The significance of the 'best interests of the child' principle in international investment law

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1. *Introduction*

At first glance, the rights of children and the rights of foreign investors have little in common. The United Nations Convention on the Rights of the Child (hereinafter referred to as CRC)[1] was drafted in accordance with the recognition of the special care and assistance due to children in the Universal Declaration of Human Rights, and as a result of the identification of children as particularly vulnerable subjects in any legal system.[2] Investment treaties, on the other hand, respond to the need to protect the interests of corporations investing abroad, and are generally considered part of international economic law – a field of public international law aimed at regulating economic relations among states.[3] Considerations of children's rights may therefore seem out of place in discussions on whether and how the interest of foreign investors should be protected from interferences from the very states they conduct their activities in.

The two matters, however, are not as far apart as they may look. International investment law is primarily concerned with economic activities that generally last for years, and affect the environment and the welfare of host states. In a nutshell, it is evident from a quick look at the case-law of the International Centre on the Settlement of Investment

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[1] UN General Assembly, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[2] UN General Assembly, Res 217 A (III) Universal Declaration of Human Rights (10 December 1948) art 25.

[3] L Choukroune, J Nedumpara, 'International Economic Law' (CUP 2021) 1-34.

Disputes (ICSID)[4] that many of the activities protected by bilateral investment treaties (BITs) and investment chapters of free trade agreements (FTAs) affect, more or less directly, the welfare of children; and a number of measures taken by states that affect foreign investment – namely, most regulations of economic and industrial matters in the territory of the host state – concern, also more or less directly, children. The significance of the rights of children in the system of international human rights law, therefore, begs the question of whether children's rights, and in particular the obligation to take into account the best interests of the child established by Article 3(1) of the CRC, should be amongst the factors to be considered in the interpretation of the scope and purpose of the rules of international law that protect the rights of investors and limit the states' power to regulate matters domestically.

The question is not meant to be provocative but rather practical, as it concerns the rules of interpretation to be applied to international investment law. However, the question may in fact result in being merely theoretical: the current makeup of investment arbitration and the dominant approaches to the interpretation of investment treaties make it quite unlikely that the best interests of the child will appear amongst the reasons of an arbitral award anytime soon. The issue, however, should be raised: and it is what I intend to do with this article. Section 2 shall therefore contextualize the rights of children within public international law in general, and in relation to international investment law in particular. Section 3 shall address the significance of the 'best interests of the child' principle against international investment law, before testing it against the dominant approach to investment treaty interpretation by investment arbitral tribunals in Section 4. Section 5 shall provide some brief concluding remarks.

[4] In this article the acronym 'ICSID' shall be used to refer to both the International Centre for the Settlement of Investment Disputes and the Convention on the settlement of investment disputes between States and nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, which established the Centre.

2. *The rights of the child in international human rights law*

It is a well-known fact that the aim of the drafters of the CRC was the universal ratification of the treaty.[5] The goal was certainly ambitious and, one may argue, not quite realistic: instead, it has been almost achieved, with the United States being the sole major country that has elected not to ratify the CRC (despite having signed it in 1995). It can therefore be stated that the very ambition of the drafters led to an unquestionable, and perhaps unprecedented, success of the Convention, as it currently represents one of the most ratified human rights instruments in history with 196 member states.[6] As underscored by Alston, '[t]his prospect of universal ratification […] also serves to place the Convention at the forefront of debates about whether human rights norms are capable of attaining 'universality' or are inevitably relative to each individual society.'[7] The question of universality of human rights has been extensively debated in the scholarship, and to this day it is difficult to argue that a shared position has been reached within the international community.[8] In addition to the polemical positions towards human rights as an instrument of equality,[9] it should be emphasized that many commentators have often highlighted the Western-centric

[5] P Alston, 'The Best Interests Principle: towards a Reconciliation of Culture and Human Rights' (1994) 8 Intl J of L and the Family 1-15.

[6] J Tobin, 'Introduction: The Foundation for Children's Rights', in J Tobin (ed), 'The UN Convention on the Rights of the Child: A Commentary' (OUP 2019) 1-20.

[7] Alston (n 5) at p. 2.

[8] See generally T Schilling, 'On the Universality of Human Rights as Norms and Rights' (2021) 59 Archiv des Völkerrechts 251-277; M Kilanowski, 'From Universality to Responsibility in International Human Rights: Analyzing David Kennedy's Critical Approach', in D Gozdecka, M Kmak (eds), 'Europe at the Edge of Pluralism' (Intersentia 2015) 59-71; E Sciso, 'Democrazia, diritti umani, stato di diritto: è possibile una comunità di valori universali?', in 'Sicurezza internazionale, sviluppo sostenibile, diritti umani - la cooperazione internazionale dopo il vertice mondiale del 2005: l'agenda futura delle Nazioni Unite ed il ruolo dell'Italia' (Editoriale Scientifica 2006) 105-116; L Marchettoni, 'I diritti umani tra universalismo e particolarismo' (Giappichelli 2012).

[9] J Waldron, 'One Another's Equal: the Basis of Human Equality' (Harvard UP 2017); B Ramcharan, 'The Foundations: Articles 1 and 2', in C Ferstman, A Goldberg, T Gray, L Ison, R Nathan, M Newman (eds), 'Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance' (Routledge 2020) 29-39; S Moyn, 'Not Enough: Human Rights in an Unequal World' (Harvard UP 2018).

matrix of many of the human rights commonly considered as fundamental ones.[10] Cultural issues, consequently, somewhat frustrate the uniform application of human rights, and make any discourse on their universal character problematic: although, indeed, the concept of human rights can also be seen as having a universal value, the question changes where the concept itself is used as a container, and the content of the various rights is actually defined in legal provisions. Indeed, it is not unusual for reservations to be placed on human rights treaties by states upon signature or ratification; and some reservations may in fact carry a serious risk of frustrating the scope and purpose of the treaty itself.[11] From this point of view, to talk about the universality of human rights is almost a moot point: everyone would agree in principle, but the uniform application of human rights throughout the various treaty systems and in domestic legal orders is rather unlikely. The CRC, in this scenario, constitutes a bit of an anomaly. Not only its ratification, as stated beforehand, has been almost universal: the *travaux preparatoires* of the CRC itself show a drafting process rather free from particular difficulties, except for those issues intrinsic in the construction of a global legal regime on a matter heavily influenced by cultural, social, historical and religious issues such as the protection of children.[12] The *de facto* universal character of the CRC, therefore, raises questions not only with regard to its position among fundamental human rights, but also its relevance in the wider landscape of international law: even though there is no real hierarchy among human rights, is it nonetheless conceivable to consider the rights of the child in a position of primacy, based on the

[10] M Mutua, 'The Ideology of Human Rights' (1995) 36 Virginia J Intl L 589-658; J Pirjola, 'Culture, Western Origin and the Universality of Human Rights' (2005) 23 Nordic J of Human Rights 1-15; J Cobbah, 'African Values and the Human Rights Debate: An African perspective' (1987) 9 Human Rights Quarterly 309-332.

[11] F Cowell, 'Reservations to Human Rights Treaties in Recommendations from the Universal Periodic Review: An Emerging Practice?' (2021) 25 Intl J Human Rights 274-294; M Milanovic, L Sicilianos, 'Reservations to Treaties: An Introduction' (2013) 24 Eur J Intl L 1055-1059; U Villani, 'Tendenze della giurisprudenza internazionale in materia di riserve ai trattati sui diritti umani', in G Venturini, S Bariatti (eds.) 'Liber Fausto Pocar vol 1: Diritti individuali e giustizia internazionale' (Giuffré 2009) 969-983; S Borelli, "Le riserve ai trattati sui diritti umani', in L Pineschi (ed.), 'La tutela internazionale dei diritti umani: norme, garanzie, prassi' (Giuffré 2006) 773-800.

[12] S Detrick (ed), 'The United Nations Convention on the Rights of the Child: A Guide to the *Travaux Preparatoires*' (Martinus Nijhoff 1992) 100-115.

virtual universal ratification of the CRC, over other rights – including those of investors arising out of the various BITs and FTAs?

The question has two fundamental implications: one is based on the diffusion of the CRC, which could lead to considering its specific weight greater than that of the various investment treaties currently in force and, therefore, to the primacy of the CRC over other instruments; the other is based on a more philosophical question on the role of international law and the international human rights regime - and therefore to the relationship that other rights, such as those of foreign investors, have with human rights. With reference to the former point, it is undeniable that the incredible success of the CRC leads it to be rather prominent within the system of treaties and customary international law. The almost universal ratification of the CRC testifies not only to the willingness of states to achieve a uniform and global regulation of issues relating to the protection of children, but also that states themselves consider children's rights a priority worthy of a single, uniform regime. The international law on foreign investment, on the contrary, does not feature any multilateral instrument. The ICSID Convention is no exception, as it is an instrument on the settlement of investment disputes only, that does not include any substantive provisions on the rights of the investors.[13] Every attempt at a multilateral instrument on investment protection has failed, showing the global lack of interest in a uniform regulation of relationships between foreign investors and host states, as well as the relatively little interest of states on the very subject of investors rights.[14] It is a rather peculiar feature of the investment legal regime that international investment law is actually a combination of 2815 BITs and 423 other treaties that include provisions on investment

[13] The ICSID Convention notably does not even contain an actual definition of the term 'investment', leaving it to the parties to BITs and, *de facto*, to investment arbitral tribunals. See generally P Acconci, 'The "Unexpected" Development-Friendly Definition of Investment in the 2013 Resolution of the "Institut de Droit International"' (2014) 23 Italian YB Intl L 69-90; P Vargiu, 'Beyond Hallmarks and Formal Requirements: a "Jurisprudence Constante" on the Notion of Investment in the ICSID Convention, (2009) 10 J of World Investment and Trade 753-769; F Seatzu, 'La nozione di investimento estero nel sistema dell'ICSID' in *Studi in onore di Carmine Punzi* (Giappichelli 2008) 1393-1407.

[14] On the failed attempt at a multilateral convention on the substantive regulation of foreign investment see generally S Chatterjee, 'The Convention Establishing the Multilateral Investment Guarantee Agency' (1987) 36 ICLQ 76-91.

protection;[15] even expressions such as 'the system of investment law', quite common in the literature, do not seem particularly appropriate in light of the lack of any systemic relationship amongst the large amount of investment treaties currently in force.[16] Clearly, these observations are neither aimed at underestimating the importance of investment regulation for both capital-importing and capital-exporting countries, nor at suggesting some substantive problem relating to investment law - problems that exist, but which are not relevant here, and for which I refer the reader to the relevant literature.[17] However, it is fair to wonder, in case of clashes between human rights obligations arising out of the CRC and investment treaty obligations, whether the scope of application and the ratification history of the CRC would not require it to be considered as prevailing over investment treaties.

This line reasoning could be considered faulty from a strictly positivist perspective: there is no hierarchy amongst rules of international law, and any conflict should be settled according to the long-standing principles of *lex specialis* and *lex posterior*.[18] I would object, though, and

[15] Data retrieved from the International Investment Agreements Navigator of the United Nations Conference on Trade and Development (UNCTAD) <https://investmentpolicy.unctad.org/international-investment-agreements>.

[16] While it is customary to back the statements of an academic article up with appropriate footnote references, I hope readers shall understand my choice not to provide any example of the use of the term 'system' with reference to investment law. Besides my distaste for singling out colleagues, it is worth underscoring that the use of expressions like 'system of investment law' is rather widespread even amongst those scholars who agree on the lack of systemic connections amongst the various treaties currently in force. The common features in the various BITs and other relevant treaties, however, allow to refer to the body of treaties and arbitral case-law on investment as a regime, as suggested by J Bonnitcha, L Skovgaard Poulsen, M Waibel, 'The Political Economy of the Investment Treaty Regime' (OUP 2017).

[17] P Lindseth, 'Theorizing Backlash : Supranational Governance and International Investment Law and Arbitration in Comparative Perspective' (2020) 21(1) J of World Investment and Trade 34-70; M Hamdy, 'Redesign as Reform: A Critique of the Design of Bilateral Investment Treaties' (2020) 51(2) Georgetown J Intl L 255-322; M Langford, D Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?', (2018) 29(3) Eur J Intl L 551-580; M Waibel (ed.), 'The Backlash against Investment Arbitration: Perceptions and Reality' (Kluwer Law International 2010).

[18] I Queirolo, S Dominelli, 'Articles 67 and 71 Brussels Ia Regulation 'Lex Specialis Derogat Lex Generalis' Principle: Some Critical Remarks' (2020) 20 Eur Legal Forum 85-92; A Tardieu, 'L'articulation de la lex specialis avec les autres règles de conflit et clauses spéciales', in M Ubéda-Saillard (ed), 'La mise en œuvre de la lex specialis dans le droit international contemporain' (Pedone 2017) 53-72; N Prud'homme, "Lex Specialis:

like to turn the attention of the reader to the second of the aforementioned points on the primacy of the CRC - namely, the function of international law in the contemporary global society.

Since World War II certified the failure of the League of Nations,[19] the position of individuals in international law has changed progressively but quite steadily. Although even the post-war regime is still based on a conception of international law as the system of rules regulating the relationships amongst states and between states and international organizations, individuals have become central subjects of international law (or, at the very least, less peripheral) by means of the human rights system, which has resulted in a significant number of treaties, as well as the rules on the protection of aliens applied to situations such as those of investors. Therefore, even though individuals still cannot be considered as active subjects of international law, their position as passive subjects has developed, over the years, towards the guarantee of a certain standing (before human rights courts or, in the case of investors, arbitral tribunals), as well as the general approach, in recent times, which sees the impact of law on individuals as a central theme for reflections and work on new treaties (for instance on the subject of climate change).[20] In consideration of these developments one may indeed argue that among the objectives of contemporary international law are the enhancement of human rights, the achievement of substantial equality and, therefore, the protection of the most vulnerable. If that is the case, therefore, it is necessary to address the question of possible clashes between obligations related to the rights of children and those arising out of investment treaties in light of the content of the CRC and, in particular, the provisions on the best interests of the child as a prominent principle of international law.

Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Israel L Rev 356-395.

[19] A Cassese, 'Diritto Internazionale' (Il Mulino 2017) 53.

[20] N Castro-Niño, 'Le contentieux climatique et l'invocation de la responsabilité internationale en défense d'intérêts collectifs' (2018) 64 Annuaire Français de Droit International 593-610; C Redgwell, 'Treaty Evolution, Adaptation and Change : Is the LOSC 'Enough' to Address Climate Change Impacts on the Marine Environment?' (2019) 34 The Intl J of Marine and Coastal L 440-457.

3. *The 'best interests of the child' principle and investment treaties*

As previously mentioned, Article 3(1) of the CRC introduces the principle of best interests of the child' in the Convention. The text of the Convention is rather explicit in stating that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be *a primary consideration*' (emphasis added). Whilst the first draft of the provision in question stated that the best interests of the child should be *the* primary consideration,[21] pressure from certain delegations at the Working Group of the Commission on Human Rights in 1980 led to replace the determinative *the* with a less definitive *a* to qualify the term 'primary consideration', thus demoting the best interests of the child from the most important consideration to be made by legislators and administrators to one element to be considered among others. Moreover, the CRC does not define the concept of 'best interests of the child'. The Committee on the Rights of Children has provided guidance[22] on the application of the principle without, however, providing a punctual designation of its content.[23] On one hand, the Committee clarified that the best interests of the child is a right,[24] a principle[25]and a rule of procedure.[26] On the other hand, the Committee itself warned that the best interests of the child is not a concept of easy definition, but rather a blanket term covering a number of evolving issues, and that they had no intention of prescribing 'what is best for the child in any given situation at any point in time.'[27] The task

[21] M Freeman, 'Article 3. The Best Interests of the Child', in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans, M Verheyde (eds), 'A Commentary on the United Nations Convention on the Rights of the Child' (Martinus Nijhoff 2007) 60.

[22] United Nations, Committee on the Rights of Children, 'General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (29 May 2013) UN Doc CRC/C/GC/14.

[23] ibid. 3.

[24] ibid at para 6.

[25] ibid.

[26] ibid.

[27] ibid at para. 11

has also been taken up by the scholarship, which has mostly build upon the Committee's General Comment.[28]

The most convincing position is likely Freeman's, according to whom 'the best interests concept is indeterminate' and its interpretation may be affected by political, cultural and historical factors – including, at a very fundamental level, the fact that 'different societies have different understandings of childhood'.[29] A thorough discussion of the concept of best interests is beyond the scope of this article, and I would like once again to refer the reader to the relevant literature;[30] for the purposes of this study, it is more relevant to assess the scope of application of Article 3(1) of the CRC, especially in connection with other obligations of states under international law.

In terms of its scope of application, Alston identifies, first of all, a benchmark function for issues arising under the CRC: in other words, the best interests of the child should act as a guiding principle in the interpretation of all the other provisions in the convention, particularly when there seems to be a conflict between two rights sanctioned by the CRC.[31] Parker, however, suggests an extension of the scope of application of Article 3(1) to encompass the approach that must be taken by state parties to the CRC in adopting laws, regulations and administrative acts, and in their common practices, even on matters not directly

[28] See *ex multis* Freeman (n 21); J Eekelaar, The Importance of Thinking That Children Have Rights' (1992) 6 Intl J Law and the Family 230–231; K Turković, A Grgić, 'Best Interest of the Child in the Context of Article 8 of the ECHR', in J Casadevali, G Raimondi, E Fribergh (eds), 'Mélanges en l'honneur de Dean Spielmann' (Wolf Legal Publishers 2015) 629-642; S Tonolo, 'L'evoluzione dei rapporti di filiazione e la riconoscibilità dello 'status' da essi derivante tra ordine pubblico e superiore interesse del minore' (2017) 100 Rivista di Diritto Internazionale 1070-1102; M Distefano, 'Interesse superiore del minore e sottrazione internazionale di minori' (Cedam 2012).

[29] Freeman (n 21) at 27-33; E Benfer, 'In the Best interest of the Child?: An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States' (2004) 14 Indiana Intl and Comparative L Rev 729-770;

[30] See above (n 21). It is also worthwhile to note that not only the scholarship on the best interests of the child is predominantly aimed at addressing questions of family law, migration law, criminal law and domestic human rights, but also the reports of the Committee on the Rights of the Child mostly deal with matters such as corporal punishment, juvenile sentences, family and custody matters, age of marriage, torture, or treatment of migrant children.

[31] Alston (n 5) 16.

regulated or covered by the CRC.[32] Parker's approach seems persuasive in light of the very idea behind the CRC as well as other human rights instruments within the system of the United Nations – that is, the protection of the rights of the more vulnerable.[33] Indeed, the very first point of the Preamble to the CRC reiterates, like many other human rights treaties, that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world', and that the state parties to the United Nations 'have determined to promote social progress and better standards of life in larger freedom'. Fundamental human rights, therefore, appear to be not merely one of the goals of the concerted efforts of the international community, but rather the foundational element informing the very existence of such community. One may contend that the UN treaty system has established many a right, of different nature and arguably conflicting amongst each other - at least at times; and that, lacking a clear and accepted hierarchy of human rights, statements like the ones in the preambles to the CRC and other treaties should be taken as declaration of principles, rather than obligations. I would certainly agree that the preambles do not establish international obligations; however, it is also accepted practice, codified in the Vienna Convention on the Law of Treaties (VCLT), that preambles are necessary elements to construe the context for the purpose of the interpretation of a treaty. The repetition of equivalent expressions giving primacy to human rights concern in the collective actions of the international community leads to affirm that consideration of protection and promotion of human rights must be at the forefront in interpreting and as-

[32] S Parker, 'The Best Interests of the Child; Principles and Problems' (1994) 8 Intl J L and the Family 26.

[33] The same *rationale* applies to questions of application of instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN General Assembly, 18 December 1990, A/RES/45/158); or the Convention on the Rights of Persons with Disabilities (UN General Assembly, 24 January 2007, A/RES/61/106). The question of which of these instruments would prevail in case of a conflict between treaties is beyond the scope of my enquiry, but it does not affect the argument expressed in the remainder of this article.

sessing not only international law, but any legal interaction between states. Having established this, however, there is still the question of hierarchy anticipated in Section 2 above: in a system like international law, in which human rights considerations must be considered as primary concerns, how should possible clashes between human rights be resolved? The question is not merely theoretical: the UN treaty system, together with the rights of marginalized and vulnerable individuals and groups, also protects economic rights, including the right to economic initiative.[34] To answer this question, however, one needs to go to the roots of human rights – that is, to the fundamental aim of the human rights system which, arguably, is the achievement of substantive equality across peoples and nations.[35] Substantial equality requires a further effort than simply stating the existence of rights in international law instruments and imposing general obligations upon member states. In order to discuss substantial equality, indeed, a further reflection on the scope of human rights provisions is necessary. Put simply, the mere introduction of rights for every person does not entail equality of rights; in fact, it may be the very cause of discrimination (or the perpetuation of it). A contemporary theory of human rights cannot but begin from the recognition of the diversity in personal, social, economic and cultural conditions, and how the provision of rights affects – in one way or another – such conditions.[36] If substantive equality is the goal of international human rights law, then the interpretation of human rights provision must go in that direction, including not only positive actions, where needed, to implement human rights, but also instrumental interpretive choices in case of clashes between different treaties – whether human rights treaties or between human rights obligations and international economic law ones. And because of the status of the rights of the child amongst human rights in general, it descends that the rights of the

[34] Art 6 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[35] See *ex multis* T Tridimas, 'Reflections on Equality: Substantive Values and Policy Outcomes' in I Govaere, D Hanf (eds), 'Scrutinizing Internal and External Dimensions of European Law: Liber Amicorum Paul Demaret' vol I (Peter Lang 2013) 455-468; A Grgić, 'Recognizing Formal and Substantive Equality in the Oršuš Case' (2010) 9 Eur YB of Minority Issues 327-366; S Fredman, 'Providing Equality : Substantive Equality and the Positive Duty to Provide' (2005) 21(2) South African J on Human Rights 163-190.

[36] Moyn (n 9).

child should trump considerations of investors rights any time there is a clash.

Should one accept the preeminence of the rights of the child over investors rights based on these considerations, however, it remains to be seen which situations would actually require weighing the different rights at play and in which of these situations the rights of the child should enjoy the aforementioned preeminence. Indeed, a second potentially controversial element in Article 3 of the CRC is the reference to 'all actions concerning children' as the definition of the circumstances in which the best interests of the child is to be the primary consideration. A legal definition of 'action' is not available, and this has led to a number of controversies in the interpretation of Article 3(1).[37] Not only the drafting history of the CRC shows that various delegations had questioned whether the best interests of the child should indeed be the primary consideration in all actions,[38] but it was also accepted that in certain circumstances considerations of social justice may be greater or at least equal to those about the best interests of the child.[39] These are, however, considerations of common sense about the prevalence not of interests, but of justice at large. Moreover, it is accepted that the reference to 'all actions' encompasses omissions as well – thus not only the failure to implement rights specifically introduced by the CRC, but also neglecting to rectify situations dangerous or detrimental to children would count as an action. The primary question, however, is the scope of application of the term 'concerning children' referred to all actions. Does it mean that the best interests principle only applies to actions specifically aimed at children, or that the best interests principle applies to all actions and omissions of member states directly, indirectly and potentially affecting children? The Committee clarified that the term in question must be interpreted rather broadly, to include not only those actions directly concerning a child or a group of children, but also any action that may have an effect on children 'even if they are not the direct targets of the measure.'[40] In other words, actions 'concerning chil-

[37] The Committee on the Rights of the Child's General Comment (n 22) at para 17 merely refers to 'decisions, but also all acts, conduct, proposals, services, procedures and other measures'; see also Freeman (n 21) 45.

[38] Freeman (n 21) 45.

[39] See UN Doc E/CN.4/1989/48 para 121.

[40] Committee on the Rights of the Child (n 22) para 19.

dren' may be aimed directly at children as well as any other population group.

In this context, indeed, a possibly difficult relationship between the principle of best interests and international investment law finally emerges. In theory, most actions of a state on economic, financial, investment or development matters concern children: the building of infrastructures influences their current lives and opportunities as well as their future; creating or reducing jobs affects the livelihood of their parents (and, therefore, their own) as well as their choices on education and career prospects; financial decisions leading to boosting the national economy can lead to more resources for welfare and education, while an economic crisis caused by the state's financial strategy may negatively affect children's wellbeing and perspectives; environmental policies can affect the physical and psychologic development of children; and so on. The question, therefore, is whether such a broad interpretation of the term 'all actions concerning children' is appropriate or recommendable. If so, this would entail that a great deal of actions of states with regard to foreign investment would be covered by the definition in Article 3(1), since actions concerning the environment, natural resources, and the welfare of the nation in general are directly relevant for the present and the future of children.

The other relevant question, with regard to Article 3(1) of the CRC, is whether the fact that the best interests of the child should be a primary consideration in 'all actions concerning children' also establishes a hierarchy of such considerations, and places the best interests of the child among the necessary considerations in cases, such as investment regulation and investment disputes, in which very rarely the interest of the child even enters the negotiations between the investor and the host states or the drafting process of the arguments of either party before an arbitral tribunal. A recent exception is represented by the notice of dispute reportedly submitted by a cereal manufacturer to Mexico in response to the state's decision that producers of foods high in saturated facts or sugar cannot use characters, drawings, cartoons or mascots on their packages:[41] in this case it has been made evident by the investor,

[41] N Mardirossian, L Johnson, 'Children's Cereal Company v. Mexico & the Corporate Use of Investor-State Dispute Settlement to Influence Policymaking' Columbia Center on

with their reference to the relevant legislation allegedly in breach of a BIT,[42] that the dispute arises from an action concerning children, and the question the tribunal will be asked to address is whether a measure affecting an investment is a breach of a BIT provision even though such measure has been taken with the best interests of the child in mind. Aside from this case, which may or may not in fact end up before an arbitral tribunal after the publication of this article, the investment arbitral case-law is virtually devoid of examples of cases where the interest of children has been a matter of dispute as a result of a state measure allegedly in violation of a treaty. New generation BITs, however, provide for a number of exceptions and situations in which state measures would not be considered in violation of the treaty even though they affect the profitability of the investment.[43] The best interests of the child are not expressly mentioned amongst these exceptions, which are aimed at rebalancing the interests of investors and host states in BITs and are drafted with particular attention to the matters traditionally at the basis of the state measures brought before arbitral tribunals as treaty violations.[44] An argument can be made, however, that the best interests of the child should not be treated as a possible exception, in line with those often drafted on matters of environmental protection, public health, labour standards and the right to regulate in spite of the effects measures may have on investment: the best interests of the child should in fact be, in light of its preeminence among human rights in contemporary international law, a key principle in the interpretation of treaty provisions.

Sustainable Investment News <https://ccsi.columbia.edu/news/childrens-cereal-company-v-mexico-corporate-use-investor-state-dispute-settlement-influence>.

[42] Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010, *Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados-Información comercial y sanitaria* <www.dof.gob.mx/normasOficiales/4010/seeco11_C/seeco11_C.htm>.

[43] See *ex multis* A Roberts, 'Investment Treaties: the Reform matrix' (2018) 112 AJIL Unbound 191-196; J Beechey, 'New Generation of Bilateral Investment Treaties: Consensus or Divergence?', in A Rovine (ed), 'Contemporary Issues in International Arbitration and Mediation: The Fordham Papers' (Brill 2008) 5-25.

[44] K Vandevelde, "Rebalancing through Exceptions" (2013) 17 Lewis & Clark L Rev 449-459. Even though Vandevelde states at page 458 that 'to the extent that the BITs are instruments of the rule of law, then it seems doubtful […] that having a large number of general exceptions is necessary or desirable', his article effectively summarize the *rationale* behind the introduction of exceptions in BITs since the early 2010s.

The purpose of BITs is to protect the interest of foreign investors against measures of host states that affect the enjoyment of their investment.[45] In most of the BITs currently in force, the reasons behind the measures taken by host states are hardly relevant: with the exception of provisions on expropriation, that require the measure to be for a public purpose, not arbitrary and not discriminatory,[46] every other measure is tested not against its reasons, but solely in terms of its effect – namely, whether the effect of the measure violates one of the applicable standard of protection under the BIT. New generation BITs, as mentioned beforehand, provide for a number of exceptions that allow states to regulate on certain matters without worrying that the effect of their measures on foreign investment may lead to such measures being examined by an arbitral tribunal and possibly extensive amounts of money in compensation. These exceptions are the only provisions in BITs that make the reasons why a state took certain measures relevant: in principle, indeed, the fact that a state may have taken a measure to safeguard the integrity of its own environment, to protect the health of the population, or to increase the conditions of workers in the country is inconsequential. The situation, however, is not as simple with regard to Article 3(1) of the CRC: the provision in question does in fact establish an obligation upon states to primarily consider the best interests of the child in all actions concerning children 'undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. In other words, a number of actions that affect foreign investment may be considered not merely as expression of the state's right to regulate, but also as performance of the obligation imposed (almost universally, as seen in the previous section of this article) on states by Article 3(1) of the CRC; and the significance, in terms of effects on children, of many of the measures that prominently feature in the case-law of investment arbitral tribunals as violations of BIT obligations suggests that the obligation to consider the best interests of the child may in fact justify such violations.

[45] K Vandevelde, 'Bilateral Investment Treaties: History, Policy, and Interpretation' (OUP 2010) ch 1; A Reinisch (ed), 'Standards of Investment Protection' (OUP 2008); J Salacuse, 'The Law of Investment Treaties' (OUP 2021).

[46] J Cox, 'Expropriation in investment treaty arbitration' (OUP 2019).

4. *The best interests of the child in investment arbitration*

As pointed out in the scholarship, the best interests principle should apply where failure to observe it would affect the enjoyment of any children's right.[47] There is, however, a possible objection that deserves to be addressed, and may lead to reconsider the relevance of the principle of the best interests of the child in matters of investment protection. Such objection concerns the separation between the human rights treaty system and the investment law regime. The former may not be considered a system is the technical sense,[48] as each treaty is independent from the others and several are regional rather than global; however, there are systemic connections, as it will be explained below, among the various treaties forming international human rights law. The latter, on the other hand, is hardly a system, and it is in fact a collection of treaties arising out of each state's interest to attract investment from a specific country, or to protect the interests of national investors in other specific countries (or both, in case of certain South-South BITs).[49] Human rights treaties and BITs, therefore, are not only aimed at protecting very different interests: it is also arguable that they act on different levels and, because of the fact that they deal with matters that have little in common with one another (with the notable exception of the standing before international tribunals granted to individuals), investment arbitral tribunals should not consider human rights obligations of states when assessing their conduct against investment treaty provisions. The fragmentation of international law, in essence, would shield the investment legal regime from any other kind of consideration: since human rights obligations are nominally excluded from the jurisdiction of investment arbitral tribunals, arbitrators should not even consider whether the measures taken by states were in performance of other interna-

[47] Parker (n 32); Alston (n 5).

[48] See generally J Raz, 'The Concept of a Legal System' (Clarendon Press 1997).

[49] L Skovgaard Poulsen, 'The Significance of South-South BITs for the International Investment Regime: a Quantitative Analysis' (2010) 30 Northwestern J Intl L & Business 101-130; S Bonilla, R Castro Benieri, 'Exploring the South-South Exception in the World of BITs: The Cases of Latin America and India' (2008) 1 Indian J Intl Economic L 109-144.

tional law obligations, but merely whether their effects violate any of the provisions of the applicable BIT.

This objection is not entirely convincing, even from a formalist perspective. The fragmentation of international law is a long-known problem, but the International Law Commission (ILC) has settled certain arguments in a fashion that should discourage from arguing that the interpretation and application of investment law can be isolated from the rest of the rules of international law.[50] As pointed out by the ILC, different rules and principles of international law are vested with different normative powers, and peremptory norms – among which are a considerable number of human rights treaty provisions and customs – trump provisions that are not consistent with the rules and principles established by such norms. I would not dare to argue that the best interests of the child constitute a peremptory norm of international law: regardless of the virtually universal ratification of the CRC, the very qualification of the principle of best interests as 'a right, a principle and a rule of procedure' does not allow to consider it among the substantive rules 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[51] Amongst these substantive rules, however, are the principles at the core of the UN Charter, amongst which is the protection of human rights.[52] As an expression of fundamental human rights, the best interests of the child must trump inconsistent BIT provisions before any international court or tribunal. Arbitral tribunals are called to apply investment treaties as the applicable law to disputes between investors and host states as part of public international law and together with general international law, to which the host state is subject and from which the very concept of investment protection is de-

[50] International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission', finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006.

[51] VCLT art 53.

[52] Charter of the United Nations (adopted 24 October 1945, entered into force 24 October 1945) 1 UNTS 16 art 1(3).

rived.[53] BITs too must therefore be interpreted in accordance with Article 31(3)(c) of the VCLT, which requires interpreters to take into account 'any relevant rules of international law applicable between the parties.'[54]

However, in order to ensure that BITs are interpreted not in a vacuum, but within the broader context of public international law they belong to, it is necessary that arbitrators are, if not experts, at least familiar with the core concepts of international law. Sadly, that is not always the case: the influence of arbitrators with solid backgrounds in international commercial arbitration has introduced a certain private law-based approach the interpretation of BITs, according to which investment treaties are to be read independently from any other provision of international law – or at least those that may affect the protection of investors as the primary objective of BITs. Such approach is rather questionable, as it tends to transform the interpretation of investment treaties to something closer to the interpretation of a contract than what Article 31 of the VCLT prescribes. The lack of any possibility of appeals in investment arbitration complicates matters significantly: there is no way to review legal interpretations of treaty provisions by arbitral tribunals unless they constitute gross procedural violations relevant under Article 52 of the ICSID Convention or Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This means that awards flawed by interpretations of investment treaties inconsistent with norms of international law – even peremptory ones – are routinely enforced, populating the arbitral case-law with questionable readings of international law that end up forming that *de facto* precedent that suggests a certain systematicity of investment law.[55] The fact that the best interests of the child should be amongst the

[53] See in particular Permanent Court of International Justice, *German Interests in Polish Upper Silesia* (Germany v Poland) 1925 PCIJ Ser A No 6 August 25 on the international law on the treatment of aliens.

[54] This is explicit in ICSID arbitration under art 42(1) ('…and such rules of international law as may be applicable') and implied in *ad hoc* investment arbitral proceedings. See generally C Schreuer, L Malintoppi, A Reinisch, A Sinclair, 'The ICSID Convention: A Commentary" (CUP 2009) 545-639; T Begic, 'Applicable Law in International Investment Disputes' (Brill 2005).

[55] S Schill, 'The multilateralization of international investment law' (CUP 2009); S Schill, 'The Multilateralization of International Investment Law: Emergence of a

primary considerations of investment arbitrators just as well as any other international court or tribunal may therefore remain the subject of a literary endeavour.

5. *Concluding remarks*

The rise of the new generation BITs since the early 2010s has shown that, notwithstanding the issues inherent in a treaty system designed to confer all rights to a party to a relationship and impose all obligations upon the other party, when there is the will to try and raise questions of public interest in matters of investment protection, a way can be found – and the way has been indeed found in public international law. Section 2 ('Reservations') of the VCLT allows state to interfere with the nominal reciprocity of treaty obligations in BITs by excluding certain matters from the protection awarded to investors should the state's measure affect the investment. The best interests of the child, as stated beforehand, does not feature amongst the various reservations placed by states to their more recent BITs – thus, according to how BITs are commonly interpreted, the best interests of the child should not be an issue to be considered by arbitrators in assessing the consistency of state measures with their treaty obligations.

As I have argued in this article, there should be no need to include the best interests of the child in BITs to make the principle relevant in the interpretation of investment treaties. Investment law, properly interpreted, actually requires arbitrators to consider the various international law obligations of states when assessing their conduct towards foreign investors: and the almost universal ratification of the CRC leads to consider that virtually every state is under an obligation to primarily consider the best interests of the child in a significant number of actions affecting the enjoyment of investment by foreign corporations. The tradition of considering investment law as a closed and self-sufficient system is part of that legal imagination at the very core of the contemporary regime of relations between investors and states – a regime that is designed to ensure the profitability of corporations in business activities

Multilateral System of Investment Protection on Bilateral Grounds' (2010) 2 Trade, L and Development 59-86.

around the world in spite of clashing interests of host states.[56] It is therefore difficult to conceive an investment dispute in which arbitrators consider other international law obligations while interpreting investment treaties, let alone obligations on matters, such as the welfare of children, hardly considered relevant in investment relations. The matter, however, is far from theoretic: while it is arguable that states do not adopt investment-related measures explicitly aimed at protecting the interest of children, it is worth underscoring that Article 3 of the CRC has a much broader scope of application, as it covers 'all actions concerning children'. If one considers the implications of any large-scale economic activity on the current and future welfare of children, the connection between the best interests of the child and international investment law appears much less far-fetched than it *prima facie* would.

As hinted in the previous section of this article, I am not optimistic that the best interests of the child will feature in the reasons of an investment arbitral award in the near future. The commercialization, or privatization, of investment arbitration is certainly a factor that has progressively reduced the application of public international law in disputes that should in fact be based on treaties and customary international law, and from which contract-based claims are generally excluded. Moreover, it would be up to the states to raise the issue of their obligations under the CRC to justify measures lamented by investors as violations of BIT obligations. The case-law, however, is unsurprisingly lacking in arguments based on the best interests of the child raised by states; in fact, it has become progressively lacking in defenses of states' conducts or against investors claims based on public international law. The consistent failure to challenge questionable interpretations of public international law can be considered as akin to the endorsement of such interpretations.[57] It is doubtful, therefore, that the best interests of the child will enter the investment law arena anytime soon – even though public international law dictates that it should already be there.

[56] N Perrone, 'Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules' (OUP 2021) 122-149.

[57] M Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83 Modern L Rev 1246-1286.