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Labour Provisions and Dispute Settlement in International Investment Agreements

An Inquiry into the Politicization of the Settlement of 'Labour Disputes'

1. Introduction

As part of the principle of sustainable development,[1] the protection of social rights and labour conditions, as well as of the environment, are gaining increasing importance in the field of international investment law (IIL). This is the result of two phenomena that have met in recent years. The first is the rise of sustainable development as a policy objective of states and international organizations, a development which has not been exclusive to IIL, but has been prevalent in public international law more widely.[2] The second development is specific to IIL. It relates to questions about the scope of the regulatory power of host states under international investment agreements (IIAs) and, more particularly, about the ability of host states to regulate for public interest purposes under IIAs without running the risk of being held internationally responsible by arbitral tribunals and condemned to compensate foreign investors. In connection with these concerns, there has been frequent debate in the literature about the existence of a 'chilling effect' on state regulatory action brought about by uncertainty over the scope of IIA obligations, as well as the alleged existence of a pro-investor bias by arbitral tribunals.[3] It is not necessary to resolve that debate here, for irrespective of the existence of a 'regulatory chill' phenomenon or of a pro-investor bias, it remains the case that the rising importance of sustainable development in this field results from the will of states to draft treaties which more

[1] See United Nations General Assembly 'Declaration on Environment and Development' (22 December 1992) UN Doc A/ RES/47/190 <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>; UNGA 'Declaration on the 'Future We Want' (27 July 2012) UN Doc A/RES/66/288 [1] <http://www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf>.
[2] See (n 1) ; See also 'World Commission on Environment and Development : Our Common Future' (*UN Documents,* 1987) <http://www.un-documents.net/our-common-future.pdf>; International Law Association, 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development' (70th Conference New Delhi, 2-6 April 2002) <http://cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf>.
[3] Some argue that IIAs and arbitration have such a chilling effect and that arbitration tribunals favour foreign investors' interests. See M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 39; J Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in PM Marie Dupuy and others (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 275. On the opposite side, others put forward that mainstream arbitration practice balances quite fairly the interests of foreign investors and those of host states. See Y Radi, 'The Human Nature of International Investment Law' (2013) 1 Transnational Dispute Management 4.

explicitly make reference to these matters and better protect public interests, notably the environment as well as social rights and labour conditions.[4]

The promotion of sustainable development, often referred to in IIAs preambles,[5] translates into two treaty strategies, which, despite having a common 'teleological denominator,' are characterized by two different rationales. The first strategy is well-known and extensively discussed in the literature. It aims at reinforcing the right of host states to regulate for the benefit of public interests. It consists of general[6] and specific[7] exceptions that provide *mutatis mutandis* that IIAs do not prevent states from adopting regulations protecting public interests.[8] It is debateable whether such

[4] In this respect, it has been noted in the literature that the first references to 'sustainable development' in IIAs (See n 5) stemmed from the idea that foreign direct investments (FDIs) operations by themselves would promote sustainable development, i.e. labour standards. Since then, the realization that FDIs can 'hurt' labour standards has led, as discussed below, to an evolution of the treaty strategy and treaty provisions taking into account this potential negative impact. See V Prislan and R Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy* (OUP 2012-13) 358, 377.

[5] The first BIT which mentioned those rights (i.e.) provides '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'. Treaty Between the United States of American and the Republic of Poland Concerning Business and Economic Relations (entered into force 6 August 1994); See also the preamble of the North-American Free Trade Agreement, North America Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States (entered into force 1 January 1994) ('The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: (...) STRENGTHEN the development and enforcement of environmental laws and regulations'); See also the preamble of the Netherlands-Namibia BIT, Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Namibia (entered into force 1 October 2004) ('Considering that these objectives [of investment protection] can be achieved without compromising health, safety and environmental measures of general application'); See also the preamble of the United States-Chile Free Trade Agreement, United States-Chile Free Trade Agreement (entered into force 1 January 2004) ('The Government of the United States of America and the Government of the Republic of Chile, resolved to: (...) PROMOTE sustainable development') (US-Chile FTA).

[6] See for example, Model Agreement for the Promotion and Protection of Investments (2004) art 10 <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> ('Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources').

[7] See for example, 2012 US Model Bilateral Investment Treaty, Annex B <http://www.state.gov/documents/organization/188371.pdf> (2012 US Model BIT) ('Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.')

[8] For a typology of the different types of general exception provisions, see S A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(4) Journal of International Economic Law 1037, 1060-62.

exceptions result in substantively different interpretations and applications of treaty protections, as compared to the current mainstream of arbitral rulings on standards like indirect expropriation and fair and equitable treatment.[9] Nevertheless, it remains true that the intended objective of these provisions is to provide textual reinforcement for host states' continued exercise of bona fide regulatory power without incurring international responsibility.

The second treaty strategy is largely unexplored in the literature and constitutes what appears to be a landmark (r)evolution in the field of international investment law. As discussed in detail below, this strategy actually sets limits on states' regulatory power with the view to thereby fostering sustainable development. More precisely, this strategy translates into substantive provisions aimed at protecting the environment and labour conditions in host states. Most importantly, for the purposes of this article, these provisions are often combined with a dispute settlement mechanism specifically designed to resolve disputes between the states parties with respect to these obligations, permitting one state to initiate a claim against the other with respect to an alleged failure to abide by the treaty's relevant provisions.

This article focuses on this second treaty strategy in relation to the way in which a number of IIAs have begun to treat host state labour conditions. It is contended that the move away from the method of dispute settlement traditionally resorted to in IIAs (i.e. arbitration) for the purposes of disputes regarding labour conditions is the result of the unprecedented limitation that these IIAs' labour provisions place on states' regulatory power. This limitation, which is discussed below, effectively leads to a politicization of the settlement of 'labour disputes,'[10] a concept quite distinct from the legalized settlement of disputes between investors and states afforded through arbitration.

To support this claim, Section 2 offers an analysis of the labour provisions found in IIAs. It examines the relevant substantive provisions as well as the dispute settlement mechanism provisions specifically providing for the settlement of labour disputes. In

[9] For this discussion, see Y Radi, 'International Investment Law and Development: a History of Two Concepts' in S Schill and others (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar 2015) (forthcoming).

[10] The notion of 'labour disputes' refers to the disputes arising from the alleged violation of the IIAs' labour provisions that are discussed in this article and that aim at the protection of labour conditions.

light of that analysis and of existing disputes, Section 3 inquires into the specificities of labour disputes and their settlement. As to the former, it shows that labour disputes are underpinned by multi-faceted conflicts of interests that distinguish these disputes from traditional investor-state disputes. With respect to the settlement of these disputes, Section 3 addresses the policy challenges that stem from the politicization of these disputes and, in particular, tackles the issue of its legitimacy and of its efficiency.

2. Mapping treaty practice: a positivistic overview of IIA labour provisions

This section undertakes an overview of the IIA provisions relevant for the discussion of labour disputes and their settlement.[11] It starts with an analysis of the main features of the provisions aimed at the protection of labour conditions (2.1). It then addresses the provisions on dispute settlement (2.2).[12]

2.1 Overview of the substantive provisions aimed at the protection of labour conditions

This subsection examines two types of provisions: first, those targeting the lowering of labour standards by IIA states parties (2.1.1), and second, the provisions that express the shared commitments of states parties towards labour standards (2.1.2).

2.1.1 'No-lowering standards' provisions

Whatever the real effect of the lowering of labour standards to attract foreign direct investment (FDI),[13] the IIA provisions that address the possible lowering of labour standards are intended to avoid 'races to the bottom' between states.[14]

An example of such provisions can be found in the 2012 US Model BIT article 13, which reads in relevant part as follows:

[11] The objective pursued in this section is to introduce the discussion of the specificities of labour disputes and of the settlement of those disputes, not to offer an exhaustive classification. As such, it does not map exhaustively all the nuances of those provisions, nor their various combinations in existing IIAs, but rather, emphasizes their main features.

[12] Given the focus of this paper on dispute (settlement), the institutional arrangements that aim at strenghtening the cooperation between IIAs' state parties are not analyzed *per se*.

[13] For a discussion of this question, see Prislan and Zandvliet (n 4) 363-66.

[14] For examinations of this phenomenon, see D Charney, 'Regulatory Competition and the Global Coordination of Labor Standards' (2000) 3 Journal of International Economic Law 283; RB Davies and K Chaitanya Vadlamannati, 'A race to the bottom in labor standards? An empirical investigation' (2013) 103 Journal of Development Economics 1.

Article 13: Investment and Labor

1. 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.*
2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. 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. [15]
3. For purposes of this Article, "labor laws" means each Party's statutes or regulations, or provisions thereof, that are directly related to the following:
   (a) freedom of association;
   (b) the effective recognition of the right to collective bargaining;
   (c) the elimination of all forms of forced or compulsory labor;
   (d) the effective abolition of child labor and a prohibition on the worst forms of child labor;
   (e) the elimination of discrimination in respect of employment and occupation; and
   (f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Various components of this article deserve to be examined and clarified, in light of treaty practice, as to the nature and the object of the parties' commitments. As to the nature of the commitment, it is worth noting that article 13.2 places upon states an obligation of result ('each Party shall ensure . . .'). While such a binding approach is adopted in other IIAs, [16] practice in this respect is not uniform. Other treaties

[15] See 2012 US Model BIT (n 7) art 13.2 (footnote omitted). It is to be mentioned that the commitment not to waive or derogate from labour laws and the commitment not to fail to enforce them are -- depending on IIAs—included either in the same article, such as in the 2012 US model BIT, or in different articles. For instance, the commitment not to derogate is mentioned in the article on 'Shared Commitment', see United States - Peru Trade Promotion Agreement (entered into force 1 February 2009) (US-Peru PTA). Whatever the exact provision they are provided in, it remains true that the commitment not to waive or derogate from labour laws and the commitment not to fail to enforce them pursue a similar objective.

[16] See for example, Free Trade Agreement between the EFTA States and Bosnia Herzegovina (entered into force 1 January 2015) art 36 'Upholding Levels of Protection on the Application and Enforcement of Laws, Regulations or Standards'.

containing similar provisions place (only) an obligation of means upon states by providing that states 'shall strive to ensure'[17] or rely on an 'incentivising' language by providing that states 'should not waive or otherwise derogate'.[18]

Concerning the object of the commitment, several remarks can be made. Firstly, as to obligations not to fail to enforce labour laws, some treaties, such as article 13.2 of the 2012 US Model BIT, besides targeting positive action, also cover inaction ('or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction . . .'). Other IIAs do not make such a distinction between action and inaction, the question being whether inaction (i.e., the lack of enforcement of labour laws) is then covered by those IIAs.[19] This is an important issue inasmuch as the weakening of labour standards often results from a lack of enforcement and not from formal derogations.[20]

Secondly, as to obligations not to waive or derogate from labour laws, these obligations refer generally to effective waiver or derogation or to the offer to waive or derogate, as illustrated in the text of article 13.2 of the 2012 US Model BIT ('it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws'). This means that these obligations apply not only to the waivers or derogations that effectively occur, but also to the offers to waive or derogate from labour laws, even if they do not materialize into effective waivers or derogations.

Thirdly, while IIAs usually link the obligation not to fail to enforce labour laws to a 'sustained or recurring' conduct of the state, they do not provide for such a requirement of consistency as to obligations not to waive or derogate from labour laws.[21]

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[17] See for example, US-Chile FTA (n 5) art 18.2.2 ('Enforcement of Labor Laws').

[18] See for example, Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation (entered into force 1 September 2009) art 101 ('Health, Safety and Environmental Measures') (Japan-Switzerland EPA).

[19] See for example, Free Trade Agreement between the EFTA States and Montenegro (entry into force: 1 September 2012 for Montenegro, Liechtenstein and Switzerland; 1 October 2012 for Iceland; 1 November 2012 for Norway) art 34.1 ('Upholding Levels of Protection in the Application and Enforcement of Laws, Regulations or Standards').

[20] See for example, Prislan and Zandvliet (n 4) 363-66.

[21] See for example, US-Chile FTA (n 5) art 18.2.1 and 18.2.2 ('Enforcement of Labor Laws') ; US-Singapore Free Trade Agreement (entry into force 1 January 2004) art 17.2 ('Application and Enforcement of Labour Laws') (US-Singapore FTA).

Fourthly, as stated in article 13.2 of the 2012 US Model BIT, these 'no-lowering standards' provisions are not all-encompassing with respect to the labour rules that they cover, but refer to the domestic labour legislation[22] that relates to a set of international standards. Although there exist slight differences as to this 'international benchmark', this set of international standards generally includes, as in article 13.1 of the 2012 US Model BIT, the norms of the International Labour Organization (ILO) and/or the 1998 ILO Declaration.[23] These norms refer to: freedom of association and right to collective bargaining; elimination of forced and compulsory labour; abolition of child labour; and elimination of discrimination in respect of employment and occupation.[24] It is worth noting that, like the 2012 US Model BIT, IIA 'no-lowering standards' provisions have traditionally also included acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health (which is not listed in the 1998 ILO Declaration).[25] On the other hand, they have traditionally excluded the elimination of discrimination in respect of employment and occupation that is listed in the Declaration,[26] although the 2012 US Model BIT does include reference to this protection as well.[27]

Fifthly, as illustrated in article 13.2 of the 2012 US Model BIT, 'no-lowering standards' provisions generally link the lowering of labour standards with the aim of attracting investors or maintaining their presence in the territory of state parties ('it is inappropriate to encourage investment by weakening or reducing the protections . .

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[22] In federal states, such as the United States, domestic labour law refers to the federal labour legislation, states labour law being excluded from the scope of IIAs. See 2012 US Model BIT (n 7) art 13.3 ('For the United States, "statutes or regulations" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.').

[23] See e.g. The Dominican Republic – Central America – United States Free Trade Agreement (2004) art 16.8 ('Definitions') (CAFTA-DR FTA); Canada-Korea Free Trade Agreement (entered into force 1 January 2015) art 18.2 ('General obligations') and 18.3 ('Non-derogation') (CKFTA).

[24] ILO, 'Declaration on Fundamental Principles and Rights at Work and its Follow-up' adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 and Annex revised 15 June 2010) <http://ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

[25] 2012 US Model BIT (n 7) art. 13.3.f.

[26] See e.g. US – Morocco Free Trade Agreement (entered into force 1 January 2006) art 16.7 ('Definitions')

[27] 2012 US Model BIT (n 7) art. 13.3.e. This reference was added in the 2012 revision to the US Model BIT. The 2004 US Model BIT also contained a provision on labour standards but did not include a reference to the elimination of discrimination in employment. See 2004 US Model Bilateral Investment Treaty art 13 http://www.state.gov/documents/organization/117601.pdf. In that sense, mainstream treaty practice reflects the 2004 US approach.

.').[28] These obligations not to waive and derogate from labour laws, as well as not to fail to enforce them, are thus connected to the effects of such conduct on trade and investment. As a result, they arguably do not apply irrespective of any such effect and intent and therefore they do not serve as a general prohibition.

Last, but not least, it is worth emphasizing that the state conducts covered by 'no-lowering standards' provisions are generally not limited *ratione personae* to conducts that address the investors of the other state partie(s) to the IIA.[29] As a result, those provisions can be interpreted as covering more broadly all the state conducts that aim at attracting investors and maintaining their presence, whether addressed to covered investors and investments or those of non-contracting parties.[30] Although most IIAs are implicit on this point by referring to investors in general without any detail as to their home states, some IIAs provide explicitly that the prohibition to lower standards also applies to investors of a non-contracting party. An example is Article 25 ('Health, Safety and Environmental Measures and Labour Standards') of the Japan-Myanmar BIT, which reads as follows:

> Each Contracting Party shall refrain from encouraging investment by investors of the other Contracting Party by relaxing its health, safety or environmental measures or by lowering its *labour standards*. To this effect each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion in its Area of investments by investors of the other Contracting Party and *of a non-Contracting Party*.[31]

Before drawing the conclusions with respect to the consequences of these features of 'no-lowering standards' provisions on labour disputes and their settlement, the article

[28] See e.g. Agreement between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalisation, Promotion and Protection of Investment (entered into force 7 August 2014) art 25 (Japan-Myanmar BIT); Free Trade Agreement between the EFTA States and Bosnia Herzegovina (n 16) art 36 ('Upholding Levels of Protection on the Application and Enforcement of Laws, Regulations or Standards').

[29] Some IIAs prohibit only state conduct that aims at encouraging investment from another Party, see for example, Free trade agreement between the EFTA States and the Central American States (entered into force: 19 August 2014 for Costa Rica, Panama and Norway; 29 August 2014 for Liechtenstein and Switzerland; 5 September 2014 for Iceland; pending for Guatemala) art 9.4 ('Upholding Levels of Protection').

[30] An analogy can be made here with the prohibition of performance requirements which apply with respect to both the investors of state parties and the investors of non state parties, see NAFTA (n 5) art 1106.

[31] Japan-Myanmar BIT (n 28) art 25 (emphasis added).

now turns to a review of the IIA provisions which address the states parties' shared commitments towards labour standards.

2.1.2 'Statement of shared commitment' provisions

IIA provisions providing for states parties' shared committments towards labour standards are well-illustrated by Article 13.1 of the 2012 US Model BIT. As noted above, it reads as follows: '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.'[32] This particular phrasing pursues the same objective, viz., respect for international labour standards,[33] as found in the provisions of other IIAs in which states parties express their shared commitment to ensure that their domestic labour legislation is consistent with internationally recognized standards,[34] or in which they commit to adopt or maintain in their legislation labour rights as enshrined in such standards.[35]

Most IIAs that contain similar provisions are phrased in terms of a 'reaffirmation' of states parties' obligations. However, some IIAs use binding language relying on an obligation of means ('shall strive to ensure')[36] or an obligation of result ('shall adopt')[37]. As to the object of these commitments, these provisions refer usually to the obligations of the members of the ILO as well as to the principles enshrined in the

[32] 2012 US Model BIT (n 7) art. 13.1.

[33] As noted in the literature, all those provisions have also the effect to reinforce state parties' normative freedom to protect labour standards in some situations, see Prislan and Zandvliet (n 4) 383-86.

[34] For example, the CAFTA-DR provides: '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 improve those standards in that light', see CAFTA-DR FTA (n 23) art 16.1 ('Statement of Shared Commitment').

[35] See US-Peru TPA (n 15) art 17.2.1 ('Labor') ('Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration): (a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labor; (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and (e) the elimination of discrimination in respect of employment and occupation.')

[36] See US-Singapore FTA (n 21) art 17.1.2 ('Statement of Shared Commitment').

[37] See US-Peru FTA (n 15) art 17.2.1 ('Labor').

1998 ILO Declaration.[38] More importantly, however, it is to be emphasized that these provisions, contrary to the 'no-lowering standards' provisions, are not usually linked to the encouragement or maintenance of investments or to the negative impact on trade and investment. In other words, the statement of shared commitment towards labour standards has a general scope of application disconnected from any objective related to the encouragement or maintenance of investments. As illustrated by the provisions of the US 2012 Model BIT examined in Section 2.2, this means that these provisions can be breached and that a dispute can arise in situations disconnected from the encouragement or maintenance of investments. This last feature of the 'statement of shared commitments' provisions is of great interest in the discussion of the specificities of labour disputes and of their settlement. Before entering into this discussion, it is first necessary to shed light on the procedural dimension of the treaty protection of labour conditions.

2.2 Overview of the dispute settlement mechanism provisions attached to IIAs' substantive labour provisions

The settlement of labour disputes is specialized in two ways. First of all, the above-mentioned labour provisions, and therefore, labour disputes, are generally excluded from the scope of IIA's 'general' dispute settlement mechanism provisions, e.g., the dispute settlement provisions applicable to disputes between investors and states.[39] Secondly, it is specialized in the sense that it is generally a political settlement which is opted for, and not an adjudicative one (e.g., through arbitration). Beyond these two general observations, however, there is more diversity than commonality in state treaty practice.

Article 13.4 of the 2012 US Model BIT illustrates the institutional 'common denominator' of IIAs that provide for an inter-state consultation with respect to labour disputes:

[38] See (n 24).

[39] See CKFTA (n 23) art 18.24 ('Dispute Settlement'); Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (entered into force 1 December 2013) art 5.9 ('Consultation') (ANZTEC Agreement). The exclusion can also implicitly result from the scope of the consent given in the 'general' dispute settlement mechanism provision.

> 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, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.'[40]

Beyond this 'common denominator', treaty practice evidences various differences as to the settlement of labour disputes.[41] Firstly, depending on the IIA concerned, the situations to which the provision applies may cover a dispute that has already arisen[42] and/or, preventively, any matter whether a 'dispute' has arisen or not. This is illustrated well by article 13.4 of the 2012 US Model BIT above. Secondly, the settlement of disputes can be conducted pursuant to more or less *ad hoc* arrangements, as illustrated by article 13.4, or may be subject to more institutionalized procedures. The institutional features of the settlement of labour disputes may be more or less complex depending upon the IIA. In some IIAs, for example, settlement is entrusted to a committee composed of senior officials, usually a joint committee.[43] Depending upon the treaty, this committee may be seized either directly,[44] or only after direct consultations between the parties.[45] In case of the absence of an agreement, some IIAs do not provide for any further step to settle labour disputes,[46] while others elevate the settlement to a higher political setting.[47] Another option offered by some IIAs in such a situation is the intervention of a dispute settlement panel whose report is usually non-binding.[48] In case of the non-implementation of the report of the dispute settlement panel or of the agreement reached thereafter by the

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[40] See 2012 US Model BIT (n 7).
[41] It can be noticed that the procedure set up by one IIA can also vary from one substantive provision to the next. For instance, see CAFTA-DR FTA (n 23) art 16.6 ('Cooperative Labor Consultations'), which provides for a specific procedure for the obligation not to fail to enforce labour law.
[42] See Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment (2008) art 13.1 ('Investment and Labor'). In this respect, it can be noted that the US practice has evolved towards an enlargement of the scope of consultation on any matter, compare 2004 US BIT Model (n 27) art 13 and 2012 US BIT model (n 7) art 13.
[43] See e.g. Free trade agreement between the EFTA States and the Central American States (n 29) art 9.10 ('Implementation and Consultations'). The institutionalization of the arrangement does not only aim at addressing existing and potential disputes, but also at improving the cooperation between states.
[44] ibid.
[45] See ANZTEC Agreement (n 39) art 5 ('Consultations'), chapter 16 ('Trade and Labour').
[46] See Free trade agreement between the EFTA States and the Central American States (n 29) art 9 ('Implementation and consultation').
[47] See ANZTEC Agreement (n 39) art 5 ('Consultations'), chapter 16 ('Trade and Labour').
[48] See Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area (entered into force 17 December 2001) art 17.1 ('Dispute settlement') (US-Jordan FTA).

parties, IIAs may provide for a mechanism of 'annual monetary assessment'[49] or entitle the claimant to take any appropriate or commensurate measure.[50] Conversely, IIAs which do not provide for the intervention of such a panel are usually silent about the consequences of the failure to resolve the dispute.[51]

Although private entities are largely excluded from the enforcement of labour provisions, two mechanisms aim at giving them a voice. First of all, some IIAs provide that state parties 'shall ensure' that requests emanating from employers, employees or their representative are given due consideration by domestic tribunals.[52] Secondly, some IIAs entitle private entities to submit complaints with national authorities as to the alleged violation of obligations by state parties.[53] As is demonstrated by the US submissions against Guatemala and Bahrain discussed in Section 3, such recommendations have the potential to lead to an inter-state consultation.

3. Making sense of treaty practice: a policy analysis of IIAs' provisions

In light of the account of IIA labour provisions provided in Section 2, this section probes the specificities of labour disputes and examines the policy challenges that their political settlement raises. To do so, it first examines the two disputes that have so far arisen from the alleged violation of the labour provisions under IIAs (3.1). Against the backdrop of these cases, the section then turns to the discussion of the specificities of labour disputes (3.2) and the challenges that result from the politicization of their settlement (3.3).

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[49] The assessment is transferred to a fund that aims at improving labour conditions in the state complained against, see CAFTA-DR FTA (n 23) art 20.17.4 ('Non-Implementation in Certain Disputes').

[50] See US-Jordan FTA (n 48) art 17.2 ('Dispute settlement').

[51] As to the *ad hoc* consultations provided in provisions similar to the above-mentioned Article 13.4 of the 2012 US Model BIT, it is worth noticing that the IIAs that contain them are also ill-equipped to constrain states to effectively comply with labour provisions.

[52] See US-Peru FTA (n 15) art 17.4 ('Procedural Guarantees and Public Awareness') ('Each Party shall ensure that persons with a legally recognized interest in a particular matter have appropriate access to tribunals for the enforcement of the Party's labor laws. Such tribunals may include administrative, quasi-judicial, or labor tribunals, as provided in the Party's law'.).

[53] See US-Singapore FTA (n 21) art 17.4 ('Institutional Arrangements') ('Each Party's contact point designated under paragraph 2 shall provide for the submission, receipt, and consideration of public communications on matters related to provisions of this Chapter, and shall make such communications available to the other Party and, as appropriate, to the public. Each Party should review such communications, as appropriate, in accordance with domestic procedures. The Parties, when they consider it appropriate, shall jointly prepare reports on matters related to the implementation of this Chapter, and shall make such reports public'.).

3.1 Case studies: the US submissions against Bahrain and Guatemala

These submissions are the first to have arisen from the purported violation of the labour provisions discussed in this article. In that sense, they constitute an interesting 'laboratory' to reflect prospectively upon labour disputes and their settlement.

The first dispute[54] to have arisen originates from a submission in April 2008 under Article 16.4 of the CAFTA-DR by six Guatemalan worker organizations and the American Federation of Labour and the Congress of Industrial Organizations with the US Department of Labor. The submission concerned the alleged violation by Guatemala of Article 16.2.1(a) of the CAFTA-DR, which provides: 'A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement'.[55] After examination, the United States reached the conclusion that Guatemala was failing to meet its obligation with respect to the enforcement of labour laws on the right of association, the right to organize and bargain collectively, and acceptable conditions of work. For example, it alleged that Guatemala was failing through a sustained and recurrent course of action or inaction: (1) to investigate alleged labour law violations, (2) to take enforcement actions once labour law violations had been identified, and (3) to enforce Labor Court orders in cases involving labour law violations.[56] As a result, the United States decided to request consultations with Guatemala under Article 16.1.1 of the CAFTA-DR in July 2010.

Consultation meetings between the United States and Guatemala were held in September and December 2010. Despite some steps taken by Guatemala that it regarded as positive, the United States took the view that the conduct of Guatemala demonstrated insufficient progress with respect to the concerns at the basis of the request for consultation. Consequently, it requested a meeting of the Free Trade

[54] This description of the dispute is based on the information available on the website of the Office of the United States Trade Representative <http://www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>.
[55] See CAFTA-DR FTA (n 23).
[56] See the Letter from Ambassador Ron Kirk and Secretary of Labor Hilda Solis requesting Consultations (30 July 2010) <http://www.ustr.gov/webfm_send/2114>.

Commission of the CAFTA-DR in compliance with article 16.6.6.[57] The meeting was held in June 2011, but proved to be unsuccessful. Therefore, the United States requested in August 2011 the establishment of an arbitration panel under Article 20.6 of the Agreement so that this panel determines whether Guatemala violated its obligations, and that it makes, if necessary, appropriate recommendations. In the aftermath of the request, the United States and Guatemala agreed on a comprehensive Labor Enforcement Plan in April 2013. In this plan, Guatemala made the commitment:

> to strengthen labor inspections, expedite and streamline the process of sanctioning employers and ordering remediation of labor violations, increase labor law compliance by exporting companies, improve the monitoring and enforcement of labor court orders, publish labor law enforcement information, and establish mechanisms to ensure that workers are paid what they are owed when factories close.[58]

However, the United States considered that Guatemala was failing to comply sufficiently with these commitments. As a result, it filed its first submission in the case in November 2014.[59] Guatemala was expected to file its submission by February 2015.

The second dispute[60] that has arisen from the alleged breach of the labour provisions in an IIA originates from a submission against Bahrain filed by the American Federation of Labour and the Congress of Industrial Organizations[61] with the Office of Trade and Labor Affairs (OTLA) of the US Department of Labor's Bureau of International Labor Affairs. The OTLA was designated as the national contact point for complaints about labour violations, in compliance with Article 15.2 of the US-

[57] See the Letter from the Ambassador Kirk to Guatemala requesting Free Trade Commission Meeting (16 May 2011) <http://www.ustr.gov/webfm_send/3041>.
[58] See <http://www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>.
[59] See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/United-States-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala>.
[60] This description of the dispute is based on the information available on the website of the United States Department of Labour, see United States Department of Labour, 'Bahrain Submission Under U.S.-Bahrain FTA' <http://www.dol.gov/ilab/trade/agreements/bahrainsub.htm>; See also, Office of Trade and Labour Affairs, 'Public Report of Review of U.S. Submission 2011-01 (Bahrain)' (US Department of Labour, 20 December 2012) <http://www.dol.gov/ilab/reports/pdf/20121220Bahrain.pdf>.
[61] With a statement from the General Federation of Bahrain Trade Unions.

Bahrain FTA.[62] In its 2012 report,[63] the OTLA concluded that trade unionists and, in particular, trade union leaders in Bahrain had been targeted for dismissal and, in some cases, prosecution, in part for their role in organizing and participating in a March 2011 general strike. Furthermore, it concluded that widespread dismissals after this strike reflected discrimination based, in part, on political opinions and activities. In that regard, the report of the OTLA reads as follows:

> Bahrain appears to have acted inconsistently with its commitments by failing (1) to strive to ensure that freedom of association and the right to organize and bargain collectively are recognized and protected by its law; (2) to strive to ensure that its labor laws provide for standards consistent with the rights of association and to organize and bargain collectively; and (3) to strive to improve such standards. ... Bahrain appears not to have fulfilled its commitments by failing to strive to ensure that the principle concerning the fundamental right of elimination of discrimination in employment and occupation is recognized and protected by its law.[64]

These events were regarded by the OTLA as a violation of Articles 15.1.1[65] and 15.1.2[66] of the US-Bahrain FTA. In light of these conclusions, the OTLA

[62] US-Bahrain Free Trade Agreement (entered into force 11 January 2006) (US-Bahrain FTA).
[63] See Public Report of Review of U.S. Submission 2011-01 (Bahrain) (n 60).
[64] ibid.
[65] '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 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 (n 62).
[66] '1. (a) Neither Party shall fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources. 2. Each Party recognizes that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 15.7 as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory, US-Bahrain FTA (n 62).

recommended 'to the Secretary of Labor that the Government of the United States request Labor Consultations under Article 15.6.1([67]) of the FTA to consult with the Government of Bahrain on the matters raised in this report.'[68] In May 2013, the United States requested consultations with Bahrain in a joint letter from the Acting Secretary of Labor and the U.S. Trade Representative. Consultations were held in July 2013 and June 2014 and the dialogue is continuing to address the alleged violations of the US-Bahrain FTA in relation to freedom of association, the right to organize and bargain collectively, as well as the right to freedom from discrimination in employment and occupation.[69]

A few elements deserve to be emphasized in these cases to pave the way for the discussion of the specificities of labour disputes. Firstly, although Article 16.2.1 (a) of the CAFTA-DR and Articles 15.1.1 and 15.1.2 of the US-Bahrain FTA are formally obligations due bilaterally to the states parties to those treaties, it is clear that the workers of the states parties, and in the above-mentioned cases Guatemalan and Bahraini workers, are benefiting *de facto* from those obligations. Secondly, the American Federation of Labor and Congress of Industrial Organizations, the US federation of labour organizations, played a major role in the submissions that triggered the US actions against Bahrain and Guatemala. In other words, it is worth emphasizing that a US private entity is at the genesis of actions addressing labour conditions suffered by workers, not in the United States, but in other countries. Thirdly, it is important to take note of the situations in which alleged violations of these IIAs are claimed. As to Guatemala, the United States argues that Guatemala was failing to enforce labour laws on the right of association, the right to organize and bargain collectively, and acceptable conditions of work. Concerning Bahrain, the U.S. submission concerns Bahrain's alleged targeting of trade union leaders for dismissal and, in some cases, prosecution, in part for their role in organizing and participating in a general strike. It also addresses allegedly widespread dismissals by Bahrain after the general strike that reflected discrimination based, in part on political opinion and

[67] US-Bahrain FTA (n 62) ('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.').
[68] Public Report of Review of U.S. Submission 2011-01 (Bahrain) (n 60) 40.
[69] See United States Department of Labour, 'Bahrain Submission Under U.S.-Bahrain FTA' http://www.dol.gov/ilab/trade/agreements/bahrainsub.htm.

activities. As it appears clearly in the allegations of the American Federation of Labor and Congress of Industrial Organizations against Bahrain, the consultations, triggered by the complaints of a US labour federation, and requested by the United States, aim at protecting workers in Bahrain from the conduct of their own national authorities (and not from foreign investors). This brief series of observations leads to more general remarks as to the certain specificities of regarding labour disputes.

3.2 The specificities of labour disputes

In order to make sense of the labour disputes discussed in this article, investment lawyers should not draw too heavily upon their knowledge of investor-state arbitration.[70] The labour disputes addressed herein are radically different from traditional investor-state disputes; they are not disputes underlain by a Manichean conflict between the public interest of the host state and the private interest of the foreign investor. The labour disputes that can arise from the alleged violation of 'no-lowering standards' provisions and 'statement of shared commitments' provisions are much more complex. They are characterized by multi-faceted conflicts of interests. To explain and illustrate this notion, it is necessary to discuss prospectively various situations in which the alleged violation of labour provisions may be claimed.

As mentioned above, 'no-lowering standards' provisions address especially situations wherein by a recurrent course of action or inaction a host state fails to enforce specific labour standards with the aim of attracting or maintaining investments in its territory. At first glance, if a dispute arises from the alleged violation of this provision, it can be said to be underlain by a conflict between the interests of workers and the interests of investors. It is so in the sense that the actions and/or inactions of the host states precisely aims at reinforcing the interest of investors to invest in their territory to the detriment of their workers' interests. However, the competing interests in such disputes regarding 'no-lowering standards' provisions have at least[71] another facet. To understand this, one should not forget that the objective of attracting investors or securing their presence in the territory of the host state relates to an overarching

[70] It is even more so in the sense that their reading of the labour provisions discussed in this article may be influenced by the provisions aiming to reinforce the regulatory freedom of states to protect public interests and that form part of the first strategy described in the introduction. Indeed, the purpose of those provisions is in line with the traditional object of investor-state disputes.

[71] See (n 74).

objective, viz., the economic development of the host state, an objective which is part of the notion of sustainable development.[72] In that sense, I submit that disputes concerning 'no-lowering standards' provisions are not only characterized by a competition between public and private interests, but also and mainly, by a competition between various public interests. Of course, no public interest justifies forced labour or child labour and, in that sense, no balance is to be struck between fundamental labour rights and economic development. However, it remains true that disputes regarding the no-lowering of labour standards cannot be viewed only through the spectrum of the public-private divide.

A similar specificity and complexity characterize disputes arising from the alleged violation of the 'statement of shared commitments' provisions, even though those disputes do not necessarily involve the interests of investors, as is illustrated by the United States action against Bahrain.[73] The multi-faceted dimension of the interests underlying those disputes can be illustrated by reference to the right of association. In some cases, the failure to implement this right may be viewed as resulting from the will of ruling authorities to prohibit protests or the development of a political opposition. Such a situation can be characterized as a conflict between a public interest (i.e., the right of association of workers) and the private interest of the individuals exercising public authority over the territory of the state. Such reasoning adds an additional facet, i.e. the conflict between a public interest and the private interest of ruling authorities,[74] to the multi-faceted conflicts of interests conceptualized in this article to make sense of labour disputes.

On the other hand, restrictions on the right of association can also be justified by a public interest. To exemplify this, one can usefully refer to the restrictions on the right to strike[75] in the energy sector, as illustrated by the claim filed by the General

[72] See (n 1).
[73] See Public Report of Review of U.S. Submission 2011-01 (Bahrain) (n 60).
[74] One can also argue that such a conflict between the public interest of the state and the private interest of ruling authorities also characterizes some situations in which labour standards are lowered to attract investors, the overarching objective being not the economic development of the state, but the financial benefit that these authorities may find in investment operations.
[75] The inclusion of the right to organize and the right to strike in the freedom of association and the right to collective bargaining is debated. This is illustrated by discussions at the International Labour Conference (ILC), see for example ILC, Provisional Record, 101st session, Geneva (2012), 19 (REV) Part one / 37 quoted in Prislan and Zandvliet (n 4) 383. Some Agreements specify that the freedom of

Federation of Bahrain Trade Unions with the ILO Committee on Freedom of association.[76] In that case, the Federation complained that Decision No 62 of the Prime Minister, following Legislative Decree No 33 on the Trade Union Law and Law No 49 amending certain provisions of the Trade Union Law, had incorporated oil and gas installations in the list of essential services in which strike actions were prohibited.[77] Bahrain replied that the ILO Committee on Freedom of Association had 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, Bahrain submitted that it had concluded that they should not be permissible given that these two industries constitute a principal source of Bahrain's national revenue.[78] In its report, the ILO Committee on Freedom of Association determined 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 depend 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.'[79]

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association and the right to collective bargaining include the right to organize and the right to strike, see for example, Canada-Peru Agreement on Labour Cooperation (entered into force 1 August 2009) art 1.

[76] See ILO Committee on freedom of association, Case no 2552, 'Complaint against the Government of Bahrain presented by the General Federation of Bahrain Trade Unions (GBTU)', 349th Report of the Committee on freedom of association (2008) [411]-[412] <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_091464.pdf>.

[77] 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, see eg ILO Committee on freedom of association, Case no 1576, 'Complaint against the Government of Norway presented by the Norwegian Trade Union Federation of Oil Workers', 279th Report of the Committee on freedom of association (1991), [91]-[118] <http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2902142>.

[78] ibid [415]-[418].

[79] ibid [421]-[422].

Such a situation in which the right of workers to strike is restricted or denied could lead a union to submit a complaint with national authorities under existing IIAs. As illustrated by the above-mentioned case, at the core of the dispute that would emerge one would find a conflict between two public interests: the interest of workers to associate and, for example, the interest to secure the energy supply of the population. That type of conflict between two public interests requires a balance to be struck, the main issue being to determine the scope of the host state's right to strike that balance in light of its IIA obligations. This leads to a discussion of the settlement of labour disputes under IIAs.

3.3 The challenges raised by the politicization of the settlement of labour disputes

As described above, labour disputes are multi-faceted. They involve competing interests of various natures by various stakeholders. However, they have one common denominator: the negative effect on workers of measures taken by their own states. In this respect, one should realize that the dispute settlement mechanism provisions analyzed above allow (other) states to act to protect workers from their own states. This is an unprecedented level of involvement in the domestic affairs of one state by another under these IIAs. Dispute settlement mechanisms in this field have traditionally allowed states, through diplomatic protection, or investors themselves, through treaty-based arbitration, to act to protect their interests, by definition *foreign* interests, and not interests internal to the host state. Indeed, the dispute settlement provisions in the IIAs discussed in this article are even more notable when one takes into account the fact that in some cases complaints of *foreign, private* entities can indirectly initiate the dispute settlement procedure which will bring about review of the host state's domestic affairs.

This intrusion into the domestic affairs of states certainly explains why IIA states parties have largely opted for the politicization of the settlement of these kinds of disputes.[80] In this context, it is indeed crucial for them to retain a certain degree of control over the dispute and not to turn it over to uncontrollable adjudicative bodies, such as arbitral tribunals. That being said, this politicization of the settlement of labour disputes raises a number of issues both as to its legitimacy and its efficiency.

[80] Or even why they chose not to attach any dispute settlement mechanism provision to the substantive provisions aiming at the protection of labour standards.

As to legitimacy, it can of course be argued that states have a 'legitimacy of origin' to become involved in the domestic affairs of other states inasmuch as the IIAs by their terms establish the procedures for initiating consultations. On the other hand, asymmetric bargaining power of states parties in negotiations can lead to a rebuttal of this argument; in that sense the politicization of the settlement of labour disputes could be seen as a Western 'Trojan horse' allowing developed states to interfere with the domestic affairs of developing states. Irrespective of this counter-argument, one can still discuss the legitimacy issue from the standpoint of legitimacy of origin, as well as from the 'legitimacy of exercise'.[81]

As to the legitimacy of origin, the question relates to the representativeness of the states parties to these IIAs. On the one hand, it can be said that they are not private entities, but are imbued with public authority. On the other hand, it remains that this public authority does not emanate from the population directly concerned by the dispute. One way of legitimizing the authority of states to interfere with the domestic affairs of other states is then to consider that they are *de facto* representing the interests of workers – that they are acting on their behalf even though there is no direct democratic link between them. The persuasiveness of this argument depends upon one's view of the situation. For instance, it proves to be persuasive in situations where children or adults are forced to work for the benefit of the private interest of ruling authorities. In such a situation, those children and adults have no way to protest against such practices, and need others to speak for them. On the other hand, one may wonder whether it remains persuasive when, for instance, states make the decision through a democratic procedure to restrict the right to strike of certain categories of workers to secure the energy supply of the population. In such a situation, is it not for the population directly or through its representatives to decide the balance to be struck between those two legitimate public interests? Even if one accepts the argument of the representation of workers by IIA states parties in all circumstances, one would then expect some consistency and constancy from these states in their action, which leads to the discussion of the 'legitimacy of exercise'.

[81] On the distinction between the 'legitimacy of origin' and the 'legitimacy of exercise', see J d'Aspremont and E de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2010) 34 Fordham Law Review 101.

Indeed, given the preponderance of states' interests in the determination of their international relations, one can forecast that the decision to initiate consultations will be governed, not only by concerns with respect to the protection of the interests of workers, but also by states' own national interests. The weight of states' own interests in their decisions to take action has the potential to undermine the legitimacy of origin conceived of in terms of representativeness. Another concern which relates to the above-mentioned asymmetry in treaty negotiations is the fact that the exercise of the prerogatives offered by IIAs will likely be asymmetrical in the sense that only the most powerful states will be *de facto* able to act. All of these concerns, besides putting into question the legitimacy of the dispute settlement mechanism designed for the settlement of labour disputes, are also relevant to considering its efficiency.

In addition to entitlement of discretion in the exercise of the rights offered to states parties by IIAs with respect to labour standards, the main challenge of the current strategy as to its efficiency relates to the result to be expected from the political settlement of the disputes. This is so especially with respect to the numerous IIAs that are silent as to the consequences of the failure of state parties to reach an agreement. In that sense, the efficiency of IIAs is likely to be proportional to the 'teeth' with which the IIAs are equipped. It goes without saying that IIAs that provide for the use of a dispute settlement panel in the settlement of the dispute and that allow for 'sanctions' to be imposed in the case of a failure to reach an agreement will be more efficient in the protection of labour conditions. In that sense, it is likely that the judicialization of the settlement of labour disputes could reinforce the efficacy of the enforcement of the substantive provisions aiming at protecting labour conditions more than the present approach of politicized dispute resolution.

4. Conclusion

The labour disputes discussed in this article cannot be equated to the investor-state disputes that arise from IIAs. They are much more complex and diverse in nature; indeed, they are characterized by a multi-faceted competition of interests which, depending on the dispute at hand, can overlap. Beyond this diversity, it remains the case that those disputes are all characterized by the fact that the interests underlying them are mostly interests internal to the state which is allegedly in violation of its treaty obligations. This specificity largely explains the politicization of the settlement of labour disputes. More generally, it demonstrates how the rise of the principle of sustainable development to which labour rights belong impacts on the *ethos and telos* of IIAs and international investment law. Indeed, IIAs are becoming tools of global governance geared to the protection of public goods of interests for local populations, state parties, and the international community more generally.