*].

82. Alvarez, *supra* note 39, at 200.

83. *See, e.g.*, Dutch Model BIT, *supra* note 12; *see also* UNCTAD'S REFORM PACKAGE FOR INTERNATIONAL INVESTMENT REGIME 87 (2018) (reporting that "several recent IIAs reference CSR standards in a general manner, typically referring to 'internationally recognized standards' in the areas such as labor, environment, human rights, anti-corruption and the like (e.g., Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, Burk. Faso-Can., Apr. 20, 2015 [hereinafter Can.-Burk. Faso BIT]; Free Trade Agreement between the Republic of Colombia and the Republic of Panama, Colom.-Pan., Sept. 20, 2013)") [hereinafter UNCTAD'S REFORM PACKAGE]. Further observing that, other recent IIAs are more specific, referring to global standards such as the SDGs (e.g., Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria,

global standards" and lists it among several options for modernizing IIAs.[84] Through referencing, sovereign states seek to harden soft law by making it binding on foreign investors and—depending on the language of the treaty—also on state parties. Paradoxically, states thereby charge investment tribunals with the enforcement of these otherwise non-binding rules of international environmental law, sustainable development and CSR. This is astounding if one recalls all the criticism of the international community towards ISDS and the ongoing efforts to reform it.

C. *Soft Law in Investment Arbitration*

Soft law in the form of institutional and ad hoc arbitration rules and the IBA guidelines is a familiar concept for international arbitration—in particular, international commercial arbitration. The use of soft law in international arbitration has attracted a fair amount of attention in legal scholarship, although scholars have largely focused on international commercial (as opposed to investment) arbitration. This includes studies of the nature and purpose of soft law, its codification, and the use of procedural and substantive soft law in international commercial arbitration.[85]

One can identify various categories of soft law instruments relevant for international arbitration, most importantly for our purposes, based on (1) the actors they seek to regulate (e.g., disputing parties in international arbitration or sovereign states seeking to adopt an international arbitration statute) and (2) the subject-matter of their regulation (e.g., the process of international arbitration or the status and legal framework for international arbitration in domestic law). For

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Morocco-Nigeria, Dec. 3, 2016 [hereinafter Morocco-Nigeria BIT]); UN Charter, Universal Declaration of Human Rights and/or ILO instruments (e.g., Free Trade Agreement between the EFTA States and Georgia, EFTA–Geor., June 27, 2016; Comprehensive Trade and Economic Agreement between Canada and the European Union, Can.-Eur. Union, Oct. 30, 2016 [hereinafter Can.-E.U. CETA]); or the Organization for Economic Cooperation and Development MNE Guidelines and OECD Principles of Corporate Governance (e.g., Can.-E.U. CETA; Free Trade Agreement between the EFTA States and Bosnia and Herzegovina, Bosn. & Herz.-EFTA, June 24, 2013).

84. *See, e.g.*, UNCTAD'S REFORM PACKAGE, *supra* note 83, at 84–85. According to UNCTAD, "such instruments reflect broad consensus on relevant issues and referencing them can help overcome the fragmentation between IIAs and other bodies of international law and policymaking." *Id.* at 84. Among various instruments that can be references in modernized IIAs, UNCTAD lists the seventeen SDGs (adopted in 2015), the outcome document of the third UN Conference on Financing for Development (FfD), UNCTAD's Investment Policy Framework for Sustainable Development (2012, as updated in 2015), and "numerous voluntary and regulatory initiatives to promote CSR standards and guidelines that foster sustainable development (e.g., ISO 26000 'Social responsibility', the U.N. Global Compact)." *Id.* at 85.

85. *See, e.g.*, Kaufmann-Kohler, *supra* note 36, at 1 (discussing various sets of arbitration rules and their roles in codification).

instance, to promote international arbitration among sovereign states and harmonize its regulation across national borders, UNCITRAL developed and made available for adoption by states the UNCITRAL Model Law on International Commercial Arbitration.[86] As a soft law instrument, it is directed towards sovereign states and/or their constituent parts (e.g., separate states in a federal state) seeking to develop and adopt a domestic statute on international commercial arbitration. Further, UNCITRAL developed and made available for adoption by disputing parties the UNCITRAL Arbitration Rules[87]—a set of largely procedural rules for adoption by parties preferring ad hoc arbitration. Although geared towards international commercial arbitration, these rules of ad hoc arbitration are also popular among parties in investment arbitration.

For the purposes of this Article, it is important to distinguish *procedural* and *substantive* soft law as applied in international arbitration. Procedural and substantive laws are generally understood to be opposite, mutually exclusive categories. I use these concepts loosely to distinguish between the rules of largely procedural soft law (governing the existence and process of commercial or investment arbitration) from the rules of largely substantive soft law (invoked by disputing parties and arbitral tribunals to resolve the essence of the parties' dispute).

The use of procedural soft law in international arbitration is common and well researched.[88] Contractual parties regularly subject themselves to soft law rules, such as the ICC Arbitration Rules and the IBA Guidelines on Conflicts of Interest in International Arbitration.[89] These rules become binding on the parties and arbitral tribunal through incorporation by reference in the parties' agreement, an arbitration clause, or a stand-alone arbitration agreement.

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86. G.A. Res 40/72, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), *amended by* G.A. Res 61/33, U.N Doc. A/RES/61/33 (Dec. 18, 2006). To date, according to UNCITRAL, 118 jurisdictions (in a total of eighty-five sovereign states) have adopted legislation based on the Model Law, thereby harmonizing legal regulation of international commercial arbitration across national borders. *See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in* 2006, UNITED NATIONS COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Dec. 2, 2022) [https://perma.cc/78R8-DLF5] (archived Dec. 2, 2022).

87. UNITED NATIONS COMM'N ON INT'L TRADE L., UNCITRAL ARBITRATION RULES, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf [https://perma.cc/NP5K-SCMT] (archived Sept. 29, 2022) (containing new article 1, paragraph 4, as adopted in 2013) [hereinafter UNCITRAL Arbitration Rules].

88. *See, e.g.*, Kaufmann-Kohler, *supra* note 36, at 4 (arguing that "procedural soft law is peculiar to international arbitration and thus more likely to capture the essence of soft law codification in this field").

89. For the ICC Arbitration Rules, see 2021 ICC Rules of Arbitration, *supra* note 63. For the IBA Guidelines, see IBA Guidelines, *supra* note 63.

A more complex (and especially so for investment treaty arbitration) and far less explored issue is the use of substantive soft law in international arbitration.[90] By contrast to international commercial arbitration, where disputing parties directly (by exercising party autonomy) or indirectly (by submitting themselves to arbitration and thereby permitting an arbitral tribunal to determine the governing law) control the substantive law to be applied to their dispute, in investment arbitration (albeit commenced by a foreign investor), the substantive law is not in the hands of the foreign investor.[91] Instead, a foreign investor only chooses which investment treaty to invoke based on the facts of the dispute and the structure of the investment. If such a treaty includes a reference to a soft law instrument, an investment tribunal may engage in treaty interpretation, including interpretation of the soft law provisions incorporated by reference. This is not, however, the only way for soft law to be submitted for the assessment of an investment tribunal. For instance, the host state can refer to soft law as part of its defense or counterclaim.[92] Thus, arbitral tribunals increasingly engage with soft law in investment arbitration, from assessing the role of soft law in the context of investment disputes to interpreting and enforcing such rules in ISDS.

1. Procedural Soft Law

Before turning to the substantive soft law in investment arbitration, which is at the core of the present Article, consider the importance of procedural soft law in international arbitration. In particular, in the area of international commercial arbitration, parties commonly adopt by reference institutional arbitration rules, such as rules of the ICC,[93] the American Arbitration Association,[94] or the ad hoc UNCITRAL

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90. For recent studies of the role of substantive soft law in international investment law and arbitration, see Giovanna Adinolfi, *Soft Law in International Investment Law and Arbitration*, 1 ITALIAN REV. INT'L & COMPAR. L. 86 (2021); Jean-Michel Marcoux, *Informal Instruments to Impose Human Rights Obligations on Foreign Investors: An Emerging Practice of Legality?*, 34 LEIDEN J. INT'L L. 109 (2021).

91. One should note that a foreign investor may have a choice between different investment treaties and dispute resolution mechanism and file for arbitration in view of a more beneficial treaty regime. Ultimately, however, if a treaty makes a reference to a soft law instrument, it is not up to a foreign investor to exclude such instrument from consideration of an investment tribunal.

92. *See infra* Part III.B. and accompanying text.

93. 2021 ICC Rules of Arbitration, *supra* note 63. For an analysis of these sets of rules and their role in the codification of soft law, see Kaufmann-Kohler, *supra* note 36, at 1.

94. For rules developed by the American Arbitration Association (AAA) for international arbitration, see *International Arbitration Rules*, *in* INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) (2014).

Arbitration Rules (as adopted in 2010).[95] These arbitration rules are instruments of largely procedural soft law, which are legally non-binding until they are adopted by disputing parties to govern their arbitration.

Further, the IBA has developed and successfully promoted its highly influential IBA Guidelines on Conflicts of Interest in International Arbitration.[96] Separately, the IBA has published the IBA Rules on the Taking of Evidence in International Arbitration.[97] Both documents are largely procedural soft law instruments, which can be adopted by disputing parties in international arbitration to regulate the issues of the arbitrator's disclosure, conflicts of interest, as well as taking of evidence in international arbitration.

Judging by these examples alone, international commercial arbitration is not a newcomer to applying soft law. Arbitral tribunals consistently use institutional and ad hoc arbitration rules and the IBA guidelines in international arbitration when such rules are agreed upon or incorporated by reference by disputing parties. The application of this soft law derives from the agreement of the parties and incorporation by reference, thereby providing a procedural legal framework for conducting international arbitration.[98] Once they are adopted by the parties, these soft law instruments become mandatory for the disputing parties and may be viewed as the "hard law" for them.[99] Yet, even without incorporation by agreement, these instruments represent commonly accepted rules and standards in the area of international arbitration, thereby performing soft law functions in its regulation (such as directly impacting arbitrators on the issues of conflicts of interest, or harmonizing the development of the arbitration rules across arbitral institutions and domestic laws).

2. Substantive Soft Law

A more controversial and unexplored issue is whether tribunals in investment treaty arbitration interpret and enforce substantive soft

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95. *See* UNCITRAL Arbitration Rules, *supra* note 87.

96. *See* IBA Guidelines, *supra* note 63.

97. INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (adopted by resolution on May 29, 2010), https://www.ibanet.org/MediaHandler?id=68336C49-4106-46BF-A1C6-A8F0880444DC [https://perma.cc/F9QT-QMKX] (archived Nov. 7, 2022).

98. For procedural soft law in international arbitration more generally, see William W. Park, *The Procedural Soft Law of International Arbitration, in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141 (Loukas Mistelis & Julian Lew eds., 2006).

99. *See, e.g.*, Kaufmann-Kohler, *supra* note 36, at 11 (making the "hard law" argument with regard to the adoption of the ICC Arbitration Rules by disputing parties in international arbitration; also suggesting that the ICC Arbitration Rules serve as the offer to arbitrate, which may be accepted by disputing parties who incorporated the ICC Arbitration rules into their arbitration agreement, thereby converting such rules from "soft law" into the "hard law" with regard to their arbitration).

law because the parties refer to this law in their submissions or because the arbitral tribunal finds it necessary to apply soft law as part of ISDS. This issue, which is at the center of this Article, narrows down the body of soft law subject to analysis. Investment tribunals in ISDS deal with legal rules and principles that govern *sovereign states* (first and foremost, the host state, but also the home state of the foreign investor) and *multinational corporations* (allegedly, the most frequent users of the ISDS). Some of these rules are soft in their content and/or form. Within this broad category of soft law, this Article focuses on the rules of environmental protection, sustainable development, and CSR, which are increasingly incorporated into the legal framework of the international investment law and dispute settlement.[100]

Two reasons explain the choice of these subject matters for analysis. First, there is a growing number of ISDS disputes that touch upon (or directly relate to) environmental protection and the right to regulate. For instance, as part of the regulatory expropriation claims, foreign investors often challenge government laws and regulations adopted for the benefit of the public at large. This includes challenges of regulatory measures seeking to protect the environment, public health, public safety, or public policy. Consequently, if soft law is indeed invoked by parties or arbitral tribunals in investment arbitrations—as this Article claims—this often will be the soft law on environmental protection and/or sustainable development.

Second, there is a growing trend in investment treaty making of expanding foreign investors' obligations in the areas of social responsibility, labor laws, environmental protection, and sustainable development. This trend includes references to soft law instruments on environmental protection and sustainable development in recent investment agreements. With regards to multinational corporations as foreign investors, it is common to refer to these obligations as CSR, which in the context of IIAs can be defined broadly to include the overall obligations of transnational corporations.[101] By definition, soft law on CSR includes rules and standards in the areas of environmental protection and sustainable development, but also other areas such as human rights and anti-bribery.[102] In this sense, CSR, as applied to multinational corporations, is a broader category than environmental protection and sustainable development. Yet, in the context of

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100. *See infra* Part III.A. and accompanying text.

101. UNITED NATIONS CONF. ON TRADE AND DEV., SOCIAL RESPONSIBILITY, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 5 (2001).

102. *See id.* at 1 (observing that "[t]he concept of corporate social responsibility is potentially very wide and may encompass most matters pertaining to the economic and social impact of [transnational corporations]" and noting that a more specialized approach to CSR includes under this heading "development obligations, socio-political obligations and consumer protection, . . . corporate governance, ethical business standards and the observance of human rights").

international investment law, CSR seeks to regulate the conduct of multinational corporations—the alleged primary users of ISDS—and not other actors subject to environmental and sustainable development obligations, such as state parties to investment treaties. For this reason, this Article discusses soft law instruments on environmental protection and sustainable development separately from instruments on CSR.

a. Environmental Protection and Sustainable Development

A cursory look into the rules of environmental protection and sustainable development shows that there is a substantial body of international environmental law and law on sustainable development that one can classify as soft law. The International Environmental Agreements Database Project, which currently encompasses 3,997 environmental agreements, including 2,295 bilateral and 1,450 multilateral agreements, provides an insight into the number of the environmental soft law instruments worldwide.[103] The database includes 546 so-called non-agreements, which are non-binding instruments on environmental protection (such as declarations and memoranda of understanding), although the authors of the project stress that the database is "less reliable" with respect to non-binding instruments of international environmental protection.[104] The non-binding instruments in the database range from the 1973 Memorandum of Understanding Between Mexico and the United States of America Relative to Cooperative Efforts to Protect Crops from Plant Pest Damage and Plant Diseases in the Republic of Mexico and the United States of America through the Execution of Cooperative Programs to the 2009 Memorandum of Understanding between the Ministry of Natural Resources and Environment of the Russian Federation and the Ministry of State for Environmental Affairs of the Arab Republic of Egypt on Cooperation in the Field of the Environmental Protection.[105]

In view of the subject-specific nature of many of these instruments, not all of them are prone for inclusion into IIAs, which tend to focus on compliance of foreign investors with more general soft law

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103. *IEA Database Project*, *supra* note 81 (including 250 other environmental agreements in addition to bilateral and multilateral environmental agreements). For the current count of the agreements included in the database, see *IES Project Contents*, INT'L ENV'T AGREEMENTS DATABASE PROJECT, https://iea.uoregon.edu/iea-project-contents (last visited Dec. 2, 2022) [https://perma.cc/Z4NK-LU9M] (archived Dec. 2, 2022).

104. *IEA Database Project*, *supra* note 81.

105. For the first of these non-agreements, see Memorandum of Understanding Concerning Cooperative Efforts to Protect Crops from Plant Pest Damage and Diseases, U.S.-Mex., Feb. 8, 1973, 28 U.S.T. 7004. For the second of these non-agreements, see *FAOLEX Database*, FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, http://www.fao.org/faolex/results/details/en/c/LEX-FAOC115418 (last visited Nov. 7, 2022) [https://perma.cc/EZ3J-AWVT] (archived Oct. 12, 2022).

instruments on environmental protection, sustainable development, and CSR. For instance, it is highly unlikely that a BIT would include a reference to the 1993 Memorandum of Understanding Concerning Conservation Measures for the Siberian Crane,[106] in view of its specialized, narrow scope of regulation. Yet, modern IIAs regularly, and increasingly, include references to more general soft law instruments on environmental protection and sustainable development.[107]

Notable soft law instruments on environmental protection and sustainable development include the Rio Declaration,[108] Agenda 21,[109] the UN 2030 Agenda for Sustainable Development (adopted by UN member states in 2015) with its SDGs,[110] and the UNCTAD Investment Policy Framework for Sustainable Development.[111] Recent international trade and investment agreements and model BITs increasingly refer to these instruments as guiding principles for environmentally and socially responsible investments, a criterion of "covered" investments and/or as part of the context and objectives settings for the investment treaty.[112]

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106. Memorandum of Understanding Concerning Conservation Measures for the Siberian Crane, UNEP/CMS/SC-6/Inf/6, Apr. 26, 2004.

107. International environmental law and sustainable development law are inherently close and integrated concepts. Achieving sustainable development requires taking into account environmental protection as part of development. *See, e.g.*, Rio Declaration, *supra* note 2, at princ. 4 (stating that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it"). Hence, this Article discusses soft law instruments on international environmental protection and sustainable development together. Yet, one may prefer to distinguish international environmental law (e.g., international law on climate change) from a separate category of international law of sustainable development.

108. *Id.* (endorsed by G.A. Res. 47/190, *supra* note 6, ¶ 2).

109. UNITED NATIONS SUSTAINABLE DEV., AGENDA 21: PROGRAMME OF ACTION FOR SUSTAINABLE DEVELOPMENT (June 1992), https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf [https://perma.cc/J3WX-ATVJ] (archived Nov. 7, 2022) [hereinafter Agenda 21].

110. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015) [hereinafter 2030 Agenda].

111. U.N. Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, UNCTAD/DIAE/PCB/2015/5 (2015).

112. *See, e.g.*, The Economic Partnership Agreement, Eur. Union-Japan, art. 16.5, July 17, 2018 [hereinafter E.U.-Japan EPA]; Canada-Korea Free Trade Agreement, art. 17.1(1), Can.-S. Kor., Mar. 11, 2014 ("Recalling *Agenda 21 on Environment and Development of 1992*, and the *Johannesburg Plan of Implementation on Sustainable Development of 2002*, the Parties affirm their commitments to promoting the development of international trade in such a way as to contribute to the objective of sustainable development.") [hereinafter Can.-S. Kor. FTA]; *see also* UNITED NATIONS CONF. ON TRADE AND DEV., IIA ISSUES NOTE, INTERNATIONAL INVESTMENT AGREEMENTS, RECENT DEVELOPMENTS IN THE INTERNATIONAL INVESTMENT REGIME 3 (Issue 1, May 2018) (reporting in 2018 that "[s]ince 2012, over 150 countries have undertaken at least one action in the pursuit of sustainable development-oriented IIAs as set out in the UNCTAD's Reform Packages for the International Investment Regime").

A prominent role among soft law instruments of environmental protection and sustainable development belongs to the 1992 Rio Declaration.[113] Most principles of the Rio Declaration are addressed to the sovereign states and include both rights (e.g., Principle 2 which establishes the right of sovereign states to exploit their own resources "pursuant to their own environmental and developmental policies") and obligations (e.g., Principle 11 which provides that "[s]tates shall enact effective environmental legislation").[114] In addition to the obligations of the states (which can be identified by the use of the word "shall"),[115] there are also more soft-worded principles, which encourage sovereign states to contribute to achieving sustainable development, but do not impose obligations on the states. For instance, Principle 8 uses the word "should" and provides that "[t]o achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."[116]

Finally, there are several open-ended principles that do not have specific addressees and may be considered as addressed to everyone, including foreign investors. For instance, pursuant to Principle 1 of the Rio Declaration, "[h]uman beings . . . are entitled to a healthy and productive life in harmony with nature."[117] The principle grants the right to a healthy life to individuals, who can invoke this principle against states as well as private parties, including foreign companies. Even more broadly, Principle 3 proclaims that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations,"[118] yet leaves open the question as to specific obligations of companies and the government in this respect.

Thus, the Rio Declaration does not address multinational corporations specifically, but contains open-ended obligations, as well as provisions, encouraging sovereign states to contribute to sustainable

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113. *See* G.A. Res. 47/190, *supra* note 6, ¶ 2; *see, e.g.*, Handl, *supra* note 7 (arguing that some provisions of the Rio Declaration reflected customary international law already formed at the time, while other provisions were introduced "to shape the future normative expectations").

114. Rio Declaration, *supra* note 5, at princs. 2, 11.

115. *See, e.g.*, *id.* at princ. 13 ("States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage."), princ. 18 ("States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States."), princ. 19 ("States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."), princ. 24 ("States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.").

116. *Id.* at princ. 8.

117. *Id.* at princ. 1.

118. *Id.* at princ. 3.

development. Yet, as Illias Bantekas pointed out, "the whole structure of sustainable development (including human rights) is necessarily dependent on [multinational enterprises'] direct participation."[119] In his support, he invokes Principles 5 and 27 of the Rio Declaration, where obligations in the area of sustainable development are "addressed to 'all States and all people.'"[120] In the context of international investment law, the Rio Declaration therefore has direct relevance for multinational corporations and other foreign investors seeking protection under investment treaties.

Agenda 21 is another soft law instrument of sustainable development commonly referred to in recent investment treaties. Adopted at the conclusion of the Earth Summit in Rio de Janeiro in 1992, it constitutes an "implementing blueprint"[121] of the Rio Declaration and provides a "plan of action" for the sovereign states, United Nations, NGOs, and major groups (such as women, workers and trade unions, and scientific and technological communities) in every area where there is human impact on the environment.[122] Chapter 30 of Agenda 21 outlines the role of business and industry, including transnational corporations, in "the social and economic development of a country" and calls for "recogniz[ing] environmental management as among the highest corporate priorities and a key determinant to sustainable development."[123]

More recently, UN member states adopted another soft law instrument in the area of sustainable development—that is, the 2030 Agenda for Sustainable Development.[124] It sets the "plan of action for people, planet and prosperity" and includes seventeen SDGs and 169 targets for the years 2015-2030.[125] Similar to the Rio Declaration and Agenda 21, the 2030 Agenda for Sustainable Development is increasingly referred to in recent investment treaties, which is in line with the UNCTAD recommendations on reforming international investment regime.[126]

In principle, parties in ISDS can invoke any of these soft law instruments as part of their submissions. Alternatively, investment tribunals may look at these soft law instruments on their own (*sua*

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119. Illias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 313 (2004).

120. *Id.* at 313.

121. *Id.*

122. *Agenda 21, UNCED, 1992*, U.N. SUSTAINABLE DEV., https://sustainabledevelopment.un.org/outcomedocuments/agenda21 (last visited Dec. 2, 2022) [https://perma.cc/NF2X-FMBY] (archived Dec. 2, 2022).

123. Agenda 21, *supra* note 109, ch. 30.

124. 2030 Agenda, *supra* note 110.

125. *Id.*

126. *See* UNCTAD'S REFORM PACKAGE, *supra* note 83, at 84–87 (calling on sovereign states to rely on "referencing global standards" in modernized IIAs and listing the 2030 Agenda among global standards with investment relevance).

sponte or *ex officio*), although doing so may violate the tribunal's obligations towards disputing parties.[127]

b. Corporate Social Responsibility

Similar to the environmental and sustainable development guidelines and standards, the body of soft law on CSR has expanded drastically over the years. Most notably, soft law on CSR today encompasses the OECD Declaration on International Investment and Multinational Enterprises, which includes the OECD Guidelines for Multinational Enterprises (OECD Guidelines).[128] Broader efforts to regulate multinational corporations led to further soft law instruments in this field, including the UN Global Compact (the world's largest corporate sustainability commitment),[129] the UN Guiding Principles on Business and Human Rights (endorsed by the UN Human Rights Council in June 2011),[130] and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (considered but not approved by the United Nations Commission on Human Rights in 2004, and therefore of "no legal standing"[131]).[132]

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127. *See, e.g.*, Vera Korzun, *Arbitrating Antitrust Claims: From Suspicion to Trust*, 48 N.Y.U. J. INT'L L. & POL. 922–23 (2016) (questioning whether raising mandatory antitrust laws *sua sponte* may violate tribunal's obligations towards disputing parties in international commercial arbitration).

128. OECD Declaration on International Investment and Multinational Enterprises, *supra* note 11.

129. See *The U.N. Global Compact*, UNITED NATIONS, https://www.unglobalcompact.org/ (last visited Nov. 7, 2022) [https://perma.cc/9GNL-44A2] (archived Nov. 7, 2022); The Ten Principles of the U.N. Global Compact in the areas of human rights, labor, environment, and anti-corruption derive from the Universal Declaration of Human Rights; the International Labour Organization's Declaration on Fundamental Principles and Rights at Work; the Rio Declaration on Environment and Development; and the United Nations Convention Against Corruption. *The Ten Principles of the UN Global Compact*, UNITED NATIONS, https://www.unglobalcompact.org/what-is-gc/mission/principles (Nov. 7, 2022) [https://perma.cc/H3B3-XF5B] (archived Nov. 7, 2022). Sovereign states have begun incorporating a reference to the U.N. Global Compact in their BITs, often, emphasizing the importance of this legal instrument in the preamble to an investor protection treaty. *See, e.g.*, Austria-Taj. BIT, *supra* note 24 ("taking note of the principles of the UN Global Compact").

130. Addressed to sovereign states and companies, the Guiding Principles represent a set of guidelines to "prevent, address and remedy human rights abuses committed in business operations." U.N. Guiding Principles on Business and Human Rights, *supra* note 10.

131. *See* Comm'n on Hum. Rts., Rep. of the Subcommission on the Promotion and Protection of Human Rights on Its Sixtieth Session, Agenda Item 16, E/CN.4/2004/L.73/Rev.1 (2004), para. (c) (affirming that document E/CN.4/Sub.2/2003/12/Rev.2, *infra* note 132, which embodied the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, has no legal standing).

132. Comm'n on Hum. Rts., Rep. of the Subcommission on the Promotion and Protection of Human Rights on Its Fifty-Fifth Session, Norms on the Responsibilities of

The OECD Declaration on International Investment and Multinational Enterprises (OECD Declaration), the most notable example of soft law on CSR, was first adopted by the governments of the OECD member countries in 1976. Since then, the OECD Declaration was reviewed on several occasions, most recently in 2011. The OECD Declaration "provides non-legally binding norms on responsible conduct for national governments and multinational enterprises."[133] By adhering to the OECD Declaration, sovereign states declared that they "jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines, having regard to the considerations and understandings that are set out in the Preface and are an integral part of them."[134] Consequently, the OECD Guidelines represent recommendations from the governments to multinational enterprises on responsible business conduct in the areas of environmental protection, human rights, and anti-bribery.

In addition to setting standards on corporate conduct, the OECD Guidelines establish a unique, government-backed international grievance mechanism in the form of National Contact Points. Every government that adheres to the OECD Guidelines is required to establish a National Contact Point to promote the OECD Guidelines and handle complaints against companies that have allegedly failed to adhere to the OECD Guidelines' standards. Complaints are usually handled through mediation or other conciliatory practices that seek to help parties reach mutual agreement on past acts and future goals. Yet, this mechanism does not provide for an enforcement mechanism in its traditional sense as it limits the aggrieved party's options to launching a complaint with the National Contact Points, which is then handled through non-binding methods of dispute resolution.

III. INVOKING SOFT LAW IN INVESTMENT ARBITRATION: FROM THEORY TO PRACTICE

Against this background, how can soft law come into play in ISDS? After all, "soft law" is, by definition, non-binding, lacks an enforcement mechanism, and therefore is unenforceable. In theory, there are at least four ways of bringing soft law into play in ISDS: by (1) alleging

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Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2 (2003).

133. *The OECD Declaration on International Investment and Multinational Enterprises: Promoting Responsible Government and Responsible Business*, ORG. FOR ECON. COOP. AND DEV., http://www.oecd.org/newsroom/theoecddeclarationoninternationalinvestmentandmultinationalenterprisespromotingresponsiblegovernmentandresponsiblebusiness.htm (last visited Nov. 7, 2022) [https://perma.cc/8JDP-5CFF] (archived Oct. 13, 2022).

134. OECD Declaration on International Investment and Multinational Enterprises, *supra* note 11.

violations of international investment agreements that make a reference to soft law instruments on environmental protection, sustainable development, and CSR; (2) submitting counterclaims in ISDS that invoke host states' soft law commitments pursuant to non-binding rules and standards; (3) invoking exceptions as safeguard provisions in investment treaties reserving for the state the right to regulate; and (4) allowing submissions by amicus curiae or a non-disputing party that rely on soft law as part of their arguments. In addition, soft law may be used in investment arbitration to interpret treaty provisions, in particular, pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires taking into account "[a]ny relevant rules of international law applicable in the relations between the parties."[135]

I will now focus on each of the four ways of bringing soft law to the attention of investment tribunals, although they could have been categorized differently. For instance, Giovanna Adinolfi points out that parties may invoke soft law regarding, on the one hand, issues of jurisdiction and, on the other hand, the merits of the parties' dispute (in the latter case, to interpret treaty provisions or to ascertain an international customary norm).[136] Another route for bringing soft law into consideration in investment arbitration is to invoke prior tribunals' awards in subsequent arbitrations. However, as explained in the soft law section above, this category of soft law—soft law arising as part of dispute resolution instead of law-making efforts of sovereign

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135. Vienna Convention on the Law of Treaties, art. 31(3), May 23, 1969, 1155 U.N.T.S. 331, 340; *see also* Crina Baltag, *Human Rights and Environmental Disputes in International Arbitration*, KLUWER ARB. BLOG (July 24, 2018), http://arbitrationblog.kluwerarbitration.com/2018/07/24/human-rights-and-environmental-disputes-in-international-arbitration/ [https://perma.cc/3REY-YSV8] (archived Oct. 13, 2022) (exploring how the issues of human rights and environmental law come into play in investment disputes). Baltag identifies a scholarly and tribunal divide as to whether "human rights are part of the applicable law" in investment arbitration. She explains that some scholars and decisions of investment tribunals suggest that human rights are part of international law and as such shall be taken into account as part of applicable law in arbitration. *Id.* Yet, other investment tribunals reject this approach "narrowing [in light of Article 31(3)(c) of the Vienna Convention] the reference to 'international law' only to international law relevant to the BIT." *Id.*

136. *See* Adinolfi, *supra* note 90, at 99; *see also* Marcoux, *supra* note 90, at 121 (referring to *South American Silver Ltd. v. Plurinational State of Bolivia (U.K. v. Bol.)*, PCA Case No. 2013-15, where in its Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits the host state referred to the U.N. Guiding Principles on Business and Human Rights and the OECD Guidelines as a ground for indigenous peoples' rights). Marcoux further cites the award in *Copper Mesa Mining Corp. v. Republic of Ecuador (Can. v. Ecuador)*, Award, PCA Case No. 2012-2, where the host state unsuccessfully challenged the tribunal's jurisdiction, alleging that the investor's conduct "amounts . . . to severe breaches of *legal principles* governing corporate social responsibility and is contrary to *international public policy*, including the UN Global Compact [and] the OECD Guidelines." *Id.* ¶ 5.29 (emphasis added) (footnote omitted).

states and international organizations—is beyond the scope of the present Article.[137]

A. *Alleging Violations of International Investment Agreements*

By their design, international investment agreements—most commonly, BITs—focus on the protection of foreign investors and/or investments. According to UNCTAD, which tracks IIAs worldwide, to date countries have concluded 2,844 BITs in addition to 420 other treaties with investment provisions.[138] Out of these treaties, 2,290 BITs and 324 other treaties with investment provisions are currently in force.[139] Most of the IIAs follow the same logic—they are concluded by sovereign states to provide foreign investors (effectively, "third-party beneficiaries" of these treaties) with substantive protections, such as non-discrimination, fair and equitable treatment, and full protection and security.[140] IIAs also set the rules on appropriate compensation in cases of expropriation and provide for a mechanism of dispute resolution between a foreign investor and the host state (commonly, through investment treaty arbitration, or ISDS).

However, the scope and content of the IIAs have evolved over time from the first "bare-bones" investor protection treaties. The evolution of the US Model BIT,[141] which grew over time to the current thirty-seven articles and three annexes, is indicative in this respect. Some of the changes in IIA treaty making reflect the desire of state parties to provide for clarification of "old" treaty provisions, possibly following investment disputes and decisions by arbitral tribunals. Other changes reflect the overall trends in the evolution of international investment law, such as the expansion of protection from foreign direct investments to portfolio and indirect investments. Notably, there is a revived concern that foreign investors interfere with state sovereignty by challenging in ISDS government measures of the host states. Modern IIAs seek to clarify their provisions with regard to the right to regulate in view of the host state's obligations to foreign investors.[142]

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137. *See supra* Part II.

138. *International Investment Agreements Navigator*, UNITED NATIONS CONF. ON TRADE AND DEV., https://investmentpolicy.unctad.org/international-investment-agreements (last visited Nov. 7, 2022) [https://perma.cc/E4ZC-UFXR] (archived Oct. 13, 2022).

139. *Id.*

140. *See* Korzun, *supra* note 21, at 366.

141. *See generally* U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/HMZ8-Y2V6] (archived Oct. 13, 2022) [hereinafter U.S. Model BIT].

142. According to UNCTAD's IIA Mapping Project, which to date includes 2,574 investment treaties, forty-five treaties include a refence to the right to regulate in their

Consequently, investor protection treaties acknowledge a number of legitimate public policy goals where the host state reserves its right to regulate, despite its obligations to foreign investors. This includes protection of public health, the environment, competition, human rights, and social values.[143]

In line with these trends, recent IIAs include provisions on the protection of human rights, labor standards, environment, sustainable development, and corporate social responsibility.[144] According to the 2014 OECD survey, more than three-fourths of IIAs concluded in the period between 2008 and 2013 contain provisions on sustainable development and responsible business conduct.[145] Most of these treaties are free trade agreements (FTAs) with investment provisions.[146] Further, "virtually all of the investment treaties concluded in 2012 and 2013 include[d] such language."[147]

Commonly, there is a reference to environmental protection, sustainable development, and CSR already in the preamble of investment treaties.[148] For instance, the preamble to the 2016 Iran-

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preamble (with seventeen of these treaties also including separate provisions on the right to regulate in their text, in addition to the preamble of the treaty). UNCTAD IIA Mapping Project, *supra* note 21.

143. *See, e.g.*, Comprehensive and Progressive Trans-Pacific Partnership, art. 9.16, Feb. 4, 2016 ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives."); *see also* Investment Protection Agreement between the European Union and Its Member States and the Socialist Republic of Vietnam, art. 2.2(1)–(2), Eur. Union-Viet., June 30, 2019 ("1. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity. 2. For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.") [hereinafter E.U.-Viet. BIT]; Investment Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile, Chile-H.K., art. 12.1, Nov. 18, 2016 ("Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its area is undertaken in a manner sensitive to environmental, health or other regulatory objectives.") [hereinafter Chile-H.K. BIT].

144. *See, e.g.*, Baltag, *supra* note 135 (observing that "[t]he new IIAs entered into force or recently signed, as well as the proposed drafts, appear to take a positive approach towards addressing human rights and environmental issues").

145. Kathryn Gordon, Joachim Pohl & Marie Bouchard, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*, 2014/01 OECD WORKING PAPERS ON INT'L INV. 5 (2014).

146. *See id.*

147. *Id.*

148. *See, e.g.*, Georgia-Switzerland BIT, *supra* note 24, pmbl. (stating that the Contracting Parties are "[d]etermined to encourage investors to respect internationally recognized corporate social responsibility standards and principles").

Slovakia BIT refers to the state parties' determination to "prevent and combat corruption, including bribery, in international cooperation and investment and to promote corporate social accountability."[149] New IIAs also include separate articles on environmental protection and CSR, largely as part of the discussion of the state's right to regulate, as well as the foreign investor's obligations to comply with the host state's laws in these areas as a condition of investment protection under a treaty.

Most importantly for our purposes, newer IIAs also incorporate by reference soft law rules and standards on environmental protection, sustainable development, and CSR. These provisions perform two functions. First, they set the legal framework and thereby adjust foreign investors' expectations with respect to rules and standards of the host state in the areas of human rights, labor rights, environmental protection, sustainable development, and CSR. Second, they also underline the host state's right to regulate in these areas.[150] Consequently, they put foreign investors on notice that rules and regulations in these areas might change and that the host state views it as inappropriate to encourage investment by relaxing such laws.[151]

There is a variance of such references, from general references to the principles of sustainable development and corporate social responsibility in the preamble of the treaty,[152] to separate articles in the treaty establishing the obligations of the foreign investor and/or state parties to comply with broadly defined international environmental and sustainable development law principles, to treaty provisions incorporating by reference soft law instruments, such as the Rio Declaration and the OECD Guidelines.[153] Some recent treaties provide an opportunity for state parties to review treaty provisions within a certain time period after entrance into force (e.g., in the third year following the entry of a treaty into force) to take into account corporate social responsibility.[154]

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149. Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, pmbl., Iran-Slovk., Jan. 19, 2016 [hereinafter Iran-Slovk. BIT].

150. *See generally* Korzun, *supra* note 21 (discussing the state right to regulate).

151. *See e.g.*, Iran-Slovk. BIT, *supra* note 149, arts. 10(1)–10(2) (addressing environmental and labor rights and other standards and reserving the state's right to regulate in these areas).

152. *See, e.g.*, Can.-E.U. CETA, *supra* note 83, pmbl. ("encouraging enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct").

153. *See, e.g.*, *id.* arts. 22.1, 22.3.

154. See, e.g., Agreement Between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment, Japan-Uru., art. 30, Jan. 26, 2015 [hereinafter Japan-Uru. BIT], providing that

For instance, pursuant to the Canada-EU Comprehensive Economic and Trade Agreement (CETA), state parties agree on "encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guidelines for Multinational Enterprises, to strengthen coherence between economic, social and environmental objectives."[155]

Similarly, in its draft proposal for modernizing the Energy Charter Treaty, the European Commission included a reference to the Rio Declaration (and Agenda 21) as part of the new proposed article called "Sustainable development—Context and objectives."[156] The work on the proposal was preceded by approval of the Council of the European Union, which agreed with the Commission and specifically requested for the modernized Energy Charter Treaty to include stronger provisions on sustainable development and corporate social responsibility.[157] The article "recalls" the Rio Declaration together with other instruments of soft law on sustainable development, such as Agenda 21 of 1992 and the UN 2030 Agenda for Sustainable Development of 2015, with its SDGs.[158] Further, the proposed article affirms the states' commitment to the SDGs:

> The Contracting Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. The Contracting Parties affirm their commitment to promote the development of international trade and investment in energy-related sectors in such a way as to contribute to the objective of sustainable development.[159]

A separate new proposed article called "Sustainable development—Responsible Business Practices" talks about corporate social responsibility, with a reference to the UN and OECD soft law instruments:

> The Contracting Parties recognise the importance of responsible business practices in contributing to the goal of sustainable development. Accordingly, they shall promote the uptake of corporate social responsibility or responsible

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> [i]n the third year following the date of entry into force of this Agreement or a year on which the Contracting Parties otherwise agree, whichever comes first, with a view to the possible improvement of the investment environment, the Contracting Parties may review this Agreement. Such review may take into consideration, among others, the functioning of the Agreement, the prohibition of additional performance requirements including with regard to a license contract, corporate social responsibility, and progressive liberalization of investment.

155. Can.-E.U. CETA, *supra* note 83, art. 22(3).

156. Revised Draft (EC), EU text proposal for the modernisation of the Energy Charter Treaty (ECT), at 10, WK 3937/2020 INIT (Apr. 20, 2020) at pt. IV [hereinafter ECT Modernisation].

157. *See* Negotiating Directives for the Modernisation of the Energy Charter Treaty, at 5, 10745/19 ADD 1 (July 2, 2019).

158. *See* ECT Modernisation, *supra* note 156, at 10.

159. *Id.*

> business conduct, in line with relevant international instruments, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the UN Guiding Principles on Business and Human Rights.[160]

Along with the soft law of environmental protection and sustainable development, the soft law of CSR has found its way into the body of hard international investment law.[161] Increasingly, investor protection treaties contain references to socially responsible behavior seeking to impact how foreign investors, in particular multinational corporations, conduct business in host states.[162] Treaties vary in their reference to CSR—from incorporating a single-sentence reference to socially responsible conduct, without invoking soft law instruments on CSR, to listing specific soft law instruments of CSR, most commonly, the OECD Guidelines. Such references frequently appear in the preambles of IIAs as declaratory, largely aspirational statements.[163] References to CSR in the preamble do not impose positive obligations on foreign investors but provide context for treaty interpretation and perform a signaling function of the importance of CSR for state parties.[164]

Modern IIAs also reaffirm the importance of CSR in the text of the treaty, calling on state parties to encourage foreign investors to comply with the international standards on CSR.[165] For instance, the United

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160. *Id.* at 11–12.

161. For instance, out of 2,574 treaties mapped by UNCTAD as part of the IIA Mapping Project, thirty-three treaties contain separate provisions on corporate social responsibility in the body of the treaty. All of these treaties have been signed since 2013. *See, e.g.*, Agreement Between Canada and Mongolia for the Promotion and Protection of Investments, art. 14, Can.-Mong., Feb. 24, 2016; Morocco-Nigeria BIT, *supra* note 83, art. 24; *see also* Dubin, *supra* note 20 (observing in 2018 that "[t]here are at most 30 CSR clauses in investment treaties and modes or FTAs" (footnote omitted)).

162. *See, e.g.*, Dubin, *supra* note 20 (offering the following typology of CSR clauses in IIAs: (i) CSR clauses "in which, at most, states encourage companies to self-regulate"; (ii) CSR clauses "in which the home and host states of foreign investors consider CSR to be within their own national competence"; (iii) CSR clauses "in which states explicitly require that investors comply with human rights or environmental obligations").

163. *See, e.g.*, Austria-Taj. BIT, *supra* note 24 ("expressing [the Contracting Parties'] belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries").

164. Although the preamble does not set obligations of the state parties, it plays an important role in providing context for the purposes of treaty interpretation. According to Article 31 of the Vienna Convention on the Law of Treaties, treaties are to be interpreted in their context, which for the purposes of the interpretation includes in addition to the text of the treaty, its preamble and annexes. *See* Vienna Convention, *supra* note 135, art. 31.

165. *See, e.g.*, Can.-S. Kor. FTA, *supra* note 112, art. 8.16:

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate

States-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020, includes provisions on CSR with reference to the OECD soft law instruments:

> Article 14.17: Corporate Social Responsibility
>
> The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.[166]

Other IIAs include a more general reference to corporate social responsibility, without referencing specific CSR instruments.[167] According to Laurence Dubin, CSR clauses encouraging foreign investors to adopt voluntary CSR code—that is, to self-regulate—"do not change the corporate or ethical duties of companies into enforceable legal obligations in the context of dispute settlement proceedings."[168] Instead, she argues, "[t]hey merely reaffirm the voluntary nature of CSR, which remains a form of self-responsibility for companies that can, at most, be encouraged by states."[169]

Furthermore, when such CSR clauses are addressed to state parties—the host state and the home state of foreign investors—they are worded rather softly (e.g., using "should" instead of "shall") and generally do not impose obligations on state parties either. For instance, while Article 16 of the Chile-Hong Kong investment agreement "reaffirm[s] the importance" of CSR, Article 21 of the same treaty states that a failure by a state party to comply with Article 16 (that is, to encourage foreign investors to voluntarily incorporate international standards, guidelines, and principles on CSR into their internal policies) cannot be invoked by a foreign investor as a ground for bringing a claim against a host state in ISDS.[170] One possible interpretation of this provision in the Chile-Hong Kong investment agreement is that Article 16 does not create obligations for the state parties to encourage

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> social responsibility in their practices and their internal policies, including statements of principle that are endorsed or supported by the Parties. These principles address issues such as labour, environment, human rights, community relations, and anti-corruption.

166. USMCA, *supra* note 25, art. 14.17.

167. *See, e.g.*, Chile-H.K. BIT, *supra* note 143, art. 16 ("The Parties reaffirm the importance of each Party encouraging enterprises operating within its area to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.").

168. *See, e.g.*, Dubin, *supra* note 20.

169. *Id.*

170. *See* Chile-H.K. BIT, *supra* note 143, art. 21(1).

adoption of CSR by foreign investors operating within their territories. This is an uncomfortable reading of the treaty provisions since host states have been advocating for imposing CSR obligations on companies, including foreign investors, as evidenced by recent IIAs. Yet, it appears that host states are not yet ready to take responsibility for their fair share in promoting CSR among foreign investors, at least not within the international investment law framework, and not at the risk of losing foreign investments if the host state pushes too hard for CSR rules.

Another possible interpretation of the Chile-Hong Kong investment agreement might be that Article 16 creates an obligation on a state party, but not one that can be enforced in investment arbitration by a foreign investor. Arguably, such an obligation can be enforced by state parties themselves using a dispute resolution procedure provided in Article 34 of the investment agreement (that is, using *mutatis mutandis*, a dispute settlement mechanism of Chapter 17 of the FTA between Hong Kong and Chile).[171]

Similarly, the Canada-Benin BIT (in force as from May 12, 2014) contains a separate article on CSR, which calls on state parties to "encourage" foreign investors to "voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies."[172] Thus, CSR clauses are addressed to state parties, while foreign investors are encouraged but, arguably, under no obligation to incorporate such CSR standards.[173]

Further, according to the Canada-Benin BIT, a foreign investor cannot bring a claim in ISDS against a host state alleging that such state has breached its obligations in the area of CSR. CSR-related claims are specifically excluded from the types of claims that can be submitted to arbitration under Article 23 of the treaty.[174] This suggests that state parties cannot be found liable if they do not encourage en-

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171. *See id.* art. 34.

172. Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, Can.-Benin, art. 16, Jan. 9, 2013 [hereinafter Can.-Benin BIT]. Article 16 of the Agreement covers Corporate Social Responsibility and provides that

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

173. *See, e.g.*, Dubin, *supra* note 20 (arguing with regard to similar provision in Can.-E.U. CETA that "[t]hese provisions do not change the corporate or ethical duties of companies into enforceable legal obligations in the context of dispute settlement proceedings. They merely reaffirm the voluntary nature of CSR, which remains a form of self-responsibility for companies that can, at most, be encouraged by states").

174. *See* Can.-Benin BIT, *supra* note 172, art. 23.

terprises operating within their territory or subject to their jurisdiction to voluntarily incorporate internationally recognized CSR principles. But there is also no enforcement mechanism with respect to foreign investors' non-compliance with CSR rules. Unlike the 2019 Dutch Model BIT, the Canada-Benin BIT does not contain a provision instructing the arbitral tribunal to consider investor non-compliance with CSR in determining the amount of compensation. Other BITs concluded by Canada in recent years contain virtually identical CSR provisions (see, for instance, Article 16 of Canada-Burkina Faso BIT[175]).

Investment treaties may also contain CSR clauses addressed to foreign investors. Dubin refers to such provisions as "direct CSR clauses [that] aim to hold foreign investors responsible by defining the obligations that govern their activities."[176] For instance, Article 24(1) of the Morocco-Nigeria BIT states that foreign investors "should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community."[177] This language seemingly goes further than simply recalling the importance of CSR or encouraging state parties to remind foreign investors about the importance of CSR. Yet, the treaty uses the word "should" instead of the stronger word "shall," which would unequivocally establish foreign investors' obligations with respect to CSR.

Dubin explains this weakness of the treaty language (reliance on "should" instead of "shall") by the primary objective of traditional investment treaties—that is, the encouragement and protection of foreign investors whose rights under investment treaties are not accompanied by obligations.[178] One may also explain such weakness

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175. *See* Can.-Burk. Faso BIT, *supra* note 83, art. 16; *see also* Ying Zhu, *Corporate Social Responsibility and International Investment Law: Tension and Reconciliation*, 2017 NORDIC J. COM. L. 90, 113 (2017) (observing that by contrast to other Canadian investment treaties, "the 2015 Burkina Faso-Canada BIT . . . does not prohibit an arbitration claim formed on the basis of the CSR provision." (footnote omitted)). Zhu further argues that "[a]s a result, the foreign investor who has incurred damages by reason of a violation of the CSR provision by the host state can claim for compensation in the investor-state arbitration process under Article 21 of the Burkina Faso-Canada BIT." *Id.*

176. Dubin, *supra* note 20. The author also notes that there are social responsibility clauses in investment treaties. *See id.* (arguing with regard to similar provision in Can.-E.U. CETA that "[t]hese provisions do not change the corporate or ethical duties of companies into enforceable legal obligations in the context of dispute settlement proceedings. They merely reaffirm the voluntary nature of CSR, which remains a form of self-responsibility for companies that can, at most, be encouraged by states").

177. Morocco-Nigeria BIT, *supra* note 83, art. 24(1); *see also* Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar, Arg.-Qatar, art. 12, June 16, 2016 (stating that "[i]nvestors operating in the territory of the host Contracting Party should make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices").

178. *See* Dubin, *supra* note 20.

by an unwillingness of state parties to deter foreign investors from investing in host countries that may require socially responsible investments. Moreover, weak language allows avoiding a question of whether IIAs, as treaties for the benefit of third parties (that is, foreign investors), may also impose obligations on foreign investors without acquiring their consent to be bound by such provisions. If international rules of CSR were legally binding (instead of soft law rules), a mere incorporation by reference would simply reiterate their role in international legal regulation. But in view of self-regulation and voluntary reliance on CSR rules by multinational corporations and industry groups, including stronger language in investment treaties without direct participation by multinational corporations in the treaty-making process remains impossible and counterproductive. Hence, it is not surprising that, as Dubin points out, "Pan-African Investment Code (PAIC) uses conditional verbs ('should') to encourage investors to comply with internationally recognized human rights laws while using imperative verbs ('shall') in relation to combating corruption."[179] After all, corporate obligations and responsibilities regarding human rights are still largely regulated by soft law, while anti-corruption obligations of corporations derive from legally binding treaties, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which sets the obligation of the state parties "to establish the liability of legal persons for the bribery of a foreign public official."[180]

UNCTAD encourages the use of CSR clauses as part of investment treaty reform, offering to state parties several options for treaty modernization. These options include the encouragement of investors "to comply with widely accepted international standards (e.g., the UN Guiding Principles on Business and Human Rights)," "to require tribunals to consider an investor's compliance with CSR standards, endorsed by the parties, when deciding an ISDS case," and to include commitments for state parties of investment treaties to promote and cooperate on CSR issues.[181]

In addition to using CSR clauses in investment treaties to ensure responsible investments, CSR may also help to achieve the other top priority for IIA reform—that is, safeguarding the state's right to regulate.[182] For instance, Dubin argues that "CSR clauses could . . . justify or emphasize the restrictive interpretation of [fair and equitable treatment] and, in particular, the protection of investors' legitimate

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179. Dubin, *supra* note 20.

180. Senate Consideration of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, S. TREATY DOC. NO. 105-43 (Dec. 17, 1997) [hereinafter Senate Consideration of Convention].

181. UNCTAD'S REFORM PACKAGE, *supra* note 83, at 66–67.

182. *See id.* at 22–23.

expectations."[183] UNCTAD includes the clarification of the fair and equitable treatment standard in the reform options available for safeguarding the right to regulate—a distinct reform priority, separate from ensuring responsible investment.[184] One should therefore expect more CSR clauses in modernized investment treaties, in particular, with reference to the OECD Guidelines.

Inclusion of these and similar provisions into IIAs is a relatively new practice, which goes against a traditional view of international investment law as "silent" with regard to investors' obligations in the areas of international environmental law, sustainable development, human rights, labor and employment law, and CSR.[185] By incorporating soft law instruments into IIAs, state parties make them binding on themselves, thereby hardening the soft law nature of these rules and principles in international law. It should come as no surprise that investment tribunals in ISDS will be asked to enforce these provisions, together with any other provisions of the investment treaty invoked in arbitration. Yet, soft law instruments that are frequently incorporated today into IIAs (the Rio Declaration, Agenda 21, the 2030 Agenda for Sustainable Development, and the OECD Guidelines) were not created as binding rules of law. Moreover, soft law (instead of hard law) may have been deliberately chosen by states and other actors as a "superior institutional arrangement."[186] Being soft by their nature, soft law instruments are largely vague in content and may provide no obligations that would allow an investment tribunal to establish a breach and liability by a foreign investor. Consequently, investment tribunals are left to evaluate the content of these instruments and judge the investors' compliance without much guidance by the state parties.

The 2019 Model Dutch BIT provides a notable exception in this regard, seeking to guide investment tribunals a step further, but even this model treaty does not account for the soft law nature of the CSR instruments tribunals are called upon to enforce. Notably, in 2019, the Netherlands incorporated several provisions into its new Model BIT, which seeks to impact behavior of the contracting states and investors

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183. Dubin, *supra* note 20. Dubin further explains that "[b]y explaining the intention of states to reinforce investors' corporate responsibility, indirect clauses could help better define the scope of investors' legitimate expectations." *Id.* (footnote omitted).

184. *See* UNCTAD'S REFORM PACKAGE, *supra* note 83, at 35–36.

185. *See, e.g.*, Yulia Levashova, *The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law*, 14(2) UTRECHT L. REV. 40, 41 (2018) (arguing that "[t]he regime of international investment law, as it currently stands, provides little opportunities to hold foreign investors accountable for those human rights, environmental and labour violations that are pertinent to investment, as these subjects are rarely a part of investment treaties or investment contracts").

186. Abbott & Snidal, *supra* note 49, at 423. According to Abbott and Snidal, "international actors choose softer forms of legalized governance when those forms offer superior institutional solutions." *Id.* at 421.

in the field of human rights (Article 5), sustainable development (Article 6), and corporate social responsibility (Article 7).[187] In particular, with respect to CSR, Article 23 provides that, in assessing the amount of compensation, the arbitral tribunal "is expected" to take into account non-compliance by a foreign investor with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines.[188]

Thus, the treaty seeks to increase compliance of foreign investors with non-binding UN and OECD instruments by introducing a remedy for non-compliance—presumably, reduced damages awarded by arbitral tribunals. However, one should keep in mind that arbitral tribunals might not consider themselves bound by provisions of Article 23. Therefore, they might ignore the requirement to take non-compliance into account while assessing the amount of compensation. In such a case, the host state or non-disputing state will have no recourse against the "non-obedient" tribunal, which raises the question of the effectiveness of the Dutch approach. Yet, this is a new and innovative way of increasing compliance, which serves a signaling function and might also have deterrent effect on foreign investors. It also allows introducing soft law instruments on CSR as part of dispute resolution in ISDS by reference to binding provisions of a BIT.

The Dutch example deals with a model law, which still needs to materialize into actual treaties for the Dutch approach to be tested in investment treaty arbitrations. However, there are agreements currently in force, which already incorporate by reference soft law instruments. Depending on the text of the relevant provision, such reference arguably gives these instruments binding force, thereby removing them from the soft law category. For instance, the EU-Japan Economic Partnership Agreement (EPA),[189] in its Chapter 16 on trade and sustainable development, contains a reference to the OECD Guidelines and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office in November 1977.[190] Directed towards state parties, Article 16.5 reiterates the importance of the internationally recognized principles and guidelines on CSR, including the above-referred soft law instruments on CSR. Similar to recent

187. *See* Dutch Model BIT, *supra* note 12, arts. 5–7. *See generally* Duggal & van de Ven, *supra* note 19.

188. *See* Dutch Model BIT, *supra* note 12, art. 23. Contrast with prior Dutch practice with regard to BITs, which simply called on state parties to promote corporate social responsibility. *See, e.g.*, Neth.-U.A.E. BIT, *supra* note 27, art. 3 (stating that "[e]ach Contracting Party shall promote as far as possible and in accordance with their domestic laws the application of the OECD Guidelines for Multinational Enterprises to the extent that is not contrary to their domestic laws").

189. *See* E.U.-Japan EPA, *supra* note 112, art. 16.5.

190. *See id.*

FTAs, the EPA also contains state commitments to sustainable development and references to a number of soft law instruments to this effect.[191]

In any case, the import of soft law provisions into the text of the IIAs allows arbitral tribunals to directly apply and interpret the soft law instruments, effectively providing them with the enforcement mechanism they so urgently need. In addition, through ISDS, foreign investors may be able to enforce environmental and sustainable development obligations of the host state articulated in the investor protection treaty.[192]

B. *Asserting Defenses and Counterclaims*

Host states may assert a variety of defenses in investment arbitration to avoid liability or to mitigate the amount of damages.[193] Defenses provide justification or excuse for non-performance and may invoke local environmental laws or international laws of environmental protection and sustainable development, including soft law instruments. For instance, host states may assert an investor's non-compliance with environmental laws as a defense seeking to dismiss the case on jurisdictional grounds or to challenge the admissibility of a claim.[194] Similarly, as Dubin suggests, host states may seek "to avoid

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191. See *id.* art. 16.1, referring to

> the Agenda 21 adopted by the United Nations Conference on Environment and Development on 14 June 1992, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference on 18 June 1998, the Plan of Implementation adopted by the World Summit on Sustainable Development on 4 September 2002, the Ministerial Declaration entitled "Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development" adopted by the Economic and Social Council of the United Nations on 5 July 2006, the ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference on 10 June 2008, the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want" adopted by the General Assembly of the United Nations on 27 July 2012, and the outcome document of the United Nations summit for the adoption of the post-2015 development agenda, entitled "Transforming our world: the 2030 Agenda for Sustainable Development" adopted by the General Assembly of the United Nations on 25 September 2015.

192. *See* Parlett & Ewad, *supra* note 15 (arguing that "there is also potential for investors to seek to enforce a State's environmental obligations through investment arbitration").

193. *See generally* Jorge E. Viñuales, *Defence Arguments in Investment Arbitration*, 18 ICSID REPORTS 9 (2020) (providing a comprehensive study of defenses).

194. *See* Baltag, *supra* note 135 (identifying three distinct categories of cases where tribunals dealt with human rights and environmental protection issues, including cases "where Respondent State invoked an investor's alleged non-compliance with environmental law/human rights law, making claims for compensation inadmissible, or subject to reduction under 'contributory fault' principles"). Baltag includes in this category *S.D. Myers v. Canada* (where Canada invoked investor's non-compliance with Canadian local environmental laws) and *Aven v. Costa Rica* (where "Costa Rica raised the defense that investors did not follow local environmental laws, justifying measures taken against investors or, alternatively, giving rise to a defense of 'unclean hands'").

their own responsibility by challenging the claimant investor's socially responsible conduct (whether or not it characterizes [it] as such)."[195]

Where foreign investors engage in some sort of inappropriate behavior, host states may invoke several defenses, which Jorge E. Viñuales, in his comprehensive study of defenses, calls "defence arguments concerning the entitlement to rely on the treaty."[196] These defenses include inconsistency of a claim with international public policy, abuse of right, and corruption.[197] In theory, in raising any of these defenses, host states can invoke the soft law of environmental protection, sustainable development, and CSR. For instance, modern IIA treaties call on state parties to encourage foreign investors to incorporate internationally recognized principles of CSR, including anti-corruption norms.[198] The OECD Guidelines also call on multinational enterprises to combat bribery, bribery solicitation, and extortion.[199] Thus, in a case of corruption, a host state may be able to bring a defense of corruption and, in doing so, in addition to legally binding instruments (such as the UN Convention against Corruption[200] and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[201]), invoke voluntary CSR provisions adopted by foreign investors. This would require the investment tribunal to take into account and assess investor compliance with international soft law invoked by the host state or tribunal itself.[202]

Similarly, host states can invoke soft law instruments while raising defenses seeking to reduce the quantum of damages. Notably, these defenses include contributory fault,[203] necessity, and the "unclean

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195. *See* Dubin, *supra* note 20.

196. *See* Viñuales, *supra* note 193, at 34–51.

197. *See id.* at 35, 42, 46.

198. *See, e.g.*, Can.-Burk. Faso BIT, *supra* note 83, art. 16.

199. *See* OECD Guidelines, *supra* note 11, § VII.

200. G.A. Res. 58/4, United Nations Convention Against Corruption (Dec. 9, 2003).

201. Senate Consideration of Convention, *supra* note 180; *see also* Viñuales, *supra* note 193, at 48 (noting that in *Lao Holdings v. Laos*, where the host state alleged but could not establish corruption, the tribunal rendered the claims inadmissible, although it framed it as a matter to be decided on the merits).

202. *See, e.g.*, George K. Foster, *Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking "Reasonable Expectations" and Expecting More from Investors*, 69 AM. U. L. REV. 105, 164–65 (2019) (calling on investment tribunals, in their assessment of claimant's behavior, "[r]ather than limiting the inquiry to domestic legal requirement, . . . to consider how the investor's conduct sizes up against relevant *international* standards, such as the OECD Guidelines for Multinational Enterprises, UN Guiding Principles on Business and Human Rights, and international financial institutions' environmental and social standards" (footnotes omitted)).

203. On the role of contributory fault in investment arbitration, see generally Jean-Michel Marcoux & Andrea K. Bjorklund, *Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration*, 69(4) INT'L & COMPAR. L.Q. 877 (2020); *see also* Andrea K. Bjorklund, *Causation, Morality, and Quantum*, 32 SUFFOLK TRANSNAT'L L. REV. 435, 446–47 (2009).

hands" doctrine.[204] The concept of contributory fault is established in international law.[205] In investment arbitrations, it can allow arbitral tribunals to reduce the quantum of damages by apportioning fault between the host state and the foreign investor. As Viñuales explains, in addition to establishing negligence by a foreign investor, contributory fault requires establishing a causal link between the investor's behavior and the challenged measure of the host state.[206] Moreover, the harm caused by the foreign investor has to be severable from the harm resulting from the state's breach of investor protection obligations.[207]

Host states have successfully invoked contributory fault in investment arbitrations to reduce the amount of damages by up to 50 percent and even to avoid damages entirely.[208] More recently, contributory fault in ICSID arbitrations was invoked, but not applied, in *Bear Creek Mining Corporation v. Republic of Peru* and *Burlington Resources v. Republic of Ecuador*.[209] Interestingly, in both arbitrations, there were dissents with regard to the contributory fault argument, arguing for the reduction of the measure of damages in view of the investor's fault.[210]

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204. *See, e.g.*, Viñuales, *supra* note 193, at 95 (explaining that "[t]he 'clean hands' doctrine operates as a component of other defence arguments (e.g., the requirement, for the availability of the customary defence of necessity, that the party invoking it must not have contributed to the situation of necessity) and, possibly, on a stand-alone basis, although tribunals have sometimes denied the latter possibility" (footnote omitted)).

205. For example, see Article 39 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, providing that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought." Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. (No. 10), U.N. Doc. A/56/10 (2010).

206. *Cf.* Viñuales, *supra* note 193, at 95.

207. *See id.* As Viñuales notes, these three main elements of the contributory fault test were identified by the tribunal in *Occidental Petroleum Corp. v. Republic of Ecuador*. *See* Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 665–68 (Oct. 5, 2012).

208. *See* Viñuales, *supra* note 193, at 96–97 (referring to *Occidental Petroleum Corp.*, ¶ 687; Hulley v. Russia, Final Award, ¶ 1637 (July 18, 2014); Yukos v. Russia, Final Award, ¶ 1637 (July 18, 2014); Veteran Petroleum v. Russia, Final Award, ¶ 1274 (July 18, 2014); Copper Mesa Mining Corp. v. Republic of Ecuador, Award, ¶ 6.102; MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶¶ 242–43 (May 25, 2004), and Hesham Talaat M. Al-Warraq v. Republic of Indon., UNCITRAL, Final Award, ¶ 683, point 6 (Dec. 15, 2014) (where Indonesia avoided compensation entirely for the claim relating to breach of fair and equitable treatment)).

209. *See* Bear Creek Mining Corporation v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶ 569 (Nov. 30, 2017); Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 585 (Feb. 7, 2017).

210. *See* Partial Dissenting Opinion by Professor Philippe Sands (QC) attached to the *Bear Creek Mining* Award, ¶ 39 (concluding that the foreign investor's "contribution

Host states may also seek affirmative relief in investment arbitration by bringing counterclaims alleging the illegality of the investment or the investor's conduct, corruption, bribery, or breach by the investor of domestic laws of the host state or international law obligations.[211] In contract-based investment arbitration, the counterclaims may include the argument that the investor has breached its obligations owned to the host state under the investment contract.[212]

Scholars have identified five possible grounds for the investment tribunal to establish jurisdiction over a counterclaim by the host state against the foreign investor.[213] They include (1) an explicit provision to this effect in the IIAs, (2) a decision of the investment tribunal finding that it has jurisdiction, (3) the agreed arbitration rules providing for counterclaims, (4) parties' consent to the investment tribunal taking jurisdiction over counterclaims, and (5) the rare case of the IIAs providing that the state can bring claims in ISDS.[214] For instance, in *Burlington v. Ecuador*, Ecuador put forward a counterclaim alleging violations of environmental laws of Ecuador and contractual obligations as a ground for seeking compensation of nearly $2.8 billion USD.[215] By a separate agreement with Ecuador, Burlington then agreed not to contest jurisdiction of the investment tribunal over the counterclaim.[216] In *Perenco v. Ecuador*, an arbitration closely related

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was significant and material, and that its responsibilities are no less than those of the government," and that it would warrant the reduction of "the measure of damages by one half"); Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶ 580 n.1113 (Feb. 7, 2017) (where Professor Stern disagreed with the majority, arguing that "the behavior of Burlington refusing to pay its taxes played a major role in the chain of events leading to the expropriation")

211. *See* Jean E. Kalicki, *Counterclaims by States in Investment Arbitration*, INV. TREATY NEWS (Jan. 14, 2013), https://www.iisd.org/itn/en/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/ [https://perma.cc/28WX-XM5A] (archived Sept. 28, 2022) (observing that counterclaims in investment arbitration "may include arguments that the investment was illegal from the start, that its operations in due course violated local law, or that the investor breached its direct obligations to the State under a contract"). On the counterclaims in investment arbitration, see generally Bjorklund, *supra* note 18, at 461; Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT'L L. 216 (2012); Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 255–63 (2009).

212. *See* Kalicki, *supra* note 211.

213. *See generally* Parlett & Ewad, *supra* note 15.

214. *See id.* (explaining that "[t]his was the interpretation given by an ICSID tribunal to the Argentina-Spain BIT in *Urbaser v Argentina*, and was one of the grounds on which it permitted a counterclaim by the State against the investor in that case").

215. *See* Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, ¶¶ 6, 52–53 (Feb. 7, 2017). On the environmental counterclaim, the tribunal ultimately awarded Ecuador $39 million USD plus interest in compensation. *See id.* at ¶ 1075.

216. *See id.* ¶ 6.

to *Burlington v. Ecuador*,[217] Ecuador also presented environmental and infrastructure counterclaims.[218] Perenco contested the admissibility of the counterclaims, but the tribunal found jurisdiction and considered the counterclaims admissible.[219]

However, there are limits on counterclaims in investment arbitration because they require the consent of disputing parties for an investment tribunal to accept jurisdiction over a counterclaim or an investment treaty with sufficiently broad provisions to cover counterclaims. Today, the majority of investment treaties, which contain the host state's consent to investment arbitration and provide arbitral tribunals with jurisdiction, do not provide for the host state's right to bring a counterclaim. The right to bring a claim in ISDS is commonly reserved for foreign investors. Yet, counterclaims are permitted by the ICSID Convention,[220] the ICSID Arbitration Rules,[221] the ICSID Arbitration (Additional Facility) Rules,[222] and the UNCITRAL

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217. In the *Perenco* arbitration, the claimant—Perenco Ecuador Limited ("Perenco")—brought an ICSID arbitration claim against Ecuador pursuant to the France-Ecuador BIT. The investment project and dispute also involved two participation contracts for the exploration and exploitation of hydrocarbons in two blocks of the Ecuador Amazon region. *See* Daniela Páez-Salgado & Natalia Zuleta, Perenco v Ecuador*: An Example of a 'Lengthy, Complex, Multi-faceted, Hard Fought and Very Expensive' Investment Arbitration?*, KLUWER ARB. BLOG (Nov. 14, 2019), http://arbitrationblog.kluwerarbitration.com/2019/11/14/perenco-v-ecuador-an-example-of-a-lengthy-complex-multi-faceted-hard-fought-and-very-expensive-investment-arbitration/ [https://perma.cc/CCA9-ZGLV] (archived Sept. 29, 2022). Both contracts provided for the ICSID arbitration. *See id.* Perenco operated the two blocks and—as part of the consortium comprised of Burlington Resources Oriente Limited ("Burlington") and Perenco—entered into the participation contracts. *See id.*

218. *See* Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, ¶ 5 (Aug. 11, 2015).

219. *See* Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Perenco's Application for Dismissal of Ecuador's Counterclaims, ¶ 51 (Aug. 18, 2017). On the *Perenco* arbitration and the investment tribunal's willingness to engage with the environmental issues, see also Jason Rudall, *The Tribunal with a Toolbox: On* Perenco v Ecuador, *Black Gold and Shades of Green*, 11 J. INT'L DISP. SETTLEMENT 485 (2020).

220. *See generally* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (establishing ICSID and providing facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states) [hereinafter ICSID Convention]. Article 46 of the ICSID Convention provides that

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

221. *See* ICSID CONVENTION, REGULATIONS AND RULES, ICSIC/15/Rev.3, p. 115, r. 48(1) (July 2022), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf [https://perma.cc/UR89-CMTZ] (archived Sept. 28, 2022) [hereinafter ICSID Arbitration Rules].

222. *See* ICSID ADDITIONAL FACILITY RULES AND REGULATIONS, ICSIC/11/Rev.3, p. 70, r. 58(1) (July 2022), https://icsid.worldbank.org/sites/default/files/documents/

Arbitration Rules, commonly used in investment arbitrations.[223] This allowed scholars and arbitration practitioners to argue that counterclaims in investment arbitration should generally be accepted as long as the relevant arbitration rules provide for counterclaims, regardless of the language of the IIAs.

In the last two decades, investment tribunals have shown an increased willingness to expand their jurisdiction to counterclaims by host states.[224] In several investment arbitrations, tribunals have accepted jurisdiction over the counterclaim but rejected the counterclaim on the merits.[225] Recently, counterclaims were submitted in *Naturgy Energy (formerly Gas Natural) v. Colombia*, where the tribunal rejected jurisdiction over the counterclaims,[226] and in *Société des Parcs d'Alger v. Algeria*, currently pending.[227]

ICSID_Additional_Facility.pdf [https://perma.cc/4E5F-FXCM] (archived Sept. 28, 2022) ("Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim ("ancillary claim"), provided that such ancillary claim is within the scope of the arbitration agreement of the parties.") [hereinafter ICSID Arbitration (Additional Facility) Rules].

223. *See* UNCITRAL Arbitration Rules, *supra* note 87, art. 21(3) (providing that "the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it"); *see also id.* arts. 4(2)(e), 21(4), 22, 23(2), 30(1)(b).

224. *See, e.g.*, José Antonio Rivas, *ICSID Treaty Counterclaims: Case Law and Treaty Evolution, in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 779, 779 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015) (observing in 2015 that "most of the ICSID treaty cases involving counterclaims have been decided within the last five years" (footnote omitted)). For early examples of counterclaims raised in investment treaty arbitrations, see Saluka Investment B.V. v. Czech Republic, UNCITRAL (1976), Decision on Jurisdiction over the Czech Republic's Counterclaim (May 7, 2004); Sergei Paushok, CJSC Golden East Co. v. Government of Mong., UNCITRAL (1976), Award on Jurisdiction and Liability (Apr. 28, 2011); Spyridon Roussalis v. Rom., ICSID Case No. ARB/06/1, Award (Dec. 7, 2011). *See also* Rivas, *supra*, at 779 n.2 (reviewing ICSID treaty arbitrations involving counterclaims: Genin v. Est., ICSID Case No. ARB/99/2, Award (June 25, 2001); Patrick H. Mitchell v. Dem. Rep. Congo, ICSID Case No. ARB/99/7, Excerpts of Award (Feb. 9, 2004); Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award (Feb. 6, 2008); Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (June 18, 2010); Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukr., ICSID Case No. ARB/08/8, Excerpts of Award (Mar. 1, 2012); Antoine Goetz et consorts v. Republic of Burundi [II], ICSID Case No. ARB/01/2, Award (June 21, 2012)).

225. *See, e.g.*, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 36, 1234(1)–(5) (Dec. 8, 2016) (where the Argentina's counterclaim alleged that the claimant has failed to provide the necessary investment pursuant to the concession contract and thereby violated its "commitments and its obligations under international law based on the human right to water").

226. *See* Naturgy Energy (formerly Gas Natural) v. Colom., ICSID Case No. UNCT/18/1, Award (Mar. 12, 2021). In this arbitration, the UNCITRAL tribunal in ICSID-administered proceedings dismissed the foreign investor claims and rejected jurisdiction over the host state's counterclaim.

227. *See* Société des Parcs d'Alger v. Alg., ICSID Case No. ARB/18/11 (pending).

Bringing a counterclaim is the most logical and direct way for the host state to hold the foreign investor accountable for the environmental harm and the CSR violations related to the investment. As a ground for such violations, the host state may invoke relevant domestic and international law provisions, as well as its soft law instruments. Consequently, counterclaims provide a direct opportunity for arbitral tribunals to face and interpret soft law provisions, address the consequences of non-compliance with the soft law rules and standards, and thereby "enforce" relevant non-binding rules and regulations as part of ISDS. Not surprisingly, several tribunals have already addressed environmental counterclaims.[228]

Early attempts by host states to bring in ISDS counterclaims related to environmental concerns were unsuccessful.[229] Investment tribunals in these arbitrations found that these counterclaims did not arise out of an investment and/or were not closely connected to the foreign investor's claims.[230] For instance, in *Paushok v. Mongolia*, Mongolia advanced seven counterclaims, including that claimants violated their environmental obligations towards Mongolia.[231] The tribunal found no jurisdiction over the counterclaims, observing that the environmental counterclaims did not have a "close connection with the primary claim [of the foreign investor] to which (they are) a response."[232] More recently, the tribunal in *Anglo American PLC v. Venezuela* declined jurisdiction over the Venezuelan counterclaims because of the restrictive wording of the United Kingdom-Venezuela BIT, which, according to the tribunal, excluded the possibility of a counterclaim.[233]

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228. *See* Aziah Hussin, *Environmental Counterclaims Under the CPTPP: Lessons for Asia from Recent Investor-State Jurisprudence*, 16 TDM, *in* Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) 1, 1 (2019) (noting that "it is no coincidence that several of the instances in which we have seen counterclaims raised have been in relation to the alleged negative environmental effect of the business operations of investors in these sectors").

229. *See, e.g.*, Spyridon Roussalis v. Rom., ICSID Case No. ARB/06/1, Award (Dec. 7, 2011); Paushok, CJSC Golden East Co. v. Mong., UNCITRAL, Award on Jurisdiction and Liability (Apr. 28, 2011).

230. *See, e.g.*, *Paushok*, UNCITRAL, Award on Jurisdiction and Liability, ¶ 694. The need to establish connection with the investor's claim stems from the language of investment treaties, which commonly limit the jurisdiction of investment tribunals to disputes arising in connection with investments. *See, e.g.*, Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, art. X(1), Arg.-Spain, Oct. 3, 1991, 1699 U.N.T.S. 202, ("Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.").

231. *See Paushok*, UNCITRAL, Award on Jurisdiction and Liability, ¶ 678.

232. *See id.* ¶ 696.

233. *See* Anglo American PLC v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/14/1, Award, ¶ 528 (Jan. 18, 2019) ("Therefore, the wording of the arbitration offer itself excludes the possibility that the Counter-claim is 'within the scope

Yet, investment tribunals have accepted counterclaims in ISDS in instances where the counterclaims were closely related to the investor's conduct and/or investment. This allowed such counterclaims to satisfy the jurisdictional and admissibility requirements.[234] To support their counterclaims, host states have already invoked, in investment arbitrations, soft law instruments on environmental protection and sustainable development.[235] They have done so to establish the existence and scope of their international and domestic law obligations, as well as to support their interpretation of the legal instruments at hand. Notably, in *Perenco v. Ecuador*, one of Ecuador's legal experts referred to the Rio Declaration as the "guiding instrument for Ecuador's environmental policy."[236] According to the expert report, the Rio Declaration was one of the international instruments on environmental protection that inspired the 1999 Environmental Management Law of Ecuador.[237] Ecuador relied on this law in its submissions to support its claim that the term "environmental harm" had to be interpreted broadly.[238] In turn, the *Perenco* tribunal has acknowledged the influence of the Rio Declaration and the Ecuadorian law's embrace of the principle of sustainable development, which—according to the

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of the arbitration agreement of the parties.'"). The investor in this case relied on the U.K.-Venezuela BIT, *infra*. The dispute resolution provisions of this treaty restrictively refer to "[d]isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former." Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, art. 8(1), U.K.-Venez., Mar. 15, 1995, T.S. No. 83. Further, Article 8(3) of the treaty limits the jurisdiction of the arbitral tribunal "to determining whether there has been a breach by the Contracting Party concerned of any of its obligations under this Agreement, whether such breach of its obligations has caused damage to the national or company concerned, and, if such is the case, the amount of compensation." *Id.* art. 8(3).

234. *See* Dubin, *supra* note 20 (noting a recent trend in investment law "to take CSR into account implicitly or explicitly" and further explaining that "[i]mplicitly, it appears when the 'non-socially responsible' behavior of an investor is considered in investment arbitration in relation to conditions of admissibility or jurisdiction of arbitration tribunals").

235. *See, e.g.*, Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, ¶ 81 (Aug. 11, 2015).

236. *Perenco Ecuador Ltd.*, Interim Decision on the Environmental Counterclaim, ¶ 81. In the *Perenco* arbitration, the tribunal ultimately awarded Perenco damages in the amount of $448.82 million USD, including pre-judgment interest. Upholding Ecuador's counterclaim, the tribunal also ordered Perenco to pay Ecuador nearly $55 million USD in damages for environmental cleanup efforts. *See* Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Award, ¶ 1023 (Sept. 27, 2019). The ICSID ad hoc committee upheld much of the tribunal's award, reducing the amount of damages owed by Perenco to Ecuador for environmental cleanup from $55 million USD to $36 million USD. *See* Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Annulment, ¶ 727 (May 28, 2021).

237. *See Perenco Ecuador Ltd.*, Interim Decision on the Environmental Counterclaim, ¶ 81.

238. *See id.*

experts on both sides—"informed the precepts of the Environmental Management Law . . . and other Ecuadorian regulatory instruments."[239] The tribunal also found it "relevant for the distinction drawn by the Environmental Management Law between the definitions of 'environmental harm' and 'environmental impact.'"[240]

Thus, counterclaims in investment arbitration allow the host states to mitigate the inherent "asymmetry of the [international] arbitration agreement underpinning most investment claims."[241] By giving to the host state the right to bring an affirmative claim in arbitration, they rebalance the rights of the foreign investor and the host state in ISDS.[242] They also increase the overall efficiency of the international dispute resolution process by permitting the claims of an investor and related claims of the host state to be heard in the same forum during the same arbitral proceeding.[243]

Yet, counterclaims in treaty-based investment arbitrations remain very rare,[244] in large part due to the restrictive language of the investment treaties and consent to arbitration, as well as what Jean Kalicki refers to as "an instinctive preference by States to pursue any affirmative claims in their own courts,"[245] where they might have a home-field advantage over the outcome of the case.

Consequently, although counterclaims are relatively new for ISDS, and there are only a few instances of reliance on international environmental and soft law instruments in these arbitrations, investment tribunals have encountered such provisions in ISDS. When they are called upon to analyze the content of these instruments as part of investment dispute resolution, investment tribunals engage in the interpretation and enforcement of these otherwise nonbinding legal instruments.

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239. *Id.* ¶ 331.

240. *Id.*

241. James Harrison, *Environmental Counterclaims in Investor-State Arbitration*, 17(3) J. WORLD INV. & TRADE 479–80 (2016) (referencing *Perenco Ecuador Ltd.*, Interim Decision on the Environmental Counterclaim (Peter Tomka, Neil Kaplan, J. Christopher Thomas)).

242. *See generally* Bjorklund, *supra* note 18, at 461.

243. Professor Michael Reisman argued that

> [i]n rejecting ICSID jurisdiction over counterclaims, a neutral tribunal – which was, in fact, selected by the claimant – perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.

See Spyridon Roussalis v. Rom., ICSID Case No. ARB/06/1, Declaration of Michael Reisman (Dec. 7, 2011) (discussing Professor Michael Reisman's view of the case).

244. *See, e.g.*, Rivas, *supra* note 224, at 779 (observing that by 2013 "[l]ess than 3% of [then 314 ICSID arbitration] cases have involved counterclaims submitted by the disputing host State").

245. Kalicki, *supra* note 211.

C. *Invoking Exceptions*

International soft law may also come into play in ISDS through so-called exceptions.[246] In international investment law, exceptions are the safeguard provisions of IIAs that allow the host state to defend regulatory measures adopted for legitimate public welfare objectives, such as protection of the environment, human life, or public health.[247] In other words, if a foreign investor challenges a regulatory measure in ISDS, a host state may be able to justify it pursuant to a general exception, although the measure violates the host state's investor protection obligations. Article 22(1) of the Japan-Uruguay BIT (2015), contains a typical *general exception*, which in relevant part provides that

> [s]ubject to the requirement that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party in the Area of the former Contracting Party, nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures:
>
> (a) necessary to protect human, animal or plant life or health;
>
> . . .
>
> (d) imposed for the protection of national treasures of artistic, historic or archaeological value; or
>
> (e) necessary for the conservation of living or nonliving exhaustible natural resources.[248]

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246. In a previous article, I observed that

> [t]he variety of terms used with respect to safeguard provisions is astounding and includes such terms as exceptions, exclusions, exemptions, derogations, reservations, non-conforming measures (NCM), non-precluded measures (NPM). Among these terms, the terms exceptions, NCM and NPM are used in the treaties, while most other terms are employed only in scholarly and public policy debates.

Korzun, *supra* note 21, at 389 n.157.

247. This is a narrow definition of the term "exceptions." Others have used the term "exceptions" to designate any treaty provisions that *exclude* the application of a treaty to a regulatory measure and/or *justify* a measure once a violation is established. *See* Korzun, *supra* note 21, at 389–90 (exploring the use of exceptions in investments treaties and arguing that "[o]ther scholars . . . use the word exception in its broad sense, applying it to any deviation from the investor protection regime, including instances where a measure is excluded from the application of a treaty" (footnote omitted)).

248. Japan-Uru. BIT, *supra* note 154, art. 22(1).

Similar general public policy exceptions are found in Canada-Peru BIT (2006),[249] China-New Zealand FTA (2008),[250] New Zealand-Malaysia FTA,[251] Japan-Singapore EPA (2014),[252] Korea-Australia FTA (2014),[253] and other treaties. Some IIAs incorporate by reference general exceptions of Article XX of the General Agreement on Tariffs and Trade (GATT).[254] This supports Wolfgang Alschner and Kun Hui's conclusion that "public policy exceptions are becoming more prominent in treaty practice."[255] In their study, Alschner and Hui investigated 2,963 BITs, of which they identified at least 106 BITs with general public policy exceptions.[256] By 2016, they note, the share of newly concluded BITs with general public policy exceptions grew to 40 percent.[257]

In adopting exceptions, investment treaties often contain a separate article on general exceptions, which can be found both in BITs and FTAs (in the latter case, either as part of the investment chapter or a separate chapter, usually applicable only to the selected chapters of an FTA).[258] Exceptions can also be used to limit the scope of specific obli-

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249. Agreement between Canada and the Republic of Perú for the Promotion and Protection of Investments, art. 10, Can.-Peru, Nov. 14, 2006.

250. China-New Zealand Free Trade Agreement, art. 200, China-N.Z., Apr. 7, 2008.

251. New Zealand-Malaysia Free Trade Agreement, art. 17.1, Malay.-N.Z., Oct. 26, 2009.

252. Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership, art. 83, Japan-Sing., Jan. 13, 2002.

253. Free Trade Agreement between Australia and the Republic of Korea, art. 22.1(3), Austl.-S. Kor., Apr. 8, 2014.

254. General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 55 U.N.T.S. 194, providing, in particular, that

> [s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same condition prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (b) necessary to protect human, animal or plant life or health.

For a similar provision covering trade in services, see General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, 1869 U.N.T.S. 183.

255. Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 1, 1 (Lisa Sachs et al. eds., 2018).

256. *Id.* at 4.

257. *Id.*

258. *See, e.g.*, China-Australia Free Trade Agreement, art. 9.8, China-Austl., June 17, 2015 [hereinafter ChAFTA]. This article, titled "General Exceptions," is included directly into the investment chapter of the treaty, and not into a separate chapter of the FTA applicable to the treaty as a whole. *See also* Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, art. 33, Can.-China, Sept. 9, 2012; Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Kazakhstan on the Reciprocal Promotion and Protection of Investments, art. 13, Kaz.-Maced,, July 2, 2012; Agreement Between the Government of the Republic of

gations contained in investment treaties, such as non-discrimination, minimum standard of treatment, and non-expropriation.[259]

IIAs may also contain specific environmental exceptions. For instance, following in the footsteps of Article 1114 of the North American Free Trade Agreement (NAFTA),[260] Chapter 14 of the USMCA contains Article 14.16 (Investment and Environment, Health, Safety, and other Regulatory Objectives), which provides as follows:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.[261]

Similarly, the US Model BIT provides that "[n]othing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[262]

This specific environmental exception of the US Model BIT seeks to protect the state's regulatory power in the area of environmental protection. This is in addition to other safeguard provisions of the US Model BIT, such as provisions on performance requirements, non-conforming measures, essential security, taxation, and expropriation.[263]

Thus, exceptions create an avenue for protecting the state's right to regulate.[264] In other words, by providing for exceptions, investment treaties acknowledge that the host state may regulate for the benefit

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Turkey and the Government of the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments, art. 5, Pak.-Turk., May 22, 2012.

259. *See* Bradly J. Condon, *Treaty Structure and Public Interest Regulation in International Economic Law*, 17 J. INT'L ECON. L. 1, 4–6 (2014).

260. North American Free Trade Agreement, art. 1114, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

261. USMCA, *supra* note 25, art. 14.16.

262. *See, e.g.*, U.S. Model BIT, *supra* note 141, art. 12(3) (recognizing each party's right to "exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities").

263. *See id.* arts. 8(3)(c), 14, 18, 21, Annex B.

264. *See, e.g.*, Bradly J. Condon, *Climate Change and International Investment Agreements*, 14 CHINESE J. INT'L L. 305, 306 (2015) (exploring "four ways to save climate change measures from violating IIAs," including "by justifying a violation of an obligation under an exception"). Condon divides existing exceptions into three categories: (i) "exceptions whose application is limited to the specific obligations," (ii) "general exceptions set out in the treaty," and (iii) "exceptions that form part of customary international law (such as those regarding necessity and countermeasures)." *Id.*

of the public at large, even where the measure adopted contradicts or deviates from the state's investor protection obligations. For instance, in *Aven v. Costa Rica*, the tribunal held that a general exception of Article 10.9(3)(c) of the Dominican Republic-Central America FTA (DR-CAFTA) "seeks to ensure that States retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions, but they do not—in and of themselves—impose any affirmative obligation upon investors."[265] Further, according to the tribunal, the general exceptions of Article 10.9(3)(c) and Article 10.11 (Investment and Environment) do not "provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty which could be the basis of a counterclaim."[266]

Yet, the practice of introducing general exceptions into IIAs is relatively new and appears to be more common for trade agreements with investment chapters than BITs.[267] Moreover, as Bradly J. Condon argues, "most IIAs do not contain comprehensive exceptions for environmental measures,"[268] and their "introduction . . . may create more problems than it solves."[269] For instance, according to Condon, tribunals may view the inclusion of general exceptions in IIAs as an indication that environmental regulatory measures fall within the scope of the investment treaty and analyze the regulatory measures accordingly.[270] As Condon explains, general exceptions shift the burden of proof from the foreign investor alleging a violation of investment treaty to a host state invoking an exception as a defense, which may be difficult to meet, "[p]articularly in cases that involve complex factual or scientific issues."[271] As a result, despite their goal of protecting the state's regulatory power, exceptions may have the opposite effect of making it more difficult for the host state to justify its regulatory choices.[272]

To date, according to Wolfgang Alschner and Kun Hui, "[t]he vast majority of international investment awards have been rendered under

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265. Aven v. Costa Rica, ICSID Case No. UNCT/15/3, Final Award, ¶ 743 (Sept. 18, 2018). For the text of the treaty, see Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), Aug. 5, 2004, 119 Stat. 462.

266. *Aven*, Final Award, ¶ 743.

267. *See* Condon, *Treaty Structure and Public Interest*, *supra* note 259, at 2 ("In IIA practice, some States have begun to introduce general exceptions in their IIAs, borrowing language from the general exceptions of the WTO, with apparent disregard as to whether such transplants are appropriate in the IIA context." (footnote omitted)). According to Condon, "most [IIAs] lack general public interest exceptions," which elevates the importance of the arguments regarding the scope of application of investment treaty obligations as compared to those of the GATT. *Id.* at 3.

268. Condon, *Climate Change and International Investment Agreements*, *supra* note 264, at 309.

269. *Id.* at 338.

270. *See id.*

271. Condon, *Treaty Structure and Public Interest*, *supra* note 259, at 4.

272. *See id.* at 11.

treaties that do not contain general public policy exceptions."[273] Out of the few awards that discuss general exceptions,[274] none invoke soft law instruments of environmental protection, sustainable development, or CSR. Yet, host states will start referring to soft law once they begin more actively invoking general exceptions or specific environmental exceptions that are increasingly incorporated into IIAs. As the tribunal practice will continue to change, investment tribunals will have to deal with interpretation and application of the general public policy exceptions. They will also have to deal with interpretation and application of nonbinding soft law instruments of environmental protection, sustainable development, and CSR invoked as part of general exceptions analysis.

D. *Allowing Submissions by Amicus Curiae or Non-Disputing Party*

When disputing parties agree on it and investment tribunals authorize it, investment treaty arbitrations may involve submissions by amicus curiae and non-disputing parties. The former submissions are often made by NGOs, public interest groups, and environmental groups. The latter submissions represent the views of the home state of the foreign investor. They are particularly important because they outline the position of the other sovereign state who participated in negotiating and drafting an investment treaty. Both types of submissions may contain references to international soft law instruments, thereby charging arbitral tribunals with the task of their interpretation and application as part of dispute resolution in ISDS.

Similar to general exceptions in investment arbitration, submissions by amicus curiae and non-disputing parties are well positioned to grow in investment arbitration. Both the ICSID Convention Arbitration Rules and the ICSID Arbitration (Additional Facility) Rules permit such submissions.[275] On their side, home states may be interested in providing the investment tribunal with their view on the interpretation of treaty provisions. Similarly, NGOs, public interest groups, and environmental groups may seek to persuade the invest-

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273. Alschner & Hui, *supra* note 255, at 8.

274. *See id.* at 12 (reviewing arbitral awards in investment arbitration that discuss general exceptions or *ought* to have done so). Alschner and Hui ultimately conclude that "general public policy exceptions, while increasingly popular in recent treaties, are currently largely missing in action" either because state parties fail to raise them or because "tribunals have done little to elucidate the role of the general exception clauses." *Id.* at 27.

275. For the text of the rules, see ICSID Arbitration Rules, *supra* note 221, at rules 67–68. ICSID rules distinguish between submissions made by "non-disputing party" (i.e., any person or entity that is not a party to the dispute) and submissions made by a "non-disputing treaty party" (i.e., a treaty party that is not a party to the dispute, such as a home state)), and ICSID Arbitration (Additional Facility) Rules, *supra* note 222, at rules 77–78, respectively.

ment tribunal to assess investment projects in view of their environmental, sustainable development and CSR impact. In doing so, home states, NGOs, and other actors will undoubtedly invoke, in their submissions, key soft law instruments in these areas, such as the Rio Declaration, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines. In addition to enforcement of soft law instruments incorporated into IIAs or raised in counterclaims by the host state, investment tribunals will then have to interpret and apply this soft law as part of ISDS.

IV. ENFORCING SOFT LAW: IMPLICATIONS FOR THE ISDS REFORM

The current system of ISDS is at a crossroads and has to change in some way in order to survive. In the eyes of the developing countries, ISDS has long lost its legitimacy and become a forum for multinational corporations to sue sovereign states for multimillion-dollar damages for failed investment projects. The European Union now leads the debate on replacing ISDS with a two-tier system of permanent international investment courts.[276] Disputes in these courts are to be resolved by professional judges, trained and experienced in public international law and international investment law and dispute resolution. The new system also provides for an appellate court. Its creation should contribute to the overall coherence of international investment law and increase consistency and predictability of arbitral awards among tribunals and across investment treaties.

In line with these proposals, the EU has begun replacing its ISDS provisions in IIAs with a more elaborate system of investment dispute resolution.[277] The new provisions provide for an appellate mechanism and decision-making by professionals with prior experience and expertise, in particular, in public international law and international investment law and dispute resolution. There are also efforts to increase accountability of arbitrators by introducing codes of conduct and ethics rules into investment treaties.[278] The proposed system of the centralized investment courts is praised as a better alternative to the current fragmentation and multiplicity of arbitral tribunals that render

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276. *See, e.g.*, Malmström, *supra* note 17 (discussing the EU position expressing dissatisfaction with modern ISDS and suggesting it be replaced with an investment court system); *see also* European Commission Press Release, Commission Proposes New Investment Court System, *supra* note 17; European Commission Press Release, EU Finalises Proposal for Investment Protection and Court System for TTIP, *supra* note 17.

277. *See* Can.-E.U. CETA, *supra* note 83, arts. 8.27–8.28 (provisionally in force as of Sept. 21, 2017); *see also* E.U.-Viet. BIT, *supra* note 143, at ch. 3, subsec. 4 (Investment Tribunal System).

278. *See* ChAFTA, *supra* note 258, at ch. 9, annex 9-A (containing a code of conduct for arbitrators appointed pursuant to the investment chapter of the free trade agreement); *see also* EU-Singapore Free Trade Agreement and Investment Protection Agreement, Annex 14-B, Eur. Union-Sing., Oct. 15, 2018 (providing a Code of Conduct for Arbitrators and Mediators); Korzun, *supra* note 21, at 384.

conflicting and diverging awards, thereby hindering the "progressive" development of the "global" international investment law.

The in-depth analysis of the advantages of the permanent international investment court as compared to the current system of ISDS is beyond the scope of this Article. Yet, as many centralized systems of governance and decision-making suggest, the permanent court for investment disputes will likely require setting the limits on its jurisdiction and admissibility of claims. This will necessarily limit the types of claims and issues that can be submitted to the court, as well as the types of sources of international law and non-binding instruments that the court will be allowed to apply in resolving investment disputes. Consequently, by focusing on the legitimacy and coherence of arbitral awards in ISDS, advocates of the new system might be depriving investment dispute resolution of its flexibility and ability to adjust and respond to the needs of a particular dispute.

Yet, as recent awards and pending arbitrations demonstrate, the role of ISDS has long evolved from serving merely as a dispute resolution platform for foreign investors seeking to enforce their rights under international investment law. As part of investment dispute resolution, foreign investors and host states increasingly call upon arbitral tribunals to interpret and apply soft law instruments in the areas of environmental protection, labor laws, human rights, CSR, and domestic regulatory measures adopted in line with the state's international law obligations in these fields. In doing so, arbitral tribunals increasingly enforce these instruments and set the levels of compliance, both for foreign investors and sovereign states. They also alter other actors' expectations as to the consequences of non-compliance with the soft law rules and standards.

Hardened through the enforcement in ISDS, soft law today has occupied the areas of environmental protection, sustainable development, and CSR, which sovereign states had largely left outside of international treaty making or enforcement framework to allow for flexibility in compliance. Similar developments have happened in international commercial arbitration, where arbitral tribunals and domestic courts increasingly rely on and enforce soft law created by non-state

actors.[279] As a result, as Kaufmann-Kohler concludes, "flexibility is traded for predictability."[280]

One may question, in this regard, whether the process of applying and enforcing substantive soft law in investment arbitration is at least partially driven by international arbitrators, who frequently serve in international commercial and investment arbitration cases. In the former case, they are not only accustomed to applying procedural soft law, but also substantive soft law, such as the Principles of International Commercial Contracts of the International Institute for the Unification of Private Law (UNIDROIT).[281] However, there is a noticeable difference in enforcing soft law in ISDS as compared to international commercial arbitration. In international commercial arbitration, procedural soft law created by non-state actors (such as the arbitration rules of arbitral institutions) fills the void left by sovereign states for agreement by private parties.[282] In international investment arbitration, substantive soft law—created by state and non-state actors alike—occupies the space left open by hard law (that is, international treaty and customary law). In doing so, soft law in international investment law and dispute resolution seeks to regulate both state and non-state actors—most commonly, host state and/or foreign investors—without regard to the language and intent of soft law instruments and whether such rules are mandatory for home and host states.

In addition, investment tribunals apply and enforce soft law directly, where IIAs incorporate these instruments by reference, which is a new but rapidly growing practice. And so, through ISDS, arbitral tribunals have contributed to international rulemaking and have effectively transformed ISDS into an enforcement mechanism for largely soft areas of law, such as international environmental law and rules on CSR. Paradoxically, non-binding (meaning unenforceable) soft law instruments are directly and indirectly enforced in ISDS. Furthermore, for many of these soft legal obligations, ISDS serves as the only available enforcement mechanism. This is particularly true for envi-

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279. *See, e.g.*, Kaufmann-Kohler, *supra* note 36, at 16 (discussing the explosion in international commercial arbitration of soft law codified by non-state actors, such as the International Chamber of Commerce and the International Bar Association). Kaufmann-Kohler observed: "Under the label of party autonomy, states have left wide areas of arbitration law unregulated. Paradoxically, this lack of regulation has not resulted in fewer rules. To the contrary, private actors have occupied the space left by states with often dense and highly detailed soft law rules." *Id.* (footnote omitted).

280. *See, e.g.*, *id.* Kaufmann-Kohler notes the existing criticism towards explosion of codified soft law in international commercial arbitration: (i) "a loss of flexibility that was one of the beauties of arbitration," and (ii) soft law's "lack of democratic legitimacy" due to its regulation of users of international arbitration, which have not participated in its creation. *Id.*

281. *See generally* INT'L INST. FOR THE UNIFICATION OF PRIV. L., PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2016), https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf (last visited Nov. 7, 2022) [https://perma.cc/A758-MDAB] (archived Nov. 7, 2022).

282. *See* Kaufmann-Kohler, *supra* note 36, at 16.

ronmental treaties, which are technically binding, but are generally lacking in a meaningful enforcement mechanism. In other words, as Jan Klabbers argues,

> [t]he idea of soft law plays a trick with images, inviting us to think that a rule at the moment of its creation is innocuous because, after all, it is soft, but as soon as we turn our back we find the norm to be somehow transmogrified (the vocabulary of cartoon characters Calvin and Hobbes seems oddly fitting) into something which is either not law at all or, as is more often the case, turns out to be as hard as hard law itself.[283]

Calling upon arbitral tribunals to assess investors' compliance with international environmental and sustainable development law and CSR rules seeks to achieve cross-field dialogue between these areas of law and international investment law, as well as between various decision makers in these fields, including domestic and international courts and arbitral tribunals. This has long been the goal of the ISDS reform. Along the way, it may also contribute to the overall consistency and coherence of the international law system. Yet, such an arbitral practice may go against sovereign states who, in Meyer's view, in designing legal rules may prefer soft law to hard law in view of its ability to encourage "unilateral legal innovation" by "*de facto* delegat[ing] to states with certain comparative advantages [the power] to set legal rules."[284] Going forward, in choosing between soft and hard law, states may need to account for the potential enforcement of soft law in international investment arbitration. Ultimately, a threat of conversion of soft law into hard law as part of ISDS may deprive states a choice in designing legal agreements.

Sovereign states, international organizations, legal scholars, and other stakeholders involved in the reform of the international investment law and dispute resolution should also acknowledge that today's investment tribunals are deprived of any meaningful guidance from states or other actors as to the desired level of enforcement of soft law. Take, for instance, the Dutch Model BIT example, which simply calls for an arbitral tribunal to "take into account" an investor's compliance with soft law instruments as part of damages calculations.[285] This provision would leave an arbitral tribunal without any guidance as to how such taking into account is to be exercised. From the viewpoint of the investor, it is also unclear whether establishing a compliance and training program and tailoring it to the requirements of the local jurisdiction would serve as a defense and allow the foreign investor to eliminate liability, as it is often the case for the other areas of compliance. The outcomes of such dispute resolutions are also unlikely to increase

283. Klabbers, *supra* note 44, at 391.
284. Meyer, *supra* note 36, at 910, 912.
285. Dutch Model BIT, *supra* note 12, art. 23.

consistency of awards in investment arbitration. One has to agree with Alvarez here that "[a]rduous *ex ante* treaty negotiations to establish hard law may be preferable than open-ended delegations of authority to party-selected arbitrators to use soft law to alter the rules over time, especially if those arbitrators are perceived, rightly or wrongly, to be biased, incompetent, ethically conflicted or all three."[286]

Finally, more guidance is needed for the arbitral tribunals to effectively apply and enforce CSR rules as part of the investment dispute resolution. As it stands now, the Dutch Model BIT invites arbitral tribunals to interpret and apply the UN Guiding Principles on Business and Human Rights and the OECD Guidelines, which are neither precise nor actionable. These instruments set up guiding and aspirational principles but do not establish obligations on foreign investors. Yet, arbitral tribunals are to use these instruments to assess the behavior of the foreign investor as to its compliance with the environmental protection, sustainable development, and CSR rules. Applying these BIT rules would give considerable freedom to arbitral tribunals called upon to provide actionable content to the soft law in question but would also put enormous weight on their shoulders. After all, the arbitral award is binding on the disputing parties in a given arbitration and may also extend normativity of soft law to other disputing parties in subsequent arbitrations. Also, requiring arbitral tribunals to reflect their views on investor compliance with soft law as part of the compensation analysis (i.e., damages reduction) instead of the jurisdictional analysis (i.e., denying jurisdiction or admissibility of a claim in view of the investor's non-compliance with soft law provisions) puts investment tribunals outside of their "comfort zone." No other IIA or arbitration rules so far have encroached on the tribunal's power to set a compensation level for violation of investment obligations. Yet, the Dutch Model BIT does exactly this, without giving any direction to arbitral tribunals as to how arbitral tribunals are to decide on the compensation in these cases.

V. CONCLUSION

The current system of investor-state dispute settlement has long evolved from serving merely as a dispute resolution platform for foreign investors suing sovereign states for violations of investor protection obligations. ISDS today performs important functions of international rulemaking and enforcement. Recent awards and pending arbitrations demonstrate that investment tribunals increasingly are called upon to interpret and assess compliance with the soft law instruments on environmental law, sustainable development, and corporate social responsibility. Paradoxically, non-binding (meaning unenforceable) soft law instruments are directly and indirectly

286. Alvarez, *supra* note 39, at 194.

enforced in ISDS, and this trend is likely to continue. Thus, ISDS contributes to rebalancing international investment law and promoting responsible investments. For international environmental law and the law of sustainable development, where the lack of enforcement mechanisms has long been identified as the single major weakness of the system, ISDS might be a viable option for increasing compliance with and enforcement of international law obligations of sovereign states.

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