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# MASTER THESIS

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## Human Rights in Investor-State Arbitration in Light of Case Studies on Water


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# ABBREVIATIONS

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|---|---|
| ABA | Azurix's Argentine subsidiary, Azurix Buenos Aires S.A. |
| Argentina | The Republic of Argentina |
| Argentina-French BIT | Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments |
| Argentina-United States BIT | Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America |
| Azurix | Azurix Corp. |
| BIT | Bilateral Investment Treaty |
| Biwater Gauff | Biwater Gauff (Tanzania) Limited |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CESCR | United Nations Committee on Economic, Social and Cultural Rights |

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|---|---|
| City Water | City Water Services Limited |
| CRC | Convention on the Rights of the Child |
| CRPD | United Nations Convention on the Rights of Persons with Disabilities |
| DAWASA | Dar es Salaam Water and Sewerage Authority |
| ECHR | European Court of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICSID | International Centre for the Settlement of Investment Disputes |
| IIA | International Investment Agreements |
| ILC | International Law Commission |
| IMF | International Monetary Fund |
| Law 2029 | Law 2029 on Potable Water Services and Sanitary Sewage of Bolivia ("Ley de Servicios de Agua Potable y |

| | |
|---|---|
| | Alcantarillado Sanitario") |
| NAFTA | North American Free Trade Agreement |
| Netherlands-Bolivia BIT | Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia |
| NGO | Non-Governmental Organization |
| Rio Summit | United Nations Conference on Environment and Development |
| Tanzania | The United Republic of Tanzania |
| United Kingdom – Tanzania BIT | Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments |
| United States | United States of America |
| UN Watercourses Convention | UN Convention on the Law of the Non-Navigational Uses of International Watercourses |
| VCLT | Vienna Convention on the Law of Treaties |

# INTRODUCTION

Water, which is a limited natural resource, is fundamental for human life and health, to preserve human dignity and to realize other human rights.[1] It is a vital resource with the principal function of sustaining life and producing biological resources,[2] which cannot be considered as merely a good or merchandise. In practice, water is treated both as a public good and an economic good. As a result of the trend emerged in the 1990s, the commoditization of water through privatization of water supply systems with the encouragement of the World Bank and the International Monetary Fund (IMF) demonstrated that water carries financial value that is of interest to private investors. Foreign investors have begun to provide essential, formerly public services, including the operation of water and sanitation systems, instead of the states or local communities. Consequently, there has been a great increase in the number of water privatization contracts between states and investors as was the case with the countries such as Argentina, Bolivia or Tanzania, where the governments had granted concessions to foreign investors to properly run the water services. On the one hand, such foreign investment can promote the human right to water and the economic development in the country; on the other hand it may lead to a dispute when the host state adopts effective measures towards the protection of the human right to water, which may result in affecting investors' rights under international investment agreements. Over the course of the last 15 years, such disputes in the water sector led to a number of water-related investor-state arbitrations brought against states, mostly against Argentina.[3] The purpose of this study is to analyze the intersection between human right to water and investors' rights by

[1] Committee on Economic, Social and Cultural Rights, General Comment No. 15, UN Doc. E/C.12/2002/11, 20 January 2003.
[2] M. A. L. Moreta, *The Human Rights Fundaments of Conservation in the Context of the Extraction of Energy Resources* (2015), at 235.
[3] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case no. ARB/97/3; ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case no. ARB/02/3; ICSID, *Azurix Corp. v. The Argentine Republic*, ICSID Case no. ARB/01/12; ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case no. ARB/05/22; ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19; ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/17; ICSID, *SAUR International SA v. Republic of Argentina - Decision on Jurisdiction and Liability,* 6 June 2012, ICSID Case no. ARB/04/4; ICSID, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case no. ARB/07/17; ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case no. ARB/07/26.

examining prominent cases before the International Centre for Settlement of Investment Disputes (hereinafter, "ICSID") in order to assess the challenges facing water-related investment disputes and to strike a balance between these competing interests by suggesting solutions. In order to achieve this purpose, this study is organized in four main chapters.

In a first step, the first chapter will examine the emergence and the development of the right to water as an international human right and assess its current legal status in international law. Having established this framework, the normative content of the human right to water and states' obligations in relation to the human right to water will be addressed. In the second chapter, in order to elaborately address the issue of human right to water in investor-state arbitration, firstly, the issue of a potential conflict between human rights obligations, including obligations regarding the human right to water, and investment obligations will be assessed. Secondly, the question of whether there is a concrete conflict between states' aforementioned simultaneous treaty obligations will be tackled focusing on the advantages and disadvantages of non-compliance with each. Lastly, the ways in which human rights and the human right to water in particular may be raised or argued before an investment tribunal as defenses to justify alleged breaches of international investment agreements, and some entry points, namely exception clauses in international investment agreements, invocation of state of necessity and interpretation of international investment agreements' standards of investment protection will be reviewed in light of a number of investment disputes, which are directly or indirectly related to the human right to water.

The third chapter will examine four prominent cases concerning privatization of water systems before ICSID, in which the human right to water and investors' rights were allegedly in conflict, and analyze the approaches adopted by arbitral tribunals in the context of addressing human rights, including the human right to water, alongside the need to protect foreign investment. Following the assessment of the key investment disputes which constitutes milestones on the issue of human right to water in the context of international investment arbitration, the last chapter will briefly address the subsequent case law with the most recent and significant water-related investment arbitration cases in order to shed more light on the issue of the human

right to water in international investment arbitration and to give further shape to the legal analysis based on human rights by arbitral tribunals in the same context. Furthermore, the place of human right to water in ICSID arbitration will be evaluated in light of the analyzed cases as a whole and lastly, some solutions will be suggested to the tension between the human right to water and investor's rights and the question of how the violations of human right to water can be avoided will be tackled in this context.

# CHAPTER 1. THE HUMAN RIGHT TO WATER

## I. The Genesis of the Debate and Emergence of the Human Right to Water

Water is a limited natural source with global use growing at more than twice the rate of population increase in the last century.[4] The global water crisis, where 2.4 billion people in the world lack access to adequate drinking water sources and 663 million people lack access to adequate sanitation, has been a major problem and great matter of urgency.[5]

The debate on the human right to water started with its rise during the international conferences in the 1970s. In the 1972 Stockholm United Nations Conference on the Human Environment, water was considered as a natural resource that must be safeguarded "for the benefit of present and future generations through careful planning or management, as appropriate."[6] Furthermore, one of the first explicit references to the human right to water is found in the Declaration from the 1977 United Nations Mar del Plata Water Conference. In Resolutions of the aforementioned Conference, it is specifically stated that "All peoples, whatever their stage of development and social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs."[7]

[4] U.N., *Water Scarcity* (2007), available at http://www.un.org/waterforlifedecade/scarcity.shtml (last visited 3 August 2016).
[5] WHO, UNICEF, *Progress on Sanitation and Drinking Water* (2015), available at http://apps.who.int/iris/bitstream/10665/177752/1/9789241509145_eng.pdf (last visited 3 August 2016).
[6] United Nations, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.4814/Rev.1, Stockholm, 5-16 June 1972.
[7] International Environmental Law Research Centre, United Nations Water Conference - Resolutions in Report of the United Nations Water Conference Mar del Plata, United Nations Publications, Sales No.

Another non-binding declaration that included explicit recognition of the human right to water besides the Declaration from the 1977 United Nations Mar del Plata Water Conference, is the Dublin Statement on Water and Sustainable Development, in Principle 4 of which stated "... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price." [8] The Dublin Conference was held as a preparatory meeting for the United Nations Conference on Environment and Development (hereinafter the "Rio Summit") and Agenda 21 of the Rio Summit "Programme of Action for Sustainable Development" had a separate chapter on freshwater resources.[9]

Besides its recognition in international environmental law instruments that are in the form of soft law, the right to water was also included in international water law instruments such as the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention), which is an international treaty with a binding effect. Article 10(2) of the aforementioned Convention, entitled "Relationship between Different Kinds of Uses", provides "in the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs."[10] This provision is considered as having a special normative utility in establishing the human right to water.[11] It is agreed that in determining the "vital human needs", "special attention is to be paid to providing

E.77.II.A.12, 14-25 March 1977, available at http://ielrc.org/content/e7701.pdf (last visited 10 January 2017).

[8] The Dublin Statement on Water and Sustainable Development, 31 January 1992, available at http://www.un-documents.net/h2o-dub.htm (last visited 5 August 2016).

[9] United Nations Sustainable Development, Report of the United Nations Conference on Environment and Development, Agenda 21, 3-14 June 1992, available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (last visited 10 January 2017). With regard to the issue of the needs and rights to water, Chapter 18.8 provides "Water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perenniality of the resources, in order to satisfy and reconcile needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of the ecosystems."; Salman M.A. Salman, "The Human Right to Water and Sanitation: Is the Obligation Deliverable?", 39:7 *Water International* (2014) 969, at 970.

[10] U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 36 ILM 700 (1997); G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/51/229 (1997).

[11] Takele Soboka Bulto, "The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery? ", 12(2) *Melbourne Journal of International Law* (2011) 1, at 23.

sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation."[12]

It should also be noted that some regional human rights treaties such as the African Charter on the Rights and Welfare of the Child[13] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[14] offered references to the human right to water.

In addition, one of the first legal fields to provide explicit reference to the right to water is international humanitarian law.[15] Particular provisions in the Geneva Convention III relative to the Treatment of Prisoners of War[16] and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War[17] cited in support of the human right to water.

Furthermore, there are significant binding human rights instruments that make explicit references to the right to water. Firstly, two years after the Mar del Plata Conference, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (hereinafter, "CEDAW") made an explicit reference to water within its Article 14(2)(h), providing that states parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply."[18] Secondly, the 1989 Convention on the Rights of the Child (hereinafter, "CRC") made a connection between water and health and committed states parties to ''combat disease and malnutrition ... through, inter alia, ... the provision of adequate nutritious foods and clean drinking water'' in its Article

[12] Convention on the Law of the Non-Navigational Uses of International Watercourses, Report of the Sixth Committee convening as the Working Group of the Whole, UN Doc. A/51/869, 11 April 1997.
[13] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 11 July 1990. Article 14.2(c) provides "States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures … to ensure the provision of adequate nutrition and safe drinking water."
[14] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003. Article 15(1)(a) provides "States Parties … shall take appropriate measures to: provide women with access to clean drinking water."
[15] Pierre Thielbörger, "The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?", in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 487, at 488.
[16] Geneva Convention III relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135/ [1958] ATS No 21, Articles 26, 29, 46.
[17] Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287/ 1958 ATS No 21, Articles 89 and 127.
[18] GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980).

24(2)(c).[19] Furthermore, the Convention on the Rights of Persons with Disabilities (hereinafter, "CRPD") also made an explicit reference to water in its Article 28 by stating that "States Parties … shall take appropriate steps to safeguard and promote the realization of this right, including measures: (a) To ensure equal access by persons with disabilities to clean water services."[20]

Most of these developments constitute milestones for the emergence of the human right to water and paved the way for the United Nations Committee on Economic, Social and Cultural Rights (hereinafter, "CESCR") to issue General Comment No. 15 titled "The Right to Water"[21], which will be discussed in detail below.

## II. Evolution Through Interpretation and Recognition: The General Comment No.15 and Beyond

The General Comment No.15 offers the broadest elaboration of the human right to water [22] and constitutes "the most relevant of all recognitions of the human right to water to date."[23] It provides the legal basis of the human right to water in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (hereinafter, "ICESCR"), addresses its normative content and sets out obligations of state parties and other actors in order to progressively realize the human right to water. The CESCR interpreted Article 11(1) of the ICESCR, which recognizes "the right of everyone to an adequate standard of living . . . including adequate food, clothing and housing", as comprising the right to water, due to the fact that the word "including" indicates that these list of rights were not intended to be exhaustive and the right to water is presupposed for securing an adequate standard of living.[24] Furthermore, the CESCR also derived the right to water from Article 12(1) of the ICESCR, which deals with the right to "the highest attainable standard of health", concluding that the right to water "is also inextricably related to the right to the

[19] GA Res. 44/25, Annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989).
[20] Convention on the Rights of Persons with Disabilities, UN Doc. A/61/611 (2006).
[21] Committee on Economic, Social and Cultural Rights, *supra* note 1.
[22] Heather L. Bray, "ICSID and the Right to Water: An Ingredient in the Stone Soup", 29 ICSID Review (2014) 474, at 476.
[23] Thielbörger, *supra* note 15, at 490.
[24] Committee on Economic, Social and Cultural Rights, *supra* note 1, para 3.

highest attainable standard of health."[25] It should be noted that, while dealing with the human right to water in detail, the General Comment No.15 lacks binding force and constitutes merely an authoritative interpretation of the ICESCR.

Eight years after the General Comment No.15, the U.N. General Assembly adopted a Resolution on the Human Right to Water and Sanitation, which formally recognizes a self-standing human right to water as declaring "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights".[26] In this respect, this Resolution connected the human right to water to the right to life and considered it as a prerequisite for the realization of all human rights. This resolution was followed by another Resolution titled "Human Rights and Access to Safe Drinking Water and Sanitation" issued by the Human Rights Council. The Council affirmed that "the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity".[27] This Resolution clarified the legal bases of the human right to water in line with the General Comment No.15, which derived this right from other rights. In this sense, it is considered that, on the one hand, in some instances, an autonomous human right to water has been affirmed; on the other hand, such a right remained characterized as an extension of existing rights in others.[28] Nevertheless, both General Comment No.15 and aforementioned Resolutions recognized the human right to water by providing a solid legal basis through three analytical foundations: derivation from Articles 11 and 12 of the ICESCR, an analysis of the centrality and necessity of water to other rights under the ICESCR and basing the argument to the right to water on the prior existence of such right under other legal instruments.[29]

Finally, one should note that, national governments have increasingly recognized the right to water in their constitutions and incorporated the right to water in their national legislations, [30] which demonstrates that international rules on the

[25] *Ibid*.
[26] GA Res. 64/292, 28 July 2010.
[27] HRC Res. 15/9, 30 September 2010.
[28] L. Boisson de Chazournes, Fresh Water in International Law (2013), at 150.
[29] Salman, *supra* note 9, at 974.
[30] The right to water is explicitly recognized in: Constitution of the United Mexican States, Uruguayan

right to water as a human right is placed high in the Governments' agenda.[31] Furthermore, these developments are considered as elevating the status of the right to water to customary international law.[32] However, although the customary law status of the right to water has been strengthened especially in recent years, the prevailing opinion in the scholarship still considers that there is not sufficiently consistent state practice to establish a right to water under customary international law that would bind those states that have not formally recognized the right.[33]

Despite the ambiguity over the last decade with regard to the nature of its status as an international human right, U.N. General Assembly Resolution, along with the General Comment No. 15 and the Resolution of the Human Rights Council, demonstrates a growing global consensus on the existence of a legal human right to water under international law.[34] However, one should note that, no document exists with a binding effect to date that effectively establishes a binding norm in this respect.[35] Although, the right to water is not considered yet as forming part of international customary law, it is conceptualized as a derivative right and as part of treaty law by the prevailing opinion in legal scholarship.[36] Despite the fact that the CESCR linked the right to water to other human rights such as the right to housing and adequate food and the right to the highest attainable standard of health, these

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Constitution, Constitution of the Republic of Uganda, Constitution of the Republic of South Africa, Political Constitution of the Republic of Nicaragua, Constitution of the Democratic Republic of the Congo, Constitution of the Republic of the Ecuador, Constitution of the Republic of Maldives, Constitution of Kenya, Constitution of the Republic of Niger, Constitution of the Kingdom of Morocco, Provisional Constitution of the Federal Republic of Somalia, Constitution of the Republic of Tunisia, Constitution of Zimbabwe. For a detailed discussion see, Pedi Obani, Joyeeta Gupta, "The Evolution of the Right to Water and Sanitation: Differentiating the Implications", 24(1) *Reciel* (2015) 27, at 34-35.

[31] Fabrizio Marrella, "On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration", 12 *International Community Law Review* (2010) 335, at 339.

[32] Bree Farrugia, "The Human Right to Water: Defences to Investment Treaty Violations", 0, Arbitration International (2015), 1, at 7.

[33] Pierre Thielbörger, "Re-Conceptualizing the Human Right to Water: A Pledge for a Hybrid Approach", 15 *Human Rights Law Review* (2015) 225, at 226-227; Owen McIntyre, "The Human Right to Water as a Creature of Global Administrative Law", 37:6 *Water International* (2012) 654, at 661.

[34] Pierre Thielbörger, "Re-Conceptualizing the Human Right to Water: A Pledge for a Hybrid Approach", 15 *Human Rights Law Review* (2015) 225, at 226; Madeline Baer, Andrea Gerlak, "Implementing the Human Right to Water and Sanitation: A Study of Global and Local Discourses", 36:8 *Third World Quarterly* (2015) 36:8 1527, at 1527.

[35] Eric de Brabandere, "Human Rights Considerations in International Investment Arbitration", in M. Fitzmaurice and P. Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (2012) 183, at 200.

[36] Thielbörger, *supra* note 33, at 228.

rights are considered as "complementary or supporting sources".[37] Due to the fact that the General Comment No. 15 provides that the right to water "clearly falls within the category of guarantees essential for securing an adequate standard of living"[38], as mentioned above, the right to an adequate standard of living is considered as the "source right"[39] for the right to water by the CESCR. This is affirmed by Resolution titled "Human Rights and Access to Safe Drinking Water and Sanitation" issued by the Human Rights Council, which is discussed above.

It is argued by some scholars that legally connecting the right to water to economic and social and cultural rights (an adequate standard of living and to health) rather than to civil and political rights, in particular the right to life, may have impaired the right to water by attaching to such right the problems that economic, social, and cultural rights generally have to face.[40] The underlying reason for this legal connection is that the CESCR only supervises the human rights listed in the ICESCR; thus, it does not have the authority to interpret the International Covenant on Civil and Political Rights (hereinafter; ICCPR). Therefore, there is not an "established relationship" between the human right to water and the rights set forth in the ICCPR, such as the right to life.[41]

## III. The Normative Content of the Human Right to Water and States' Obligations

With the recognition of the human right to water, the question arises regarding its normative content. The applicable normative content for the human right to water is considered to be composed of five criteria: availability, accessibility, quality and safety, affordability, and acceptability.[42] However, it must be noted that the normative

[37] *Ibid*., at 229.
[38] Committee on Economic, Social and Cultural Rights, *supra* note 1, para.3.
[39] Thielbörger, *supra* note 33, at 228.
[40] Some authors suggest that, due to the fact that the customary law status of many civil and political rights is widely accepted contrary to many economic and social rights, recognizing that part of the right to water is partly rooted in civil and political rights could make the recognition of the right to water as custom more convincing. It is further argued that the normative content of the right to water with regard to "availability" is derived from the right to life and therefore it must be considered also to be part of custom, as the right to life itself. For a detailed discussion, see Thielbörger, *supra* note 33, at 243-247; Bray, *supra* note 21, at 476-477.
[41] Bray, *supra* note 22, at 476.
[42] Colin Brown, Priscila Neves-Silva, Léo Heller, "The Human Right to Water and Sanitation: A New Perspective for Public Policies", 21(3) *Ciência & Saúde Coletiva* (2016) 661, at 662; Marrella, *supra* note 31, at 340.

content and scope of the right to water remains under development.[43]

Firstly, availability means that water that is supplied to each individual must be in sufficient quantity and on a continuous basis for personal and domestic uses.[44] Secondly, as to quality and safety, water required for each personal or domestic use must be safe and also it must be free from microorganisms, chemical substances and radiological hazards that constitute a threat to a person's health.[45]

Thirdly, in addition to these, there is the factor of "accessibility" which requires water and water facilities to be accessible to everyone without discrimination. Furthermore, accessibility has four overlapping dimensions: Physical accessibility, economic accessibility, non-discrimination and information accessibility.[46]

Fourthly, the factor of "acceptability" requires that water services must be culturally acceptable to everyone and therefore, cultural needs and preferences of users should be taken into consideration.[47] Lastly, affordability means that access to water must be affordable for everyone and therefore it most not detract a person's capacity to buy other necessities and access other human rights, such as housing, food or health services.[48]

The normative content of the right to water leads to the question concerning state parties' obligations with regard to such a right. The right to water, as other human rights derived from the ICESCR, imposes three types of obligations on states parties: obligation to respect, to protect, and to fulfil.[49] Firstly, the obligation to respect requires state parties to refrain from interfering directly or indirectly with the enjoyment of the right to water.[50] Secondly, states must also prevent third parties, including individuals, groups, corporations and other entities, as well as agents acting under their authority, from arbitrary or unlawful interferences with the enjoyment of

[43] Moreta, *supra* note 2, at 242.
[44] Committee on Economic, Social and Cultural Rights, *supra* note 1, para. 12(a).
[45] *Ibid*., para. 12(b).
[46] *Ibid*., para. 12(c).
[47] U.N. Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Catarina de Albuquerque, *On the Right Track: Good Practices in Realising the Right to Water and Sanitation* (2012), available at http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf (last visited 10 September 2016).
[48] *Ibid*., at 35.
[49] Committee on Economic, Social and Cultural Rights, *supra* note 1, para.20.
[50] *Ibid*., para.21.

the right to water.[51] This obligation to "protect" includes adopting the necessary and effective legislative and other measures, in order to achieve this purpose.[52] Finally, the obligation to fulfil requires states parties to adopt the necessary measures in order to promote the full realization of the right to water.[53] This obligation is categorized as comprising the obligations to facilitate, promote and provide.[54] The obligation to facilitate requires state parties to adopt measures to ensure individuals and communities enjoy the right to water.[55] The obligation to promote obliges state parties to ensure that there is appropriate education concerning the water issues.[56] Lastly, the obligation to provide urges state parties to fulfil the right to water in cases where individuals or a group are unable to realize such right themselves by means at their disposal based upon reasons beyond their control.[57]

The obligations of state parties set out under the title of "obligations to protect" in General Comment No.15 that requires to prevent third parties from "interfering in any way with the enjoyment of the right to water"[58] and "compromising equal, affordable, and physical access to sufficient, safe and acceptable water"[59] where water services are operated or controlled by third parties, are particularly relevant for investment disputes to the extent that they intend to impose on states to adopt "the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems."[60] On the one hand, if the use of water by private companies is not protected by the human right to water as elaborated above, their activities such as water distribution, considerably benefit from the guarantees previously granted to foreign investors under bilateral investment treaties, including the ones regarding

[51] *Ibid*., para.23.
[52] *Ibid*.
[53] *Ibid*., para.26.
[54] *Ibid*., para.25.
[55] *Ibid*.
[56] European Citizens' Initiative, *Water and Sanitation are a Human Right Water is a Public Good, not a Commodity!*, Explanatory note, (Annex to ECI Water and sanitation are a human right) (2012), available at http://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/2012/000003/en (last visited 10 January 2017).
[57] *Ibid*.
[58] Committee on Economic, Social and Cultural Rights, *supra* note 1, para.23.
[59] *Ibid*., para 24.
[60] *Ibid*., para 23.

expropriation and the fair and equitable treatment.[61] On the other hand, when a state adopts "the necessary and effective legislative and other measures" in order to fulfil its obligations, the measures at stake may negatively affect the interests of the foreign investors and the above mentioned guarantees may be impaired. This type of conflicts led to several high-profile investment disputes of great importance, which will be discussed in detail in the third chapter.

# CHAPTER 2. HUMAN RIGHT TO WATER IN INVESTOR-STATE ARBITRATION

## I. Conflicts between Human Right to Water and Investment Treaty Obligations

According to the International Law Commission (ILC) Group on Fragmentation in International Law, when two norms are both valid and applicable to the same situation, the precise relationship between such norms must be determined.[62] In this context, there are two types of relationships: relationships of interpretation, where one norm is used in the interpretation of the other norm and relationships of conflict, where one norm must be chosen instead for the reason that both norms are valid and applicable.[63] With regard to the potential conflicts between human right to water and investment protection, "this distinction could be adjusted to say that either the competing interests/norms are interpreted in a way that they actually do not conflict or one set of interests/norms is given priority on the basis of one of several techniques available in international law."[64] However, despite the relationships between different norms of international law, such norms exist at different levels of hierarchy and there are two norms, namely *jus cogens* or peremptory norms and United Nations Charter [65]

[61] Jorge E. Vinuales, "Access to Water in Foreign Investment Disputes", XXI *The Georgetown International Environmental Law Review* (2009) 733, at 740.
[62] International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (2006), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf (last visited 19 December 2016).
[63] *Ibid*., para. 2.
[64] Vinuales, *supra* note 61, at 742.
[65] The Charter of the United Nations, UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119 (1945).

obligations, which trump all other areas of international law, including international investment agreements.[66]

As seen in several investment disputes, a state's obligations under international investment agreements may be frustrated by fulfilling its obligations with regard to the human right to water, which is, as analyzed in detail in the previous chapter, explicitly or implicitly appears in several international human rights treaties. In this situation, given that the human right to water is neither fully embraced as *jus cogens* nor a United Nations Charter obligation, general principles of international law provide tools that may be called upon to resolve such conflicts.[67] However, one must note that, firstly, an interpretation must be conducted in order to determine whether a conflict exists. The first principle that governs the conflict is *lex specialis derogat generali*, which suggests that when two norms deal with the same subject matter, priority should be given to the special rule rather than the general one.[68] Under the second principle, namely *lex posterior derogat priori*, priority is given to the latter legislation over the earlier one.[69] Finally, the last one is the principle that the latest expression of the states' intentions resolves any conflict.[70] Nevertheless, it must be noted that, when states enter into a new treaty that might conflict with other treaties, they should ensure that the rights of third parties are not affected and the object and purpose of the treaty is not undermined.[71]

Given the aforementioned principles, states' obligations under international investment agreements will prevail over obligations with regard to the human right to water "if encapsulated in special rules and human rights obligations are delineated in general ones"; where the intentions of a state indicates that obligations under

[66] Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements* (2010), Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, July 8-10, 2010, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632437 (last visited 18 December 2016), at 4.
[67] F. Baetens (ed.), *Investment Law Within International Law: Integrationist Perspectives* (2013), at 179.
[68] International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (2006), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf (last visited 19 December 2016), para. 5.
[69] S. A. Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (2003), at 211.
[70] Baetens, *supra* note 67, at 179.
[71] International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* (2006), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf (last visited 19 December 2016), para. 30.

international investment agreements will prevail over other obligations; and where international investment agreements are concluded after human rights treaties providing that the former does not affect the rights of third parties to the latter or undermines the latter's object and purpose.[72] Given that most of the international investment agreements were "encapsulated in "special rules" subsequent to the promulgation of leading human rights treaties", the principle of latest expression of the states' intentions would suggest that investment obligations would prevail over the obligations in pre-existing human rights treaties.[73] However, regardless of the fact that the human right to water is neither fully embraced as *jus cogens* nor a United Nations Charter obligation, it is embodied in a number of international human rights treaties. Consequently, given that such treaties have the object and purpose of observing and promoting such rights, including the human right to water, these can be frustrated by obligations under international investment agreements that adversely modify the content of the right to water and "where a state is party to both an IIA and a human rights treaty prescribing the right to water, and the legal status of both treaties is equivalent, the IIA obligation should be displaced."[74]

## II. Legal Paradox for States: Simultaneous Treaty Obligations

Under international human rights law, states hold obligations and duties to protect, respect and fulfil human rights of individuals within their territory and/ or jurisdiction.[75] It must be noted that, this also includes the duty of states to protect against human rights abuses within their territory and/ or jurisdiction by third parties, including business enterprises.[76] The obligation to protect requires states to protect individuals and groups against violations of their human rights.[77] The obligation to respect entails that states must refrain from interfering with the enjoyment of human

[72] Choudhury, *supra* note 66, at 6.
[73] *Ibid*.
[74] *Ibid*., at 6-7.
[75] Report of the Special Representative of the Secretary- General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, 21 March 2011.
[76] *Ibid*.
[77] The Office of the United Nations High Commissioner for Human Rights, *International Human Rights Law*, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx (last visited 3 February 2017).

rights.[78] Lastly, the obligation to fulfil requires states to take positive action to ensure the enjoyment of human rights.[79] Furthermore, as United Nations Independent Expert Alfred de Zayas notes "States that ratify human rights treaties also enter into agreements that prevent them from fulfilling their human rights obligations",[80] in our case namely international investment agreements by which they commit themselves to comply with investment obligations towards foreign investors. While the legal protection of human rights framework is primarily based on the obligations vis-à-vis individuals and groups, investment law is focused on the relations between states and foreign investors. Nevertheless, in both cases, states have legal obligation under international law to comply with obligations set out in a treaty. Accordingly, the factual reality for most states is that they hold different international obligations in parallel, which they seek to respect simultaneously, in good faith.[81] In practice, this led to a number of disputes, where the two aforementioned obligations came into tension, when host states adopted effective measures in the context of their human rights obligations, which resulted in affecting investors' rights under international investment agreements at stake.

The decision regarding which of the two obligations to comply with is based on an assessment of the advantages and disadvantages of compliance and non-compliance. This can depend on several factors such as a cost-benefit analysis, especially depending upon the impact of non-compliance in the economy and fiscal circumstances, remedies that are available, the incentive to be consistent in the foreign policy and political relations.[82] A state may find it convenient to comply with an obligation that has the possibility to have more detrimental effects, stronger remedies and/or more significant and political consequences in case of non-compliance.

[78] *Ibid*.
[79] *Ibid*.
[80] The Office of the United Nations High Commissioner for Human Rights, *UN Expert: UN Charter and Human Rights Treaties Prevail over Free Trade and Investment Agreements*, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16439&LangID=E (last visited 3 February 2017).
[81] Jasper Krommendijk, John Morijn, "Proportional" by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration", in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 422, at 423.
[82] Erik Denters, Tarcisio Gazzini, "Multi-Sourced Equivalent Norms from the Standpoint of Governments", in T. Broude,Y and Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011) 69, at 85.

While reparation for a wrongful act of a state takes the form of restitution, compensation, or satisfaction under the international law of state responsibility, the remedy under investment arbitration almost invariably consists of monetary compensation.[83] Furthermore, based on the principles of finality and correctness, arbitral awards are final and subject to neither an appeals procedure nor any form of scrutiny by domestic courts.[84] Another crucial issue is the enforceability: the pecuniary obligations are enforceable by domestic courts around the world and such courts may not examine the correctness of such awards or the issue of jurisdiction and the proper procedure adhered by arbitral tribunals.[85]

International mechanisms to protect human rights and the procedure of international investment arbitration share structural similarities. As international investment arbitration, international human rights claim mechanisms enable a non-state actor to bring a claim based on a violation of an international human rights obligation against a state in an international forum outside the domestic legal system.[86] Human rights treaties recognize the rights of individuals internationally and they may seek redress by international mechanisms that are established under such treaties. The European Convention on Human Rights (hereinafter, "ECHR") and the American Convention on Human Rights (ACHR) have corresponding courts and commissions that can hear claims by individuals for the violation of their human rights by states.[87] Furthermore, individuals can bring claims against states before committees with the mandate of interpreting and overseeing the application of the treaties within the legal framework of the ICCPR and ICESCR.[88] Furthermore, as to the international accountability mechanisms with regard to the violation of the human right to water, individuals whose human right to water has been violated by a state party under the ICCPR, ICESCR, CEDAW, CRPD and/or CRC, may bring a communication to the relevant United Nations committee, providing that the state has

[83] Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, (2nd ed., 2012), at 294.
[84] *Ibid*., at 300-301.
[85] *Ibid*., at 310-311.
[86] Jorge Daniel Taillant, Jonathan Bonnitcha, "International Investment Law and Human Rights", in M.Cordonier Segger , M. W. Gehring (eds), *Sustainable Development in World Investment Law* (2011) 57, at 70.
[87] *Ibid*.
[88] *Ibid*.

recognized the competence of such committee.[89] However, it must be noted that individuals, who bring a claim against a state in an international human rights forum are required to prove that they have exhausted domestic remedies available and that the same matter is not being assessed under another procedure of international investigation or settlement.[90] This constitutes a significant difference on the procedural step in comparison with the procedure of investment arbitration. Furthermore, the reasons that investment arbitration provides a stronger remedy and a higher level of enforceability when compared to international human rights law mechanisms, may provide incentive for states to comply with their investment obligations at the cost of non-compliance with their human rights obligations under human rights treaties. However, on the issue of the legal consequences of non-compliance with a state's human rights obligations, it is crucial to state that the violation of human rights stigmatizes the state that fails to comply with its human rights obligations, causes political pressure especially by international actors and restrains the state to use its reputational capital in the human rights arena.[91]

Furthermore, due to the fact that arbitral tribunals do not address the conflict between the two obligations in their decisions, which will be analysed in detail in subsequent chapters, "The dilemma about whether a state should choose to violate a treaty obligation rather than its human rights obligations … in practice this may prove inevitable, particularly since international investment tribunals view all cases of expropriation solely from the point of view of the loss incurred by the investor rather than through a human rights lens."[92]

[89] Nobonita Chowdhury, Basak Mustu, Haley St. Dennis and Melanie Yap, *The Human Right to Water and the Responsibilities of Businesses: An Analysis of Legal Issues* (2011), available at https://www.ihrb.org/pdf/SOAS-The_Human_Right_to_Water.pdf (last visited 4 February 2017).
[90] *Ibid*.
[91] Andrew T. Guzman, "A Compliance-Based Theory of International Law", 90 *California Law Review* (2001) 1823, at 1846.
[92] Ilias Bantekas, Lutz Oette, *International Human Rights Law and Practice* (2013), at 667.

# III. Raising Human Rights and Human Right to Water in Investment Arbitration

## 1. Human Rights Arguments by the Investor

Firstly, human rights can be invoked by the investor in investment arbitrations. However, this is interestingly rare in practice.[93] Furthermore, it must be noted that the legal issues with regard to the human right to water are more likely to be raised by the host state in arbitral proceedings, since investors are engaged in distribution in most disputes with regard to water issues.[94]

Investors have brought human rights arguments into play in investment arbitrations either as independent claims by grounding their claims directly on human rights violations in addition to violations of BIT obligations,[95] or in support of establishing a violation of a BIT by deriving methodology or arguments from human rights law and jurisprudence.[96] For instance, investors have introduced human rights argumentation for their preferred interpretation of a given BIT obligation, such as expropriation.[97] The approaches of tribunals to human rights claims of investors varied from considering them in determining breaches of investment obligations to denying their competence for human rights claims as such and hence not addressing them, even in cases where human rights of the investor were relevant.[98] It is argued by some scholars that there is a lack of consistent methodology that risks entailing biases favoring foreign investors and the impact of the human rights argumentation is

[93] Christoph Scheurer, Clara Reiner, "Human Rights and International Investment Arbitration", in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 82, at 88.
[94] Vinuales, *supra* note 61, at 743.
[95] UNCITRAL, *Biloune and Marine Drive Complex Ltd* v. *Ghana Investments Centre and the Government of Ghana,* Award on Jurisdiction and Liability, 27 October 1989; UNCITRAL, *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v The Republic of Ecuador*, Interim Award, 1 December 2008; ICSID, *Spyridon Roussalis v. Romania – Award*, 7 December 2011, ICSID Case no. ARB/06/1; ICSID, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon – Award,* 7 June 2012, ICSID Case no. ARB/07/12.
[96] ICSID, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania - Decision on Jurisdiction and Admissibility*, 24 September 2008, ICSID Case no. ARB/05/20; UNCITRAL, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Award, 12 January 2011; ICSID, *The Rompetrol Group N.V. v. Romania - Award*, 6 May 2013, ICSID Case No. ARB/06/3; See Vivian Kube, Ernst-Ulrich Petersmann, "Human Rights Law in International Investment Arbitration", *EUI Working Paper LAW 2016/02* (2016) 1, at 5.
[97] L. W. Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016), at 152.
[98] Kube, Petersmann, *supra* note 96, at 9; Schreuer, Reiner, *supra* note 93, at 88.

difficult to assess due to the vague language used by the tribunals.[99]

## 2. Human Rights Arguments by the Host State

Up to the present, human rights considerations have been often invoked by the host state as a defense to justify measures with adverse effects on the investment taken to comply with their human rights obligations under international human rights law.[100] Under human rights law, states are not only the bearer of obligations to refrain from engaging in human rights violations. They are also under obligation to prevent third parties, including the foreign investors, operating in their territories from interfering with the enjoyment of human rights.[101] The measures taken by the host states in order to ensure the protection of human rights may have an adverse impact upon foreign investors' interests and enter into conflict with provisions of investment treaties and contracts. This may lead to investment disputes and the question of whether the human rights obligations of host states can serve as a defense to justify the breaches of international investment agreements becomes crucial in this respect.

Argentina has often invoked human rights considerations to justify the measures it adopted during the country's economic and social crisis that began in 2001. For instance, in *CMS Gas v Argentina*,[102] Argentina argued that, in case of an economic and social crisis that compromises basic human rights of the citizens, "no investment treaty could prevail as it would be in violation of such constitutionally recognized rights."[103] However, in response to this argument, the Tribunal held that "there is no question of affecting fundamental human rights when considering the issues disputed by the parties."[104] Furthermore, in *Siemens v Argentina*,[105] Argentina claimed that given the social and economic conditions of Argentina, "the human rights so incorporated in the Constitution would be disregarded by recognizing the property

[99] Kube, Petersmann, *supra* note 96, at 9.
[100] Schreuer, Reiner, *supra* note 93, at 89.
[101] *Ibid.*
[102] ICSID, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case no. ARB/01/8.
[103] ICSID, *CMS Gas Transmission Company v. The Republic of Argentina – Award*, 12 May 2005, ICSID Case no. ARB/01/8., para. 114.
[104] *Ibid.*, para. 121.
[105] ICSID, *Siemens A.G. v. The Argentine Republic*, ICSID Case no. ARB/02/8.

rights asserted by the Claimant."[106] The Tribunal noted that this argument of Argentina had not been developed and further held that "without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case."[107] These cases demonstrates Tribunals' reluctance to take up human rights considerations, since they avoided engaging in discussing the substantive human rights arguments by for instance referring to lack of sufficiently elaborated argumentation.

On the other hand, in *Sempra v Argentina*,[108] the Tribunal adopted an approach that can be considered as more open to human rights considerations. In this case, Argentina claimed that its responsibility is excluded under its legislation and jurisprudence on emergency and by the rules of state of necessity under international law.[109] In response, the Tribunal acknowledged that the discussion at stake "raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners."[110] However, when examining the issue of whether the Argentine Government still had a number tools at its disposal to deal with the situation or whether Argentina's constitutional order and its survival were hanging by a thread, it held that "the constitutional order was not on the verge of collapse" and "even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation."[111] In *LG&E v. Argentina*,[112] although it did not explicitly referred to human rights, the Tribunal held that "Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests."[113] Similarly, the Tribunal in *Continental Casualty v Argentina*,[114] again not explicitly referring to human rights, held that the measures taken by Argentina in its social and economic crisis in order to protect constitutional

[106] ICSID, *Siemens A.G. v. The Argentine Republic – Award*, 6 February 2007, ICSID Case no. ARB/02/8, para. 75.
[107] *Ibid.*, para. 79.
[108] ICSID, *Sempra Energy International v. The Argentine Republic*, ICSID Case no. ARB/02/16.
[109] ICSID, *Sempra Energy International v. The Argentine Republic – Award*, 28 September 2007, ICSID Case no. ARB/02/16, para. 98.
[110] *Ibid.*, para. 332.
[111] *Ibid.*
[112] ICSID, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic,* ICSID Case no. ARB/02/1.
[113] ICSID, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic - Decision on Liability*, 3 October 2006, ICSID Case no. ARB/02/1, para. 226.
[114] ICSID, *Continental Casualty Company v. The Argentine Republic*, ICSID Case no. ARB/03/9.

guarantees and fundamental liberties were justified[115] and in applying particular measures, states have a "significant margin of appreciation."[116]

Lastly it must be noted that human rights considerations have been often invoked by host states to justify a breach of its obligations under an international investment treaty in disputes concerning the privatization of water systems. States such as Argentina and Tanzania have privatized their water systems and granted concession and lease contracts to foreign investors, and ultimately terminated or suspended these contracts based upon human rights considerations. Consequently, foreign investors brought claims for the violation of such contracts and international investment treaties. Such cases involving the human right to water, constitutes examples of great importance in this regard and demonstrates a wide range of possible approaches to such human rights justifications of host states[117] as will be analyzed in the following chapters.[118]

## 3. Human Rights Introduced by the Tribunal

Human rights have been also referred by tribunals *ex officio* in some cases, particularly in determining the existence of an expropriation and the scope of property rights. In *Tecmed v Mexico*,[119] the Tribunal referred to both the case law of ECHR and the Inter-American Court of Human Rights in order to determine whether an indirect expropriation took place.[120] Furthermore, it referred to the case law of the ECHR with regard to proportionality and the treatment of nationals and non-nationals.[121] In *Azurix*

[115] ICSID, *Continental Casualty Company v. The Argentine Republic – Award*, 5 September 2008, ICSID Case no. ARB/03/9, para. 180.
[116] *Ibid.,* para. 181.
[117] Kube, Petersmann, *supra* note 96, at 10.
[118] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case no. ARB/97/3; ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case no. ARB/02/3; ICSID, *Azurix Corp. v. The Argentine Republic*, ICSID Case no. ARB/01/12; ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case no. ARB/05/22; ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19; ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/17; ICSID, *SAUR International SA v. Republic of Argentina - Decision on Jurisdiction and Liability,* 6 June 2012, ICSID Case no. ARB/04/4.
[119] ICSID, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case no. ARB (AF)/00/2.
[120] ICSID, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States – Award*, 29 May 2003, ICSID Case no. ARB (AF)/00/2, para. 116.
[121] *Ibid.*, para. 122.

*v Argentina*,[122] the Tribunal also sought guidance in the case law of ECHR regarding the interpretation of property rights and the public purpose criterion within the context of expropriation.[123] Another case in which the case law of the ECHR was cited is *Saipem v Bangladesh*,[124] where the Tribunal held that "rights under judicial decisions are protected property that can be the object of an expropriation"[125] and court decisions can amount to an expropriation.[126] Furthermore, in *Mondev v United States*,[127] the Tribunal referred to the case law of the ECHR on the issue of the retrospective applicability of a new law[128] and also state immunity and access to a court.[129] The occasional references to human rights jurisprudence by Tribunals for guidance demonstrate the impact of human rights on investment arbitration.[130] Yet, it is argued that these references do not follow a transparent legal methodology.[131]

One should note that, although technically there is not any legal impediment to an arbitral tribunal's application of rules governing the human right to water in international law *ex officio*, they remain reluctant to address the legal issues that have not been discussed by parties to dispute in order to avoid excessing their power in practice.[132] Given the fact that they remain reluctant even when a party raises a human rights argument, including an argument in relation to the human right to water, this appears to be predictable.[133]

## 4. Human Rights Introduced by Non-Party actors

There are an increasing number of human rights interventions by NGOs and civil society organizations through filing of *amicus curiae* briefs in international investment arbitration. It must be noted that the *amicus curiae* participation started in

[122] ICSID, *Azurix Corp. v. The Argentine Republic*, ICSID Case no. ARB/01/12.
[123] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case no. ARB/01/12, para. 311.
[124] ICSID, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case no. ARB/05/07.
[125] ICSID, *Saipem S.p.A. v. The People's Republic of Bangladesh - Decision on Jurisdiction and Recommendation on Provisional Measures*, 21 March 2007, ICSID Case no. ARB/05/07, para. 130.
[126] *Ibid.*, para. 132.
[127] NAFTA, *Mondev International Ltd v United States of America*, ICSID Case no. ARB(AF)/99/2.
[128] NAFTA, *Mondev International Ltd v United States of America – Award*, 11 October 2002, ICSID Case no. ARB(AF)/99/2, para. 138.
[129] *Ibid.*, paras 141-144.
[130] Schreuer, Reiner, *supra* note 93, at 94.
[131] Kube, Petersmann, *supra* note 96, at 19.
[132] Vinuales, *supra* note 61, at 743.
[133] *Ibid*.

the case of *Methanex v United States*[134] in 2001. In this ground-breaking decision, the tribunal held that it had the power to accept submissions by *amicus curiae*.[135] This was followed by the Statement of the Free Trade Commission of North American Free Trade Agreement (hereinafter, "NAFTA") on non-disputing party participation in 2003, stating that "No provision of the North American Free Trade Agreement ("NAFTA") limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party")." [136] This procedure was followed by the acceptance of *amicus curiae* briefs from third parties by the NAFTA Tribunals in cases of *UPS v Canada*[137] and *Glamis Gold v USA.*[138]

Furthermore, several ICSID Tribunals adjudicating upon BITs decided on *amicus curiae* submissions, especially in cases concerning the privatization of water supply systems. One should note that the discussion with regard to *amicus curiae* submissions evolved slightly differently in ICSID arbitrations due to the fact that the ICSID Convention provided the relevant framework for procedural decisions.[139]

The first case is the *Aguas del Tunari v Bolivia*,[140] where the first time an ICSID tribunal was faced with an application for third-party participation in the proceedings. In this case, several individuals and environmental non-governmental organizations filed a petition[141] and requested the Tribunal to grant them standing to participate as parties in the proceedings or at least *amicus curiae* status, arguing that they had a direct interest in the subject matter of Aguas Del Tunari, S.A.'s claim and their participation would increase transparency in the international arbitral process and that they would provide "unique expertise and knowledge" during the Tribunal's

[134] NAFTA (UNCITRAL), *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001.
[135] *Ibid.,* para. 47.
[136] NAFTA Free Trade Commission Statement on Non-Disputing Party Participation, para. A.1, 7 October 2003, available at http://www.state.gov/documents/organization/38791.pdf (last visited 8 October 2016).
[137] NAFTA (UNCITRAL), *United Parcel Service of America Inc. v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001.
[138] NAFTA (UNCITRAL), *Glamis Gold, Ltd. v. The United States of America*, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para. 10. It must be noted that the Tribunal in this case did not explain the reasons of the acceptance of *amicus curiae* submission; it merely held that "the submission satisfies the principles of the Free Trade Commission's Statement on non-disputing party participation."
[139] Schreuer, Reiner, *supra* note 93, at 92.
[140] ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case no. ARB/02/3.
[141] ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia - NGO Petition to Participate as Amici Curiae*, 29 August 2002, ICSID Case no. ARB/02/3.

proceedings and deliberations.[142] The Tribunal held that the interplay of the ICSID Convention, the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia (hereinafter, "the Netherlands-Bolivia BIT") and the consensual nature of arbitration placed the control under the initiative of the parties instead of the Tribunal and consequently, the Tribunal could not have had the power to allow a non-party to join the proceedings or to make the documents of the proceedings public.[143] Since the consent of the parties was absent in the case, the Tribunal rejected the request in the petition to participate in the proceedings, either as party or *amicus curiae* at the jurisdictional stage of the proceedings.[144]

After the Tribunal's refusal in *Aguas del Tunari v Bolivia* through a restrictive interpretation of the consensual nature of investment arbitration,[145] some ICSID tribunals adopted a different approach and decided to receive *amicus curiae* briefs and grant non-parties *amicus curiae* status in subsequent cases. The first case where an ICSID Tribunal decided that it had the authority to receive *amicus curiae* submissions and accepted participation of a non-party as *amicus curiae* is the *Suez/Vivendi v Argentina.*[146] The Tribunal accepted *amicus curiae* briefs based on Article 44 of the ICSID Convention, which "grants it the power to admit *amicus curiae* submissions from suitable nonparties in appropriate cases."[147] The Tribunal stated that particular public interest is given in this case since "the investment dispute centers around the water distribution and sewage systems of a large metropolitan area … Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and

[142] *Ibid*., para. 2(iii).
[143] ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia - Letter from President of Tribunal Responding to Petition*, 29 January 2003, ICSID Case no. ARB/02/3.
[144] *Ibid*.
[145] E. De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (2014), at 168.
[146] ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic*, ICSID Case no. ARB/03/19.
[147] ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic - Order in Response to a Petition for Transparency and Participation as Amicus Curiae,* 19 May 2005, ICSID Case no. ARB/03/19, para.16.

thereby the public they serve."[148] It further concluded that the case "does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties." [149]

Furthermore, one must note that the *amicus curiae* submission by the Center for International Environmental Law in the case of *Suez/Vivendi v Argentina*[150] is of great importance in the context of the human right to water. In this submission, it is argued that human rights law, particularly the human right to water plays a role as applicable law to the dispute and these would aid the interpretation of the BIT standards, contribute to the proper application of such standards and even displace investment law.[151] This is considered as a significant demonstration of how the human right to water could be raised by non-party *amicus curiae*.[152]

Similarly, the Tribunal in *Suez/Interaguas v Argentina*,[153] which was identical in its composition to the Tribunal in *Suez/Vivendi v Argentina*, reached the same decision by concluding that it had the power to accept *amicus curiae* submissions from suitable nonparties according to Article 44 of the ICSID Convention.[154] In both of these cases, the disputes arose from Argentina's economic crisis in 2001 and centered on the water distribution systems that "provide basic public services to hundreds of thousands of people and as a result may raise a variety of complex public and international law questions, including human rights considerations."[155]

The decision of the Tribunal in *Suez/Vivendi v Argentina* has been followed by the revision of the ICSID Arbitration Rule 37(2) on 10 April 2006, which now

[148] *Ibid.*, para 19.
[149] *Ibid.*, para 20.
[150] ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic – Amicus Curiae Submission by Centro de Estudios Legales y Sociales (CELS), Asociación Civil por la Igualdad y la Justicia (ACIJ), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria Unión de Usuarios y Consumidores Center for International Environmental Law (CIEL)*, 4 April 2007, ICSID Case no. ARB/03/19, available at http://www.ciel.org/wp-content/uploads/2015/03/SUEZ_Amicus_English_4Apr07.pdf (last visited 9 October 2016).
[151] *Ibid.*, at 13-28.
[152] Vinuales, *supra* note 61, at 746.
[153] ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17.
[154] ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic – Order in Response to a Petition for Participation as Amicus Curiae*, ICSID Case No. ARB/03/17, para. 16.
[155] *Ibid.,* para.18.

explicitly provides that, under certain conditions, tribunals have the capacity to allow a non-disputing party to file a written submission.[156] Another case concerning privatization of water systems, *Biwater v Tanzania*,[157] was the first case to test the new provisions of ICSID Arbitration Rule 37(2).[158] In this case, several NGOs filed a petition for *amicus curiae* status by emphasizing that investment arbitration is not merely about resolving conflicts but rather has a significant effect on people's ability to enjoy their human rights. Therefore, the arbitration process should be transparent and open to participation of third parties.[159] The Tribunal concluded that it would benefit from the *amicus curiae* submission by the petitioners on the grounds that "allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself."[160] In the Award, the Tribunal summarized the key themes of the amici submissions[161] and noted that it had found the Amici's observations useful and their submissions had informed the analysis of the claims.[162]

In general, the participation of non-parties in international dispute settlement is salient in cases in which public interest is given, namely cases involving human rights considerations, especially with regard to the human right to water. It can be inferred from this case law that Tribunals provided similar reasoning in accepting the *amicus curiae* submissions and considered certain factors as key to their decision-making in

[156] ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Art. 37 (2), available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited 10 October 2016); Art. 37(2) provides: After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non- disputing party") to file a written submission with the Tribunal regard- ing a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

1. (a) the non-disputing party submission would assist the Tri- bunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the dis- puting parties;
2. (b) the non-disputing party submission would address a matter within the scope of the dispute;
3. (c) the non-disputing party has a significant interest in the proceeding.

[157] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case no. ARB/05/22.
[158] Bray, *supra* note 22, at 480.
[159] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* – Petition for Amicus Curiae Status, 27 November 2006, ICSID Case no. ARB/05/22, at 8.
[160] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania – Procedural No 5*, 2 February 2007, ICSID Case no. ARB/05/22, para.50.
[161] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania – Award*, 24 July 2008, ICSID Case no. ARB/05/22, paras 370-391.
[162] *Ibid.,* para.392.

this regard.[163] Firstly, the fact that the subject matter of the case involved public interest was crucial regarding the acceptance of these briefs.[164] Secondly, the capacity of these briefs to assist the Tribunal by bringing expertise and perspectives were considered as key in making their determinations.[165] Lastly and probably most importantly, acceptance of the *amicus curiae* submissions would lead to improve transparency and enhance legitimacy in investor-state arbitration.[166] As Professor Christoph Schreuer pointed out, when the reasoning of the Tribunals are taken into consideration in general, it seems that the rationale behind the acceptance of the *amicus curiae* briefs is mostly based on increasing transparency and responding to public interest rather than human rights considerations,[167] including the human right to water.

# IV. Examining the Conflict between Human Right to Water and Investment Protection

## 1. International Investment Agreements

A number of international investment agreements contain exception provisions that reserve a state's right to protect non-economic public interests,[168] which could be relevant in the context of a conflict between human right to water and investment protection. For instance, NAFTA explicitly reserves environmental considerations in its Article 1114, which provides: "1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or

[163] James Harrison, "Human Rights Arguments in *Amicus Curiae* Submissions: Promoting Social Justice?", in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 396, at 404.
[164] *Ibid*.
[165] *Ibid*., at 405.
[166] *Ibid*.
[167] Schreuer, Reiner, *supra* note 93, at 93.
[168] Choudhury, *supra* note 66, at 8.

retention in its territory of an investment of an investor."[169]

Furthermore, as another significant example in this regard, Article XI of the Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (hereinafter, "the Argentina-United States BIT") provides that "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[170] Argentina has invoked this exception provision in its BIT as a defense to investor claims and Tribunals have interpreted this provision in a number of decisions and awards.[171] It is noteworthy that, in two cases, namely *LG&E v Argentina*[172] and *Continental Casualty v Argentina*[173], this provision constituted a basis to justify measures adopted by Argentina during its economic and social crisis that were in conflict with investors' interests. Tribunals in these cases held that maintenance of public order and the protection of essential security interests included not only the economic effects but also the social and political effects by stating that "All of these devastating conditions –economic, political, social– in the aggregate triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest"[174] and "the leap in unemployment; the social hardships bringing down more than half of the population below the poverty line; the immediate threats to the health of young children, the sick and the most vulnerable members of the population, the widespread unrest and disorders" constituted "a situation where the maintenance of public order

[169] North American Free Trade Agreement, 32 ILM 289, 605 (1993), Article 1114.
[170] Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Washington, November 14, 1991, 31 I.L.M. 124 (1992), Article XI.
[171] ICSID, *CMS Gas Transmission Company v. The Republic of Argentina – Award,* 12 May 2005, ICSID Case no. ARB/01/8; ICSID, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic - Decision on Liability*, 3 October 2006, ICSID Case no. ARB/02/1; ICSID, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic – Award*, 22 May 2007, ICSID Case no. ARB/01/3; ICSID, *Sempra Energy International v. The Argentine Republic – Award*, 28 September 2007, ICSID Case no. ARB/02/16; ICSID, *Continental Casualty Company v. The Argentine Republic - Award*, 5 September 2008, ICSID Case no. ARB/03/9.
[172] ICSID, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic - Decision on Liability*, 3 October 2006, ICSID Case no. ARB/02/1.
[173] ICSID, *Continental Casualty Company v. The Argentine Republic - Award*, 5 September 2008, ICSID Case no. ARB/03/9.
[174] ICSID, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic - Decision on Liability*, 3 October 2006, ICSID Case no. ARB/02/1, para. 237.

and the protection of essential security interest of Argentina as a state and as a country was vitally at stake."[175]

Consequently, it has been considered that the reasoning developed by Tribunals in the aforementioned cases could potentially be relevant for water-related disputes, which "present similar patterns, both with respect to the lack of access to essential services and the social unrest that such lack may cause" and in which the same provision, or a provision with a similar scope and effect, is at stake.[176] Given the fact that the aforementioned Tribunals took many social factors into consideration stemming from the crisis of Argentina, such as unemployment, poverty, lack of access to healthcare and proper nutrition, it is possible that Tribunals could interpret non-specific exception provisions concerning "public order" or "essential security interests", as embracing human rights norms, including the human right to water.[177] Furthermore, more generally, these decisions of Tribunals demonstrate that exception provisions can serve as a balancing tool between a state's human rights and investment obligations, when interpreted to encompass human rights objectives.[178]

## 2. Invocation of State of Necessity

The human right to water was not always invoked as the main argument by host states as a defense to justify the breach of their obligations under international investment treaties. In some cases, the main argument of host states as another possible entry point was the general customary rule of state of necessity[179] and states have argued that protection of human rights, including the human right to water, can

[175] ICSID, *Continental Casualty Company v. The Argentine Republic - Award*, 5 September 2008, ICSID Case no. ARB/03/9, para. 180.
[176] Vinuales, *supra* note 61, at 748-749.
[177] Choudhury, *supra* note 66, at 23.
[178] *Ibid*., at 26.
[179] GA Res.56/83, 28 January 2002; Article 25 of the Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts provides:
1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
(a) The international obligation in question excludes the possibility of invoking necessity; or
(b) The State has contributed to the situation of necessity.

function as a form of necessity as precluding the wrongfulness of breach of their obligations under the international investment treaty at stake.[180]

In cases that are brought against Argentina in order to challenge the emergency measures taken during its economic and social crisis, Argentina supported its necessity defense by referring to human rights of its population.[181] However, it must be noted that, "arbitral tribunals avoided dealing in detail with the preconditions and limits of the necessity defenses in cases of threats to the human rights of Argentina's population."[182]

For instance, in *Suez v Argentina*, Argentina put forward a necessity defense and argued that it adopted the measures that infringed upon its obligations towards the investor out of the necessity of dealing with its economic and social crisis in order to safeguard the human right to water of its population. It further argued that given the fundamental role of water in sustaining life and health, it must be granted a broader margin of discretion than in cases involving other commodities and services.[183] The Tribunal dismissed this argument and held that adopting measures that were in breach of investors' rights were not the only means available to pursue the public interests of Argentina and asserting the relevance of its human rights obligations by Argentina within the context of the necessity defense merely led the Tribunal to conclude that "Argentina was subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive."[184]

One must note that, although, in general, "jurisprudence is inconclusive on the role of human rights considerations for reliance on necessity";[185] the prevailing tendency is restrictive as demonstrated in *Suez v Argentina* and putting forward the

[180] Brabandere, *supra* note 35, at 204.
[181] August Reinisch, Christina Binder, "Debts and State of Necessity", in Juan Pablo Bohoslavsky, Jernej Letnar Cernic (eds), *Making Sovereign Financing and Human Rights Work* (2014) 115, at 121; According to Prof. August Reinisch and Prof. Christina Binder, the cases brought against Argentina demonstrate the problems with regard to reliance and application of the necessity defense in economic emergencies.
[182] *Ibid*., at 122.
[183] ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19, paras 250-252.
[184] *Ibid*., para. 262.
[185] Reinisch, Binder, *supra* note 181, at 122.

relevance of its human rights obligations within the framework of the necessity defense proved to be counterproductive for Argentina.[186] This may have been predictable, due to the fact that upholding the necessity defense of Argentina "would be tantamount to maintaining the incompatibility between the two bodies of law in point while giving prevalence to that of human rights."[187]

## 3. Interpretation of International Investment Agreements' Standards of Investment Protection

### 3.1. Expropriation

The fulfillment of the human right to water could be envisioned as a justification for regulatory expropriation of a foreign investor's property, even if the regulation adopted by the state amounts to a partial or total deprivation of the economic substance of a foreign investor's assets in the country.[188] In this context, there are a few stances regarding the issue of compensating such a deprivation in international investment arbitration, which draws a line between a non-compensatory regulation and regulatory expropriation.[189]

Firstly, according to the "sole effects" doctrine, if the regulatory measures taken by the state exceed a certain level, there will be an expropriation regardless of the purpose behind and the investor will receive full compensation.[190] For instance, in *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*[191], the Tribunal noted that "the *effect* of the measure on the investor, not the state's intent, is the critical factor" and further held that "if public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose."[192] A crucial aspect

[186] Attila Tanzi, "Reducing the Gap between International Investment Law and Human Rights Law in International Investment Arbitration?", 1 *Latin American Journal of International Trade Law* (2013) 299, at 305.
[187] Attila Tanzi, "Public Interest Concerns In International Investment Arbitration in the Water Services Sector", in Tullio Treves,Francesco Seatzu,Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (2014) 318, at 326.
[188] Vinuales, *supra* note 61, at 752.
[189] Ursula Kriebaum, "Regulatory Takings: Balancing the Interests of the Investor and the State", 8 The *Journal of World Investment & Trade* (2007) 717, at 724.
[190] *Ibid*.
[191] ICSID, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Award*, 20 August 2007, ICSID Case no. ARB/97/3.
[192] *Ibid*., paras 7.5.20-7.5.21.

of this stance that is worth mentioning is the extensive definition of expropriation that can have a negative impact on the regulatory capacity of states in fulfilling their obligations towards the protection of the human right to water. In the case of *Metalclad v Mexico*,[193] while discussing the extent to which the regulatory capacity of Mexico interfered with investor's rights, the Tribunal held that "expropriation under NAFTA includes … covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."[194] By adopting such an extensive interpretation, the Tribunal extended the claim of expropriation and added an additional element to what would otherwise be non-compensatory regulation by the host state.[195]

Secondly, according to the "radical police powers" doctrine, which takes the measure's public purpose as the decisive element, under some conditions, if the regulatory measures of the state serve a legitimate purpose, there will be no expropriation and consequently no compensation will be due for the investor.[196] The Tribunals in *Methanex v USA*[197] and *Saluka v Czech Republic*[198] adopted such an approach in their Awards. The Tribunal in *Suez v Argentina*[199] referred to these cases when assessing whether the measures taken by Argentina to cope with its economic and social crisis amounted to expropriation and noted that "in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation."[200] It further concluded that when the nature of its crisis is taken into consideration, the measures that were undertaken by Argentina were within its general police powers and did not constitute a permanent and substantial deprivation of the Claimants' investments and therefore did not

[193] NAFTA, *Metalclad Corporation v. The United Mexican States*, ICSID Case no. ARB(AF)/97/1.
[194] NAFTA, *Metalclad Corporation v. The United Mexican States*, Award, 30 August 2000, para 103.
[195] William Schreiber, "Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations", 48 *Natural Resources Journal* (2008) 431, at 450.
[196] Kriebaum, *supra* note 189, at 725-726.
[197] NAFTA (UNCITRAL), *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.
[198] UNCITRAL, *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006.
[199] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19.
[200] *Ibid*., para. 139.

constitute expropriation.[201]

Lastly, according to the "moderate police powers" doctrine, besides relying on the effect of the measure at stake, the purpose is also taken into account when deciding whether an expropriation has occurred.[202] The Tribunal in *Tecmed v Mexico*[203] conducted a proportionality analysis and established a relationship between the effect and purpose of the measure taken by a state.[204] In *Azurix v Argentina*[205], the Tribunal expressly referred to the proportionality analysis by relying on the approach adopted by the Tribunal in *Tecmed v. Mexico* in order to find out whether there was an expropriation. It ultimately came to the conclusion that the impact on the investment of the investor attributable to the actions of the host state was not to the extent required to find that these actions amounted to an expropriation, since they did not constitute a permanent deprivation of investor's investment.[206] It must be noted that the Tribunal did not discuss the underlying intentions of the measure at stake and failed to discuss the relation between protection of the human right to water as a public purpose and expropriation of the investor's investment. Furthermore, the Tribunal in *Biwater Gauff v Tanzania*[207] held that the measures taken by Tanzania were "unreasonable and arbitrary, unjustified by any public purpose (there being no emergency at the time), and the most obvious display of puissance publique"[208] and "In all the circumstances, therefore, there was no necessity or impending public purpose to justify the Government's intervention in the way that took place."[209] On this basis, by contrast to *Azurix v Argentina*, the Tribunal held that the measures of Tanzania amounted to expropriation of the investor's investment.[210] On the other hand, similar to *Azurix v Argentina*, although the principle of proportionality was not explicitly referred to, the Tribunal applied "some type of balancing", in which the

[201] *Ibid*., para. 140.
[202] Kriebaum, *supra* note 189, at 727.
[203] ICSID, *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case no. ARB (AF)/00/2.
[204] Kriebaum, *supra* note 189, at 727-728.
[205] ICSID, *Azurix Corp. v. The Argentine Republic*, ICSID Case no. ARB/01/12.
[206] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case no. ARB/01/12, paras 311-312.
[207] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case no. ARB/05/22.
[208] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania - Award*, 24 July 2008, ICSID Case no. ARB/05/22, para. 503.
[209] *Ibid*., para. 515.
[210] *Ibid*., para. 519.

sub-elements of the principle of proportionality were implied.[211] However, it failed to elaborate on the issue of the human right to water while reaching its conclusion.

All in all, the inconsistency of interpretations do not allow to foresee which measures can be considered in the context of non-compensatory regulation and regulatory expropriation. However, one must note that if expropriation is interpreted as "interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property", measures taken by states in order to protect the human right to water in conformity with the General Comment No. 15, which requires states to adopt effective measures in this regard, may be deemed expropriatory.[212] Due to the fact that the closest approximation of the obligation to protect and promote human rights is the concept of state's right to regulate, the doctrine of police powers seems to be a good entry point for human rights arguments, including the arguments based on the human right to water.[213] However, it must be noted that, while the approaches adopted by Tribunals in *Azurix v Argentina* and *Methanex v USA*, which took into account the public purpose criterion, is certainly more conducive to the realization and promotion of the human right to water, neither of the Tribunals engaged in discussing states' human right obligations when assessing the alleged expropriatory measures at stake.[214] Therefore, without the explicit discussion of human rights within arbitral tribunals, it is not clear to what extent the human right to water can form part of the police powers doctrine and which regulatory activities required by states to fulfil the human right to water may be deemed expropriatory.[215]

## 3.2. Fair and Equitable Treatment

Regarding the fair and equitable treatment standard, one should first focus on the relationship between the legitimate expectations of the investor and the human right to water, since the former, as the "dominant element" of fair and equitable

[211] Krommendijk, Morijn, *supra* note 81, at 441.
[212] Fabrizio Marrella, "The Human Right to Water and ICSID Arbitration: Two Sides of a Same Coin or an Example of Fragmentation of International Law?", II *Current Issues of Public International Law: Proceedings of Conference* (2010) 11, at 35.
[213] Krommendijk, Morijn, *supra* note 81, at 433.
[214] Marrella, *supra* note 212, at 36.
[215] *Ibid.*

treatment standard,[216] has evolved into a prominent place for human rights considerations.[217]

Legitimate expectations of the investors have several times been associated with the regime for tariff adjustment, which can easily become politicized as demonstrated in the case of *Azurix v Argentina*,[218] in case of a change of the conditions upon which tariffs were first set.[219] In *Azurix v Argentina*[220] and *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*[221] the regime for tariff adjustments have played a role in Tribunals' decisions by leading them *inter alia* to conclude that host states were in breach of the fair and equitable treatment standard. Similarly, in *Suez v Argentina*, the Tribunal concluded that Argentina breached the fair and equitable treatment standard by refusing to revise the tariff and pursing the forced renegotiation of the Concession Contract.[222]

One must acknowledge that, in order to achieve the objective to protect and promote the human right to water, Tribunals should interpret the fair and equitable standard with a full analysis of what is fair to both the investor and the host state, not merely what is fair to the investor.[223] Furthermore, adopting inflexible interpretations of the fair and equitable treatment standard may impair the human right to water, since legitimate expectations of investors may be considered as violated for any state involvement in the regulation of tariffs or adjustments.[224] In this context, it is crucial to acknowledge that in certain industries, such as water, concession contracts last

[216] UNCITRAL, *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, para. 302.
[217] Kube, Petersmann, *supra* note 96, at 24. It is widely recognized in international investment law that if violation of legitimate expectations of an investor is established, then it can be acknowledged as a violation of the fair and equitable treatment standard and the majority of claims brought by investors within the ambit of this standard is related to the violation of the investor's legitimate expectations. See, Annika Wythes, "Investor–State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?", 23 *Leiden Journal of International Law* (2010) 241, at 246.
[218] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case no. ARB/01/12, para. 375.
[219] Vinuales, *supra* note 61, at 755.
[220] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case no. ARB/01/12, paras 375, 377.
[221] ICSID, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Award*, 20 August 2007, ICSID Case no. ARB/97/3, paras 7.4.18- 7.4.25.
[222] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19, para. 247.
[223] Schreiber, *supra* note 195, at 459.
[224] Marrella, *supra* note 212, at 33.

generally more than 30 years and therefore foreign investors can reasonably expect more regulatory tightenings and changes.[225]

# CHAPTER 3. CASE STUDIES ON WATER

## I. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*[226]

### 1. Facts and Issues

The case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, also known as the "Vivendi story", is one of the longest disputes in ICSID history and the first known investment treaty case to canvass the idea that access to clean water was an indispensable element of human life.[227] This case arose from the privatization of water services in one of Argentina's provinces, namely Tucumàn, in the 1990s, as a result of an economic crisis in Argentina. In May 1995, one consortium, led by the Compagnie Générale des Eaux, a French corporation, which later on became Vivendi Universal, won the bid following a two-year tender process and its Argentine affiliate, Compañía de Aguas del Aconquija, S.A. was awarded a 30-year Concession Contract. Argentina was not involved in the tender process or the negotiations that led to the conclusion of the Concession Contract and it did not become a party.[228]

Soon after Compagnie Générale des Eaux's performance under the Concession Contract, disputes began to arise between Compagnie Générale des Eaux and the governmental authorities of the Province of Tucumán, which became the center of extensive publicity and controversy.[229] Further, due to public controversy, the Governor, demanded to renegotiate the agreement in order to lower the tariffs and following the negotiations with regard to revisions in the Concession Contract, a common ground was finally reached. However, Compagnie Générale des Eaux and

[225] *Ibid*., at 34.
[226] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID case no. ARB/97/3.
[227] Farrugia, *supra* note 32, at 9.
[228] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Award*, 21 November 2000, ICSID case no. ARB/97/3, at 1.
[229] *Ibid*., para. 29.

Compañía de Aguas del Aconquija (hereinafter, collectively referred to as "Claimants") argued that the Governer unilaterally altered the Concession Contract before submitting it to the Province of Tucumán legislature without consulting to Compagnie Générale des Eaux. Ultimately, Compagnie Générale des Eaux refused to sign the revised Concession Contract and the Claimants finally notified the Governor of the Province of Tucumán that they were was rescinding the Concession Contract on August 1997. On September 1997, Tucumán rejected the notice of rescission and terminated the Concession Contract.[230]

## 2. Procedure and Awards

In 1996, Claimants filed a request for ICSID arbitration against Argentina, alleging several violations of the 1991 the Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments (hereinafter, "the Argentina-French BIT" or "BIT") and sought over U.S. $300 million for damages.

The first issue of the dispute was whether the forum selection clause in the Concession Contract,[231] which referred disputes arising from the Concession Contract to the exclusive jurisdiction of the local courts of the Province of Tucumán, excluded the jurisdiction of the Tribunal or whether it had jurisdiction according to Article 8 of the BIT[232] and Article 25 of the ICSID Convention, extending jurisdiction to "any

[230] *Ibid*., paras 36-38.
[231] Concession Contract for Water and Sewage Service in the Province of Tucumán provides:
"For purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán."
[232] Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments, 3 July 1991 (the Argentine-French BIT); Article 8 provides:
"1. Any dispute relating to investments, within the meaning of this agreement, between one of the Contracting Parties and an investor of the other Contracting Party shall, as far as possible, be resolved through amicable consultations between both parties to the dispute.
2. If such dispute could not be resolved within six months from the time it was stated by any of the parties concerned, it shall be submitted, at the request of the investor:
- either to the national jurisdictions of the Contracting Party involved in the dispute;
- or to international arbitration in accordance with the terms of paragraph 3 below.
Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.
3. In the event of recourse to international arbitration, the dispute shall be submitted to any of the following arbitration bodies at the choice of the investor:
- The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,

legal dispute arising directly out of an investment." The Claimants relied on the BIT in order to establish the jurisdiction of ICSID, rather than bringing their claim before local courts of the Province of Tucumán. However, Argentina relied on the forum selection clause in the Concession Contract in order to challenge ICSID's jurisdiction. The Tribunal distinguished between claims based on the Concession Contract and claims based on the BIT and consequently held that the Claimants could pursue their claims through international arbitration, on the grounds that the forum selection clause in the Concession Contract did not affect the Claimants' right to resort to ICSID arbitration.[233]

Secondly, the Claimants argued that four categories of acts of the Province of Tucumán led to the violation of the BIT: acts that resulted in a fall in the recovery rate, acts that unilaterally reduced the tariff rate, abuses of regulatory authority and dealings in bad faith, respectively.[234] The Tribunal noted that these alleged acts of the Province of Tucumán on which the Claimants rely for their position attributing liability to Argentina are closely linked to the performance or non-performance of the parties under the Concession Contract and it is not possible for the Tribunal to separate the two types of claims. Consequently, the Tribunal held that, the Claimants could resort to ICSID arbitration only after they had failed in their pursuit of their claims before the local courts of the Province of Tucumán, based on the requirement of the forum selection clause in the Concession Contract, not the exhaustion of local remedies.[235]

The Claimants sought partial annulment of the Award, and the Award was partly annulled.[236] The ad hoc Committee concluded that the Tribunal had manifestly exceeded its powers by not examining the merits of the claims for acts of the Province

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opened for signature in Washington on March 18, 1965, when each State Party to this agreement has adhered to it. . . .
- An 'ad hoc' arbitration tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."

[233] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Award*, 21 November 2000, ICSID case no. ARB/97/3, paras 53, 54; Christoph Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *Vivendi I* Case Considered", in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005) 281, at 282-283.

[234] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Award*, 21 November 2000, ICSID case no. ARB/97/3, para.63.

[235] *Ibid.,* paras 77-81.

[236] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Decision on Annulment*, 3 July 2002, ICSID case no. ARB/97/3.

of Tucumán authorities under the BIT before it and noted that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT and of contract.[237] This decision of the ad hoc Committee demonstrates that the failure to exercise an existing jurisdiction constitutes an excess of powers.[238]

As to the relation between the breach of a contract and the breach of a treaty, the ad hoc Committee stressed that "A state may breach a treaty without breaching a contract, and vice versa … the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard ... A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty."[239] After the partial annulment of the Award in 2002, the Claimants resubmitted the very same claims before a newly constituted tribunal. In the Award of 2007, the Tribunal awarded the claimants $105 million in damages.[240]

## 3. Evaluation in Light of the Human Right to Water

Firstly, in considering the case in light of the human right to water, one should note that the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* is a primary example within the range of water-related investment disputes as it demonstrates that the human right to water can be violated during the conclusion of a contract or even during the negotiations that led to the conclusion of a contract; even though there is not an outbreak of a water crisis. After the investment has been made, the Province of Tucumán realized the consequences of the terms in the Concession Contract concluded with the Claimants and sought to renegotiate and unilaterally changed the terms in a manner that they would be in conformity with its obligations towards the protection of the human right to water as embodied in the General Comment No. 15. This ultimately led to the violation of its obligations towards the Claimants under the BIT. Although one can argue that

[237] *Ibid*., para. 60; Schreuer, *supra* note 233, at 286-287.
[238] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Decision on Annulment*, 3 July 2002, ICSID case no. ARB/97/3, para. 86.
[239] *Ibid*., paras 95, 101, 103.
[240] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Award*, 20 August 2007, ICSID case no. ARB/97/3, at 264.

Argentina sought to change the policy based on reasonable and legitimate governmental concerns, the commitment of the Province of Tucumán to the Concession Contract that created a potential conflict between the human right to water and its obligations owed to the investor under the BIT already constitutes a violation of the right to water.[241]

Secondly, on the issue of jurisdiction, which is the most outstanding part of the Award of 2000, the ad hoc Committee offers an important lesson to host states. It made it clear that the treaty-based jurisdiction of ICSID Tribunals to decide on violations of these treaties are not affected by the contractual selection of local courts in contracts and an investment dispute may at the same time contain interpretation and application of a treaty and of a contract.[242] Consequently, since relying on the forum selection clauses that grants exclusive jurisdiction over the interpretation of the contracts to local courts in order to deprive ICSID Tribunals of their jurisdiction may constitute an unsuccessful attempt, this decision of the ad hoc Committee encourages host states' to ensure that they ensure the protection of the human right water from the very beginning, even before the investment has been made.[243]

Lastly, an interesting point with regard to the human right to water in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* is one of the arguments of Argentina in its request for the annulment of the second Award. Argentina asserted that the Tribunal had disregarded fundamental issues related to the dispute between the parties, including that "the dispute between the parties related to the right to water as an essential human right".[244] The ad hoc Committee did not explicitly assess this argument and noted that "not all arguments need to be addressed but only the fundamental ones."[245] However, it must be noted that, neither of the Awards included any arguments of Argentina that adopted the language of "the human right to water" or even "human rights" and notably, the human right to water was mentioned by the Tribunal.

[241] Thielbörger, *supra* note 15, at 495.
[242] Schreuer, *supra* note 233, at 286-287.
[243] Thielbörger, *supra* note 15, at 495.
[244] ICSID, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic – Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007*, 10 August 2010, ICSID case no. ARB/97/3, para. 57.
[245] *Ibid*., para. 248.

## II. *Aguas del Tunari v. Bolivia*[246]

### 1. Facts and Issues

The second landmark case related to the privatization of water systems is *Aguas del Tunari* v. *Bolivia*, also known as the "water war" of Cochabamba. In 1997, the World Bank conditioned the additional aid for water development upon the privatization of the water systems of two of Bolivia's cities, including Cochabamba.[247] Following the pressure caused by the World Bank, Bolivia engaged in a tender process to privatize its water services for its third largest city, Cochabamba, in order to improve the previous water system. In September 1999, Aguas del Tunari, S.A., a subsidiary of the United States-based Bechtel Corporation, was granted a concession that provided a 40-year relationship between Aguas del Tunari, S.A. and Bolivian Water and Electricity Superintendencies.

In October 1999, following the signing of the Concession Contract between Aguas del Tunari, S.A. and the Bolivian government, the Bolivian Congress passed Law 2029 on Potable Water Services and Sanitary Sewage (hereinafter, "Law 2029"), which contained controversial provisions allowing for the privatization of water sources, without consulting the civil society.[248] Both Law 2029 and the Concession Contract involved provisions that allow Aguas del Tunari, S.A. to charge for water drawn from private wells and even to force residents to stop using water from wells and instead connect them to Aguas del Tunari, S.A.'s network. Furthermore, Aguas del Tunari, S.A. was granted the exclusive right to use the water sources in the area covered by the concession.[249]

In the first months of Aguas Del Tunari, S.A.'s operation of water systems, the tariffs were increased dramatically: water prices increased by 40% for poor families, 43% for the poorest families and according to some consumers even increased by

[246] ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case no. ARB/02/3.
[247] Democracy Center, *Bechtel vs Bolivia: Details of the Case and the Campaign*, available at http://democracyctr.org/bolivia/investigations/bolivia-investigations-the-water-revolt/bechtel-vs-bolivia-details-of-the-case-and-the-campaign/ (last visited 15 October 2016).
[248] Maria McFarland Sanchez-Moreno, Tracy Higgins, "No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia", 27 *Fordham International Law Journal* (2003) 1663, at 1758.
[249] *Ibid.*, at 1766-1767.

200%.[250] This resulted in a citywide rebellion known as the "Cochabamba Water Revolt". [251] In November 1999, residents of Cochabamba began to protest the privatization of the water systems and up to %200 increases in water tariffs initiated by Aguas del Tunari, S.A. The Bolivian Government suppressed the major violent protests in Cochabamba through military force and the Bolivian President declared martial law. Tragically, near 100 people were wounded and a Bolivian teenager was killed in April 2000.[252] In consequence of the persistent widespread major protests, Bechtel Corporation ultimately abandoned its concession in Cochabamba, the Bolivian government terminated the contract and Aguas del Tunari, S.A. was replaced by a public company in April 2000.

## 2. Procedure, Awards and Agreements

The Bolivian government and Aguas del Tunari, S.A. tried to reach an amicable settlement. When their negotiations failed, Aguas del Tunari, S.A. filed a request for arbitration against the Bolivian Government on November 2001 with the ICSID based on the breach of various provisions of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia (hereinafter, the "Netherlands-Bolivia BIT"). The Bechtel Corporation claimed US$50 million in damages and profits lost.

In August 2002, certain individuals and environmental non-governmental organizations filed a Petition[253] requesting the Tribunal to grant them standing to participate as parties in the proceedings or at least *amicus curiae* status. They claimed that they had a direct interest in the subject matter and their participation would increase transparency in the international arbitral process.[254] However, The Tribunal rejected the petition for *amicus curiae* submission concluding that it lacked the power

[250] *Ibid.*, at 1763.
[251] Democracy Centre, *Bechtel vs Bolivia: Details of the Case and the Campaign*, available at http://democracyctr.org/bolivia/investigations/bolivia-investigations-the-water-revolt/bechtel-vs-bolivia-details-of-the-case-and-the-campaign/ (last visited 15 October 2016).
[252] Marrella, *supra* note 31, at 355.
[253] ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia - NGO Petition to Participate as Amici Curiae*, 29 August 2002, ICSID Case no. ARB/02/3.
[254] *Ibid.*, para. 2(iii).

to allow a non-party to join the proceedings or to make the documents of the proceedings public, since the consent of the parties was absent in the case.[255]

In January 2006, parties requested discontinuation of the proceedings and Bechtel Corporation and the Bolivian government signed an agreement in which they abandoned the case for a token payment of 2 bolivianos (approximately 30 cents). The Bolivian government and the shareholders of Aguas del Tunari, S.A. declared in a joint statement, "the concession was terminated only because of the civil unrest and the state of emergency in Cochabamba and not because of any act done or not done by the international shareholders."[256] This was the first time that a major corporation has ever abandoned a major international trade case as a consequence of large scaled and continuing international pressure from civil society and it set a significant precedent for the politics of similar future cases.[257] It is worth mentioning that, Bolivia left ICSID Convention and the notification of its withdrawal was received by ICSID on 2 May 2007 and took effect on 3 November 2007.[258]

## 3. Evaluation in Light of the Human Right to Water

To begin with, one of the most crucial aspects of *Aguas del Tunari v Bolivia* relevant vis-à-vis the human right to water is the clear conflict with two of distinct but strongly related core principles embodied in the General Comment No.15, namely the principle of equity and the principle of affordability. Firstly, the principle of equity requires to ensure that water services must be affordable for everyone and "socially disadvantaged groups" and poorer households should not be subjected to bear the burden of water expenses disproportionately as compared to richer households.[259] Secondly, the principle of affordability requires that "The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise

[255] ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia - Letter from President of Tribunal Responding to Petition*, 29 January 2003, ICSID Case no. ARB/02/3; *Ibid*., at 458-459.
[256] Bilaterals.org, *Bechtel, Bolivia resolve dispute, Company drops demand over water contract canceling* (2006), available at http://www.bilaterals.org/?bechtel-bolivia-resolve-dispute (last visited 16 October 2016).
[257] Democracy Center, *Bolivia Investigations: The Water Revolt*, available at http://democracyctr.org/bolivia/investigations/bolivia-investigations-the-water-revolt/ (last visited 16 October 2016).
[258] UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, IIA Issues Note No.2, 2 December 2010, available at http://unctad.org/en/Docs/webdiaeia20106_en.pdf (last visited 16 October 2016).
[259] Committee on Economic, Social and Cultural Rights, *supra* note 1, Art. 27.

or threaten the realization of other Covenant rights" and therefore no one should be subjected to compromise their other basic needs.[260]

Firstly, when the principle of equity is applied to *Aguas del Tunari v. Bolivia*, given that at some levels of consumption, the tariff increases for the poor and the poorest households were proportionately higher than they were for richer households,[261] and neither Aguas del Tunari S.A. nor the Bolivian government regulated the increases in tariffs by taking into consideration the principle of equity in the Concession Contract, the human right to water was evidently violated. The Bolivian Government had to ensure to mitigate the impact on those who did not have the capacity to pay the increased tariffs charged by Aguas del Tunari S.A., already in the Concession Contract, e.g. by obliging Aguas del Tunari S.A. to provide free services or state subsidies for poor households.[262]

Secondly, with regard to the principle of affordability, the human right to water was violated to the extent that the dramatically increased water expenses following the privatization in Cochabamba adversely affected the fulfillment of other basic needs and economic, social and cultural rights of the poor and the poorest households.

Furthermore, it is also worth mentioning that, the human right to water was also violated to the extent that the Bolivian Government arbitrarily interfered with the "customary or traditional arrangements for water allocation"[263] of the residents of Cochabamba. The reason for this is the exclusive rights granted to Aguas del Tunari, S.A. to use the water sources, and the provisions involved in the Law 2029 and the Concession Contract that allow Aguas del Tunari, S.A. to charge for water drawn

[260] *Ibid*., Art. 12(c)(ii).
[261] McFarland Sanchez-Moreno, Higgins, *supra* note 248, at 1777.
[262] Ursula Kriebaum, "Privatizing Human Rights, The Interface between International Investment Protection and Human Rights", in A. Reinisch / U. Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (2007) 165, at 177.
[263] Article 21 of the General Comment No. 15 provides:
(a) Obligations to respect
The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.

from private wells and even to force residents to stop using water from wells,[264] which ultimately led to the violent conflict in Cochabamba.

A second important aspect as to the human right to water is the lack of transparency and public participation in the decision-making process. Although the ICESCR does not explicitly provide for a right to participate in the decision-making process with regard to economic, social and cultural rights, the existence of such rights and their importance to the protection and fulfillment of a number of substantive economic, social and cultural rights, including the human right to water, are recognized by the Committee on Economic, Social and Cultural Rights.[265] The General Comment No. 15 identifies one of core obligations of states' as "to adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process."[266] As noted by some legal scholars, "substantive rights should be procedurally reflected in order to be effective",[267] hence the lack of a transparent and participatory manner in conducting the decision-making process constitutes a violation of the procedural rights of the inhabitants in Cochabamba and ultimately led to the violation of the human right to water.

It is also worth mentioning that since the Protocol to the ICESCR,[268] which establishes an individual complaint mechanism, entered into force in 2013, one can note that if there had been such a mechanism, individuals in Cochabamba would have had the opportunity to ascertain whether the Bolivian Government had violated the human right to water through the Concession Contract. According to Ursula

[264] McFarland Sanchez-Moreno, Higgins, *supra* note 248, at 1766-1767.
[265] *Ibid*., at 1781.
[266] Committee on Economic, Social and Cultural Rights, *supra* note 1, Art. 37(f). See also Art. 48 of the General Comment No.15, which similarly provides:
"The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties."
[267] Thielbörger, *supra* note 15, at 502.
[268] GA Res. 63/117, 10 December 2008.

Kriebaum, "This in turn could then have served as a guideline for future cases."[269]

Another crucial aspect as to the human right to water in *Aguas del Tunari v. Bolivia* is the issue of "nationality planning" or "treaty shopping." The jurisdiction of ICSID was based on the Netherlands-Bolivia BIT that allowed a company incorporated under the laws of Bolivia, which is "controlled directly or indirectly" by a company in Netherlands, to initiate arbitration against Bolivia.[270] Due to the fact that there was no BIT in force between United States and Bolivia, United States-based company Bechtel restructured its investment through a Dutch holding company which enabled to access to arbitration under the Netherlands–Bolivia BIT.[271] The Tribunal accepted the "migration" of the controlling company to a state that had treaty protection.[272] Bolivia argued that the availability of the protection of the BIT was the result of strategic changes in the corporate structure that rose to the level of fraud or abuse of corporate form.[273] The Tribunal rejected this claim by stating "it is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT."[274] It is argued that, since in such a scenario, the ICSID arbitration becomes unavoidable for states following a failed privatization regardless of the origin of the company or jurisdiction clauses in the concession contracts, multinational corporations may have the capacity to avoid domestic laws and disrupt the democratic processes.[275]

All in all, although it is unknown whether the Tribunal would have engaged in discussing the human right to water, since this case is unusual compared to other water-related investment cases for the dispute was settled before the Tribunal could issue its decision; it is beyond doubt that the human right to water played a

[269] Kriebaum, *supra* note 262, at 175.
[270] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, 10 March 1992 (entry into force on 1 November 1994), Article 1(b)(iii).
[271] Julian Arato, "Corporations as Lawmakers", 56 *Harvard International Law Journal* (2015) 229, at 233.
[272] Dolzer, Schreuer, *supra* note 83, at 53.
[273] ICSID, *Aguas del Tunari, S.A. v. Republic of Bolivia - Decision on Respondent's Objections to Jurisdiction*, 21 October 2005, ICSID Case no. ARB/02/3, para. 330.
[274] *Ibid*., para. 330(d).
[275] Thielbörger, *supra* note 15, at 501.

considerable role in the case of *Aguas del Tunari v. Bolivia*.[276] It was the driving force of the city wide rebellion, led the environmental non-governmental organizations and interest groups to become involved in the dispute and ultimately, following the extensive pressure, led to the discontinuation of the proceedings and the abandonment of the dispute. Most importantly, this case demonstrated how the privatization of water systems might be publicly objected by the reason of the fact that it is a resource of vital importance, which should not be considered as a commodity for profit-making by profit-oriented corporations. One should acknowledge that the drafting of the Concession Contract, which failed to take the human rights aspect of the right to water into consideration, explicitly demonstrated the problems in realizing and promoting the human right to water.

## III. *Azurix Corp v. Argentina*[277]

### 1. Facts and Issues

This arbitration was launched by the Azurix, a United States-based corporation, which is a spin-off of the ENRON Corporation, against the government of Argentina. In 1999, Azurix won the bid through its Argentinean subsidiary (ABA) for a 30-year concession to run the privatized water services in the Argentine Province of Buenos Aires, by paying a canon of US $438.5 million. After a while, conflicts began to arise with regard to water quality and pressure and while customers began to complain, the government warned half a million customers that the local water had a toxic bacteria and therefore they should avoid drinking it and boil the tap water and minimize exposure to showers and baths.[278] This was considered as the biggest water crisis for at least 25 years in the Province of Buenos Aires.[279]

Azurix argued that the Province of Buenos Aires had agreed to complete certain infrastructure repairs in the Concession Contract before Azurix took over the concession. However it failed to fulfil its obligation and the repairs, which were of the essence to algae removal, were not completed. Therefore, "the failure to complete the Algae Removal Works caused an extraordinary algae bloom in the reservoir on April

[276] A. Kulick, Global Public Interest in International Investment Law (2012), at 294, 296.
[277] ICSID, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12.
[278] Thielbörger, *supra* note 15, at 496.
[279] *Ibid*.

10-11, 2000 resulting in the water appearing cloudy and hazy and with earth-musty taste and odor."[280] Azurix claimed that, after the algae outbreak, the Province of Buenos Aires caused panic in the population[281] and encouraged customers not to pay their water bills.[282]

## 2. Procedure and Awards

Azurix filed a request for arbitration against Argentina on September 2001, with ICSID based on the violations under the Argentina-United States BIT. Azurix asserted that the actions of Argentina amounted to expropriation and constituted violation of the fair and equitable standard, non-discrimination and full protection and security under the BIT.[283] It claimed more than US$ 550 million in compensation.

The Tribunal found that "the reaction of the provincial authorities shows a total disregard for their own contribution to the algae crisis and readiness to blame the Concessionaires for situations that were caused by years of disinvestment, and to use the incident politically" and further stated that "governments have to be vigilant and protect the public health of their citizens but the statements and actions of the provincial authorities contributed to the crisis rather than assisted in solving it."[284]

Further, the Tribunal held that Argentina was in breach of the standard of fair and equitable treatment based on its actions of "the refusal by the Province to accept that notice of termination and its insistence on terminating it by itself on account of abandonment of the Concession",[285] politicized tariff regime[286] and "the repeated calls of the Provincial governor and other officials for non-payment of bills by customers."[287] Furthermore, it concluded that the obligation to provide full protection and security was violated by Argentina whereas it is not only a matter of physical

[280] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case No. ARB/01/12, para. 124.
[281] *Ibid*.
[282] *Ibid*., para. 125.
[283] *Ibid*., para. 43.
[284] *Ibid*., para. 144.
[285] *Ibid*., para. 374.
[286] *Ibid*., para. 375.
[287] *Ibid*., para. 376.

security, but goes beyond the protection and security ensured by the police and host states should ensure a "stability afforded by a secure investment environment".[288]

On the other hand, the Tribunal rejected several vital claims of Azurix. Firstly, Azurix's claims of expropriation were rejected on the grounds that the Province of Buenos Aires' actions did not amount to expropriation.[289] Secondly, the Tribunal granted compensation to Azurix, which was a comparatively lower amount: US $165 million.[290] Although Azurix had claimed that the canon payment of US $438 million could justify the periodic tariff increases, the Tribunal granted compensation in the amount of the fair market value of the concession[291] by deciding that the canon payment should not be considered recoverable through periodic tariff increases.[292]

## 3. Evaluation in Light of the Human Right to Water

Firstly, in *Azurix v Argentina*, Argentina raised the issue of the compatibility of the BIT with human rights treaties that protect consumers' rights and an expert intervening for Argentina had opined that "a conflict between a BIT and human rights treaties must be resolved in favor of human rights" because human rights obligations must overweigh the private interest of service provider. Argentina further argued that the users' rights were duly protected by the provisions made in the Concession Agreement and it was unclear how termination affected such rights.[293]

The Tribunal held that the matter had not been fully argued and noted that it "fail[ed] to understand the incompatibility in the specifics of the instant case."[294] According to some scholars, Tribunal's reasoning indicates that Argentina's argumentation, alleging a "spurious" conflict between its human rights obligations and investment obligations, was "half-hearted."[295] In this sense, Tribunal's decision

[288] *Ibid*., para. 408.
[289] *Ibid*., para. 322.
[290] *Ibid*., para. 442.
[291] *Ibid*., para. 424.
[292] *Ibid*., para. 427.
[293] *Ibid*., para. 254.
[294] *Ibid*., para. 261.
[295] Ursula Kriebaum, "Foreign Investments & Human Rights - The Actors and Their Different Roles", 10 *Transnational Dispute Management* (2013) 1, at 7; James D. Fry, "International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity", 18 *Duke Journal of Comparative & International Law* (2007) 77, at 100; Kube, Petersmann, *supra* note 96, at 11.

constitutes a significant example as encouraging host states to introduce their human rights arguments in a thorough manner in investment disputes.[296]

On the other hand, one must note that, even though Argentina may have failed to substantiate the connection between the measures it had adopted and the protection of the human right to water,[297] it is not uncommon that Tribunals, as seen in other cases,[298] tend to set forth the lack of adequately elaborated argumentation to abstain from human rights defenses of the host States.[299] As Professor Christoph Schreuer notes with respect to these kind of cases including *Azurix v. Argentina*, "These awards seem to indicate the tribunals' reluctance to take up matters concerning human rights, preferring to dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves."[300]

Secondly, with regard to the issue of expropriation, Argentina asserted that the intentions of the state, namely the protection of public interests such as the human right to water, were crucial in determining whether the host state's actions amounted to expropriation.[301] The Tribunal relied on the approach adopted by the Tribunal in *Tecmed v. Mexico*[302] in order to find out whether there was an expropriation or a legitimate exercise of police powers,[303] by stating that it provides "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation."[304] The Tribunal in *Tecmed v Mexico* had referred to the proportionality analysis from the jurisprudence of the ECHR in *James v UK*[305] by stating that an expropriatory measure "[must] pursue, on the facts as well as in

[296] Bray, *supra* note 22, at 479.
[297] Kube, Petersmann, *supra* note 96, at 11.
[298] For instance, in *Siemens v. Argentina*, the Tribunal refused to consider Argentina's human rights argument and noted that this argument had not been developed by Argentina and "without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case." (ICSID, *Siemens A.G. v. The Argentine Republic – Award*, 6 February 2007, ICSID Case no. ARB/02/8, para. 75).
[299] Brabandere, *supra* note 35, at 208.
[300] Schreuer, Reiner, *supra* note 93, at 90.
[301] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case No. ARB/01/12, para. 278.
[302] ICSID, *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case no. ARB (AF)/00/2.
[303] Valentina Vadi, "Proportionality, Reasonableness, and Standards of Review in Investment Treaty Arbitration", in A. K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy, 2013-2014* (2015) 201, at 219.
[304] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case No. ARB/01/12, paras 311, 312.
[305] ECtHR, *James and Others v. United Kingdom*, Appl. no. 8793/79, Judgment of 21 February 1986.

principle, a legitimate aim 'in the public interest'", and bear "a reasonable relationship of proportionality between the means employed and the aim sought to be realized."[306] Following the statement of this approach, the Tribunal came to the conclusion that the impact on the investment of the Claimant attributable to the actions of the Province of Buenos Aires was not to the extent required to find that these actions amounted to an expropriation.[307] However, it did not indicate how it would have examined the intentions underlying the government actions.[308]

Tribunal's reliance on the jurisprudence of the ECHR did not play a role in discussing Argentina's human rights argument and the relation between expropriation and the protection of the human right to water as a public purpose. It was rather discussed under the scope of investor's property rights and whether these rights were violated by Argentina.[309] In this sense, Tribunal's decision has been considered as "regrettable with regard to the human right to water", although it was in favor of Argentina, on account of the fact that the human right to water could have had a "decisive role" in weighing of values as between the actions of the state in the public interest and the protection of the investor's investment.[310]

One can note that, the Tribunal could have been more precise in its assessment of proportionality, where the human right to water could be considered as a factor, rather than taking a cursory glance at the reasons behind Argentina's actions that violated its obligations towards the investor under the BIT. Nevertheless, the willingness of the Tribunal to rely on the jurisprudence of the ECHR as authority for its decision and to consider the underlying intentions of the state's actions in the public interest is of great immense.

The third issue that is crucial in the context of the human right to water is the reasoning of the Tribunal in its decision concerning compensation granted to Azurix. According to the Tribunal, Azurix was merely entitled to a compensation based on the

[306] ICSID, *Técnicas Medioambientales Tecmed, SA v The United Mexican States – Award*, 29 May 2003, ICSID Case no. ARB (AF)/00/2, para. 122.
[307] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case No. ARB/01/12, para. 322.
[308] Thielbörger, *supra* note 15, at 497.
[309] Tamar Meshel, "Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond", 6(2) *Journal of International Dispute Settlement* (2015) 1, at 10.
[310] Thielbörger, *supra* note 15, at 497.

fair market value of the Concession for the violation of the BIT and therefore it could not retain the whole amount of the canon payment it had paid in order to obtain the concession.[311] The Tribunal granted Azurix a reduced compensation, instead of US$438.5 million and stated with a criticizing approach that "no well-informed investor, … would have paid for the Concession the price (and more particularly, the Canon) paid by Azurix in mid-1999, irrespective of the actions taken by the Province and of the economic situation of Argentina at that time."[312] Most importantly, the Tribunal further held that the canon payment could not be considered in the recoverable asset base for the purpose of tariff increases.[313]

It has been considered that the Tribunal hereby implicitly applied a key element of the human right to water developed by the General Comment No. 15, namely economic accessibility, which requires that "water, and water facilities and services, must be affordable for all"[314] and hence enabled the human right to water outweigh investor's economic freedom.[315] According to General Comment No. 15, where water services are operated or controlled by third parties, states must prevent them from compromising affordable water.[316] In this context, States must ensure that water is affordable by adopting necessary measures including "appropriate pricing policies such as free or low-cost water".[317] Furthermore, General Comment No. 15 identifies "discriminatory or unaffordable increases in the price of water" as a typical example of violation of obligations with regard to the human right to water. [318]

On the other hand, it is argued that the Tribunal might have not made its assessment taking account of the human right to water, since it never mentioned such a right in its decision.[319] Nevertheless, it should be acknowledged that the Tribunal's decision, in which it significantly reduced the compensation granted to Azurix, clearly demonstrates that water is not viewed as a commodity for profit-making, [320] rather

[311] ICSID, *Azurix Corp. v. The Argentine Republic – Award*, 14 July 2006, ICSID Case No. ARB/01/12, para. 424.
[312] *Ibid.*, para. 426.
[313] *Ibid.*, para.427.
[314] Committee on Economic, Social and Cultural Rights, *supra* note 1, Art. 12(c)(ii).
[315] Thielbörger, *supra* note 15, at 498.
[316] Committee on Economic, Social and Cultural Rights, *supra* note 1, Art. 24.
[317] *Ibid*., Art. 27.
[318] *Ibid*., 44(a).
[319] Kulick, *supra* note 276, at 299.
[320] Thielbörger, *supra* note 15, at 498.

than an essential human right and the limits set out in the General Comment No. 15, especially concerning affordability to everyone, cannot be neglected under any circumstances.

## IV. *Biwater Gauff v. Tanzania*[321]

### 1. Facts and Issues

*Biwater Gauff* v. *Tanzania* is another significant example in the specific case studies concerning the human right to water that demonstrates how human rights considerations have been dealt with by investment tribunals. This case involved a water supply project in Dar es Salaam, Tanzania, which was funded by the World Bank, African Development Bank and the European Investment Bank. Tanzania, in order to fulfil the condition of the funding, invited tenders for the Project to appoint a private operator to manage and operate the water systems of Dar es Salaam. Biwater Gauff (Tanzania) Limited (hereinafter, "Biwater Gauff") submitted a tender and it was awarded the bid.

Following the bid, Biwater Gauff incorporated City Water Services Limited (hereinafter, "City Water"), since it was obliged to incorporate a local Tanzanian operating company under the terms of the request for tender. The City Water entered into three contracts associated with the Project with the Dar es Salaam Water and Sewerage Authority (hereinafter, "DAWASA") and agreed to provide water services on behalf of it for a 10-year period by operating the water production, transmission, distribution and building and collecting revenue from the customers receiving these services.[322] However, City Water failed to meet the anticipated performance,[323] underestimated the risks of the tasks of the Project and encountered organizational and financial complications.[324] Ultimately, between 13 May 2005 and 1 June 2005, representatives of Tanzania and DAWASA terminated the contract, seized the company's assets, deported City Water's senior managers, installed a new

[321] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case no. ARB/05/22.
[322] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania - Award*, 24 July 2008, ICSID Case no. ARB/05/22, paras 3-8.
[323] *Ibid*., para. 147.
[324] *Ibid*., para. 149.

management and took over City Water's business.[325]

## 2. Procedure and Awards

Biwater Gauff filed a request for arbitration against Tanzania on August 2005, with the ICSID, based on the Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments (hereinafter, the "United Kingdom-Tanzania BIT"). It claimed that the actions of Tanzania amounted to expropriation and constituted violation of the fair and equitable treatment standard and full protection and security under the United Kingdom-Tanzania BIT.

In this case, five international and national NGOs with specialised interests and expertise in human rights, filed a petition for *amicus curiae* status in the proceedings[326] by claiming that "given the nature of the Project, the issue of investor responsibility in this case must be assessed in the context of sustainable development and human rights" and "access to clean water is, moreover, characterised as a basic human right by the United Nations Committee on Economic, Social and Cultural Rights in 2002."[327] They argued that Tanzania must have taken action under its human rights obligations to ensure access to water for its citizens and in this sense, terminating the agreement did not constitute a breach of the contract, since it had the aim of promoting and enhancing the achievement of human rights.[328]

The Tribunal accepted the petition by concluding that it would benefit from written submissions by the petitioners[329] and cited the case of *Suez/Vivendi v Argentina* in order to highlight the public interest dimension of the dispute, as equally applying in *Biwater Gauff v Tanzania*[330] and held that "written submission by the Petitioners appears to have the reasonable potential to assist the Arbitral Tribunal by

[325] *Ibid*., para. 15.
[326] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* – Petition for Amicus Curiae Status, 27 November 2006, ICSID Case no. ARB/05/22.
[327] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania - Award*, 24 July 2008, ICSID Case no. ARB/05/22, para. 379.
[328] *Ibid*., para. 387.
[329] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania – Procedural No 5*, 2 February 2007, ICSID Case no. ARB/05/22, para.50.
[330] *Ibid.,* para. 52.

bringing a perspective, particular knowledge or insight that is different from that of the disputing parties".[331]

Furthermore, the Tribunal held that actions of Tanzania constituted expropriation of Biwater Gauff's investment and was in breach of several other standards of the BIT. However, it held that there was no compensable quantifiable monetary loss by stating that there was not a sufficient casual link between the breach of the BIT by Tanzania and the loss sustained by Biwater Gauff.[332] The compensable loss and damages to the investment of Biwater Gauff had already occurred before the violations of the BIT by Tanzania, between 13 May 2005 and 1 June 2005,[333] and consequently "none of the Republic's violations of the BIT caused the loss and damage."[334] According to the majority of the Tribunal, despite the unlawful nature of the wrongful acts of Tanzania, they did not cause injury to City Water.[335]

## 3. Evaluation in Light of the Human Right to Water

To begin with, *Biwater Gauff v Tanzania* is a further case in which the host state, namely Tanzania, invoked human rights considerations in order to justify a breach of its obligations under an international investment treaty. Although Tanzania did not directly invoke the human right to water as a defense, it argued that Biwater Gauff had created "a real threat to public health and welfare"[336] and "water and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so."[337] In response, the Tribunal noted that the interference of the Government of Tanzania, which resulted in the occupation of City Water's facilities, and the usurpation of management control were "well beyond the ambit of normal contractual behavior" and "unreasonable and arbitrary, unjustified by any public purpose".[338] It further held that "there was no necessity or impending public purpose

[331] *Ibid.,* para. 50(a).
[332] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania - Award*, 24 July 2008, ICSID Case no. ARB/05/22, para. 779.
[333] *Ibid.,* para. 798.
[334] *Ibid.,* para. 807.
[335] *Ibid.,* para. 803.
[336] *Ibid.,* para. 436.
[337] *Ibid.,* para. 434.
[338] *Ibid.,* para. 503.

to justify the Government's intervention in the way that took place."[339] Consequently, the Tribunal did not assess the legitimacy of the actions of Tanzania from the perspective of a conflict between the human right to water and host state's obligations towards the investor and failed to address the relevance of human right to water by merely focusing on the failures in fulfilling the contractual obligations in its reasoning.

A second crucial aspect of *Biwater Gauff v Tanzania* case is the petition submitted to the Tribunal by several NGOs as *amicus curiae*, in which they claimed that the issue of investor responsibility must be examined within the context of human rights. They argued that "human rights … issues are factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations as between the investor and the host State" and Biwater Gauff as an investor engaged in projects intimately related to human rights, namely the human right to water, had the highest level of responsibility to meet their duties and obligations, since such an investment had a direct impact on the population at large.[340] Biwater Gauff had specific responsibilities both in the pre-investment and investment phases, which it failed to meet and its acts and omissions caused the investment to fail.[341] However, although the Tribunal acknowledged the importance and usefulness of the *amicus curiae* submissions and summarized them in detail, it gave little weight to the arguments of NGOs. Most importantly, it failed to directly address the human right to water argument and its impact on the apportionment of responsibility between the host state and the investor as suggested by the *amicus curiae* submission.[342]

Nevertheless, the acceptance of the *amicus curiae* submission, which suggested that the investor beared the responsibility and the failure in providing water services was mainly based on its own fault, demonstrates that human right to water played a role after all. The acceptance of the *amicus curiae* submission in *Biwater Gauff v Tanzania*, as a case that involved the human right to water, is not only a significant development to add a human rights dimension to investment arbitration, but also indicates the acknowledgement that investors, not only host states, bear

[339] *Ibid.,* para. 515.
[340] *Ibid.,* para. 380.
[341] *Ibid.,* para. 381.
[342] Meshel, *supra* note 309, at 13.

responsibilities with regard to the human right to water.

Lastly, another crucial aspect of the case of *Biwater Gauff v Tanzania* is the legal reasoning of the Tribunal concerning damages. As the acceptance of the *amicus curiae* submission, the Award, which held Tanzania in breach of the BIT but with no damage to the investor, indicates that the element of human right to water again played a considerable role, particularly in emphasizing the investors' responsibility, since Biwater Gauff was found as the only one responsible for the loss sustained and it was found that none of the violations attributable to actions of Tanzania caused the loss and damage.

# CHAPTER 4. SUBSEQUENT CASE LAW AND THE PLACE OF THE HUMAN RIGHT TO WATER IN INVESTMENT ARBITRATION

## I. Subsequent Case Law

To begin with, it must be noted that as the above case law analysis demonstrated, until the *Suez v Argentina* cases[343] and the case of *Saur International v Argentina*,[344] only little reference was made to the human right to water in investment arbitration.[345] The disputes in *Suez v Argentina* cases were triggered by the emergency measures adopted by Argentina to cope with the significant economic and social crisis it experienced between 2001 and 2003. Argentina argued that its human rights obligations to ensure its population the human right to water trumps its obligations under the BITs and the human right to water implicitly gives Argentina the authority to take actions in disregard of its BIT obligations.[346] Furthermore, a group of non-governmental organizations, admitted to the proceedings as *amicus curiae,*

[343] ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19; ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/17.
[344] ICSID, *SAUR International SA v. Republic of Argentina - Decision on Jurisdiction and Liability,* 6 June 2012, ICSID Case no. ARB/04/4.
[345] Tanzi, *supra* note 187, at 322.
[346] ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19, para. 262; ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/17, para. 240.

highlighted the need for interpreting and applying treaty provisions in light of human rights law, including human right to water.[347] The Tribunals avoided making a determination on the relevant hierarchy of investment protection obligations and the human right to water.[348] In the view of Tribunals, adopting measures that were in breach of investors' rights were not the only means available and "Argentina was subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive."[349]

Firstly, a considerable aspect of the *Suez v Argentina* cases is furthering the enunciation of the human right to water as a basic human right under the United Nations General Assembly Resolution 64/292 on the Human Right to Water and Sanitation that formally recognizes a self-standing human right to water.[350] However, Tribunals ultimately rejected Argentina's defense with regard to the human right to water by a cursory assessment. Furthermore, they did not address the relationship between Argentina's human right to water obligations and its investment protection obligations and most importantly, failed to provide guidance on balancing these competing interests at stake.

In the most recent prominent dispute concerning the human right to water, *SAUR International v Argentina*[351], which had a similar factual background to that of *Suez v Argentina* cases, Argentina argued that investment protection regime embodied in the BIT could not displace its human rights obligations, including the obligation of safeguarding the human right to water, under human rights treaties and with the

[347] ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19, paras 13, 256.
[348] J. E. Viñuales, Foreign Investment and the Environment in International Law (2012), at 180.
[349] ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/19, para. 262; ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic - Decision on Liability,* 31 July 2010, ICSID Case no. ARB/03/17, para. 240.
[350] Tanzi, *supra* note 186, at 309.
[351] ICSID, *SAUR International SA v. Republic of Argentina - Decision on Jurisdiction and Liability,* 6 June 2012, ICSID Case no. ARB/04/4. Here, the analysis is based on unofficial translation of the original decisions in French and Spanish and on secondary sources, e.g., Farrugia, *supra* note 32; Meshel, *supra* note 309; Kube, Petersmann, *supra* note 96.

constitutional hierarchy in the Argentine legal system.[352] Therefore, its obligations under the BIT should be interpreted with reference to state's human rights obligations, in particular the human right to water. It further argued that the actions of the Argentine authorities were consistent with its obligations to ensure fundamental right to water and protection of this right against the violation of third parties, and therefore could not constitute an expropriation.[353]

In response, the Tribunal acknowledged that human rights in general, and the human right to water in particular, are one of the various sources that the Tribunal should take into consideration to resolve the dispute.[354] Furthermore, it stated that access to clean water is from the standpoint of the state, an essential public service, and from the perspective of the citizen, an essential right, and therefore the law can and should allow the government for its legitimate functions concerning the investment, including the planning, supervision, penalties and, where appropriate, termination.[355] However, it concluded that these powers are also consistent with the rights of investors and state's powers to guarantee the human right to water are not absolute, and hence must be balanced against the rights and protection granted to foreign investors under the BIT.[356] Although the Tribunal recognized its task to counterbalance the principles, namely fundamental human rights and investor's rights, when making its decision on the substantive relief sought by the investor, it failed to engage in such a balancing task both in its Decision on Liability and its Award.[357] Consequently, although the Tribunal acknowledged the role of the human right to water in resolving the dispute, it did not address its impact on Argentina's investment protection obligations, and hence chose to adopt the same restrictive approach adopted by the Tribunals in *Suez v Argentina*.[358]

The acknowledgment of the right to water as an essential human right by the international arbitration tribunals is a welcome development in investment arbitration, while only implicit reference were given to human right to water in the cases of

[352] Farrugia, *supra* note 32, at 11-12; Kube, Petersmann, *supra* note 96, at 12.
[353] Farrugia, *supra* note 32, at 12; Meshel *supra* note 309, at 16-17.
[354] ICSID, *SAUR International SA v. Republic of Argentina - Decision on Jurisdiction and Liability,* 6 June 2012, ICSID Case no. ARB/04/4, para. 330.
[355] Farrugia, *supra* note 32, at 12; Meshel *supra* note 309, at 17.
[356] *Ibid.*
[357] Meshel, *supra* note 309, at 17.
[358] *Ibid.*

*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, *Aguas del Tunari v Bolivia*, *Azurix Corp v Argentina* and *Biwater Gauff v Tanzania*. Nevertheless, "this does not appear to have been of particular help for the defendant state, at least no more than in the previous case law in which the right to water has been possibly considered only indirectly."[359] However, it must be noted that as evident in *Suez v Argentina* and *SAUR International v Argentina*, recent arbitration case law "offers legal reasoning capable of bringing about a more balanced judicial approach", since it enhanced the reasoning based on the search for balancing investors' interests and public interest concerns, namely the human right to water.[360]

## II. Evaluating the Human Right to Water in ICSID Arbitration

The above review of the ICSID arbitral practice, where fundamental human rights issues related to the human right to water were confronted, shows that human right to water plays a merely marginal role in investor-state arbitration and does not affect the arbitration outcomes, if so, only in indirect ways.[361] Arbitral tribunals have tended to be brief in their discussions of host states' defenses related to human right to water and thus refrained from addressing them and the conflicting obligations of host states in detail.

The relative reluctance of tribunals to engage in arguments related to human rights, including the human right to water, mainly result from the characteristics of international investment arbitration.[362] One must not forget that "arbitrators have to decide cases within the legal framework in which they operate and on the ground of applicable law, not *ex aequo et bono*."[363] Firstly, the consent by the host state and investor to arbitration is an indispensable requirement for a tribunal's jurisdiction.[364] The formulation of the compromissory clause in the treaty or contract in which states have expressed their consent reveals the breadth of the tribunal's jurisdiction and it is decisive in determining whether an investment tribunal is competent to decide on

[359] Tanzi, *supra* note 187, at 323.
[360] Tanzi, *supra* note 186, at 308-310.
[361] Thielbörger, *supra* note 15, at 509.
[362] Brabandere, *supra* note 35, at 185.
[363] Filip Balcerzak, "Jurisdiction of Tribunals in Investor–State Arbitration and the Issue of Human Rights", 29 *ICSID Review* (2014) 216, at 217.
[364] Dolzer, Schreuer, *supra* note 83, at 254.

human rights issues.[365] If a tribunal renders an award without having jurisdiction, or if it exceeds the scope of its jurisdiction, the award may be annulled under the ICSID Convention or subsequent recognition and enforceability of the award may be denied.[366] Furthermore, even though a tribunal's jurisdiction is established over human rights arguments raised by the host state, the analysis and evaluation of the breaches will depend upon the applicable law.[367] In the absence of specific human rights norms in investment treaties, which is quite rare,[368] parties' choice of law becomes crucial in determining whether human rights law will be applicable to the case at stake. Only, in the absence of an agreement of the parties on the applicable law, the tribunal will apply host state's law and international law according to Article 42(1) of the ICSID Convention. Therefore, tribunals remain reluctant to accept human rights arguments or incorporate human rights considerations in their decision-making,[369] since it is often not considered as to be part of the applicable law.

However, it must be noted that when a host state intends to invoke its human rights obligations to justify a breach of its investment treaty obligations, "there is no reason why the Tribunal so established under the investment agreement would be barred from taking such argument into consideration as a matter of principle."[370] On the issue of the jurisdiction of tribunals, "the limited scope of jurisdiction of an arbitral tribunal does not imply that the tribunal cannot as a matter of principle consider human rights issues" invoked by the host state.[371] Due to the fact that invocation of human rights arguments concerning its human rights obligations by the host state will always be made in response to the claims of the investors, to the extent that these arguments relate to measures allegedly violating an investment treaty, they will fall within the scope of tribunals' jurisdiction concerning the investment dispute.[372] Moreover, even if the jurisdiction of a tribunal is limited, where the scope of jurisdiction covers exclusively standards of protection included in investment treaties, "it is still broad enough to accept the possibility of the invocation of human rights obligations" of the host state in order to justify its measures that negatively

[365] Schreuer, Reiner, *supra* note 93, at 83.
[366] Balcerzak, *supra* note 363, at 218-219.
[367] Schreuer, Reiner, *supra* note 93, at 84.
[368] *Ibid*.
[369] Meshel, *supra* note 309, at 18.
[370] Brabandere, *supra* note 35, at 201.
[371] *Ibid*., at 200.
[372] Balcerzak, *supra* note 363, at 227.

affects its investment obligations, since the jurisdiction would still include exclusively the claims based on the international investment treaty at stake.[373] Therefore, tribunals will have jurisdiction to assess the possible impact of states' human rights obligations on international investment agreements' standards of investment protection alleged by the investors to be violated and the invocation of human rights obligations of the host states will be a question of applicable law.[374] However, it must be noted that, when the specific and limited jurisdiction of investment tribunals is taken into consideration, human rights arguments of the host states will be taken into account by tribunals only "if the party invoking a human rights obligation demonstrates that there is effectively a potentiality of its having interfered with the origin and/or development of the investments dispute."[375]

Furthermore, "there is no reason for a tribunal to exclude human rights considerations as a matter of applicable law" when deciding on an investment dispute.[376] As noted above, according to Article 42 of the ICSID Convention, in the absence of an agreement to the contrary, "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[377] This provision explicitly enables the application of customary international law, which "entails a set of obligations to protect fundamental human rights, ranging from the right to life to the principle of non-discrimination based on race or sex, including rights that have a peremptory character as they belong to jus cogens" and international treaty law.[378] Furthermore, ICSID Convention has been interpreted as granting arbitral tribunals the authority to resort to international law in the absence of any explicit choice of law by the parties "not only as a functional element of the choice of law process but also as a

[373] *Ibid.*
[374] *Ibid.*
[375] Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law", in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 45, at 59.
[376] Brabandere, *supra* note 35, at 200.
[377] Similarly, other multilateral investment instruments provide for the applicability of international law. See, North American Free Trade Agreement, 32 I.L.M. 605, 645 (1993); Chapter 11, Section B Article 1131 provides "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." In addition, The Energy Charter Treaty, 34 ILM 360, 400 (1995) Article 26 (6) provides "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."
[378] Dupuy, *supra* note 375, at 56.

body of substantive rules."[379] According to the Report of the World Bank Executive Directors, such references to "international law" in applicable law clauses should be understood as incorporating international treaties, customary international law and general principles of law, based upon the Article 38 of Statute of the International Court of Justice [380], which was designed to apply to inter-State disputes.[381]

In this context, a crucial issue is the applicability of international law in case of an exclusive choice of domestic law in parties' agreement on the applicable law. The Tribunal in the case of *SPP v Egypt*, [382] which constitutes the most prominent example in this context, held that "when municipal law contains a lacunae, or international law is violated by the exclusive application of municipal law", according to Article 42 of the ICSID Convention, the Tribunal would directly apply the relevant principles and rules of international law instead.[383] It is noteworthy that, despite parties' agreement on the domestic law as the applicable law to dispute, "this law is nonetheless not exclusively applied but still leaves room for international law to fill loopholes."[384] It has been considered that the approach adopted in this Award could also allow the invocation of human rights where appropriate and "if the tribunals do not hold back in reading international minimum standards for the benefit of investors into the applicable law, the arbitrators might likewise also uphold minimum standards of human rights law, and thereby uphold the unity of international law, not its fragmentation."[385] The question is then whether tribunals will consider the human

[379] *Ibid*.
[380] United Nations, Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945) Article 38(1) provides:
"1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."
[381] See, Report of the Executive Directors of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm (last visited 19 December 2016); Schreuer, Reiner, *supra* note 93, at 85.
[382] ICSID, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case no. ARB/84/3.
[383] ICSID, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt – Award*, 20 May 1992, ICSID Case no. ARB/84/3, para. 84.
[384] Kulick, *supra* note 276, at 14-15.
[385] Thielbörger, *supra* note 15, at 508.

right to water as part of the applicable law as part of a minimum human right standard regardless of parties' agreement on the applicable law.[386] However, given the current status of the human right to water in international law, this remains highly doubtful.[387]

As noted by some scholars, "It is indeed true that the jurisdiction of investment tribunals is limited to particular disputes between a foreign investor and a host state, and that those tribunals could not be used to enforce other treaties or customs, such as the violation of human rights law.... Nonetheless, a possibility of a state wanting to defend its position in terms of human rights must be added to the picture. . . . States should be encouraged to invoke human rights obligations in their defense in international treaty-governed investor-state dispute settlement, as it is reflective of their good faith effort to respect different international obligations simultaneously."[388] A more progressive approach towards the human right to water defense of host states can lead to overcome the legitimacy crisis of investment protection based on international investment treaties.[389] Investment arbitration system is increasingly considered as biased towards the interests of investors at the expense of the public interest.[390] Therefore, invoking human right to water obligations of host states in their defenses should not be ignored by arbitral tribunals based upon the perception of legitimacy of investor-state arbitration system. Furthermore, ignoring human rights considerations carries the risk of "regulatory chill", which should be taken into consideration by the tribunals [391] and states' ability to fulfil its human right to water obligations should not be undermined in this regard.

All in all, ICSID arbitration, which has limited mandate and the purpose of protecting foreign investment, is not a human rights court to investigate human rights violations. On the other hand, it has achieved a status of high importance for the settlement of disputes after failed privatizations of water supply systems and ICSID Tribunals have to decide on matters with regard to the human right to water in the absence of the holders of this right and without being able to apply the right directly,

[386] *Ibid.*, at 509.
[387] *Ibid.*
[388] Krommendijk, Morijn, *supra* note 81, at 430.
[389] Meshel, *supra* note 309, at 23.
[390] Balcerzak, *supra* note 363, at 216-217.
[391] *Ibid.*, at 217.

since the human right to water is not part of the applicable law.[392] However, they have so far not developed a coherent and balanced approach for evaluating such matters and tended to address them in a "sporadic manner."[393] One should acknowledge that if human rights considerations, including the human right to water and its potential impacts on investment protection becomes a part of the reasoning of ICSID Tribunals coherently as relevant standards, this might "draw the attention of the actors involved to the importance of abiding by such standards at the pre-contractual and contractual levels enhancing dispute prevention and the degree of perception of legitimacy of international investment law."[394]

## III. Avoiding the Violation of Human Right to Water and Striking a Balance between Human Right to Water and Investors' Interests

To begin with, a crucial point in the context of a conflict between the human right to water and investors' interests is the drafting of the concession contracts. States must ensure that explicit and stable provisions with regard to the further development of tariffs and water quality are included in such contracts,[395] which may in turn serve to dispute prevention and most importantly, avoid the violation of the human right to water of states' populations. Furthermore, as *Aguas del Tunari v Bolivia* demonstrated, transparency and public participation in the decision-making process is another crucial point in realizing and promoting the human right to water. States must ensure that these requirements for the fulfillment of the human right to water are satisfied both in the time of the negotiation of the concession contracts by making public input possible and the time after the privatization of water systems by providing broad public information.[396]

Furthermore, with the conclusion of new investment treaties or amendments to the treaties already in force, it is possible to integrate human rights and investment law through different means of intermediating human rights norms within the

[392] Thielbörger, *supra* note 15, at 507.
[393] Moshe Hirsch, "Interactions between Investment and Non-Investment Obligations", in P. Muchlinski,F. Ortino,C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 154, at 163.
[394] Tanzi, *supra* note 186, at 311.
[395] Thielbörger, *supra* note 15, at 503.
[396] *Ibid*., at 505-506.

investment treaty framework, as by including human rights treaties within the investment treaty's general provisions on governing or applicable law, through the incorporation of specific human rights-based provisions into the investment agreement itself, and through the interpretation of investment terms or concepts using human rights jurisprudence or treaty standards, on the basis of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (hereinafter, "VCLT").[397]

In order to ensure that the human right to water is taken into account in investor-state arbitrations, the human right to water should be included in the applicable law in BITs and the privatization agreements as laid down by the General Comment No. 15. By this way, the requirement of tribunals to consider the relevance of the human right to water to the matters in dispute at stake would be ensured. Furthermore, introducing explicit human rights language in investment treaties and agreements, as the "most appropriate and straightforward way for States to have human rights issues considered in investor-State arbitrations",[398] would make explicit the requirement of tribunals to consider the relevance of human rights, including the human right to water to the matters in dispute.[399] However, this leads to the issue of the capacity of arbitrators to handle the human rights dimensions of investment disputes. Although rarely arbitrators may have clear human rights law expertise, in order to eliminate the problems as to the capacity of arbitrators to handle the human rights dimensions of investment disputes, arbitrators with human rights law expertise could be chosen or arbitrators might consult outside experts or specialized agencies, including human rights treaty bodies, on human rights issues implicated in a case.[400] In addition, States should consider the need to include mandatory referral procedures providing for consultation with expert agencies or human rights adjudicative mechanisms on human rights issues in investment treaties.[401]

Furthermore, states can make reference to their human rights obligations in preambles of investment treaties, since the wording of the preamble can enhance the

[397] Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?", 60 *International & Comparative Law Quarterly* (2011) 573, at 581; Balcerzak, *supra* note 363, at 217-218.
[398] Meshel, *supra* note 309, at 25.
[399] Luke Eric Peterson, "Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration", *Rights & Democracy* (2009) 1, at 45.
[400] *Ibid.*
[401] *Ibid*.

relevance and acceptance of the human rights arguments,[402] including arguments related to the human right to water. For instance, in the preamble of the Agreement Between Japan and The Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment, it is embodied that "Desiring to further promote investment … intending to further create favorable conditions for greater investment … recognizing the growing importance of the progressive liberalization of investment … can be achieved without relaxing health, safety and environmental measures of general application."[403] Given that most of the preambles in international investment treaties refer to the protection of investments as the sole object and purpose of the treaty, which lead tribunals to adopt an interpretation that focuses primarily on investors' interests;[404] this can lead to a more balanced interpretation of all provisions of the treaty in favor of human right to water. In addition, given the extensive definitions and its implications, the clarification of substantive BIT obligations by states, such as expropriation and the fair and equitable treatment standard, may be useful[405] to avoid an attempt of investors to argue that actions of a state with the purpose of fulfilling its obligations regarding the human right to water that interfered with an investment was a violation of the state's investment obligations under the BIT at stake. For instance, in the United States-Chile Free Trade Agreement, expropriation is defined by excluding "non- discriminatory regulatory actions by a party aimed at protecting legitimate public welfare objectives, such as public health, safety, and the environment."[406]

Besides the above suggestions for states, arbitral tribunals have interpretive tools at their disposal in terms of harmonizing human right to water and investment protection.[407] The so-called principle of systemic integration embodied in Article

[402] Kube, Petersmann, *supra* note 96, at 23.
[403] Agreement Between Japan and The Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment, available at http://www.mofa.go.jp/region/asia-paci/vietnam/agree0311.pdf (last visited 28 December 2016); See also the Preamble of Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, available at https://ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf (last visited 28 December 2016).
[404] UNCTAD, *Selected Recent Developments in IIA Arbitration and Human Rights* (2009), available at http://unctad.org/en/Docs/webdiaeia20097_en.pdf (last visited 21 December 2016).
[405] Choudhury, *supra* note 66, at 25.
[406] United States – Chile Free Trade Agreement, 6 June 2003, Annex 10-D(4)(b) (entry into force 1 January 2004).
[407] Meshel, *supra* note 309, at 27.

31(3)(c) of the VCLT requires investment tribunals to interpret treaties taking into account "any relevant rules of international law applicable in the relations between the parties."[408] This "covers both of the relationships opening the interpretation of an investment treaty to human rights considerations" and codifying systemic integration of treaties is considered to be a part of customary international law.[409] In this context, given that "resorting to Article 31(3)(c) of VCLT may be particularly problematic, as in the case of economic, social or cultural rights, which are often programmatic in nature";[410] it is crucial to determine how would the obligations arising for States from economic and social rights "fare within the matrix of article 31(3)(c), particularly with regard to the element of 'applicability in the relations between the parties' to an investment treaty dispute."[411] This question is of great immense due to the fact that economic and social rights, including the human right to water, occupies a prominent place in foreign investment disputes, often invoked as defenses by host states to justify a breach of its obligations under an international investment treaty.[412] According to Bruno Simma and Theodore Kill, "rules relating to a State's obligations to meet the basic materials needs of its own citizens can ... become a matter of community concern, so that they may be 'applicable in the relations' of all States ... even if there is no independent treaty obligation running between the States in question, and even if we assume that such obligation are not owed *erga omnes*."[413] Such an approach and the explicit reference to human rights in the preamble of the VCLT, which embodies "universal respect for, and observance of, human rights and fundamental freedoms for all", may open the door for the integration of the human right to water into an arbitral tribunals' analysis of investment law cases. Furthermore, reference to Article 31(3)(c) of the VCLT by arbitral tribunals can shift "the focus from the mere compatibility and separation of the two bodies of law in hand, placing obligations on the host states only, to a more integrated application of

[408] Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).
[409] Simma, *supra* note 397, at 584.
[410] T. Gazzini, *Interpretation of International Investment Treaties* (2016), at 236.
[411] Simma, *supra* note 397, at 586.
[412] *Ibid*.
[413] See, Brunno Simma, Theodore Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology", in C. Binder, U. Kriebaum, A. Reinisch, and S. Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 678, cited in Meshel, *supra* note 309, at 28.

investment obligations in relation to those stemming from the relevant human rights rules."[414]

# CONCLUSION

The foregoing study suggests several conclusions with regard to the issue of human right to water in the context of investor-state arbitration. Firstly, once the emergence, development, the current legal status and the content of the human right to water in international law is identified as the background of our study, the next step was to assess states' obligations with regard to the human right to water. One of the most visible circumstances where a state's human rights obligations towards its population may come into the frame of investment treaty arbitrations is related to the foreign investments in water sector.[415] In this context, states' different international obligations have often come into tension when they adopted measures for the fulfillment of their human rights obligations, which in turn negatively affected investors' interests, impaired the guarantees granted to them under international investment treaties and ultimately led to a number of prominent investment disputes. In such scenarios, the situation of a potential conflict arises between human rights obligations, including obligations regarding the human right to water and investment obligations, which may be resolved by means of several tools, provided by general rules of international law. This in turn raises the issue of a legal paradox for states with regard to their simultaneous treaty obligations, where they should inevitably decide which obligation to comply with at the expense of non-compliance with the other in practice.

Furthermore, once the aforementioned issues are addressed, the following step was to examine the issue of how the human right to water and arguments related to such a right could be raised or argued and through which entry points the human right to water could become legally relevant in the context of investment disputes. In practice, arguments related to the human right to water are most likely raised by the host state as the respondent, as a defense to justify the measures it undertook with adverse effects on the investor's investment. However, in addition to this, there are an

[414] Tanzi, *supra* note 186, at 306.
[415] Peterson, *supra* note 399, at 26.

increasing number of third party interventions as *amicus curiae*, which constitutes a significant avenue for introducing the human right to water in the context of investment disputes. As to the entry points, which the human right to water could become legally relevant in the context of investment disputes, firstly, exception provisions in international investment agreements can be crucial where it may serve as a balancing tool between a state's human right to water and investment obligations, if interpreted to encompass human rights objectives. Secondly, states may invoke the general customary rule of state of necessity and argue that the wrongfulness of the breaches of their investment obligations are precluded under such rule insofar as states' actions that were in breach were required in order to fulfil their human right to water obligations. However, the prevailing tendency among arbitral tribunals regarding the role of human rights considerations for reliance on the general customary rule of state of necessity is restrictive as was the case with *Suez v Argentina*. Lastly, human right to water can become relevant in the context of interpretation of investment protection standards, which can be structured in different forms, in particular with regard to two main standards of investment protection provided by international investment treaties, namely expropriation and the fair and equitable treatment. In the context of claims for expropriation, although the inconsistency of interpretations do not allow to predict which measures of states taken towards the fulfillment of the human right to water obligations may be considered as expropriatory, the doctrine of police powers and the principle of proportionality, which are certainly more conducive to realize and promote the human right to water, have been frequently referred to by arbitral tribunals in the context of water-related investment disputes. As to claims for the breach of the fair and equitable treatment standard, legitimate expectations of investors should be carefully scrutinized as to what expectations are in fact reasonable or legitimate.[416] Inflexible interpretations of the fair and equitable treatment standard may lead to the impairment of the human right to water based on the fact that legitimate expectations of investors may easily be considered as violated in consequence of any state involvement in the regulation of tariffs or adjustments.

[416] Vinuales, *supra* note 61, at 758.

As to the conclusions that can be derived from the review of prominent investment cases, when the arbitral outcomes and the legal reasoning of the tribunals are taken into consideration, the human right to water has not so far played an efficient role in investor-state arbitration. Given the reluctance of tribunals to engage in human rights arguments even if there is a clear relevance and the lack of a coherent methodology for assessing the human rights dimensions of investment disputes, it is not surprising that the human right to water, which has a lack of clarity as a concept in international law, is not included in investment arbitration decision-making. Nevertheless, the subsequent case law demonstrated that the reasoning based on the search for balancing investors' interests and the human right to water is enhanced, which can be considered as taking a step forward. Having all these in mind, states should make sure that the protection and the promotion of the human right to water is ensured during all phases of privatization, or, to put it differently, "long before the disputes arise."[417] Failing that, it is the arbitral tribunals, who have the mandate to balance the human right to water and investors' interests and contribute to the promotion and protection of the human right to water of states' populations. "At their core, the public interest issues implicated in investment arbitrations involve society's most sacred values" [418] and the human right to water is certainly one of them.

[417] Thielbörger, *supra* note 15, at 509.
[418] Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", 41 *Vanderbilt Journal of Transnational Law* (2008) 775, at 831.

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# ABSTRACT

This study analyses the intersection between human rights, in particular the human right to water, and investors' rights by examining prominent cases before the International Centre for Settlement of Investment Disputes (ICSID), in which the human right to water and investors' rights were allegedly in conflict, and examines the approaches adopted by the Tribunals in the context of addressing human rights alongside the need to protect foreign investment and investors' rights. This study argues that States should ensure that the human right to water is protected and their obligations towards such a right is fulfilled before the disputes arise and failing that, it is the arbitral tribunals, who should balance the human right to water and investors' interests and contribute to the promotion and protection of the human right to water of States' populations. This study suggests some solutions to the tension between human rights, particularly the human right to water, and investor's rights and tackles the question of how the violations of human right to water can be avoided in this context.

Diese Studie analysiert die Überschneidung zwischen Menschenrechten, insbesondere das Menschenrecht auf Wasser, und den Investorenrechten durch die Untersuchung von hervortretenden Fällen vor dem Internationalen Zentrum zur Beilegung von Investitionsstreitigkeiten (ICSID), in denen das Menschenrecht auf Wasser und die Investorenrechte vorgeblich im Streit lagen, und untersucht die Verfahrensweisen der Gerichte die Menschenrechte angehend, neben dem Bedürfnis ausländische Investierungen und Investorenrechte zu wahren. Diese Studie argumentiert, dass Staaten gewährleisten sollten, dass das Menschenrecht ihrer Bevölkerung auf Wasser geschützt wird und dass ihre Verpflichtungen in Hinsicht auf dieses Recht erfüllt werden, bevor die Konflikte hervorkommen, und dass es andernfalls die Schiedsgerichte sind, die das Menschenrecht auf Wasser mit den Investorenrechten ausgleichen und der Förderung und Wahrung des Menschenrechtes auf Wasser der Bevölkerung der Staaten beitragen sollten. Die Studie schlägt einige Lösungen zur Spannung zwischen Menschenrechten, insbesondere dem Menschenrecht auf Wasser, und den Investorenrechten vor und geht die Frage an, wie die Verletzungen des Menschenrechtes auf Wasser in diesem Zusammenhang vermeidet werden können.