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The Tripartite Dimension of Conflicts of Interests

Workers, Foreign Investors and Host States in the Energy Sector

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Introduction

Viewed through the lens of investment treaty arbitration and in light of recent investment disputes relating *e.g.* to indigenous peoples [1] or cultural heritage, [2] foreign direct investments (FDI) operations are very often portrayed as raising conflicts between the public interest of the host state and the private interest of the foreign investor. In this context, it comes as no surprise that the analyses of these conflicts capture the discourses and writings of scholarship.[3] Nevertheless, if one takes a step back and looks at FDI operations from a broader point of view, one gets a different picture from the traditional one we are accustomed to by the arbitration lens.

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[1] See *e.g. Glamis Gold Ltd v. United States of America,* UNCITRAL, Award, 8 June 2009 available at http://www.italaw.com (accessed 30 May 2013).

[2] See *e.g. Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No ARB/05/8, Award, 11 September 2007 available at http://www.italaw.com (accessed 30 May 2013).

[3] It is worth noticing that mainstream literature elevates this conflict between the public interest of the host state and the private interest of the foreign investor to a conflict of norms between international investment law, *i.e.* international investment agreements (IIA), and its 'others', *e.g.* international human rights law. As argued by the author elsewhere, the conflicts characterizing investment treaty arbitration should not be conceived of as normative conflicts but as a conflicts of interests, because of the normative vagueness of IIA provisions and of the public nature of international investment law, see Yannick Radi, 'The "Human Nature" of International Investment Law', *Transnational Dispute Management* 1 (2013) 1. Among the abundant literature on the relationship between international investment law and its 'others', see *i.e.* Freya Baetens (ed.), Investment Law Within International Law: An Integrationist Perspective (Cambridge: Cambridge University Press, 2013); Eric de Brabandere, 'Human Rights Considerations in International Investment Arbitration', in The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications, ed. Malgosia Fitzmaurice, Panos Merkouris (Leiden/Boston: Martinus Nijhoff Publishers, 2012); Pierre-Marie Dupuy, Ernst U. Petersmann, Francesco Francioni (eds.), Human Rights in International Investment Law and Arbitration (Oxford: OUP, 2009); Tarcisio Gazzini, Yannick Radi, 'Foreign Investment with a Human Face – With Special Reference to Indigenous Peoples', in International Investment Law and its Others, ed. Rainer Hofmann, Christian J. Tams (Baden-Baden: Nomos, 2012), 87; Rainer Hofmann, Christian J. Tams, International Investment Law and its Others, (Baden-Baden: Nomos, 2012); Vid Prislan, 'Non-Investment Obligations in Investment Treaty Arbitration – Towards a Greater Role for States?' in Investment Law Within International Law: An Integrationist Perspective, ed. Freya Baetens (Cambridge: Cambridge University Press, 2013); Bruno Simma, 'Foreign Investment Arbitration: a Place for Human Rights?', *International and Comparative Law Quarterly* 60 (2011), 573; Valentina Vadi, 'Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration, *ICSID Review* 28.1 (2013) 1.

Such is the case of the FDI operations in the energy sector in relation to labour standards. Indeed, the tripartite relationship between workers, the foreign investor and the host state in this sector is characterized by a plurality of potentially entangled conflicts. Forming part of this combination, one finds the traditional conflict between the public interest of the host state and the private interest of the investor. But, there exists also a conflict within the 'box' of the public interest itself between the interests of workers and other public interests that are promoted/protected by the host state, such as the interests of an economic and social nature or interests related to national security. All these conflicts underlie and explain the labour issues that are raised in the energy sector.

In light of the above, this chapter pursues a twofold objective. First, it unravels and examines the labour issues that are generated by the above-mentioned conflicts. Second, among the various mechanisms available on the international plane, it appraises how international investment law (IIL), *i.e.* the new generation of international investment agreements (IIA) can be used to address these labour issues in the energy sector.

To reach these objectives, the chapter starts with a review of the key labour standards protected under international law (Section 1). Focusing in particular on the fundamental principles and rights at work provided by the 1998 ILO Declaration on fundamental principles and rights at work and its follow-up,[4] it then identifies the main labour issues that are currently raised in the energy sector, with an emphasis on the oil and gas sector (Section 2). Finally, the chapter analyses the labour provisions contained in the new generation of IIA, in particular in Free Trade Agreements (FTA), and assesses their potential to address these labour issues (Section 3). Going beyond the case of the energy sector, the chapter formulates some concluding remarks on the tripartite dimension of the conflicts of interests that characterizes all FDI operations.

[4] ILO Declaration on fundamental principles and rights at work and its follow-up (1998) (Annexed revised 2010) available at http://www.ilo.org/declaration/lang--en/index.htm (accessed 30 May 2013).

1. The normative background: labour rights and standards in international law

Although labour rights and standards are enshrined in human rights conventions[5] and form part of the emerging concept of 'sustainable development',[6] the instruments adopted by the International labour organisation (ILO) constitute the cornerstone of the workers' protection on the international plane. With 189 binding ILO conventions and 202 non-binding recommendations adopted,[7] the ILO has been at the vanguard of workers' protection since its creation in 1919. Because of the 'productiveness' of the ILO, it proves to be impossible to offer a comprehensive overview of the rights and standards provided in these instruments.

Among these rights and standards, a set has emerged as constitutive of a normative core to be respected, promoted and realized by states. Indeed, the International Labour Conference declared in 1998:

> All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.[8]

Before defining the content of these principles, two intertwined remarks can be formulated as to this Declaration. First, it is worth noticing that ILO member states are

[5] See *i.e.* the Universal declaration of human rights (1948), the Covenant on civil and political rights (1966) and the Covenant on economic, social and cultural rights (1966) available at http://www.ohchr.org/en/ (accessed 30 May 2013).
[6] See *i.e.* UNGA Declaration on Environment and Development (1992), UN Doc A/CONF.151/26; UNGA Declaration on the 'Future We Want' (2012), UN Doc A/RES/66/288* available at http://www.un.org/en/documents/index.shtml (accessed 30 May 2013).
[7] For an overview, see ILO, 'Labour standards' available at http://www.ilo.org/global/standards/lang--fr/index.htm (accessed 30 Mai 2013).
[8] ILO Declaration on fundamental principles and rights at work and its follow-up (1998), *supra* note 4.

bound by these principles by their only membership to the organization, irrespective of the ratification of the corresponding ILO convention. Thereby, these principles are - *mutatis mutandis*- erected as the peremptory norms of the international labour regime.[9] This 'imperative' nature very likely explains the limited number of principles that the 1998 Declaration recognizes.

To shed some light on these principles, one can usefully rely on the corresponding conventions adopted by the ILO.

The freedom of association and the effective recognition of the right to collective bargaining are especially addressed in the Convention 087 concerning the freedom of association and the protection of the right to organize[10] as well as in the Convention 098 concerning the application of the principles of the right to organize and to bargain collectively.[11] In particular, Article 1 of the former Convention provides:

> 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. 2. Such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

As to the second core labour principle, *i.e.* the elimination of all forms of forced or compulsory labour, it relates to two main conventions: the Convention 029 concerning forced or compulsory labour[12] and the Convention 105 concerning the abolition of forced

[9] This comparison comes from a discussion with Eric de Branbandere in the course of which he described this set of principles as the 'ILO *jus cogens*'.

[10] Convention 087 concerning the freedom of association and the protection of the right to organize (1948) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO (accessed 30 Mai 2013).

[11] Convention 098 concerning the application of the principles of the right to organise and to bargain collectively (1949) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO (accessed 30 Mai 2013).

[12] Convention 029 concerning forced or compulsory labour (1930) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO (accessed 30 Mai 2013).

labour.[13] The former defines forced and compulsory labour in its article 2 as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.

In relation to forced labour, the '*jus cogens*' of international labour law is also made of the effective abolition of child labour. This prohibition is enshrined mainly in two conventions, *i.e.* the Convention 138 concerning minimum age for admission to employment[14] and the Convention 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour adopted in 1999.[15] Article 1 of the Convention 138 provides:

> Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.

Finally, the fourth core labour principle, *i.e.* the elimination of discrimination in respect of employment and occupation is enshrined in two main conventions: the Convention 100 concerning the equal remuneration[16] and the Convention 111 concerning discrimination in respect of employment and occupation adopted.[17] Article 1 of the latter Convention provides in particular that discrimination includes 'any distinction, exclusion or preference' made 'on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. Equipped with this '*grille de*

[13] Convention 105 concerning the abolition of forced labour (1957) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO (accessed 30 Mai 2013).

[14] Convention 138 concerning minimum age for admission to employment (1973) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO (accessed 30 Mai 2013).

[15] Convention 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour (1999) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO (accessed 30 Mai 2013).

[16] Convention 100 concerning the equal remuneration (1951) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO (accessed 30 Mai 2013).

[17] Convention 111 concerning discrimination in respect of employment and occupation (1958) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO (accessed 30 Mai 2013).

lecture' of international labor law, one can now move to the examination of the labour issues raised in the energy sector.

2. Labor issues raised in the energy sector: the example of the oil and gas sector

To start with this review of the working conditions in the energy sector and more precisely in the oil and gas sector, it is worth noticing that there is a substantive gap between the 'external' perception of the public and the 'internal' experience of workers in this sector.[18] Indeed, on the one hand, the public generally believes and expresses this opinion that the oil and gas industry is associated with oil spills, explosions, air pollution and the neglect of human rights. Furthermore, jobs on the rig floor are often perceived as dirty, difficult and possibly dangerous. On the other hand and on the opposite, two-thirds of the polled workers in the oil industry declare a high degree of job satisfaction and even more would recommend a career in the industry to a new graduate. Such an opinion is mainly due to the good salaries that are earned in the oil and gas industry as well as the balance between a good work-life and a fulfilling and challenging job. As a result, 90 per cent of workers under the age of 35 expect to stay in the oil sector.

That being said, it remains that the oil and gas sector raises specific problems, in particular as to occupational safety and health working time,[19] forced labour as well as restrictions and prohibitions of the right to strike. This chapter focuses on occupational safety and health, on forced labour and restrictions on the right to strike.[20] To illustrate

[18] See Energy Institute, Deloitte and Norman Broadbent, quoted in ILO, 'Social dialogue and industrial relations issues in the oil industry' (2009), 18 available at http://www.ilo.org/sector/Resources/publications/WCMS_161662/lang--en/index.htm (accessed 30 Mai 2013). Which kind of evidence is provided? What do you mean? How they conducted the survey? The number of people polled? The ILO report provides for the key findings of the study conducted, not for that type of information. The fact that the ILO relies on this survey is in my view an indication as to the seriousness of the study.

[19] In the oil extraction industry, average basic working time is over 50 hours per week, although almost all countries have limits on weekly working hours, either 40 hours or 48 hours, with the former limit dominant. Several options aim at compensating the overtime such as paying a premium on the normal hourly rate or entitling workers to a rest period equivalent to or more than the hours worked, *ibid.*, 32.

[20] It can be mentioned that the inclusion of the right to strike in the ambit of the freedom of association is open to discussion. This is illustrated by the on-going discussions at the International Labour Conference (ILC). See *e.g.* ILC, Provisional Record, 101st session, Geneva (2012), 19 (REV) Part one / 37 quoted in Vid Prislan, Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development', *Yearbook of International Investment Law and Policy* (New York: Oxford

them, it relies on three case-studies: a series of accidents in the oil industry in Kuwait as to occupational safety and health (2.1), the Yadana gas project in Myanmar as to forced labour (2.2) and the case No. 2552 filed against Bahrain before the ILO Committee on freedom of association regarding restrictions and prohibitions of the right to strike (2.3). In light of these three case-studies, the tripartite dimension of the conflicts of interests that underly these labour issues is then unravelled and discussed (2.4).

2.1. Occupational safety and health

In 2000, Kuwait was faced with two major accidents at the Mina al-Ahmadi and Shuaiba refineries, as well as with a number of smaller accidents. The accident at the Mina al-Ahmadi occurred on the 28th of July, a huge explosion killing 5 people and wounding 50 others. On the 18th of June, the accident that resulted from the leak of hydrogen sulphide gas killed two workers at the refinery of Shuaiba. The commission that was instituted in the aftermath of the latter accident blamed Chevron to be responsible for this event because of technical mistakes allegedly committed in the preparation of an aviation fuel unit operation. A parliamentary commission reached a similar conclusion as to the responsibility of Chevron. Chevron denied any responsibility in the accident. Two years later, another explosion occurred in the Raudhatain oilfield, killing four people and injuring 20 others. In 2008, workers trade unions reported that between July and September 2008, at least 5 serious accidents took place at the refineries, resulting in the deaths of two contractors and injuring 14 people.All these accidents raised concerns about safety management. More than the deterioration of the machinery, the management in charge of safety was criticized. All these events led to the organization of strikes. In October 2008, 3000 unionized workers of the Kuwait National Petroleum Company demonstrated demanding higher wages and safer working conditions.[21]

University Press, 2013) (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171716, 28 (accessed 30 Mai 2013).

[21] See ILO, 'Social dialogue and industrial relations issues in the oil industry' (2009), *supra* note 18, 39.

2.2. Forced labour

Non-paid conscription of villagers by the government and the Army is a long-established practice in Myanmar that was codified in the Town Act of 1907 and the Village Act of 1908. An ILO Commission of inquiry was created in 1997 to investigate these practices in particular in light of the Convention 029 concerning forced or compulsory labour.[22] The 1998 report of the Commission criticized especially the conditions under which the army recruited villagers, *e.g.* for the construction of military camp, as well as the abuses coming sometimes together, for instance ill-treatment.[23] The process that was triggered by the communication of the report of the ILO Commission led the authorities to repeal the Village Act and the Town Act in 1999. In addition, an ILO representative to Yangon was appointed in particular to liaise with the government and observe the situation.

Despite these legislative evolutions, there are on-going allegations that forced labour still exists in Myanmar, emanating in particular from NGO.[24] This is in this context that Total, a French company, and Unocal -now Chevron- were accused of complicity in forced labour. These accusations were formulated in relation to the Yadana gas project which began officially in 1992 with the signature by Total of a contract with the military regime to develop offshore natural gas fields in the Andaman Sea. These accusations resulted in complaints filed by villagers in the United States against Unocal in 1996 and against Total in Belgium in 2005 and in France in 2002. The complaint faced by Total in France concerned allegations of 'complicity in unlawful confinement' raised by eight nationals. They alleged that they had been forced by the Myanmar army to provide what they considered to be compulsory labour for the construction of the Yadana gas pipeline. Despite denying such complicity of forced labour, Total entered into a settlement agreement in 2005. This agreement provided in particular the creation of a solidarity fund

[22] Convention 029 concerning forced or compulsory labour, *supra* note 11.
[23] 'Forced Labour in Myanmar (Burma) - Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)' (1998) available at http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007995/lang--en/index.htm (accessed 30 May 2013).
[24] See *e.g.* EarthRights International, 'TOTAL IMPACT: The Human Rights, Environmental, and Financial Impacts of Total and Chevron's Yadana Gas Project in Military-Ruled Burma (Myanmar)' (2008) available at http://www.earthrights.org/sites/default/files/publications/total-impact.pdf (accessed 30 May 2013).

to compensate the eight plaintiffs as well as any other person able to demonstrate that she had suffered a similar experience in the area around the pipeline construction corridor.[25]

Irrespective of the question of the reality of NGO's allegations and Total's denials as to the Yadana gas project, this case-study illustrates the circumstances under which the prohibition of forced labour can be violated and more generally, how these violations can be committed by host states and/or of foreign investors.

2.3. Restrictions and prohibitions of the right to strike

In 2002, Bahrainese authorities promulgated the Legislative Decree No. 33 on the Trade Union Law. Its section 21(e) provided a list of essential services in which strike actions were prohibited, *i.e.* security services, civil defence, airports, ports, hospitals, transport, telecommunications, electricity and water services. In 2006, the Law No. 49 amending certain provisions of the Trade union Law was adopted. Section 21(d) of the Trade Union Law, as amended, 'prohibits strikes in essential services which may disturb national security or disrupt the daily life of citizens'. It provides: 'The Prime Minister shall issue a decision setting out those essential services where strikes are prohibited'. On 20 November 2006, the Prime Minister issued Decision No. 62, which listed the following as essential services where strike actions were prohibited: security services, civil defence, airports, ports, hospitals, medical centres and pharmacies, all means of transport of persons or goods, telecommunications, electricity and water services, bakeries, educational institutions, and *oil and gas installations*[26].[27]

[25] See EarthRights International, 'Total, Unocal's Partner, Agrees to Compensate Human Rights Victims' (2005) available at http://www.earthrights.org/legal/total-unocals-partner-agrees-compensate-human-rights-victims (accessed 30 May 2013); Total, 'Does forced labor still exist in Myanmar. If so, does Total E&P Myanmar use it' (2013) available at http://burma.total.com/myanmar-en/faq/does-forced-labor-still-exist-in-myanmar.-if-so-does-total-ep-myanmar-use-it-200232.html (accessed 30 May 2013); New York Times, 'Total settles rights case' (2005) available at http://www.nytimes.com/2005/11/29/business/worldbusiness/29iht-total.html?_r=0 (accessed 30 May 2013) Can we really rely on information from Total's website?

[26] Emphasis added.

[27] See ILO Committee on freedom of association, Case N° 2552, 'Complaint against the Government of Bahrain presented by the General Federation of Bahrain Trade Unions (GBTU), paras. 411-12, 349 th Report of the Committee on freedom of association (2008) available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_091464.pdf (accessed 30 May 2013).

In 2007, the General federation of Bahrain trade unions filed a claim before the ILO Committee on freedom of association against the Government of Bahrain arguing in particular that decision No. 62 included as essential services certain establishments being outside the scope of essential services in which strikes may be banned, as defined by international labour standards.[28] The government replied that the ILO Committee on freedom of association indicated on several occasions that each country has the right to regulate the right to strike, as well as to prohibit its exercise in sectors deemed to be essential services, the interruption of which would lead to the disruption of everyday life for all or a certain part of the population. It further argued that the definition of these services as essential takes into consideration the general interests of the population. As to strikes in the petroleum and gas sectors, it put forth that they are not permissible, as these two industries constitute a principal source of national revenue.[29]

In its report, the ILO Committee on freedom of association considered that the petroleum and gas sector are not essential services in the strict sense of the term (that is, services whose interruption would endanger the life, personal safety, or health of the whole or part of the population). It reached this conclusion despite its acknowledgment that 'essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country' and that 'non-essential services may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population'.[30]

This case filed against Bahrain is not isolated. The ILO Committee on freedom of association has been faced with many other claims concerning domestic legislations that placed restrictions and prohibitions on the right of workers to strike in the energy sector.[31] Beyond the example of the right to strike in the context of the oil and gas sector,

[28] See ILO Committee on freedom of association, Case N° 2552, 'Complaint against the Government of Bahrain presented by the General Federation of Bahrain Trade Unions (GBTU), para. 413, *ibid.*
[29] Para. 415-18, *ibid.*
[30] Para. 421-22, *ibid.*
[31] See *e.g.* ILO Committee on freedom of association, Case N° 1576, 'Complaint against the Government of Norway presented by the Norvegian Trade Union Federation of Oil Workers', paras. 91-118, 279 th

these cases illustrate well the fact that violations of labour rights in the energy sector often emanate, not from foreign investors, but from the host states themselves.

2.4. The tripartite dimension of the conflicts of interests underlying labour issues in the energy sector

Important lessons can be learnt from the above-mentioned case-studies as to the type of conflicts of interests that underlie the labour issues in the energy sector.

With respect to the arbitration bias of international investment lawyers,[32] the first lesson relates to the fact that these issues cannot be properly understood if read through the lens of the traditional public/private divide as it exists in investment treaty arbitration. Indeed, these issues do not only/mainly raise a conflict between the public interest of the host state and the private interest of the foreign investor.

The second lesson to be learnt consists in the fact that the conflicts of interests in the energy sector as they impact on the rights of workers take place to a large extent within the 'box' of the public interest. Indeed, as illustrated by the claim filed against Bahrain before the ILO Committee on freedom of association, the conflicts often oppose one public interest, *i.e.* the protection of workers rights, and another public interest, *i.e.* national revenue or national security. It is worth noticing that the private interest of foreign investors is not (directly) involved in such conflicts, even though such prohibitions and restrictions of labour rights may (indirectly) serve their own interests.

Thirdly and as illustrated in a way by the Yadana gas project in Myanmar, the public interest that can be opposed to workers' rights may be conceived of as tinted with the private interests of the individuals or groups exercising the domestic public authority. In addition, in such situations, the private interest of foreign investors often appears to form

Report of the Committee on freedom of association (1991) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2902142 (accessed 30 May 2013). Anything in the (abandoned) Norvegian Model BIT? At that stage of the paper, I do not discuss the solutions offered by IIAs.

[32] See *supra* introduction.

part of the web of conflicts of interests that characterize the labour issues in the energy sector.

Taking these lessons seriously, it is impossible to conceive of the labour issues in the energy sector in a Manichean manner. These issues and their underlying conflicts of interests are characterized by a tripartite dimension that concerns home states' interests, workers' interests and foreign investors' interests. In light of these findings, one can now move to the analysis of international investment agreements to assess their potential in addressing these labour issues.

3. Labour issues in the energy sector and international investment law

Numerous existing mechanisms on the international plane appear to be of relevance to address the labour issues raised in the energy sector. Some of them have the potential to cover a broad range of alleged violations of labour standards, in particular ILO committees, as illustrated by the above-mentioned cases dealt with by the ILO Committee on freedom of association. On the opposite, some mechanisms are designed in such a way that they could only be used to address specific alleged violations, *i.e.* the International criminal court with respect to forced labour.[33] On a different level of normativity and enforcement, 'soft law' initiatives emanating from international organizations, *e.g.* the UN Global compact[34] and the Human Rights Council Guiding

[33] Even though many issues are open to discussion as to the elements of the crime against humanity, forced labour may be regarded as a crime against humanity under art. 7 of the Statute of the International criminal court (ICC). Such a suggestion is in particular supported by the footnote 11 to the art. 7.1.c of the ICC Elements of the crime which states: 'It is understood that such deprivation of liberty may, in some circumstances, include exacting *forced labour* (emphasis added) or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956', see Rome Statute of the International Criminal Court (1998) and ICC Elements of the Crime (2002), available at http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx (accessed 30 May 2013). See also James L. Bischoff, 'Forced Labour in Brazil: International Criminal Law as the *Ultima Ratio* Modality of Human Rights Protection', *Leiden Journal of International Law* 19 (2006), 151.

[34] See the United Nations Global Compact, information available at http://www.unglobalcompact.org (accessed 30 May 2013). What about the Human Rights Council Guiding Principles? See also *i.e.* the OECD Guidelines on multinational enterprises (1976) (as updated in 2011), available at http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 30 May 2013).

Principles[35] as well as from corporations[36] and private networks/frameworks are also relevant as to the labour issues raised in the energy sector.[37]

Among the available mechanisms on the international plane, this chapter focuses on international investment law. More specifically, it discusses the labour provisions that characterize the new generation of international investment agreements,[38] *i.e.* bilateral investment treaties (BIT) and (mainly) FTA[39] with the view to assess the extent to which they can be of assistance as to the labour issues raised in the energy sector.[40] Taking the 2012 US BIT model,[41] as a point of reference and discussion, the chapter inquires four types of clause provided in the body of these agreements: the 'adherence' clauses (3.1),

[35] See Guiding principles on business and human rights: implementing the United Nations 'Protect, Respect and Remedy' framework, annexed to the Final report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (John Ruggie) (2011) UN Doc. A/HRC/17/31 available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (accessed 30 May 2013).

[36] See *e.g.* 'Corporate Social Responsibility in Total's Business Model' (2009) available at http://www.total.com/fr/investisseurs-institutionnels/presentations/csr-total-business-model-novembre-2009-400501.html (accessed 30 May 2013).

[37] See Jedrzej G. Frynas, 'Corporate Social Responsibility in the Oil and Gas Sector', *Journal of World Energy Law & Business* 2-3 (2009), 178.

[38] The first references to labour rights were made in IIA's preambles. For instance, the first BIT which mentioned those rights, *i.e.* the US-Poland BIT, provided 'that the development of business and economic ties can contribute to the well-being of workers in both countries and promote respect for fundamental worker rights'. As noted in the literature, '(s)tatements of this kind were premised on the belief that increased FDI flows will, in itself, inevitably lead to an improvement of labor standards in recipient countries', see Vid Prislan, Ruben Zandvleit, *supra* note 21, 23. See US-Poland BIT (1991) available at http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (accessed 30 May 2013). On the relationship between labour standards and FDI operations, see David Kucera, 'Normes fondamentales du travail et investissements directs étrangers', *Revue internationale du travail* 141-1/2 (2002), 33.

[39] These provisions are characteristic of FTA. Indeed, few BITs have such provisions in particular outside the treaty practice of North-American states. Such language can be found in self-standing provisions, in independent chapters or in side letters/chapters.

[40] Given the 'accessory' dimension of the analyses here conducted, the chapter does not discuss the clauses that provide for (general) exceptions or 'sanctuarize' the right of states to regulate, in particular with respect to labour standards. Indeed, as above-mentioned, the energy sector is not characterized by situations where labour issues result from the investors' allegation that state measures aiming at the promotion/protection of labour standards affect their investment in such a way that they are in violation of the applicable IIA.

[41] See US BIT Model (2012) available at http://www.state.gov/documents/organization/188371.pdf (accessed 30 May 2013).

the 'no-lowering standards' clauses (3.2), the 'institutional arrangement' clauses (3.3) and the 'corporate social responsibility' (CSR) clauses.[42]

3.1. The 'no-lowering standards' clauses

Article 13.2 of the 2012 US BIT Model provides:

> The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor law. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[43]

Various components of this provision deserve examination and clarification, in relation to the treaty practice of other states, as to the nature and the object of state parties commitments.

As to the nature of the commitment, it is worth noticing that Article 13.2 places upon states an obligation of result. If such a binding approach is followed by other states,[44] it remains that mainstream practice places an obligation of means upon states by providing

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[42] The objective being to analyse these provisions in relation to the labour issues raised in the energy sector, this chapter 'depicts' their general features without discussing in the abstract all the specificities of treaty practice in terms of the drafting of each provision and of their combination in existing IIA. For analyses of IIA labour provisions, see *i.e.* Kimberly A. Elliott, 'Labor Standards and the Free Trade Area of the Americas', Working paper 03-7 Institute for International Economics (2003) available at http://www.iie.com/publications/wp/03-7.pdf (accessed 30 May 2013); David A. Gantz, 'Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements', *U. Miami Inter-Am. L. Rev.* 42 (2010-11), 237; OECD, 'International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues' (2008) available at http://www.oecd.org/corporate/mne/40471550.pdf (accessed 30 May 2013); Vid Prislan, Ruben Zandvleit, *supra* note 21.

[43] US BIT model (2012), *supra* note 42.

[44] See *e.g.* art. 18.2.1, Peru-Korea FTA (2010) available at http://www.customs.go.kr/kcshome/main/content/ContentView.do?contentId=CONTENT_ID_000002364&layoutMenuNo=23272 (accessed 30 May 2013).

that states 'shall strive to ensure'[45] or rely on an 'incentivising' language by providing that states 'should not waive or otherwise derogate'.[46]

Concerning the object of the commitment, several remarks can be formulated. First of all, these obligations refer generally to effective waiver or derogation or to the offer to waive or derogate, as illustrated by the above-mentioned Article 13.2. Second, besides targeting positive actions, some treaties such as the 2012 US BIT model also cover omissions by mentioning the failure to enforce the law.[47] Thirdly, while Article 13.2 of the 2012 US BIT model refers to a 'sustained or recurring' conduct from the states, it can be noticed that this 'consistency' in states' policy is not required by all IIA, with the consequence that a single failure to enforce domestic labor law may be regarded as a violation of that type of treaty provision.[48] Fourthly, the state conducts covered by these treaty clauses are generally not limited *ratione personae* to those that address the investors of the other(s) state partie(s), but cover more broadly the conducts addressing all the investors being on the territory of the state party concerned, irrespective of their nationality. Fifthly, are generally targeted state conducts that aim at attracting investors or maintaining their presence on the territory of the state party concerned.[49] Finally, these 'no-lowering standards' provisions are not all-encompassing as to the labour rules they cover, but refer to the domestic labor legislation[50] that relates to a set of international standards. Although there exist slight differences as to this 'international benchmark', this set is generally linked to ILO norms or/and the 1998 ILO Declaration.[51] It is worth noticing that these treaty provisions have traditionally included acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health (that is not listed

[45] See *e.g.* art. 18.2.2, US-Chile FTA (2003) available at http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta (accessed 30 May 2013).

[46] See *e.g.* art. 101, Japan-Switzerland FTA (2009) available at http://www.mofa.go.jp/policy/economy/fta/switzerland.html (accessed 30 May 2013).

[47] See *e.g.* art. 34.1, EFTA-Montenegro FTA (2011) available at http://www.efta.int/legal-texts.aspx (accessed 30 May 2013).

[48] See *e.g.* art. 13, US BIT model (2004) available at http://www.state.gov/documents/organization/117601.pdf (accessed 30 May 2013).

[49] Some IIA obligations do not refer to the encouragement of investments, but to the effect of such measures on trade and investment between the parties, see *e.g.* 17.3.a, US-Jordan FTA (2009) available at http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text (accessed 30 May 2013).

[50] As to federal states, such as the US, the domestic labor law referred to consists in the federal labour legislation, the states labour law being excluded from the scope of IIA, see *e.g.* art. 13 US BIT model, footnote 17 (2012), *supra* note 42.

[51] ILO Declaration on fundamental principles and rights at work and its follow-up (1998), *supra* note 4.

in the 1998 ILO Declaration), but excluded the elimination of discrimination in relation to employment and occupation (that is listed in this Declaration).[52]

In light of the above, two main remarks can be formulated with respect to the labour issues raised in the energy sector. First of all, that type of treaty provisions covers most of the issues raised in this sector, *i.e.* acceptable conditions of work with respect of occupational safety and health and the prohibition of forced labour. As to the right to strike and as above-mentioned,[53] it is still unclear whether it is encompassed by the right of freedom of association. In this respect, the Labor cooperation agreement concluded between Canada and Peru settles this controversy inasmuch as it includes expressly the protection of the right to organize and the right to strike.[54] Despite the fact that most of the labour issues raised in the energy sector appear to be *ratione materiae* covered by the IIA 'no-lowering standards' provisions, such provisions will often be ineffective inasmuch as state conducts in this sector do not generally aim at attracting or maintaining the presence of foreign investors, but instead at the satisfaction of interests that relate (more or less) to other public interests, such as national security or national revenue.

3.2. The 'adherence' clauses

Article 13.1 of the 2012 US BIT model provides: 'The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up.[55]' That type of provision pursues an objective similar to the IIA clauses that provide for the commitment of state parties to ensure that their domestic labour legislation is consistent with internationally recognized standards.[56] Most IIA that

[52] By doing so, mainstream treaty practice reflects the traditional US practice. It is worth noticing that the last BIT model incorporates discrimination in respect of employment and occupation, see art. 13.3.e US BIT model (2012), *supra* note 42.
[53] See *supra* note 21.
[54] See art 1.1, Canada-Peru Labor Cooperation Agreement (2012) available at http://www.hrsdc.gc.ca/eng/labour/labour_agreements/cpalc/index.shtml (accessed 30 May 2013).
[55] US BIT model (2012), *supra* note 42.
[56] See *e.g.* art. 16.1.2. US-CAFTA-DR FTA: 'The parties affirm their full respect for their Constitutions. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 16.8 and shall strive to

contain similar clauses refer to the reaffirmation of state parties' obligations. However, some of them use a binding language relying on an obligation of means ('shall strive to ensure')[57] or an obligation of result ('shall ensure').[58] As to the object of these commitments, the 'adherence' provisions refer usually to ILO state parties' obligations as well as to the principles enshrined in the 1998 ILO Declaration which, as above-mentioned, are binding upon states irrespective of their ratification of the corresponding ILO conventions.

These 'adherence' clauses appear to be relevant in the context of the discussion of the labour issues raised in the energy sector. First, they cover a broad range of labour standards, in particular the core standards. Second and most importantly, the respect of ILO obligations or commitments is not linked in any way to the encouragement of investment, but instead has a general teleological scope of application. As a result, the 'adherence' clauses apply to state measures restricting labour rights for the sake of other public interests. The main limit of this type of provision to address the labour issues raised in the energy sector consists in the 'sliding scale' that characterizes their normativity, from an inspirational language to the provision of an obligation of result. However, the consequences of such 'relative normativity' are limited by the institutional arrangements provided in the new generation of IIA, in particular FTA.

Before focusing on these institutional arrangements, one can illustrate the usefulness of the 'adherence' clauses in combination with these arrangements by reporting the recent US submission 2011-01 against Bahrain, filed by the American federation of labour and Congress of industrial organizations with the Office of trade and labor affairs (OTLA) of the US Department of labor's bureau of international labor affairs. In its report,[59] the

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improve those standards in that light', US-CAFTA-DR FTA (2004) available at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (accessed 30 May 2013).

[57] See *e.g.* art 17.1.2, US-Singapore FTA (2004) available at http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta (accessed 30 May 2013).

[58] See *e.g.* art 17.2, US-Peru FTA (with respect to the ILO Declaration's Principles) (2006) available at http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text (accessed 30 May 2013).

[59] See Office of trade and labor affairs, Bureau of international labor affairs, US Department of labor, 'Public report of review of U.S. Submission 2011-01 (Bahrain)' (2012) available at http://www.dol.gov/ilab/programs/otla/20121220Bahrain.pdf (accessed 30 May 2013).

OTLA considers that trade unionists and, in particular, trade union leaders in Bahrain have been targeted for dismissal and, in some cases, prosecution, in part for their role in organizing and participating in the March 2011 general strike. Furthermore, it argues that the widespread dismissals after this strike reflected discrimination based in part on political opinions and activities. These events are regarded by the OTLA as a violation of Article 15.1.1 and 15.1.2. of the US-Bahrain FTA.[60] In light of these conclusions, the OTLA recommends 'to the Secretary of Labor that the Government of the United States request Labor Consultations under Article 15.6.1([61]) of the FTA to consult with the Government of Bahrain on the matters raised in this report.[62]' Besides illustrating the potential of the 'adherence' clauses, this case also exemplifies the role of the 'institutional arrangements' clauses that are combined with the former type of clause and/or the 'no-lowering standards' clause discussed earlier in the chapter.

3.3.The 'institutional arrangement' clauses

Article 13.4 of the 2012 US BIT Model provides:

> A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter,

[60] '1. The parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) ("ILO Declaration"). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 15.7 are recognized and protected by its law. 2. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor law, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 15.7 and shall strive to improve those standards in that light'. Para. 7 refers to 'the right of association, the right the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health', US-Bahrain FTA (2006) available at http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta (accessed 30 May 2013).

[61] 'A Party may request consultations with the other Party regarding any matter arising under this Chapter by delivering a written request to the other Party's contact point. Unless the Parties agree otherwise, consultations shall commence within 30 days after a Party delivers a request for consultations to the other Party's contact point designated pursuant to paragraph 2 of Article 15.4.', *ibid.*

[62] Office of trade and labor affairs, Bureau of international labor affairs, US Department of labor, 'Public report of review of U.S. Submission 2011-01 (Bahrain)' (2012), *supra* note 60, 40.

the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

This provision illustrates the institutional 'common denominator' of treaty practice inasmuch as they all provide for an inter-State consultation.[63] Beyond this 'common-denominator', the treaty practice evidences many differences. First of all, depending on the IIA concerned, this consultation can be relied on in situations where a dispute has already arisen,[64] or more preventively, for any matter as stated for instance in the article 13.4 of the 2012 US BIT model. Secondly, this consultation can be conducted on an *ad hoc* basis, as illustrated (as well) by the above-mentioned article, or in an institutional setting. In the latter situation, in case of failure of the consultation, a permanent committee established to supervise the proper enforcement of the agreement and to review the relationship between the parties can be seized to resolve the dispute.[65] Some IIA also provide for the competence of a dispute settlement panel, either as to cases where the committee cannot reach an agreement[66] or irrespective of the existence of such an institutional arrangement and a permanent committee.[67] The report of the dispute settlement panel can be non-binding[68] or binding upon the parties[69] depending on the IIA concerned. The recourse to arbitration is generally limited to 'trade-related' disputes.[70] As to the output of these procedures, it is worth noticing that some IIA provide for a

[63] Private entities are largely excluded from the enforcement of treaty provisions. However, two mechanisms can be noticed that aims at 'giving voice' to them. First of all, some IIA provide that state parties shall ensure that requests emanating from employers, employees or their representative are given due consideration by domestic authorities. Second, some IIA entitle private entities to submit recommendations as to the alleged violations of their obligations by state parties, this recommendation having the potential to result in an inter-state consultation. For the first mechanism, see *e.g.* art. 17.4, US-Peru FTA, *supra* note 57. For the second mechanism, see *e.g.* art. 17.4.5, US-Singapore FTA, *supra* note 55 and the example of the U.S. Submission 2011-01 (Bahrain), *supra* note 60.

[64] See *e.g.* art. 13.1, US-Rwanda BIT available at http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf (accessed 30 May 2013).

[65] See *e.g.* art. 17.1.b US-Jordan FTA, *supra* note 50. The institutionalization of the arrangement does not only aim at addressing existing and potential disputes, but also at improving the cooperation between states. In this respect, they establish Labor Cooperation and Capacity Building Mechanism, see *e.g.* 16.5, US-CAFTA-DR, *supra* note 57.

[66] See *e.g.* art. 17.1.b, US-Jordan FTA, *supra* note 50.

[67] See *e.g.* art. 6.4, 12 and 13, Belgo-Luxembourg Economic Union-Mauritius BIT available at http://unctad.org/sections/dite/iia/docs/bits/BLEU-Mauritius-eng.pdf (accessed 30 May 2013).

[68] See *e.g.* art. 17.1.d, US-Jordan FTA, *supra* note 50.

[69] See *e.g.* art. 16.6.7, US-CAFTA-DR FTA, *supra* note .

[70] See *e.g.* art. 16.6.7, US-CAFTA-DR FTA, *supra* note 56. Some IIA provide that all labor provisions can be subjected to arbitration, see *e.g.* art. 17.7.6, US-Jordan FTA, *supra* note 49.

mechanism of 'annual monetary assessment'[71] or 'trade sanctions'[72] in case of the non-implementation of the report of the dispute settlement panel or of the agreement reached thereafter by the parties. As to the *ad hoc* consultations provided in the provisions similar to the above-mentioned Article 13.4 of the 2012 US BIT model, it is worth noticing that the IIA that contain them are ill-equipped to constrain states to effectively comply with their labour provisions.

Obviously, these institutional mechanisms can play an important role to foster the protection and promotion of labour standards in the energy sector. However, this effect will be proportional to the 'teeth' the concerned IIA is equipped with. It goes without saying that the few IIA that give jurisdiction to a dispute settlement panel as to any dispute regarding any of their labor provisions are very likely to be the most effective. Through a different path, the institutional mechanisms aiming at the prevention of treaty violations and at the strengthening of the inter-state cooperation for the sake of labour standards are also likely to greatly contribute to the improvement of labour conditions in the energy sector.

3.4. The 'CSR' clauses

Among all the treaty provisions that can play a role to foster labour standards in the energy sector, the CSR clauses are the most peculiar for two main reasons. First of all, although they formally 'target' state parties, they eventually aim at impacting on the respect of labour rights (among other rights) by corporations, *i.e.* multinational corporations. Second of all, they are provided in a very limited number of IIA. In a few of those treaties, the intention of the parties to encourage corporate social responsibility is provided in the Preamble. For instance, in the Preamble of EFTA-Hong Kong FTA the parties acknowledge 'the importance of good governance and corporate social responsibility for sustainable development, and affirm their aim to encourage enterprises

[71] The assessment is transferred to a fund that aims at improving labour conditions in the state complained against, see *e.g.* art. 20.17, US-CAFTA-DR FTA, *supra* note 57.
[72] See art. 17.2.a, US-Jordan FTA, *supra* note 50.

to take into account internationally recognized guidelines and principles where appropriate.[73]' In most of the treaties concerned, the intention of the parties is expressed in the treaty body. Most provisions,[74] are similar to article 9.17 of the Canada-Panama FTA which provides:

> Each 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 internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

Beyond the scarcity of these CSR provisions in existing IIA, their effect is limited by the double limitation that characterises them. Indeed, they only require from state parties that they *encourage* corporations to *voluntarily* incorporate international standards of CSR, in particular with respect to labour principles. Beyond their normative features, the added-value of these provisions may be put into question with respect to the multinational corporations operating in the energy sector, inasmuch as many of them are already equipped with CSR codes of conduct.[75] That being said, *soft law* initiatives contribute to the hardening of CSR as pointed out by John Ruggie[76] and will likely contribute to make these companies more aware of their societal responsibilities especially in the energy sector.

[73] See preamble, EFTA states – Hong Kong FTA (2011) available http://www.efta.int/free-trade/free-trade-agreements/hong-kong.aspx (accessed 30 May 2013).
[74] The draft Norway BIT model for instance uses another formula by providing that 'the parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact', see art. 32, draft Norway BIT model available at http://www.italaw.com/sites/default/files/archive/ita1031.pdf (accessed 30 May 2013).
[75] See *e.g.* 'Corporate Social Responsibility in Total's Business Model' (2009), *supra* note 37.
[76] See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (John Ruggie) UN Doc. A/HRC/4/35 (2007), para. 61 available at http://www2.ohchr.org/english/bodies/chr/special/sp_reportshrc_4th.htm (accessed 30 May 2013).

Conclusion

This chapter unravels and analyses the labour issues that exist in the energy sector, *i.e.* the oil and gas sector, and examines how international investment law can be used to address these issues. From the enquiries here conducted, three main conclusions can be drawn.

As to the labour issues as such, it appears that there is a discrepancy between the negative perception of the public as to the working conditions in this sector and the rather positive day-to-day workers' experience. It remains that there are indeed labour issues that are raised in the energy sector, especially related to occupational safety, restrictions/prohibitions of the right to strike and forced labour.

The second conclusion concerns the nature of the conflicts of interests that underlie these issues. Contrary to investment arbitration that is characterized by the public/private conflict of interests, labour issues appear to result from conflicts of interests having a tripartite dimension inasmuch as they involve the private interest of foreign investors, the public interest of workers and other states' public interest, *e.g.* national security. Depending on their exact drafting, the provisions characteristic of the new generation of IIA and in particular FTA have the potential to address these labour issues and their underlying conflict of interests, especially those existing within the 'box' of the public interest.

Last but not least, it is worth noticing that this tripartite understanding of the conflicts of interests is not merely relevant to discuss the labour issues in the energy sector. Indeed, this '*grille de lecture*' is applicable both to other sectors beyond the energy sector and to other 'humanitarian' issues beyond labour issues. In other words, all FDI operations raise tripartite conflicts of interests, in particular within the public interest's 'box', where *e.g.* the promotion/protection of human rights and of the environment, the protection of national security, the promotion of economic development can all clash the one with the other. In this context, the tripartite paradigm sketched in this chapter can assist to shed some light on the complexities of FDI operations and to bring them out of the unintelligibility where the academic focus on investment arbitration and the fragmentation narrative[77] ground them.

[77] See Yannick Radi, 'The "Human Nature" of International Investment Law', *supra* note 3.