Recognized but not Protected?

The Human Right to Safe Drinking Water

&

Protection of Foreign Investments in Water Utilities

Regulatory restrictions and duties in international investment law and a case study of three investor-Argentina disputes (ICSID)on the gap between recognition and enforcement of the human right to water.

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ABBREVIATIONS

AR	Arbitration Rule
BIT	Bilateral Investment Treaties
CESCR	Committee on Economic Social and Cultural Rights
ECHR	European Convention for Human Rights
ECJ	European Court of Justice
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and equitable treatment
GC15	General Comment No. 15
HRW	Human Right to Water
HRC	Human Right Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
IEL	International Economic Law
IILA	International Investment Law and Arbitration
IIL	International investment law
IHRL	International Human Rights Law
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
MFN	Most-Favored-Nation
MITs	Multilateral Investment Treaties
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

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Chapter 1

1.1 Introduction to Thesis

During the past decade, Investor-State Disputes Settlement (hereafter ISDS) in the World Banks' arbitration facilities in the International Centre for Settlement of Investment Disputes (hereafter ICSID), established under the *ICISD Convention*[1] in 1966, have emerged to host the majority of investor-State arbitrations globally.[2] In 2002 Argentina was hit by a severe financial crisis that triggered the largest number of investor-State claims taken to the ICISD directed at a single state in the history of investment treaties.[3] The vast majority of the 61 cases (claims)[4] came from foreign investors in the public utilities sector, mainly gas, electricity and water.[5] The conclusion and publication of the first disputes have been identified by several scholars[6] as the beginning of the 'legitimacy crisis' in international investment law and arbitration, which has subsequently become the alleged 'backlash against international law and arbitration.[7] This thesis will undertake a literature review and a case law analysis of three main cases that were brought by foreign investors in privatized water concessions in Buenos Aires. These claims were triggered by the emergency measures adopted by the Argentine government in response to the financial crisis. In all the cases Argentina argued in its defense its own obligations to safeguard the fundamental human right to safe drinking water for its citizens. Notwithstanding this significant argument, the Tribunals found that Argentina had frustrated the investors legitimate expectations amounting to a violation of Argentina's obligation under the bilateral investment treaty to guarantee Fair and Equitable Treatment (FET) to the investor. The denial of FET is the most frequently

[1] ICSID, *Convention on the Settlement of Investment Disputes Between States amd Nationals of Other States*
[2] Special Update On Investor-State Dispute Settlement: Facts and Figures,2017, UNCTAD/DIAE/PCB/2017/7, http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (11 March 2018), at 5, Figure 7 (The cumulative number of publicly known investor-State cases is 817 cases of which 60 percent (approx.. 500) have been filed under the ICISD Convention and its Additional Facility Rules, as of July 2017)
[3] Jose E. Alvarez, "Lessons from the Argentina Crisis Cases," in *The Public International Law Regime Governming International Investment* The Pocket Book of the Hague Academy of International Law (Leiden BRILL, 2011). P. 248
[4] Special Update On Investor-State Dispute Settlement: Facts and Figures (2017) P. 3 (out of *known* cases against Argentina between 1987 – July 2017).
[5] "Lessons from the Argentina Crisis Cases." p. 249
[6] Ibid., 256.; William W. Burke-White and Andreas von Staden, "Private litigation in a public law sphere: the standard of review in investor-state arbitrations," *The Yale Journal of International Law* 35, no. 2 (2010): 289; Stephan W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," *European Journal of International Law* 22, no. 3 (2011): 895.
[7] E.g. Michael Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010)

invoked claim by investors and the most successful claim on their behalf. One of its main functions is to restrict the government's policy space. In contrast, one of the main obligations of States in the relation realization of the human right to water is to regulate.

1.2. Subject matter in the wider context: Public Goods and Policy Concerns in a Globalized World

> *We are all co-owners of the resources on earth, which demands justified arrangements on how and by whom these resources should be distributed*
> -Mathias Risse [8]

The national and international regulation and good governance of under-supplied 'public goods' is said to be one of our times most challenging policy tasks.[9] In an increasingly globally regulated economic world the key designers-, and developers of rule-making governing public goods are international institutions, businesses and State governments.[10] The widespread, yet unnecessary poverty, hunger and health problems among billions of people globally bears witness of the acute need for institutional and legal safeguards to hold these actors legally and democratically accountable and to ensure 'distributive justice' of basic collective resources, such as access to food and medicine.[11] Only 3% of the worlds water resources are fresh and more than 663 million people still lack access to safe drinking water.[12] The biggest challenge for distributive justice of water as a basic collective resource is financial constraints, pollution, increased desertification and depletion of groundwater resources by private profiteers. Today, there are no effective control by national parliaments, courts or civil society over the regulatory power exercised by most worldwide economic organizations.[13] The International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO) form the most influential rule-makers constituting the

[8] Mathias Risse, On global justice, (Princeton, N.J.: Princeton University Press, 2012).
[9] Ernst-Ulrich Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, ed. Seies (Oxford: Hart, 2012), 25.
[10] E.g. the World Bank, the International Monetary Fund and the World Trade Organization. Risse, *On global justice*. 95.; Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 27.
[11] Risse, *On global justice*. 95.; Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 27.
[12] United Nations General Assembly *The human rights to drinking water and sanitation*, 17 December 2015, A/RES/70/169, p. 3
[13] *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 27.

international economic order.[14] The continued liberalization of economic regulation on the basis of economic agreements mostly without references to human rights nor human rights obligations, despite repeated global and national financial crisis', environmental crisis and underdevelopment in signatory States confirm that the current order does not effectively protect human rights.[15]

In 2002 Argentina went into the worst financial crisis in its history. More than 14 million people were forced below the poverty line.[16] Economic liberalization policies, promoted in the spirit of economic development and international co-operation, played an essential role in causing the crisis. The liberalization policies had been recommended by the IMF.[17] Joseph Stiglitz, the Nobel prize-winning economist, states that "the IMF led a whole series of mistakes, from exchange rate policy, to fiscal policy, to the privatizations, that culminated in disaster in Argentina."[18] Privatized public utilities were some of the hardest hit 'markets'. An extensive study published by the World Bank on the success of the privatization of water utilities in Latin America ascribed the failure of many concessions to the "rather bullshit nature of the market in the 1990s" which led to "overoptimistic offers" by private operators leading to "contracts whose design was not viable".[19] In 2015 another liberalization era began in the country seeking foreign investments in untapped mining reserves.[20] Yet, foreign investors have expressed reluctance to invest due to unclear environmental and export tax regulations representing a 'business risk'.[21] In April 2018 Argentina was facing another financial crisis seeing extreme inflation and poverty on the rise. The country is yet again resorting to the IMF, a move that is being protested by civil society.[22] The protective investment regime that has been set up in many developing countries are

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[14] Risse, *On global justice*. 15.
[15] Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 29.
[16] Raymond Ker, "Argentina and the IMF:," https://www.mediamonitors.net/perspectives/argentina-and-the-imf/.
[17] See, e.g. "IMF, «Argentina – Letter of Intent, Memorandum of Economc Politics, Technincal Memorandum of Understanding» ", http://www.imf.org/external/np/loi/2001/arg/01/.IMF, (accessed 23 March 2018).
[18] "Argentina and the IMF:".
[19] Philippe Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*
, ed. Seies, World Bank Publications (The World Bank 2009), 28.
[20] Julia Castilla, "Mining companies still reluctant to tap Argentina deposits," https://www.reuters.com/article/us-argentina-mining/mining-companies-still-reluctant-to-tap-argentina-deposits-idUSKCN1IO1IM.
[21] Ibid.
[22] Frederico Rivas Molina and Mar Centenera, "Why Argentina's request for an IMF loan is bringing back bad memories," https://elpais.com/elpais/2018/05/09/inenglish/1525875218_515281.html, https://elpais.com/elpais/2018/05/09/inenglish/1525875218_515281.html.*Why Argentina's request for an IMF loan is bringing back bad memories* https://elpais.com/elpais/2018/05/09/inenglish/1525875218_515281.html

increasingly perceived as one of the biggest *threats* to human rights enhancement and protection. This has been one of the effects of the one-sided focus on investors rights and privileges under investment treaties. UN experts are concerned that the treaties have a retrogressive effect on human rights protection and might even aggravate extreme poverty, and that experiences from investor-state arbitration "*demonstrates that the regulatory function of many States and their ability to legislate in the public interest have been put at risk*" due to the "*'chilling effect' that intrusive ISDS [Investor-State Dispute Settlement] awards have had, when States have been penalized for adopting regulations, for example to protect the environment*".[23]

The evolving nature of the corporate social responsibility and the UN Guiding Principles on Business and Human Rights have emerged with the realization of the accountability gap that transnational corporations and foreign investors still enjoy today. The non-legally binding nature of these instruments is a reflection of the regulatory challenges in international law. This is due to the State-centered nature of international public affairs and the various specialized 'self-contained' legal regimes that have developed in the shadows as non-subjects in international law, which accommodate transnational relationships between other legal subjects in an increasingly globalized world.

The various 'specialized' functions of law in the different 'self-contained'-regimes of international economic institutions, courts and tribunals demonstrates the risks related to the absence of international coherence in justifications for the application of principles that distribute the common public goods in a justified way.[24] For instance, it is not hard to imagine that the international investment institutions' corrective function emphasizes on 'reciprocal justice' can conflict with the ideals of the international human rights institutions of 'constitutional', 'distributive justice' and sustainable development based on the principles of 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[25] How then, should the international investment regime respond to the UNs concern that several of the protection standards in investment treaties are likely to have damaging effects on the

[23] "UN experts voice concern over adverse impact of free trade and investment agreements on human rights," OHCHR, http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E.
[24] Risse, *On global justice*. 21.
[25] United Nations *Vienna Convention on the Law of Treaties* 23 May 1969, Unitied Nations, Treaty Series, vol. 1155 p. 331, (Preamble) (my italics); United Nations*, Charter of the United Nations* 24 October 1945, 1 UNITS XVI, (Preamble)

promotion and protection of human rights in a host State? Through by raising the bar for protection of public interests?[26]

Vienna Convention on the Law of Treaties (1969)[27] (hereafter the VCLT) confirms and requires constitutional interpretation of 'disputes concerning treaties' 'in conformity with the principles of justice and international law' including 'principles of international law embodied in the Charter of the United Nations' such as 'universal respect for, and observance of, human rights and fundamental freedoms for all' (Preamble).[28] Hence, international investment treaties and disputes settlement mechanism legally could, and arguably should, remain consistent with universal human rights obligations of UN member States and their democratic constitutional delimitations.

However, the normative dimensions deriving from the aims and objectives of investment law are often perceived as a competition between private and public law perspectives. This is due to its public-private hybrid foundations and functions, as has been subject in extensive scholarly analysis.[29] This 'culture crash', which is particularly evidenced by the high degree of inconsistencies in arbitral decisions[30] and divergence in the legal doctrine bear witness of fundamental constitutional uncertainties as to the legal regimes view on the role of law, the role of the State, methodological approaches, and the true function of investment arbitration.[31] Consequently, the concern related to arbitrators inadequate consideration for non-investment public concerns at stake in disputes is perhaps a mere reflection of the 'specialized disciplines' unclear relationship with the larger body of public international law where membership entails 'constitutional' delimitations anchored in the UN Charter[32], the Vienna Convention Preamble and being true to the codified rules on treaty interpretation.

This paper is a contribution to discourse arguing that human rights and constitutional democracy call for 'civilizing' and 'constitutionalizing' international economic law and

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[26] 'UN experts voice concern over adverse impact of free trade and investment agreements on human rights' http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E

[27] *Vienna Convention (23 May, 1969),*

[28] Ibid., Preamble paras. 5 and 6 and Art. 2(1)(a) defining a "treaty" as an "international agreement concluded between States in written form and goverened by international law". .

[29] E.g. Stephan W. Schill, "Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights," *ICSID Review* 27, no. 1 (2012); Burke-White and von Staden, "Private litigation in a public law sphere: the standard of review in investor-state arbitrations."

[30] Including dissenting opinions and annulments. See also: Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis," *European Journal of International Law* 19, no. 2 (2008).

[31] Stephan W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," ibid.22, no. 3 (2011): 888.

[32] *Charter of the United Nations (24 October 1945),* Preamble and Art. 103

cooperation so that it can be an instrument for promoting our common interests in conformity with human rights obligations of all UN member states.[33]

1.3 Subject matter in a narrower context: Realization or non-realization of the right to water through economic co-operation

The interplay between the right to water and international investment law assumes key role in the realization or non-realization of access to safe drinking water because privatization of water utilities is perceived both as paramount to the realization of the right to water, and as its ultimate competitor.[34] The ICESCR Art. 11(1) sets out that for the realization of the right to an adequate standard of living, of which a right to water is part, an appropriate step to ensure realization is through recognizing 'the essential importance of international co-operation'.[35] Indeed, it is well established under international law that joint action and assistance for the achievement of development and the realization of economic, social and cultural rights, is an important condition for such fulfilment.[36]

In the 1980s the Argentine Government decentralized the responsibility of water utilities to the provincial, and municipal level.[37] Massive reductions in investment and funding from the federal budget, and no alternative adequate solution, had devastating consequences for maintenance, service quality and infrastructure expansions.[38] The timely, regional economic liberalization, strongly encouraged by the World Bank and the International Monetary Fund, introduced private sector participation in urban water utilities as a solution to accommodate the need for technical capacity and large scale investments in infrastructure services.[39] In 1991, Argentina became the first country in the 'developing world' to enter a Public-Private

[33] Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 4.
[34] Pierre Thielbörger, The Right(s) to Water : The Multi-Level Governance of a Unique Human Right, (Springer Berlin Heidelberg : Imprint: Springer, 2014). 3. NEED TO FIND SOURCE FOR THE THRID LARGEST FACT
[35] UN General Assembly, *International Convenant on Economic, Social and Cultural Rights* 16 December 1966, para. 11(11) second sentence ; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003
[36] *Charter of the United Nations (24 October 1945), Art. 56 and 55*; UN Committee on Economic, Social and Cultural Rights (CESCR)„ *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para. 14
[37] Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*
, 21.
[38] Ibid.
[39] Ibid.

Partnership in the water service sector when it awarded a concession to a private British consortium.[40] This was later followed by several ambitious concessions for water utilities in a number of provinces, among them in the capital of the Greater Buenos Aires in 1993.[41] In order to attract private- and particularly foreign investments to water concessions, the Argentine federal and provincial authorities had undertaken a number of national and local legislative changes favorable to private interests. In the same spirit the country singed a number of bilateral investment treaties providing international protection for investments made by nationals of the contracting States and enacted the ICSID Convention in October 1994.[42] Foreign-owned companies came to be awarded the majority of concession contracts for the water and sewage deliveries. In 2002 approximately 18 million people, more than half of the urban population, was served water by foreign-owned private corporations, making it the largest privately financed water market in the developing world. [43] Nearly all the private financing came from five large transnational companies and international institutions/banks.[44] State parties to bilateral investment treaties have committed to ascertain certain standards of *protection* for foreign investors operating within its territory. At the same time, the State have international obligation to *protect* human rights. These simultaneous obligations can come into tension.

The 2002 UN General Comment No. 15 stresses the duty of States to ensure that international agreements or lending conditions in financial institutions do not adversely impact upon the right to water or 'curtail or inhibit a countries capacity to ensure the full realization of the right to water'.[45] A failure of a State to take into account its obligations to the human right to water when entering agreements with States or international organization can amount to a violation to respect the right to water.[46] However, most international investment law establishing-documents and regulatory treaties, such as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States[47] (hereafter ICISD Convention) and most of the roughly 3000 bilateral investment treaties (hereafter BITs)

[40] Ibid.
[41] Ibid.
[42] ICSID, "Argentina and Nicaragua Ratify the ICSID Convention," *NEWS FROM ICSID* 1995.
[43] Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*
, 22-23.
[44] Ibid., 23.
[45] *CESR, General Comment No. 15 (2002), para. 35 and 36*
[46] Ibid., para. 44(c)(vii).
[47] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966),*

globally do not (yet) have textual references to 'justice', human rights, democratic governance or rule of law.[48] Such was the case for the BITs entered into by Argentine in the 1990s, of which most are still in force today.

In the 2002 financial crisis, Argentina undertook a number of nation-wide emergency regulatory measures in response to the financial crisis. In the years following many water concessions were prematurely terminated and reversed back to public ownership. The terminations were in most cases due to violations of the concession contract by one or both parties, or difficulties adapting the concession contracts over time to the changing social, political, economic and legislative conditions, particularly during and after the financial crisis.[49] The emergency measures triggered the largest number of investor-State claims taken to the ICISD directed at a single state in the history of investment treaties.[50] The vast majority of the 61 cases[51] came from foreign investors in the public utilities sector, mainly gas, electricity and water.[52] The regulatory changes was the essence in the vast majority of investor claims brought under the ICSID Convention and relevant BITs related to privatized utilities, and thus an investor-grievance far beyond the issue of termination of the concession contract. Particularly disputed was Argentines denial of the request by the concessionaries for substantial increases in tariffs during the crisis. According to human rights law the obligation to protect requires the State to prevent third parties from compromising "equal, affordable, and physical access" to water by "adopting the necessary and effective legislative and other measures to restrain[…]third parties from denying equal access to adequate water."[53]

However, in many of these disputes Argentina has been found liable, particularly under the 'fair and equitable treatment' standard.

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[48] Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 323.; Although we are starting to see reference to human rights and states regulatory rights in some newer Model BITs. See e.g Norwegian Model BIT, May 2015,Draft version 130515, https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf . (Preamble, Articles 6, 8(2), 11(1), 12, 23viii, and 31: reflect a direction away from a sole focus on investment protection by emphasizing the state's ability to regulate for the protection of health, human rights, safety, and environmental issues).

[49] Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*
, 28.

[50] Alvarez, "Lessons from the Argentina Crisis Cases," 248.

[51] Special Update On Investor-State Dispute Settlement: Facts and Figures (2017) 3 P. 3 (out of *known* cases against Argentina between 1987 – July 2017).

[52] "Lessons from the Argentina Crisis Cases," 249.

[53] *CESR, General Comment No. 15 (2002), para. 23*

In 2007 the UN Commissioner for Human Rights highlighted submissions of concern in her review of the right to water "regarding the relationship between the obligations of States under bilateral investment treaties and their human rights obligations in relation to access to safe drinking water" due to the potential impact BIT obligations can have on "the duty of States to regulate companies".[54] The concern was also related to two ongoing proceedings against Argentina in ISDS, and the uncertainty over "whether and how the obligations of Governments under international human rights instruments will be taken into account in ICSID judgements".[55]

The 2002 General Comment No. 5 on the right to water suggest that States should encourage 'judges, adjudicators or any member of the legal profession' to pay greater attention to violations of the right to water in the exercise of their functions.[56] Indeed in the majority of the lawsuits filed against Argentina by investors in water utilities Argentines main, and perhaps only, argument of defence was its human right to water obligations. The emerging body of ICSID case law has made arbitrators, and not necessarily the inter-State treaty-making process, the most important actor in developing the field of investment law.[57] What role does adjudicators who are deciding disputes over privatized water utilities in a private-party investment arbitration play in the advancement of the universal right to access safe drinking water? The question of whether and how Argentines obligations to the human right to water was taken in to account in the ICSID judgements is one of the key topics in this thesis.

1.4 Research Question(s) & Method

Can the system of investment law can undermine the human right to water?

[54] Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments,16 August 2007 A/HRC/6/3, http://www2.ohchr.org/english/issues/water/iexpert/docs/A-CHR-6-3_August07.pdf (4 April 2018), para. 52-53 and 63-64
[55] Ibid. (referring to ICISD proceedings ARB/03/17 and ARB/03/19)
[56] *CESR, General Comment No. 15 (2002), para. 58*
[57] Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," 880.

a) Can foreign investors in privatized water utilities 'legitimately expect' regulatory stability that undermines the regulatory duty of the host State to safeguard basic access to water for its population in times of crisis?

b) Do the arbitration Tribunals in investor-State arbitration accord legal impact to their recognition of Argentine obligation to the human right to water in disputes over public water utilities in Argentina (Buenos Aires)?

To explore these questions the methodological approach undertaken is twofold and divided into two different analysis' where the former informs the latter. For technical purposes, the thesis is divided into two parts.

Part I

The first analysis undertakes a descriptive literature review of the fragmentation discourse in international investment law and arbitration with the focus of identifying where the investment system is in tension with the ideals deriving from international human rights law. The analysis reviews literature on international investment law form both private and public law scholars in the field but has a presumption for the international public law *function* of the private law *system* of international investment law and arbitration. The literature review is complemented by case law, positive legal sources, constitutional documents and relevant UN instruments on the topic of foreign investment and water privatization.

The aim is to identify concerns raised in relation to **if** and **how** the system and function of investment law can undermine the realization of the human right to water by looking at procedural, substantive and rule of law parameters from the perspective of human rights justifications. Of particular focus is the 'fair and equitable treatment' standard(s) (FET) enshrined in most Bilateral Investment Treaties.

Part. II

The second analysis is a case law study[58] of three investor-State awards by the International Centre for Settlement of Investment Disputes rendered against Argentina over privatized

water services. The main focus of the analysis was to identify how Tribunals interpret and apply open ended investor protection standards and the legal reasons behind the choices made.

The aims of the case law analysis is to understand how the Tribunals give legal content to the 'fair and equitable treatment' standard and how they accommodate arguments of legal tension with the human right to water. The analysis will take a functional and descriptive perspective for the purposes of identifying if the Tribunals responsibly bridge tensions between the States duty to accord FET to foreign investors, and its duty to progressively realize and guarantee the human right to water.

In addition to these two analysis I will also establish the status of the human right to water in Argentina as a legal 'tool' for the purpose of 'measuring' the discrepancy between the interests at stake, and the interests addressed by Tribunals in the case law analysis in relation to the human right to water.

The relationship between the analysis in Part I and Part II: Part I will identify the constitutional foundations of the international investment law regime that enables it to retain a harmonious relationship with international human rights law, and the structures that indicate tension identified in the literature. The key concerns identified determines the approach to the case law analysis in Part II. The findings from the case law analysis will then be discussed in light of the concerns raised in the literature.

Key findings

The question of conflicts of law and resolution is an area of tension in arbitration tribunals as raise key concerns related to the tension between the states duty to regulate and the limitations placed on the regulatory space when entering treaties. This, of course is just the same with any treaty but if the it seems little regard for the fact that human rights treaties are positive rights and not simply moral norms.

From the perspective of human right to water the ultimate indicators of tension is the demand for absolute regulatory stability, the lack of concern for facts, the no concern for factual circumstances, the lack of concern for intent and isolated focus on effect on the investor, the uncertainty around inconsistent case law, States ability to contract away jurisdiction over key resources, lack of transparency and participation.

1.5 Limitations

The area of international investment law and international human rights law is broad in scope and encompasses interaction between legal sources and transboundary legal relationship from an incomprehensible number of legal sources, principles and possible conflicts of interest. The legal sphere of international investment law is currently undergoing reforms. It has been a challenge to navigate in the legal "doctrine" with such high degrees of uncertainties at every level. The methodological approach is chosen thereafter and has its legal limitations.

1.6 Structure of thesis

Part I: consists of three chapters undertaking a descriptive literature review. Chapter 2 established the existence of an internationally recognized human right to water as an introduction to Part I. The rest of Chapter 2 deals with the formal procedures and structures of investment arbitration facilities, and its possible implications for adjudicating over water utilities'. Chapter 3 looks at the applicable law in disputes with particular focus on concerns over the role played or not played by non-investment law. Chapter 4 looks closely at the fair and equitable treatment standard for the purposes of identifying the elements of possible tension and threat or opportunity to progressively make bridges between different legal spheres

Part II: consists of six chapters with focus on the case law analysis. Chapter 5 established the status of a national and international human right to water in Argentina and if this right hypothetically can be used in ICSID proceedings. Chapter 6. Looks at the human right Tribunals response to the human rights arguments advanced by Argentina. It also looks at the human rights implications identified in the decisions in three key topics: investor misconduct, regulatory framework and alternative measures. Chapters 7-9 looks at how the Tribunals dealt with the fair and equitable treatment standard in the cases. Chapter 10 makes a analysis of the

three cases interpretation and application of the FET standard. Chapter 11 gives a short summary and conclusion of my thesis.

Literature Review

PART I

Chapter 2. Investor-State Arbitration – Governing our Goods and Governments?

> "*We the people of the United Nations determined[…]to establish conditions under which justice and respect or the obligation arising from treaties and other source of international law can be maintained[…]and to these ends[..]to employ international machinery for the promotion of the economic and social development of all peoples*."
> - UN Charter Preamble, 1945

2.1 Introduction Part I

In 2010 the UN General Assembly passed the historic Resolution 64/292 that explicitly 'recognizes 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'.[59] The Resolution represented long awaited consensus in the international community[60] that is said to have established, once and for all, the human right to water as an independent human right deriving from several human rights found in internationally binding treaties.

The Resolution 'recalled' various general and specific human rights conventions, UN Resolutions and General Comments from UN expert bodies on the right to water, and specifically recalled the report of the UN High Commissioner for Human Rights on the 'scope and content of the relevant human rights *obligations* related to equitable access to safe

[59] UN General Assembly, *The human right to water and sanitation : resolution / adopted by the General Assembly*, 3 August 2010 A/RES/64/292, Art. 1

[60] General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions, 28 July 2010, https://www.un.org/press/en/2010/ga10967.doc.htm, 21 May 2018

drinking water and sanitation under international human rights instruments.'[61] Of particular significance was the 2002 General Comment No. 15[62] (hereafter GC15) which established a thorough legal basis for the right to water under the ICESCR Art. 11(1) and art. 12.[63] GC15 established that 'everyone' under the right to health and the right to adequate standard of living has a right to '*sufficient, safe, acceptable, physically accessible and affordable water*' and set out a norm prioritizing the allocation of water "for personal and domestic uses" and "to prevent starvation and disease".[64] The report identifies a rich base of instruments referring implicitly or explicitly to the right to safe drinking water.[65] Of particular significance was the 2002 General Comment No. 15[66] (hereafter GC15) which established a thorough legal basis for the right to water under the ICESCR Art. 11(1) and art. 12.[67] GC15 established that 'everyone' under the right to health and the right to adequate standard of living has a right to '*sufficient, safe, acceptable, physically accessible and affordable water*' and set out a norm prioritizing the allocation of water "for personal and domestic uses" and "to prevent starvation and disease".[68]

The Hight Commissioners report further emphasized that "while human rights treaties do not recognize access to safe drinking water and sanitation per se, specific obligations to access to safe drinking water and sanitation have been increasingly and explicitly recognized in core human rights treaties, mainly the right to an adequate standard of living and the right to health."[69]

Later on in 2010 the Human Rights Council passed resolution 15/9 which 'recalled' Resolution 64/292 and 'affirmed' that "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."[70]

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[61] *A/RES/64/292, 2*
[62] *CESR, General Comment No. 15 (2002),*
[63] Ibid.
[64] Ibid., para. 6.
[65] United Nations High Commissioner for Human Rights *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, 16 August 2007, A/HRC/6/3, para. 5 (b)1
[66] *CESR, General Comment No. 15 (2002),*
[67] Ibid.
[68] Ibid., para. 6.
[69] Ibid., para. 6.
[70] Human Rights Council*, Human Rights and Access to Safe Drinking Water and Sanitation*, 30 September 2010 A/HRC/RES/15/9, Art. 2 and Art. 3

In 2015 the General Assembly adopted by consensus Resolution 70/169 which made a clearer distinction between the right to water and the right to sanitation, and affirms again that the right to safe drinking water is a part of the right to an adequate standard of living and the right to the highest attainable standard of health and "entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[71]

Foreign direct investment, investor-State arbitration and privatization of water services can impact on the enjoyment, realization and enforcement of the human right to water. By privatizing water supply water becomes a private economic good as well as remaining a basic collective resource which everyone depends and has a right to access.[72] As much as foreign direct investment (FDI) can contribute to the urgent need for investment in infrastructure and technical competence, it can also cause overemphasis on commercial objectives and through a protective investment regime threaten the role of the Government as duty bearer to human rights by subverting regulatory systems.[73] Nevertheless, the effectiveness and realization of the right to water largely depends on comprehensive regulation by the State to ensure non-discrimination and affordability regardless of ability to pay.[74] As such, the relationship between the States as a primary duty bearer to human rights, the populations non-derogable rights to access safe, sufficient and affordable drinking water, and the private suppliers right to a reasonable return and access to private, supranational adjudication, can pulverize responsibility and make accountability complex.[75]

International investment law can affect national water resources and water provision and how it is managed, justiciable and regulated. Of concern here is how investment agreements and investment arbitration can curtail regulatory powers of governments over privatized public water services. When a foreign investor is operating the public water services, the public's need for regulation can be curtailed because governmental regulations can be overruled by

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[71] *A/RES/70/169, Art. 1 and 2*
[72] *CESR, General Comment No. 15 (2002),* ; *A/HRC/RES/15/9,* ; Human Rights Council : resolution / adopted by the General Assembly, 3 April 2006 A/RES/60/251, http://www.refworld.org/docid/4537814814.html (2 April 2018)
[73] UN Economic and Social Council*, Liberalization of trade in services and human rights Report of the High Commissioner* Executive summary*, 25 June 2002, E/CN.4/Sub.2/2002/9, p. 3 (c)
[74] Thielbörger, *The Right(s) to Water : The Multi-Level Governance of a Unique Human Right*. 3.
[75] Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque 29 June 2010, A/HRC/15/31, http://www2.ohchr.org/english/issues/water/iexpert/docs/A-HRC-15-31-AEV.pdf (4 April 2018), para. 16

international arbitration courts based on a frustration of the investors expectation for profit. The "legitimate expectations" of investors can give protection against governmental legislation that negatively impacts on the profit-making of investors in water utilities, regardless of the purpose behind the legislation.[76] This can deter governments from regulating, intervening and improving regulatory frameworks for the fear of lawsuits.[77] In the event of arbitration, the public, whose resources are under dispute, is by large precluded from participation and transparency.

2.2 Introduction to Chapter 2

Investor-State arbitration facilities undeniably enhance procedural protection of otherwise 'vulnerable' alien investors vis-à-vis Sovereign States, with the purpose of promoting mutual economic development in the signatory States to the ICISD Convention.[78] However, there are wide-reaching concerns that investor-State dispute settlement (ISDS) in *ad hoc* tribunals under ICISD procedures constitutes an unaccountable form of global administrative governance. This is because it can leave little or nothing a Sovereign State does immune from private, supranational arbitral scrutiny, which additionally conducts its review in a manner that allegedly often leaves wide discrepancy between the interests *at stake* and the interests *addressed* by Tribunals.[79]

Notably, the conclusion and publication of the first disputes against Argentina after the crisis have been identified by several scholars[80] as the outset of the 'legitimacy crisis' in

[76] Miguel Solanes and Andrei Jouravlev, *Revisiting privatization, foreign investment, international arbitration, and water*, ed. Seies (2007), 11.
[77] Ibid., p. 11.
[78] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966),* (Preamble)
[79] Alvarez, "Lessons from the Argentina Crisis Cases," 257-258. (describing the critique as encompassing vertical, horizontal, ideological and rule of law concerns); Public Statement on the International Investment Regime – signed by 37 legal academics, (31 August, 2010), available at: https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/, (accessed: 15 March 2018) (Academics from all over the world, most of them legal professors in law, expressed deep concern for the harm done to the public welfare by the international investment regime, especially "its hampering of ability of governments to act for their people in response to concerns of human development and environmental sustainability); Attila Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector," *The Law and Practice of International Courts and Tribunals* 11, no. 1 (2012): 48. (footnote n10 contains an extensive list of literature arguing that BITs and international investment arbitration has been to the detriment of the sovereign power and duty of host States to pursue the general interests of their populations)
[80] Alvarez, "Lessons from the Argentina Crisis Cases," 256.; Burke-White and von Staden, "Private litigation in a public law sphere: the standard of review in investor-state arbitrations," 289; Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," 895.

international investment law and arbitration or the alleged 'backlash against international law and arbitration'.[81] ISDS is currently an area of legal uncertainty and political controversy.

In what follows, I will give a breach introduction the Centre, identify its constitutional governing aims, and institutional structures in the investor-State dispute settlement regime under ICSID procedural rules that set the premises for the Centers jurisdiction. This will aid the understanding of the implications of investor-State disputes over public water services, and possible tension with the aims of realizing the human right to water.

2.3 Constitutional Considerations of the ICSID

The International Centre for Settlement of Investment Disputes (hereafter ICSID) was established under the *ICISD Convention*[82] in 1966. The arbitration facilities of the Centre provides a procedural mechanism that enables foreign investors to sue States *directly* in confidential, supranational, *ad hoc* Tribunals reviewing the legality of public acts of Governments, issuing unappealable and binding decisions on State liability directly enforceable in the host States.[83] There are currently 153 contracting States to the ICSID Convention.[84]

During the past decades, investor-State disputes settlement under ICSID procedures went from being a relatively rare phenomenon to becoming an important factor in transnational economic activity.[85] Today the majority of investor-State arbitrations globally are submitted to the Centre's jurisdiction for adjudication.[86] Since the first ICSID case in 1972,[87] about 60% of lawsuits resolved under its jurisdiction has been filed under Bilateral Investment Treaties (BITs), that is, arbitration clauses in BITs providing for dispute resolution under

[81] See e.g. Michael Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010)
[82] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966),*
[83] Christoph H. Schreuer et al., *The ICSID Convention : A Commentary*, ed. Seies, 2nd ed. ed. (Cambridge: Cambridge University Press, 2009). ix – xi (introductory note)
[84] "Database of ICSID Member States," https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.
[85] Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," 879-880.
[86] Special Update On Investor-State Dispute Settlement: Facts and Figures (2017) at 5, Figure 7 (The cumulative number of publicly known investor-State cases is 817 cases of which 60 percent (approximately 500) have been filed under the ICISD Convention and its Additional Facility Rules, as of July 2017)
[87] Ibid., at 5, Figure 7

ICSID procedural rules which can be invoked by investors against States. The first BIT, as far as publicly known, was concluded between Germany and Pakistan in 1959.[88] Today, there are no less than 3000 International Investment Agreements (IIAs) globally, including multilateral, regional and bilateral investment treaties.[89]

ICISD was created under the International Bank for Reconstruction and Development (the World Bank). The World Bank is one of United Nations 'Specialized Agencies' established under the UN Charter Articles 57 and 63 with 'wide international responsibilities, as defined in their basic instruments'.[90] The governance document of the World Bank 'Articles of Agreement' sets out that the Bank 'shall' be guided in 'all its decisions' to 'promote…growth of international trade…by encouraging international investment for the *development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories'.*[91] Although the constitutional document do not refer to any human rights objects per se being an agency of the UN founded by State members, the overall purpose of the UN Charter should be part of its objective, particularly as it falls within the mandate of the Bank "to employ international machinery for the promotion of the economic and social development of all peoples."[92]

The object and purpose of the ICISD Convention was to "provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States"[93] thus a procedural instrument creating a safe investment climate stimulating larger flows of international private capital "considering the need for international cooperation for economic development".[94] State parties primary advantage in offering ICISD arbitration to investors is that it is *likely* to attract sought-for investments,[95] and that it relieves and shields the State from the process of diplomatic protection.[96]

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[88] United Nations UNCTAD, "Investment Policy Hub: International Investment Treaty Navigator " (http://investmentpolicyhub.unctad.org/IIA/mappedContent#sectionContainer_1).Available at:
[89] Ibid.
[90] *Charter of the United Nations (24 October 1945), Art. 57*(italics added)
[91] United Nations Monetary and Financial Conference*, IBRD Articles of Agreement* 22 July 1944 (as amended 17/12/65, 16/02/89 and 27/06/12), Art. 1(III)
[92] *Charter of the United Nations (24 October 1945),* (Preamble)
[93] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966),* Article 1 (2)
[94] Ibid. Preamble of ICISD Convention.
[95] Schreuer et al., *The ICSID Convention : A Commentary*, 8.
[96] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, ed. Seies (Oxford: Oxford: OUP Oxford, 2014), 232.

Traditionally, alien investors relied on diplomatic protection from their home government for access to international justice from host State abuse. However, only after exhaustion of local remedies could the investor The Report of the World Bank Executive Directors approving the ICSID Convention emphasises the "desire to strengthen the partnership between countries in the cause of economic development', and characterises the creation of the ICSID institution as a "major step toward promoting an atmosphere of mutual confidence and thus simulating a larger flow of private international capital into those countries which wish to attract it."[97]Concerning the interests of host States in light if the objective of providing investment protection the Report of the Executive on the Convention states that "the provisions of the Convention maintain a careful balance between the interests of investors and those of host States",[98] and that "the provisions of the Convention should be equally adapted to the requirements of both cases."[99] The primary objective for the creation of the ICSID was thus to promote and encourage private, foreign investment to facilitate the more overreaching purpose of global economic development in the 'developing world'. The way the ICSID Convention will accommodate this objective is by "offering a favourable climate for attractive and sound investments through neutral, binding, and efficient dispute resolution."[100] The statements can be said to somewhat underscore the importance of the balance inherent in the Convention by, again, emphasising the broader objective of providing favourable conditions for investors. Notwithstanding, of course, that the States will also benefit from benefitting the investor. By such, the positive objective to promote economic development in the developing world has more of an indirect character, as the arbitration mechanism is designed to mitigate negative impacts for the investor.

2.4 Inescapable jurisdiction

The ICISD Convention provides protected investors with *direct* access to international arbitration. The direct admissibility of claims entail that almost all investment disputes today are submitted to this non-transparent facility rather than other national or international

[97] International Bank for Reconstruction and Development, Report of the Executive Directors of the Convention on the Settlement of Investment Disputes between States and Other States (March 18, 1965), https://icsid.worldbank.org/en/Documents/resources/ICSID_Conv%20Reg%20Rules_EN_2003.pdf (26 May 2018), 41
[98] Ibid.
[99] Ibid., p. 41.
[100] Ibid., 40.

courts.[101] The State ratifies the ICSID Convention[102] *and* announces its consent in an investment treaty or agreement while the investor can give her consent to the ICSID jurisdiction directly by invoking a lawsuit. A foreign investor whose activity falls under the broadly interpreted definition of 'investment' under the ICISD Convention Article 25 can bring 'any legal dispute arising directly out of an investment'[103] to the Centre. The State often finds itself at the ultimate will of the investor as to the possibility of a dispute, as the State cannot *invoke* a claim given that the governing law if often one-sided in nature and focus primarily on investor protection. However, the State has a small window of possibilities to bring counterclaims against the investor if in on-going disputes. The 2016 *Urbaser* case brought some important jurisprudential developments as to clarifying the rules on the admissibility of such claims in relation to what can be regarded as an investors consent.[104] There are also some new developments in inter-State treaty making processes that propose BIT Models with obligations on investors.

A State and investor *can* make agreements that a dispute shall first go through local courts before reaching ICSID.[105] A State can in an agreement require *full* jurisdiction over any dispute arising out of an investment, such as water concession contracts. However, even in the event of such an agreement the investor, by the invocation of a Most-Favored-Nation clause (MFN) in an applicable BIT, can bypass national courts regardless of such agreement. This is because the MFN clause secures non-discrimination, with the effect of unifying investment protection across BITs as a State has committed not to treat any investors less favorably than another in his territory. Thus, the MFN clause enables investors to invoke more advantageous protection standards found in other BITs in the host State, such as agreements without requirements to resort to national courts.[106] Setting this precedence was the *Maffezini v Spain*[107] case where the tribunal found that a precondition to submit a dispute to a local court

[101] Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 281-282.
[102] There are some possibilities for non-parties to bring claims to the ICSID, see Additional Facility Rules
[103] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966), Art. 25*
[104] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB07/26) Award* (8 December 2016), para. 1148: the investor is considered to have given consent to a counterclaim can be admissible as long as the dispute resolution clause refers to "any claim" and there is no reservations
[105] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966), Art. 26* (Art. 26 provides that "consent of the parties…shall…be deemed consent to such arbitration to the exclusion of any other remedy")
[106] Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," 893.
[107] *Emilio Agustín Maffezini v. The Kingdom of Spain (ICSID Case No. ARB/97/7) Award*, (13 November 2000)

before commencing to the ICSID tribunal was a violation of the MFN standard because another BIT did not require such recourse.[108] Since *Maffezini*, Tribunals have similarly held that MFN clauses can extend dispute resolution provisions to preclude first-resort requirements,[109] also in the case of foreign shareholders in local companies.[110] In the words of Thielbörger in regards to concession contracts in water utilities which gave national courts full jurisdiction over disputes:

"it[Tribunal]has made its point clear that it will not accept States' attempts to deprive the ICSID tribunals of their jurisdiction, by granting exclusive jurisdiction over the interpretation of the concession contract to local courts"[111]

With the close to 3000 BITs in the world, where a majority provides for MFN-clauses, it appears difficult for *State* to avoid the tribunals jurisdiction with an agreement that requires resort to local courts nor an agreement that explicitly precludes international arbitration by requiring disputes to be resolved nationally. A part of the right to water is access to information, justice, reparation and restitution.[112] However, ICISDs broad scope can take disputes over water services away from the national jurisdiction. Due to the interconnectedness between investment and the realization of water the 2002 General Comment. No 15 from the Committee on Economic Social and Cultural Rights specifically sets out that States have to make sure that the right to water is "given du attention in international agreements and[…]make sure that these instrument do not adversely impact upon the right to water."[113]

2.5 Arbitrators, Advocates – or in fact Transnational judges?

The Tribunals under the ICSID Convention are *ad hoc,* and arbitrations are thus appointed by on a case by case basis. Tribunals usually consist of three arbitrations, and decisions are made by majority vote. As such the primary mandate of an arbitrator is to assist in dispute resolution in a specific party-driven case. Usually, one arbitrator is appointed by the Centre,

[108] Jan Paulsson Lucy Reed, and Nigel Blackaby, *Guide to ICSID Arbitration 2nd. Edition Revised* ed. Seies, Second edition ed. (The Netherlands: Kluwer Law International 2011), 85.
[109] Ibid.
[110] *Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17) Award* (21 June 2011)
[111] Thielbörger, *The Right(s) to Water : The Multi-Level Governance of a Unique Human Right*. 156.
[112] *CESR, General Comment No. 15 (2002), paras. 12 (c), 49 and 56*
[113] Ibid., para. 35.

while the two others are party-appointed. This works to insure party autonomy and confidence in the process. It has traditionally been perceived as legitimate that parties to a private arbitration choose arbitrators with maximum predetermination for their interests, while of course, still maintaining independence in light of the checks and balanced that may lead to disqualification.[114] The consequence is that arbitrators can have diverse backgrounds as they serve opposing interests and legal subjects. Lawyers and academics with backgrounds in public international law and commercial law are typical examples. They often have differing opinions and perspectives, and many are arbitrators *and* scholars in the field. Their different understandings of the role of the State, methodological approaches, the function of investment arbitration and knowledge of other international law areas contributes to making investment law an incoherent area of law.[115] The somewhat dual role of being party-appointed and independent has been criticized for possibly compromising the independence of the decision-making process due to the direct relationship that is established between the arbitrators and the parties.[116] The opposing arguments of the disputing parties also seem to have a polarizing effect on decision-making evidenced though separate or dissenting opinions by arbitrators appointed by the losing party, as well as a doctrinal state of division between private and public law affiliation. This raises the question of whether arbitrators are incentivized to build responsible bridges between the interests of the opposing parties, and whether the polarization plays an essential part in the fragmentation of investment law from other public international law systems. Some call for a reform of the system and the creation of permanent judges, while others concur to the traditional principle of 'party autonomy' as it is regarded as a vital precondition for the parties' choice of legal forum.[117]

This raises the question if Tribunals are capability of creating predictability in the areas of investment law, particularly in regard to unified methodological approaches to tensions between competing interests in disputes arising from non-investment law, such as human rights law. For now, this might seem largely dependent on the individual arbitrators as well as the chosen applicable law.

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[114] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966),* (E.g. such as having the same nationality of one of the contracting parties (ICSID Constitution Art. 38), manifest lack of qualities of ineligible for appointment (Art. 57))
[115] Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," 888.
[116] Solanes and Jouravlev, *Revisiting privatization, foreign investment, international arbitration, and water.*
[117] See e.g. Stefanie Schacherer, "Independence and Impartiality of Arbitrators," (https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/Schacherer.pdfJanuary 2018).

Arbitrators are expected to make a decision independently and "*shall judge fairly as between the parties, according to the applicable law.*[118] Apart from this, and the requirements to the content of an award, there are no clearly established 'principles of justice' or rule of law norms in the procedural rules. For now, this might seem largely dependent on the individual arbitrators as well as the chosen applicable law

Another related concern that is being raised is the impact *ad hoc* tribunals have on securing coherency and predictability in decision-making and the development of investment law. In light of their often diverse backgrounds also raises the question of unified and responsible methodological approaches to tensions between competing interests in disputes arising from non-investment law, such as human rights law. This is particularly as ad hoc Tribunals are equipped with a wide scoped discretion as to the interpretation of the applicable law and procedural questions as it "shall be the judge of its own competence".[119] Arbitrators are expected to make a decision independently and "*shall judge fairly as between the parties, according to the applicable law.*[120] Apart from this, and the requirements to the content of an award, there are no clearly established 'principles of justice' or rule of law norms in the procedural rules. For now, this might seem largely dependent on the individual arbitrators as well as the chosen applicable law. Arbitrators and tribunals are nevertheless the primary developers of international investment law through the high frequency of decisions-making and the use of its own case law as *de facto* precedents (see more under 2.7). One tribunal explicitly referred to the 'duty' of arbitrators to "contribute to harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."[121]

General Comment No. 15 on the right to water sets out that States should encourage "judges adjudicators and members of the legal progression[…]to pay greater attention to the right to

[118] ICSID*, Rules of Precedure for Arbitration Proceedings (Arbitration Rules)*, 2006 Rule 6 (2)
[119] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966), Art. 41 (41)*; J. Romesh Weeramantry, *Treaty interpretation in investment arbitration*, ed. Seies, Oxford international arbitration series (Oxford: Oxford University Press, 2012). p. 39-40; Gardiner Richard K., *Treaty Interpretation* ed. Seies (Oxford: Oxford University Press, 2008). p. 45; Ok Fauchald, "The legal reasoning of ICSID tribunals - An empirical analysis," *Eur. J. Int. Law* 19, no. 2 (2008). p. 314.
[120] *ICSID Arbitration Rules (April 10), Rule 6 (2)*
[121] *Saipem SpA v Bangladesh*, (ICSID Case No ARB/05/07) Decision on Jurisdiction and Recommendations on Provincial Measures, 21 March 2007. Para. 67.

water in the exercise of their functions."[122] Argentina argued for an a systemic integration of its responsibility to the human right water in the disputes under analysis in Part II. This is fully possible in investment arbitration under BITs as they are subject to the VCLT Art. 31 (3) (c) and "shall" therefore be interpreted in light of with "relevant rules" of international law.[123] Most States are parties to the International Convention on Economic, Social and Cultural Rights (ICESCR) where the right to water derives, and dispute over water would be deemed relevant. However, the *ad hoc* nature of Tribunals might first and foremost encourage dispute resolution in the context of single disputes, and not necessary with due regard for the larger body of international law which investment law undeniably is part of.

2.6 Immediate Immunity & Enforceability of Decisions

Art. 26 of the ICISD Convention provides that once an investor has filed a claim under the Convention this "shall (..) be deemed consent to such arbitration to the *exclusion* of any other remedy."[124] Art. 53 sets out that "the award should be binding on the parties and shall not be subject to any appeal or to any remedy except those provided for in the Convention,"[125] implying that arbitral decisions, unlike any other international decisions, are immune from court appeal review, and also under Art. 54 directly enforceable in signatory States 'as if they were final judgements of a court in a State'.[126] However, there are three remedies available under the ICSID Convention, namely interpretation, revision and annulment. The annulment committee is equally ad hoc consisting of three new arbitrators appointed by the Centre. Upon being granted annulment the case will have start all over from ground zero. Hence, there is no appellant body, although it is being discussed in light rule of law principles as well as in increasing amount of dissenting opinions being issued reflecting both legal polarization in terms of private/public law approaches, as well as an issue connected to the arbitrator affiliation with the disputing parties, as mentioned. This issue will be further elaborated under the case law analysis.

[122] *CESR, General Comment No. 15 (2002),*
[123] *Vienna Convention (23 May, 1969), para. 31 (33) (c)*
[124] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966), Art. 26* (italics added)
[125] Ibid., Art. 53. (Art. 51 – 53 provides for the remedies interpretation, revision and annulment).
[126] Ibid., Art. 26.

One inescapable consequence of the immunity of awards are that they are excluded from examination as to their compliance with national law, constitutional, human rights law, and international law in general. Several of arbitral decisions against Argentina stemming from the financial crisis have been criticized as overturning the will of an elected government who enacted emergency legislation intended to benefit all that countries residents in the midst of a crisis of substantial dimensions, and hence, unduly intruding on national sovereignty without sufficiently respecting the states right to regulate in the public interest.[127] Notably, Argentina has refused to comply with a number of ICISD awards and pay damages legally due to investors.[128] Furthermore, Venezuela, Bolivia and Ecuador decided to withdraw from ICSID altogether.[129] The growing body of criticism rising from the 'legitimacy crisis' or IIA the can be summarized as concerns that investor-State arbitration constitutes an undemocratic transfer of public authority to "unaccountable", confidential, *ad hoc*, supranational Tribunals that second-guess national law-making and regulation to the constraint of the States Sovereign right and ability to regulate in the public interest, with detrimental effects on human development and environmental sustainability.[130]

The critique is rooted in the notion that tribunals and arbitrators are in reality acting as judges in courts in the transnational legal order which is an entirely different role than the one prescribed to commercial arbitration between private parties, on which the ICSID commercial procedural rules were modelled, but whom deal with dispute resolution between to contracting parties based on private law.[131] Investor-State tribunals undertake evaluations of the legality of all aspects of government conduct, which means that, tribunals can overrule Supreme Court decisions in a given host State as well as any acts of the legislative, executive, provincial authorities, and find the State liable for citizens behavior . In the cases arising from the Argentina crisis the *ad hoc* Tribunals were reviewing the legality of the Argentine states emergency measures. How are they supposed to do that? The BIT clauses that the tribunals rely on in many cases only contain vaguely formulated standards such as "fair and equitable treatment". How shall an *ad hoc* Tribunal, consisting of party appointed arbitrators from

[127] Alvarez, "Lessons from the Argentina Crisis Cases," 257. P. 248
[128] Ibid., 254.
[129] Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," 895. (Ecuador announced its withdrawal from ICISD in 2009, and Bolivia in 2007, and Venezuela in 2012).
[130] seeTanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector," 48. footnote n10 (containing an extensive list of literature arguing that BITs and international investment arbitration has been to the detriment of the sovereign power and duty of host States to pursue the general interests of their populations)
[131] Dolzer and Schreuer, *Principles of International Investment Law*, 233.

diverse backgrounds and in the shadow of privacy, evaluate the governments' conduct in a complex emergency situation in a legitimate way against the standard of fair and equitable treatment? Several Tribunals additionally came to opposite conclusions as to Argentines contribution despite interpreting and applying the same customary rule on same emergency measures. For Argentina this distinction was in many cases the difference between livability and non-liability. In the *Suez* and *Impregilo* case the tribunal found that Argentina *significantly* contributed to the crisis,[132] while the tribunal in the *Urbaser* case came to the opposite conclusion.[133] Even more strikingly is it that *Impregilo* and *Urbaser* were the exact same concession although claims filed by different stakeholders.

It *is* increasingly recognized investor-State dispute settlement in international tribunals is not solely concerned disputes between private parties, but that investment disputes can have fundamental impacts on social life and that investment disputes, particularly over public utilities or public policy, can influence on the human rights of third-party individuals, communities and entire populations.[134] Furthermore, public law sources are governing the dispute as to both mainly reviewing the legality of States public policy regulations vis-a-vis protection standards enshrined in public international law sources, not only BITs but also customary and general international law.[135] Therefore, investment law and arbitration should be expected to adjudicate in accordance with VCLT Preamble and Articles 31-33, and resolve conflicts of tension through UN Charter Art. 103.[136] Perhaps particularly so as they render immune decisions in non-transparent facilities where public interests are usually part.

2.7 Transparency and *de facto* jurisprudence

[132] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19) Decision on Liability* (30 July 2010).para. 264 («government policies and their shortcomings significantly contributed to the crisis and the emergency"); *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 358. ("Argentina contributed significantly to the "situation of necessity")

[133] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, para. 713. ("Economic policies evaluated as wrong as they allegedly were in the 1990s in Argentina were not of a kind that they could lead to a crisis and emergency of such a magnitude")

[134] Kube and Petersmann, "Human Rights Law In International Investment Arbitration," 68.

[135] Today, the majority of disputes are filed under Multilateral or Bilateral Investment Treaties, which are concluded between two States, and thus, sources of public international law (ala Human Rights Treaties).

[136] *Charter of the United Nations (24 October 1945), Art. 103* (italics added)

The 2006 amendment of ICSID Arbitration Rule[137] 48 (4) made the Centers case law more available to the public. Up to 2006 the publishing of anything beyond "excerpts of the legal rules applied in the award" required party consent.[138] After the amendment the Centre could publish the "legal reasoning of the tribunal" and left it to the Tribunal to determine the content of the excerpts to be published, in the spirit of facilitating prompt publication of excerpts as it will "*improve transparency and promote efficiency in the development of international law"*.[139] This is a transition that can largely be attributed to the civil society demand for greater transparency and is definitely a positive development from an accountability perspective. Today, hundreds of awards and decisions are easily available, and awards are rendered with high frequency.[140]

Case law evidence active use of previous decisions, both *obiter dicta* and *ratio decidendi*, as important sources of law guiding interpretations and applications of protection standards in BITs.[141] Despite that awards are only binding on the parties (ICISD Convention Art. 53) the increased use of case law in decision making, and States response to arbitral interpretations, rule amendments, dissenting opinions, annulments and academic writing is evidence of recognition of *de facto* judicial precedents and thus judicial lawmaking by arbitration tribunals.[142]

One study from 2007 revealed that case law is actually the most frequently used source for legal argumentation in ICSID disputes, both by the disputing parties and Tribunals.[143] The preference for precedents can be partly explained by the strikingly similar textual formulations of protection standards across BITs, in combination with the unifying effect of investment protection in a given host State through most-favored-nation clauses (MFN clauses) in BITs, the global 'web' of BITs increasingly posture an embryo of a multilateral order granting the same level of protection worldwide.[144] This has marked a change in the

[137] *ICSID Arbitration Rules (April 10),*
[138] Aurélia Antonietti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules," *ICSID Review - Foreign Investment Law Journal* 21, no. 2 (2006): 442.
[139] Ibid. (italics added)
[140] See e.g. ICISDs own case-law databases https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx, or similar https://www.italaw.com/
[141] Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," 893.
[142] Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 14.
[143] Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis," 351.
[144] Stephan W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," ibid.22, no. 3 (2011): 893.

paradigm of international investment law, making arbitration Tribunals, and not necessarily the inter-State treaty-making process, the most important actor in developing the field of international investment law.[145]

However, the increased transparency and scrutiny of case law has also revealed a large degree of inconsistencies in decisions based on essentially identical facts, BIT clauses, rules of customary international law, and an unpredictable willingness to deviate from case law accepted by previously Tribunals as having precedential value, particularly when interpreting controversial standards of which there is a large degree of inconsistent use.[146] This is in addition to inconsistent methodological approached in general in light of the customary rules of treaty interpretation codified in VCLT articles 31-33 and in relation to the primary use of *subsidiary* legal sources as set out in ICJ Statute art. 38(1).[147]

The unpredictability and inconsistency that is evident in case law have generated widespread critique of Tribunals, and manifold of new scholarly contributions, mainly produced by scholars coming from public international law, are voicing concern over the impact such inconsistencies might have on the predictability and coherency of international investment law which is in the interests of investors and well as States.[148]

Chapter.3 Investment Law & Non-Investment Law

3.1 Law applicable to disputes

The jurisdiction of ICISD tribunals are strictly consent-based. Hence, the law the tribunals apply when settling disputes are restricted to the legal rules and instruments "agreed by the parties", as set out in the ICISD Convention Art. 42 (1).[149] When claims are anchored in bilateral investment treaty (BIT) provisions, the BIT become the primary *lex specialis* source

[145] Ibid., 880.
[146] Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis," ibid.19, no. 2 (2008): 331. José E. Alvarez, *The public international law regime governing international investment*, ed. Seies, vol. 11, The pocket books of the Hague Academy of International Law (Leiden ; Boston: Leiden ; Boston: Martinus Nijhoff Publishers, 2011), 233-235.
[147] Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 471. See generally Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis."
[148] Stephan W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," ibid.22, no. 3 (2011): 890.
[149] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966), Art. 42*

of law. BITs are consent based, limited party agreements with textual variations negotiated and enacted between two States committed to ascertain contractually established standards of protection to foreign investors from the Contracting State(s) operating within its territory. About 60% of its lawsuits resolved under ICSIDs jurisdiction has been filed under BITs, that is, arbitration clauses in BITs providing for dispute resolution under ICSID procedural rules which can be invoked by investors against States.[150]

Most BITs do not explicitly include human rights standards.[151] However, most BITs contain additional choice-of -law-clauses that can be utilised as supplementary or corrective sources of law, or as support and guidance in the process of interpretation of the often "vague" legal standards contained in BITs. The choice of law clauses in BITs regularly give reference to the host State law and 'relevant' or 'applicable' general principles of international law, and ultimately, the possibility of invoking national and international human rights law. For instance, the Argentina – Italy BIT Art. 8(7) provides that:

> "The arbitral tribunal shall decide the dispute in accordance with the laws of the Contracting Party involved in the dispute – including its rules on conflict of laws – the provisions of this Agreement, the terms of any possible specific agreement concluded in relation to the investment as well as with the *applicable principles of international law*".[152]

As such, the Tribunals are not restricted to the claims and arguments of the parties in the decision making but must make a decision based on the factual circumstances in the case and on the appropriate law. ICISD Tribunals regularly look to international human rights law jurisprudence when interpreting or applying customary law or vaguely formulated investor protection standards, such as protection from direct and indirect expropriation, the concept of fair trail, due process and non-discrimination.[153] In some cases, tribunals have also accepted jurisdiction over *independent* human rights law claims based on BIT clause referring to principles of international law. In the case *Toto v. Lebanon*[154] the tribunal accepted an

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[150] Special Update On Investor-State Dispute Settlement: Facts and Figures (2017)
[151] Francesco Francioni Pierre-Marie Dupuy, and Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration*, ed. Seies (New York Oxford University Press 2009). p. 84
[152] *Argentina - Italy BIT [english translation]*, (signed 22 May, 1990), (italics added)
[153] Gonzales Luis Garcia, "The Role of Human Rights in International Investment Law," in *The Future of ICSID and the Place of Investment Treaties in International Law*, ed. N. Jansen Calamita; David Earnest; Markus Burgstaller (London: British Institute of International and Comparative Law, 2013), 38-39. Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis," 342. (see reference to ICISD Tribunals using ICJ case law in footnotes 215-222)
[154] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon (ICSID Case No. ARB/07/12) Decision on Jurisdiction* (11 September 2009)

investor claim to 'right to a fair trail' based directly on provisions in a human rights treaty of which Lebanon was a party.[155] Historically speaking, both the international human rights body and investment arbitration regime incorporated certain normative standards and rights first found elsewhere, most notably in international custom.[156] Several of the standard investment guarantees and protections fairly resemble, or have clear parallels to the fundamental rights found in international human rights law. The ultimate consequence of this is that some core protection standards, such as protection from expropriation and the right to a fair trail, can be subsumed into and dealt with under the single legal discipline of human rights law.[157]

Tribunals are prohibited, as set out in the ICSID Convention Art. 42(2), from refusing to reach a decision on a claim for the reason that it finds no guidance to resolve the legal question raised in the law agreed between the parties. In those cases, the Tribunal is directed to resort to Art. 42, second sentence, which sets out that 'in the absence of such [an agreement on the applicable law]' the tribunal shall have recourse to the 'law of the Contracting State' and 'such rules of international law as may be applicable'. The term 'international law' in this context is a reference to Article 38(1) of the Statute of the International Court of Justice,[158] as set out in the preparatory works of the ICISD Convention.[159] Through Article 38 (1) (a) – (d) international human rights law can become applicable source of law in several ways. First, through international human rights "conventions" (Art. 38(1)(a)) in force between the States represented by the nationality of the claimant investor and Respondent host State in a dispute. Secondly, through human rights law that is recognized as "international custom" (Art.38(1)(b). However, the existence of customary human rights law, beyond few high-threshold *jus cogens* peremptory norms which in any case prevails treaty law,[160] remains uncertain.[161] Third, through human rights law recognized as "general principles" of

[155] Ibid., paras. 44 and 159-160.
[156] Pierre-Marie Dupuy, *Human Rights in International Investment Law and Arbitration*, 14.
[157] Jan Paulsson Lucy Reed, Nigel Blackaby, *Guide to ICSID arbitration*, ed. Seies (The Hague: Kluwer Law International 2004), 44.
[158] United Nations, *Statute of the International Court of Justice* 18 April 1946,
[159] Report of the Executive Directors of the Convention on the Settlement of Investment Disputes between States and Other States (1965) para. 40
[160] *Vienna Convention (23 May, 1969),* Art. 53 (the article sets out that "a treaty is void if…it conflicts with a peremptory norm of general international law". It is generally recognized that e.g. prohibition against slavery, corruption, terrorism and genocide is part of such norms)
[161] Hugh Thirlway, "Human Rights in Customary Law: An Attempt to Define Some of the Issues," 28, no. 3 (2015). p. 505; Tarcisio Gazzini, *Interpretation of international investment treaties*, ed. Seies (Oxford: Hart, 2016), 237.

international law (Art. 38(1)(c). And forth, as subsidiarity means of interpretation under Art. 38(1)(d), the tribunals can resort to (i) "judicial decisions" from e.g. the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), and (ii) "the teachings of the most highly qualified publicists".

Hence, ICSID Convention Art. 42(1) second sentence is another access point for the applicability of national and international human rights law in investor-State disputes. The finding that various choice of law provisions in the investment law regime can support both supportive and supplementary application of human rights through interpretation of BIT provisions, and direct application of human rights is also supported in the literature.[162]

Although the protection offered to investors vary from one individual agreement to another certain minimum standards found in most BITs bear strikingly similar textual formulations.[163] Some protection clauses usually found in most BITS the principle of 'fair and equitable treatment', the principle of 'protection and security' or the principle of 'no expropriation without compensation'. The object and purpose of BITs varies also varies from one treaty to another, however most BITs have at least two recurring common objectives. First of all, to stimulate incoming flows of foreign investment by protecting it, which ultimately is intended to promote and enhance economic development, and second of all, to promote economic cooperation between the host and home State.[164] The ordinary meaning of the notion of *economic development*[165] implies that the purpose of a BIT is not limited to the protection of foreign investment, but ultimately to the shared intention of the contracting States of improved economic conditions for the populations in the contracting states. Treaties have been enacted *between* States and must be fulfilled within a framework acceptable *to* the State parties. As set out by the tribunal in *Daimler v. Argentina case*:

"where a treaty claims is invoked, arbitral tribunals are called upon to interpret not merely the asymmetric contractual relationship between a sovereign state and a private

[162] See generally Pierre-Marie Dupuy, *Human Rights in International Investment Law and Arbitration*.; Kube and Petersmann, "Human Rights Law In International Investment Arbitration."
[163] Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," 893 , see also his article S. Schill, *The Multilateralization of International Investment Law* (2009)
[164] Jasper; Kommendjik and John. Morijin, "'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration," in *Human Rights in International Investment Law and Arbitration*, ed. Francesco Francioni Pierre-Marie Dupuy, and Ernst-Ulrich Petersmann (New York: Oxford University Press, 2009). 430, 432; Weeramantry, *Treaty interpretation in investment arbitration*. p. 73; Gazzini, *Interpretation of international investment treaties*. p. 161
[165] *Economic Development,* Oxford Dictionary of Economics (4th ed. 2013)

foreign investor, but to adjudicate whether a sovereign state has actually respected or violated the international obligations which it accepted with regard to the investment made by nationals of the other sovereign party to the same treaty."[166]

As such, the role of the arbitrator is to find the intent behind the State parties consent to the BIT clause. As treaties enacted by States are part of international public law they must be envisaged within its wider judicial context of general international law and be integrated into the international legal order in a systematic perspective for the purpose of unifying international law.[167] This builds on an assumption that upon entering an investment treaty the parties intended to respect all international obligations to which they have previously committed.[168]

State enters in to a BIT it exercises its sovereignty to contract away some of its sovereignty vis a vis the contracting parties, as it found this necessary to its objective of creating an investment-friendly climate.[169] The legal obligations set out in treaties thus determines the future *legality* of State measures vis-à-vis an investor from the State of the Contracting party, as the State has bound itself to uphold the commitments "in good faith", as required by Art. 26 of the VCLT.[170]

Nevertheless, the aspects of the States sovereignty that has not been contractually conditioned remain operational.[171] However, what exactly remains operational, or the extent to which the state's general regulatory scope has and *can* been restricted, that is, the extent to which general State regulations taken for a legitimate public purpose may negatively affect the value of an investment without becoming liable, remains *unclear*.[172] In the context of privatization

[166] *Daimler Financial Services AG v. Argentine Republic, (ICSID Case No. ARB/05/1) Award* (22 August 2012).para. 163
[167] Gazzini, *Interpretation of international investment treaties*. p. 212
[168] 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 " *Yearbook of the International Law Commission* vol. II, Part Two. (2006): p. 180 para. 119 (b).
[169] Dolzer and Schreuer, *Principles of International Investment Law*, 77.
[170] *Vienna Convention (23 May, 1969),* Art. 27 («A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46")
[171] José E. Alvarez, The public international law regime governing international investment, (Leiden: Hague Academy of International Law, 2011). 322-323, 384-385.
[172] Vera Korzun, "The right to regulate in investor-state arbitration: slicing and dicing regulatory carve-outs," *Vanderbilt Journal of Transnational Law* 50, no. 2 (2017): 375. William Schreiber, "Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations," *Natural Resources Journal* 48, no. 2 (2008): 466.

of water management and human rights the contractual freedom of a State to contract away publicly owned resources and be strictly bound by these contracts regardless of if it is an undemocratic or unconstitutional treaty seems like an unresolved issue.[173] The prevailing view seems still to be that contractual consent, good faith, *pacta sunt servanda* and party autonomy prevails all regardless of the issue of undemocratic governments, welfare-reducing acts, or the contracting away of basic common recourses, such as water. Even If treaties have profound negative impacts on constitutional rights these cannot be invokedas "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[174] The States international human rights obligations and investor obligation are regarded as belonging on the same hierarchal international legal order, and thus no right should prevail the other, unless is it of *peremptory status* which most human rights not yet enjoy. However, an increasingly preferred approach to identify the boundaries between two competing treaty interests has been through the *balancing of interests*.[175] This will be discussed further down.

3.2 Rights without representation

Many of the investment disputes taken to ICISD concern public utilities and interests such as water, waste management, electricity, gas, but also protection of the environment, indigenous rights, health rights and affirmative action policies. The Tribunal in the *Suez* case, which was a dispute over water utilities, confirmed that public interests are prevalent in disputes:

> "the present case potentially involves matter of public interest. This case will consider the legality under international law, not domestic private law, of various actions taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as oppose to the liability arising out of private law. While these factors are certainly matters of public interest*, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction»*[176]

[173] Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 13.
[174] *Vienna Convention (23 May, 1969), Art. 27*
[175] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award* (29 May 2003).para. 122 (in this case the Tribunal for the first time resorted to proportionality balancing with reference to human rights jurisprudence); *El Paso Energy International Company v. The Argentine Republic (ICSID Case No. ARB/03/15) Decision on Jurisdiction* (24 April 2006).para. 70 (The Tribunal said it needed to take "a balanced interpretation (…), taking into account both State sovereignty and the States responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow")
[176] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19) Order in response to a Petition for Participation as Amicus Curiae*, (19 May 2005).para. 19 (emphasis added)

In the *Aguas del Tunari v. Bolivia* case, also over water utilities, the *amicus*[177] petition for submission argued that:

> «Because the arbitration arises out of actions by the Government of Bolivia to guarantee public order and access to water, the Tribunal's decision in this case could implicate core government functions. The decision could also alter the legal obligations that apply to the Government of Bolivia when it regulates to protect public order and human health, as well as the economic and other factors it takes into account when deciding whether to do so»[178]

This directly confirms the social impacts of ICSID disputes. Nevertheless, ICISD procedural rules do not automatically allow public observation or participation in disputes. This is in contradiction to the right to access to justice which the State is obliged to provide.[179] In the *Aguas del Tunari v. Bolivia* the had petitioners argued that international human rights principle of 'access to justice' supported their participation in the arbitration to submit *amici curiae* briefs.[180] Their petition was dismissed as the Tribunal found that the request was "*beyond the power or the authority of the Tribunal*."[181] The case was settled with a US$1 payment due waives of public protests, demonstrations and police violence, and one killed - described as a public uprising against a 50% increase in water tariff after the privatization of water supply in the city of Cochabamba's.[182]

The actuality of public interests in disputes has been shared by Tribunals, whom in 2005 in the *Suez* case allowed *amicus curie* briefs without prior consent from both parties as previously had been required with reference to the ICSID Conventions Art. 32 (2) which dealt with petition of third parties to *attend hearings*.[183] The Tribunal nevertheless found an opening in the *Suez* case under the Convention Art. 44 which granted the tribunal residual

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[177] see E. A. Martin, "A dictionary of law," in *Oxford dictionary of law*, Oxford quick reference A dictionary of law (Oxford University Press, 2015). (*Amicie curiae* translates to 'friend of the court or tribunal' and is used describe 'a non-party who gives evidence before the court so as to assist it with research, arguments, or submissions')

[178] *Aguas del Tunari, S.A. v. Republic of Bolivia (ICSID Case No. ARB/02/3) Petition by NGOs and people to participate as an intervening party or amici curiae*
, (29 August 2002).para. 25

[179] UN General Assembly*, International Convenant on Civil and Political Rights* (16 December, 1966), United Nationa, Treaty Series, vol. 999, p. 171, Art. 14

[180] *Aguas dek Tunari SA v. Bolivia*, ICSID Case No ARB/02/3, NGO Petition to Participate as *Amici Curiae*, 29 August 2002, para. 47-48

[181] *Aguas del Tunari, S.A. v. Republic of Bolivia (ICSID Case No. ARB/02/3) Letter by NGO to Petition as amicus curiae* (January 29, 2003). 2

[182] Also referred to as the 'The Cochabamba Water War' (1999-2000); Jim Shultz, "The Water War Dispatches in Full," The Democracy Centre https://democracyctr.org/archive/the-water-revolt/the-water-war-dispatches-in-full/.

[183] *ICSID Convention (opened for signature 18 March 1965, entered into force 14 October 1966), Art. 32 (32)*

power to decide on the on unregulated questions as it differentiated hearings from submissions. The case was over water utilities in Argentina. The amicus in *Agual del Tunari* had invoked Art. 44 three years earlier. In the Suez case the Tribunals allowed amicus submission as it found that and a decision *"will have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties to the case*".[184]

The jurisprudential development was codified in the 2006 amendment of Arbitration Rule (AR) 37 (2) for the purpose of allowing possible increased consideration of societal concerns in a dispute and "increasing the transparency of investor-state arbitration".[185] Now the AR 37 (2) allows submissions upon satisfying a number of criteria's which are to be evaluated at the tribunals discretion.[186]

Being granted *Amicus* status and permission to give submissions do not guarantee that such submission will have any influence decisions. Tribunals must however deal with *all* concerns raised, as set out in the ICSID Convention. Another limitation still on transparency is that permission to submit a *amicus* does not entail permission to attend the hearings of the case, nor the be given access to any of the documents of the case. These are separate petitions. Then the question become how much actual input can *amicus* briefs be expected to have. In the *Suez* and *Aguas del Tunari* cases the amicus petition for access to hearings and documentation was rejected.

3.3 Overly extensive interpretations

With the knowledge that a decision in a dispute can reach far beyond the immediate parties it is upon the respondent State and the tribunal to give due regard to the non-investment interests of affected thirds parties. However, there are concerns that neither the State and nor the Tribunal presented with a case where the decisions *can* have impact on a wider audience do not accommodate competing concerns or norms by way of real and meaningful impact on when interpreting protection standards. However, as the party autonomy governing the proceedings already risks neglecting adversely affected but often not represented third parties and public interests judicial *balancing* of the public and private interests at stake is key to the

[184] *Suez v Argentina (ARB/03/19) Order in response to amicus curie* para. 19.
[185] Ibid., para. 22.
[186] Antonietti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules," 435.

settlement of disputes in conformity with the governments human rights obligations and fundamental rights and freedoms.[187]

The lack of balancing is evident when tribunals interpret protection clauses in BITs and end up applying a standard that is so restrictive that it almost nullifies the States regulatory space. This can undermine the States human right obligations, as the possibility of triggering costly lawsuits in international arbitration can give the State a strong incentive to be cautions to legislate in the public interests if it affects foreign investors, a phenomenon popularly referred to as the 'regulatory chill'.[188] In the words of arbitration practitioner and senior barrister Toby Landau QC

> "no State wants to be brought under a treaty to an international process. It has an impact upon diplomatic relations, it may have an impact upon a state's credit standing[...]as a practitioner I can tell you that there are states who are now seeking advice from council *in advance of promulgating particular policies* in order to know whether or not there is a risk of an investor-state claim."[189]

Concerns over investments arbitrations constraints on the governments regulatory freedoms, and the risk of "regulatory chill" led the Australian government to a policy shift suggesting, among other things, to more carefully constrained definitions of the FET standard in Australian treaties.[190] Alvarez argues that, in cases relating to the supply of basic commodities such as water, a broadly interpreted treaty obligation to protect the investors property might be in conflict with the evolving set of positive international obligations States have undertaken under the International Covenant of Economic, Social and Cultural Rights.[191]

In case where the host State has infringed on investors rights in pursuit of its human rights obligations, the overall purpose of economic development and improvement of social conditions make human right concerns relevant in light of Executive Directors of the World Bank notice of the need to "maintain a careful balance between the interests of investors and those of host States." The Tribunal in the *El Paso* case acknowledge this:

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[187] Petersmann, *International economic law in the 21st century : constitutional pluralism and multilevel governance of interdependent public goods*, 354.
[188] Alvarez, "Lessons from the Argentina Crisis Cases," 376-377. Kube and Petersmann, "Human Rights Law In International Investment Arbitration," 68.
[189] Toby Landau QC, interview by Andrea Saldarriaga, 28 March, 2014. (emphasis added)
[190] Mark S. McNeill, "Investor-State Arbitration: Striking a Balance Between Investor Protections and States' Regulatory Imperatives " in *Contemporary issues in international arbitration and mediation : the Fordham papers 2013*, ed. Arthur W. Rovine (Leiden Nrill Nijhoff, 2015), 276.
[191] Alvarez, "Lessons from the Argentina Crisis Cases," 376.

"a balanced interpretation (…), taking into account both State sovereignty and the States responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[192]

This is transferable to water concessions as water falls within the right to adequate living and health, which are progressive rights with corresponding progressive responsibilities for States.[193]

The significance of interpreting a treaty or contract in light of these broader purposes lies also in the admittance that the States regulatory ability is crucial to protect, respect and fulfil human rights.[194] This ability is key to the realization of development because foreign investment itself does not automatically lead to economic growth but requires implementation of social and economic policies.[195] By such, failing to balance public interest concerns of host States would be at risk of running counter to the scope and purpose of the body of investment law itself.[196]

3.4 Tribunals approach to Human Rights Arguments

The methodological approaches taken by tribunals confronted with human rights argumentation by either party in a dispute, or by a third-party through *amicus curie* submissions, have remained somewhat inconsistent and unclear on several points. For instance, tribunals regularly look to international human rights law jurisprudence when interpreting or applying customary law or vaguely formulated *investor protection standards*, such as protection from direct and indirect expropriation, and the concepts of fair trail, due process and non-discrimination.[197] In contrast, consideration of the host States human rights

[192] *El Paso Energy International Company v. The Argentine Republic (ICSID Case No. ARB/03/15) Decision on Jurisdiction* para. 70.
[193] *ICESCR (1966),* Art. 2 (1) *CESR, General Comment No. 15 (2002),*
[194] Kommendjik and Morijin, "'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration." p. 431
[195] Julian Scheu, "Trust building, balancing, and sanctioning: Three pillars of a systematic approach to human rights in international investment law and arbitration," *Georgetown Journal of International Law* 48, no. 2 (2017): 482.
[196] Tanzi, "On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector," 73.
[197] Garcia, "The Role of Human Rights in International Investment Law," 38-39. Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis," 342. (see reference to ICISD Tribunals using ICJ case law in footnotes 215-222)

obligations advanced as an argument of justification for the States alleged wrongdoing when fundamental human rights have been at stake, has been far more reluctant.[198] This is concerning as the State will be representing the interests of the host State population whom are precluded from becoming parties to the dispute although they might be adversely affected by decisions.

As the main objective of the regime has been perceived to be protection of foreign investors investments from State abuse, the relevancy of international human rights law as interpretative or independent arguments and claims might be higher and thus more easily influence on decisions when the human rights arguments coincide with the objectives of investment law, such as protection of property, or when the human rights arguments overlap with a broadly formulated BIT clause that need to be supplemented.[199] This has nonetheless led some scholars accuse tribunals of being one-sided and selective in their approach when determining the substantive content of the host States human rights obligations, and demonstrate a bias in favor of property rights that are ignorant to the undividable nature of human rights, and the prohibition against privileging some human rights over others.[200] Related approached to human rights will be further discussed under 4.5.

Conclusion

As bilateral investment treaties are part of public international law, they can and should be interpreted in harmony with the greater body of international law. However, this is not necessarily the status quo. There are often public interests at stake in disputes, but limited representation due to procedural restrictions. Tribunals are willing and capable of judicial borrowing from or direct application of human rights law, but seem to do this in a biased manner.

Chapter 4. Fair and Equitable Treatment

4.1 Introduction

This chapter will focus on some of the concerns related to how the protective investment rights affects human rights, particularly the 'fair and equitable' (FET). The FET standard has

[198] Kube and Petersmann, "Human Rights Law In International Investment Arbitration," 69.
[199] Ibid., 69 and 73.
[200] Ibid., 93-94.

been the most successful protection standards on behalf of investors, and also the most controversial in light of the concerns raised over treaties' potential effect of undermining human rights in the country that is hosting the investment.

4.2 What is the content of the FET standard?

The 'fair and equitable treatment' standard (hereafter the FET standard) is phrased slightly differently in different bilateral investment treaties. Interpreted in the context of a specific treaty with its specific history, object and purpose, one might naturally expect finding different interpretive results of the FET standard as in accordance with Art. 31 of the VCLT.[201] This however is not the most convincing explanation for the inconsistent adoption of the standard by ICISD Tribunals, but rather the ad hoc, and unintended interrelationship among the thousands of BITs worldwide.[202] As most FET standards in BITs enacted in the 1990s[203] were modelled on similar textual structures characterized as being 'general' and 'vague', the substantive content of the FET standard was highly uncertain as the ordinary meaning of "fair and equitable treatment" gives little intuitive guidance as to its objective components, there are still a great deal of uncertainties as to the *standards* substantive content.[204]

Although there are general guiding objectives to the what kind of 'treatment' that would be 'unfair' and 'unequitable' the doctrine is still open ended and highly fact driven as it "depends on the interpretation of specific facts for its content."[205] The lack of specificity left vast amounts of interpretative flexibility to the discretion of the arbitrator to adopt it to the variety of contexts and facts, essentially as it enabled Tribunals to assess "virtually all relevant facts and arguments".[206] Hence, the judgement of what is fair and equitable depends

[201] Gazzini, *Interpretation of international investment treaties*, 92.
[202] Pedro J. Martinez-Fraga, *Public purpose in international law : rethinking regulatory sovereignty in the global era*, ed. Seies (New York: Cambridge University Press, 2015), 256.
[203] In this paper the relevant BITs are from the 1990s. However, several more recent BITs have adopted more specific FET clauses, but as of 2017 no final award on liability under a BIT adopted after 2003 has appeared, see Alec Stone Sweet, *The evolution of international arbitration : judicialization, governance, legitimacy*, ed. Seies (Oxford: Oxford University Press, 2017).
[204] Jose E. Alvarez, "Fair and Equitable Treatment: The Heart of the Investment Regime," in *The Public International Law Regime Governing International Investment* The Pocket Book of the Hague Academy of International Law (Leiden: BRILL, 2011), 188.
[205] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22) Award*, (24 July 2008).para. 593
[206] Stone Sweet, *The evolution of international arbitration : judicialization, governance, legitimacy*, 198.

largely on the facts of a particular case, and consequently, on how the Tribunals understands and weights the facts and evidence presented to it.

Generally speaking however, the term "fair and equitable" is understood as a standard that requires State conduct towards the investor to be predictable, transparent, non-arbitrary, non-discriminatory, not amount to a denial of justice, and nor frustrate the investors legitimate expectations.[207] Essentially, the *purpose* of FET standards is to fill the protection gaps that is left by the more specific protection standards, such as clauses prohibiting unlawful expropriation, in order to obtain the intended investor protection, such as offer compensation where there the claim for indirect expropriation was rejected. [208]

From the investors perspective the FET clause is a protection from *political* risks such as legislation that negatively effects the value of the investment (including expected profit-making) or the overseas bankability and debt payment to international banks. This must be distinguished from business risk which would derive from the contracts. Political risk then becomes all acts of States in their Sovereign capacity, such as legislative and executive acts of governments, that negatively affect the investor *unless* the investor should have legitimately expected the government to act in the manner it did.

One the one hand, the investor needs protection from States who misuse their regulatory power and justifies it by claiming it was for a public purpose. The unclear scope of the concept of 'public purpose', States 'inherent right to regulate' or its 'police powers' remain and overhauling business risk for any foreign investor. On the other hand, the States regulatory task to progressively regulate is paramount to is ability to carry out its legitimate mandate, to uphold its duties vis-à-vis its population, to protect the foreign investor, and to maintain an investment-friendly climate.[209]

The concept of FET has appeared in international documents and treaties for decades. However, it is only since the late 1990s that investment tribunals started giving content to the meaning of the standard enshrined in the context of BITs.[210] Its evolution has thus primarily

[207] Dolzer and Schreuer, *Principles of International Investment Law*, 161.
[208] Ibid., 160.
[209] Ibid., 77.
[210] Ibid., 159-160.

been developed by arbitrators in a series of what has been deemed 'highly inconsistent interpretations and applications of the standard, and a general lack of justification (legal authority) for the principles substantive content, particularly with regards to the assertion that FET encompasses the "legitimate expectations" doctrine, as Tribunals generally seems satisfied with the referring to pervious arbitral decisions'.[211]

4.3 Regulatory Risk

From the investors perspective the FET clause is a protection from *political* risks such as legislation that negatively effects the value of the investment (including expected profit-making) or the overseas bankability and debt payment to international banks. This must be distinguished from business risk which would derive from the contracts. Political risk then becomes all acts of States in their Sovereign capacity, such as legislative and executive acts of governments, that negatively affect the investor *unless* the investor should have legitimately expected the government to act in the manner it did.

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There are concerns that arbitrators interpret FET in a way that constrain the States from regulating in the best way for the public interests over time with changing circumstances, resources and knowledge, or to take necessary 'good governance' measures to respond to a financial crisis, unaffordable tariff hikes or pollution. [213] The FET can possibly require the

[211] Stone Sweet, *The evolution of international arbitration : judicialization, governance, legitimacy*, 196.
[212] Dolzer and Schreuer, *Principles of International Investment Law*, 77.
[213] Jose E. Alvarez, *The Public International Law Regime Governing International Investment* ed. Seies, 1 ed., The Pocket Book of the Hague Academy of International Law (Leiden BRILL, 2011), 376-377. "UN experts voice concern over adverse impact of free trade and investment agreements on human rights". (expressing

state to abstain from new regulation that effects the investment such as environmental laws, or require state compensation for investor compliance with a new laws.[214] This is concerning, as overreaching interpretations of BIT clauses can be used as *de facto* precedents for a long time to come.

4.3 Regulatory Chill and Regulatory Duty

The States' guarantee to provide foreign investors with 'fair and equitable treatment' (FET) by not frustrating their "legitimate expectations" is the standard with the lowest threshold for investors claims, which puts strict restraints on the public policy space of governments and therefore contains a high possibility for a regulatory chill effect.

There is a general consensus among investment scholars that the FET standard does not, or should not, be interpreted to deter the States legitimate right to regulate in the public purpose, and as such, that the investor cannot expect absolute stability in the legal framework in the host state.[215] As Schreuer says FET standard does not require a total standstill of legislation but that "any *drastic* changes to that framework, that *seriously affects* the investment, is likely to constitute a breach of the BITs FET standard".[216] However, others have gone so far as to describe the FET standard adopted by some Tribunals as being an impossible goal that essentially freezes the States legislation by "requiring a state of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain".[217]

Perhaps as a response to the critique, a number of recent arbitral decisions stand for the proposition that the FET standard must be interpreted such as not to interfere with the host States ability and right to regulate domestic matters in the public interest in a non-discriminatory way, and that this can be taken into consideration by Tribunals through balancing the investors legitimate expectations and the host states interest, right and duty to

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concern that several protection standards in BITs are likely to have a damaging effect on the promotion and protection of human rights in the host State, by raising the bar for protection of public interests)

[214] International Finance Corporation, Stabilization Clauses and Human Rights,27 May 2009, https://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES (19 May 2018), para. 131

[215] Stone Sweet, *The evolution of international arbitration : judicialization, governance, legitimacy*.

[216] Schreuer et al., *The ICSID Convention : A Commentary*, 592.

[217] Alvarez, "Fair and Equitable Treatment: The Heart of the Investment Regime," 212. (quoting Z. Douglas, "Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureko* and *Methanex*", 22 *Arbitration International* 27 (2006). P. 28)

regulate in the public interest.[218] From the point of view of arbitral governance, an essential outcome of the balancing analysis is to contribute to a developing a coherent and well-reasoned balancing scheme under the FET standard to contribute to the laws predictability and legitimacy.[219]

However, if the tribunal finds that these expectations are immutable from the time of investment it nonetheless provides the investor with protection from progressive regulations as required by the State in a human rights law perspective, particularly in the area of economic and social rights. When water services are controlled by private pro-profit operators the effectiveness and realization of the right to water for the population largely depends on State enforcement regulation of the private operator.[220] A dissertation undertaking case law analysis of disputes arising out of Argentina's economic crisis concluded that with an investor-friendly interpretation of the 'fair and equitable treatment' standard without regard for the situation in the country the "developing countries run the risk of being overburdened with liabilities" and that the cases "raise alarms for developing countries in the future."[221] The concern of lack of attention to factual circumstances thus runs risk of neglecting the interests at stake.

4.4 Relationship with customary minimum standard

Traditionally, the issue of protecting foreign nationals from 'unacceptable treatment' and denial of justice was accommodated on the international level by the gradual establishment of customary 'minimum standards of the treatment of aliens'.[222] The international minimum standard historically concerned the status of aliens in *general* and not specifically foreign investors, and therefore encompass diverse areas of rights, including rights in regard to private property held by aliens.[223]

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[218] Ibid., 221. (see footnote 448 for references to case law); Dolzer and Schreuer, *Principles of International Investment Law*, 165.
[219] Stone Sweet, *The evolution of international arbitration : judicialization, governance, legitimacy*, 197.
[220] Thielbörger, *The Right(s) to Water : The Multi-Level Governance of a Unique Human Right*. 3. NEED TO FIND SOURCE FOR THE THRID LARGEST FACT
[221] Rumana Islam, "Arguments in favour of reconceptualising the fair and equitable treatment (fet) standard in international investment arbitration: developing countries in context," (ProQuest Dissertations Publishing, 2015), 212.
[222] Dolzer and Schreuer, *Principles of International Investment Law*, 67-68. (The obligations of States to protect alien property in rules of international law can be traced back to the 1778 Treaty on Friendship, Commerce and Navigation between United States and France, if not further.)
[223] Ibid., 68.

Some of the fundamental uncertainties is the scope of the standard, and its relationship with customary- and general international law.[224] In the USA – Argentina BIT (1991) Art. II 2.a) the FET standard is formulated like this:

"Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law".[225]

In the Netherland – Argentina BIT (1991) Art. 3 1. The FET standard is formulated differently:

"Each Contracting Party shall ensure fair and equitable treatment to investments of investors of the other Contracting Party and shall not impair, by unreason or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors".[226]

The US-Argentina BIT above has a reference to both FET and relevant treatment standards flowing from international law. This indicates that FET standard is a distinct rule that already exist in international law and also an autonomous rule flowing from the BIT. In the Netherland-Argentina BIT there is no reference to international law, indicating that it refers to the FET standard as a self-standing and autonomous. These textual differences can potentially have far reaching impact on the type of State actions the investor is protected against, and consequently, the scope of the States regulatory space. None of the standards define the content of the FET guarantee nor their *clear* relationship to the customary minimum law standard.

The customary guarantee of fair and equitable treatment is regarded as a minimum standard providing a narrower scope of protection than an 'autonomous' FET standard in international investment law.[227] However, the gravity of the negative effect required for a State act to amount to unjust or unequitable treatment is somewhat uncertain under both the 'autonomous'

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[224] Alvarez, "Fair and Equitable Treatment: The Heart of the Investment Regime," 181.
[225] *TREATY BETWEEN UNITED STATES OF AMERICA AND THE ARGENTINE REPUBLIC CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENT* November 14, 1991 (entered into force October 20, 1994),
[226] *Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Argentine Republic*, October 2, 1992 (entered into force October 1, 1994),
[227] "Fair and Equitable Treatment: The Heart of the Investment Regime," 202.

FET standard in BITs and the customary international law are still evolving concepts.[228] The 'minimum' standard is typically identified as requiring bad intent, or at least look at the states intention with a measures. The 'other' standard is characterized as looking only at the *effects* of the States measures.

It is argued that FET, when provided in BITs, must be presumed to go beyond being a mere restatement of customary international law as in accordance with the principle of effective interpretation, as the investor would always be protected via the minimum standard.[229] However, others contend that in the 1990s, when the BITs relevant for this paper were signed, there was no such thing as an autonomous FET standard, and therefore assigning the investors with more protection than what is found in the customary law minimum standard would go against the intent and consent of the signatory states.[230]

The difference may no longer be decisive. A case law study from 2011 indicated that most arbitral decisions issued up until 2011 equate the FET standard in international law and the FET standard in BITs, or that they at least indicate that the FET standard in BITs must be informed by the international law standard.[231]

Furthermore studies, suggest that most tribunals have *not* emphasized the textual differences among FET clauses in BITs, but indicate that arbitrators look for common, objective principles of interpretations underlying the FET standard.[232] As such 'entangled' approaches to little defined standards in treaty and custom, have, and will continue to influence on the meaning of the customary law FET standards due to mergence.[233] Consequently, when the BIT text or the interpretation of arbitrators link the FET guarantee in the BIT with those existing in customary international law or general principles of law, the result of what is considered as' relevant' public policy, might have evolved to extend or limit the scope of the States regulatory space.[234]

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[228] Dolzer and Schreuer, *Principles of International Investment Law*, 165. (goes through early case law from a variation of international courts and tribunals expressing the evolving nature of the FET standard)
[229] Ibid., 183.
[230] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19) Separate Opinion of Arbitrator Pedro Nikken* (30 July 2010).paras. 9-15
[231] Alvarez, "Fair and Equitable Treatment: The Heart of the Investment Regime," 201-202.
[232] Ibid., 205.
[233] Ibid., 201-202.
[234] Ibid., 223-225.

Alvarez suggest that "in substance the rights it [the FET standard] accords may now be the same as those under customary law",[235] and that the 'evolving' FET standard might be conflict with the also evolving nature of the States international human rights obligations to respect, protect and fulfil the human rights, particularly the right to water and health.[236] If customary law is evolving in the direction of encompassing more rights for private legal entities to the detriment of States right to regulate in a non-discriminatory way in the public interest this can ultimately weaken the position of human rights in international law in general. Because ISDS effectively incorporate customary international law into a system that generates case law on an high frequency that are publicly available and being used as legal sources it is *likely* to change the rules of custom,[237] and that indeed extensive evidence already exist that interpretation of protection provisions in BITs are expanding the reach of customary international law.[238]

Furthermore, the positive developments in the improved 'third generation BITs' which are being modelled in our time and which actively and explicitly trying to secure more regulatory discretion to the State,[239] particularly in relation to the FET standard, might be disregarded as many of the new FET standards are simply giving a more explicit reference to the customary minimum standard.

For instance, the 2009 Australia – Chile Free Trade Agreement specifically clarified that 'fair and equitable' treatment standard refers to the customary international law minimum standard of treatment of aliens, and provides the presumption that non-discriminatory regulation in the name of public health, safety, and the environment does not constitute indirect expropriation.[240] But, as Alvarez analysis suggest the customary law standard might have changed. This means that an overreaching FET standard might be hard to escape for States

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[235] Ibid., 202. E.g. *Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12) Award,* (14 July 2006).para. 364 ("The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same")

[236] Alvarez, *The Public International Law Regime Governing International Investment* p. 376

[237] Ibid., 237.

[238] Ibid., 200.

[239] See Draft version of Norwegian Model BIT (2015) Preamble, Art. 6, Art. 8(2), Art. 11(1), Art. 12, Art. 23 viii, Art. 31. Available at https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf (is said to reflect a direction away from a sole focus on investment protection by emphasizing the states ability to regulate for the protection of health, human rights, safety, and environmental issues).

[240] McNeill, "Investor-State Arbitration: Striking a Balance Between Investor Protections and States' Regulatory Imperatives " 278. (referring to the Australia-Chile Free Trade Agreement, Articles 10.5(2) and Annex 10b)

unless it is formulated in such a specific way that there is no need or opening for recourse to neither case law nor customary law. Furthermore, the FET clauses in new Model BITs might be disregarded by the inclusion of an MFN clause that the investor can invoke to avoid textual 'improvements'.

4.5 Intention behind State measures

The success of States invocation of its human rights obligations under the FET standard to justify state action as been observed to depend upon "whether the objective of a measure plays a role in determining the existence of a breach or whether the severity and the impact on the investor is the decisive criterion".[241] Case law bears witness that neither the objective behind a measure, nor its benefit to society as a whole plays a role for the assessment of BIT breaches. As set out by the Tribunal in the *CMS v. Argentina* case

> "the Tribunal… does not have jurisdiction over measures of general economic policy adopted by … Argentina and cannot pass judgement on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made *to the investor in treaties, legislation or contracts*."[242]

This means that, as a general established rule, the objective behind the States actions is regarded as irrelevant to the finding of wrongdoing. Hence, legislation passed with the purpose of adjusting to changing social, economic and technological conditions applied in a non-discriminatory fashion could come to constitute a violation of the FET standard, if it was proven to have seriously affected the investor, regardless of the positive effects it might have to the general population in the host State.

In the *SAUR International v. Argentina*[243] case, in response to the claimant's argument that the objective of the measures is irrelevant, the Tribunal said that human rights in general, and particularly the human right to water were sources the Tribunal could take into account in the dispute.[244] This exception might be because the emergency legislation was taken to prevent

[241] Kube and Petersmann, "Human Rights Law In International Investment Arbitration," 72.
[242] *CMS Gas Transmission Company v. The Republic of Argentina (ICSID Case No. ARB/01/8) Decision on Jurisdiction*, (17 July 2003).para. 33 (italics added)
[243] "Human Rights Law In International Investment Arbitration," 81.
[244] Ibid., 83. (As the decision is not available in English I rely on Petersmann and Kube's accounts of SAUR International S.A. v. The Argentine Republic, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, para. 328 (June 6, 2012).)

public disorder stemming directly from how the investor managed the water services,[245] and because the water service had been privatized for the purpose of securing the human right to water. Attention to the objective could possibly adjust the proportionality balancing. Despite this, Kube and Petersmann observes that Tribunals payed little attention to the States duty to alleviate and prevent treats to the human right to water situation of a population enduring the hardship of an economic crisis.[246] The reluctance to apply a "rights based approach" has as a consequence that the human rights are "hardly taken into consideration in substantive terms",[247] even when the State argues that the measures under review were taken to comply with its human rights obligations.

4.6 Open ended standard that can allow innovative approaches

From a more optimistic point of view the standards flexibility on a case by case basis and its lack of precision can have the benefit of leading the arbitrator to have recourse to supplemental principles, such as customary international law of general principles of law, which can give the application of FET greater coherence and legitimacy in the international law system, and why "progressive" evolution to secure a more balanced approach to the interest at stake in IIL can be possible. [248]

An empirical analysis of interpretive arguments in 98 ICISD decisions rendered between January 1998 to December 2006, found that 73 out of 98 decision used legal doctrine as an interpretative argument.[249] This made legal doctrine the second most frequently used argument used, exceeded only by ICISD case law.[250] In light of the on-going legitimacy debate taking place within the legal doctrine of investment law and international public law as regard to the FET standard, it is not an entirely unlikely prediction that the FET standard can be a tool to incorporate the larger body interests at stake in a dispute, while still maintaining its own objectives. The prediction is not necessarily substantially weakened by the even more frequent use of case law as interpretive arguments, as the study found that Tribunals to a large

[245] Alvarez, *The Public International Law Regime Governing International Investment* 371.
[246] Kube and Petersmann, "Human Rights Law In International Investment Arbitration," 82, 83, 84, . (assessment an analysis of arbitral awards where human rights arguments have been invoked. Assesses several early and recent cases relating to the Argentina crisis. This award is not available in English)
[247] Ibid., 69.
[248] Alvarez, "Fair and Equitable Treatment: The Heart of the Investment Regime," 242.
[249] Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis," 351.
[250] Ibid.

degree were willing to deviate from previous case law, particularly when interpreting controversial standards of which there is a large degree of inconsistent use.[251]

Case Law Analysis

PART II

Chapter 5. Establishing a Human Right to Water in Argentina

"It is very important to understand that international law *is law*."
- Lord Bingham

5.1 When Access to Water Depends on The Commercial Interests

This chapter will identify the content of the in Argentina and the Argentine States corresponding international and national obligations on a general level. The objective is to establish a legal background in a parallel normative sphere to the three investor-State disputes that will reviewed. The over public water services for the for the case law analysis in order to evaluate the approach taken by investor-State Tribunals to accommodate human rights arguments and concerns in disputes over water privatized water utilities.

The question is how if and when Argentina's international obligation to water was 'established'. In addition, it must also be established if any national laws provide the citizens with the right to water as this equally would inform the regulatory framework for the concession contact and be justiciable in investor-State arbitration under the doctrine of

[251] Ibid., 331.

'legitimate expectations' and the interpretation of the mandated of the Regulatory Entity of the concessions who were to protect the 'rights' of users.[252]

5.2 A Human Right to Water in Argentina?

Argentina has a long tradition for recognizing the importance of providing safe and equitable drinking water. In 1977 in Mar del Plata, Argentina hosted the UNs first Conference on Water where it outlined the first ever Action Plan for an internationally coordinated approach to water resource management, recognizing "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."[253]

Argentina has ratified a number of international human rights conventions and a great number of them were directly incorporated 'in the full force of their provisions' under Article 75(22) of the Constitution after the 1994 constitutional amendment.[254] The international treaties with constitutional rang in Article 75(22) included:

«The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol;…the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman;…the Convention on the Rights of the Child»

Several of the 'specialized' human rights treaties provide explicitly for the right to water for certain vulnerable groups, such as women, children and people with disabilities.[255] As such,

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[252] *Suez* case concession contract, signed 28 April 1993, in effect 1 May 1993 (Art. 5.3 on 'The relationship between the Regulatory authority and the concession': "..control powers in a reasonable manner, considering especially the rights and interests of the users")

[253] United Nations, *Report of the UN Water Conerence, Mar del Plata, Argentina* 14-25 March 1977, E/CONF.70/29,

[254] Constitution of the Argentine Nation (revised version of 1994), 1994 (adopted 1 May, 1853),(english version), http://www.wipo.int/wipolex/en/text.jsp?file_id=282508 (4 April 2018); María Belén Olmos Giupponi and Martha C. Paz, "The Implementation of the Human Right to Water in Argentina and Colombia," *Anuario Mexicano de Derecho Internacional*, no. 15 (2015): 336 (footnote 357).

[255] UN General Assembly *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180, Art. 14 (2) (h), (ratified by Argentina 15 July, 1985); UN General Assembly, *Convention on the Rights of the Child* 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Art. 24 (2) (c) (ratified by Argentina 4 December 1990); UN General Assembly, *Convention on the Rights of Persons*

these specialized groups have a right to water in Argentina with corresponding international obligations on the Argentine State. In a case from 1999 the Provincial High Court granted protection to children who drank contaminated water based partly on the Constitution and the right to "adequate…clean drinking water" enshrined in the UN Convention on the Right of the Child Art. 24 2.(c).[256] However, none of these specialized treaties provide a human right to water on a general basis for *all* people.

In a civil lawsuit 1997 was brought against the Province about contaminated water and the province was found liable for acting in violation of the constitutional rights to health and to a safe environment.[257] The applicable law made reference to regional and international human rights instruments including the National Constitution Art. 41,[258] the ICESCR art. 12 (right to health), the Universal Declaration of Human Rights Art 25 (right to standard of living and health), the Convention of the Rights of the Child Art. 24 and the National Constitution Art. 41 (environment).[259]

The general right to health and the right to an adequate standard of living is enshrined in the legally binding instrument of International Covenant on Economic, Social and Cultural Rights (CESCR) art. 11(1) (living) and Art. 12 (health).[260] Argentina ratified the ICESCR on August 8, 1986 without reservations.[261] Argentina was also one of the 122 countries that voted in favor of Resolution 64/292.[262]

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with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, Art. 28.2.a) (ratified by Argentina 2 September, 1989)

256 Defensoría de Menores Nº 3 c. Poder Ejecutivo Municipal" (02/03/1999). Discussed in: "The Implementation of the Human Right to Water in Argentina and Colombia," 338.

257 *Children of the Paynemil Community c/ Acción de amparo* , 2nd Chamber of Appeals for Civil Matters of the Province of Neuquén, File 311–CA – 1997 (19 May 1997) as discussed in: WaterLex, THE HUMAN RIGHTS TO WATER AND SANITATION IN COURTS WORLDWIDE:
A SELECTION OF NATIONAL, REGIONAL AND INTERNATIONAL CASE LAW,2014, https://www.waterlex.org/new/wp-content/uploads/2015/01/Case-Law-Compilation.pdf (27 May), pp. 87-89

258 Constitution of the Argentine Nation (revised version of 1994), (1994 (adopted 1 May, 1853)); (Art. 42: "right to a healthy, balanced environment, apt for human development". Art. 42: "The authorities shall provide […] the control of quality and efficiency of public utilities, and the creation of consumer and user associations. Legislation shall establish […] regulations for national public utilities")

260 *ICESCR (1966), Art. 11(11) and Art. 12*

261 United Nations Human Rights Office of the High Commissioner, "View the ratification status by country or by treaty: Ratification Status for Argentina " http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=en. (accessed 4 April 2018)

262 Human Rights Council : resolution / adopted by the General Assembly, (3 April 2006)

At the time of the privatization of water services in the early 1990s-2000, and well before the invocation of disputes in the ICSID, the right to water was and international specialized human right, international general human right and constitutional right in Argentina. As none of the general instruments specifically refer to the right to water the content and the status of the content must be established.

5.3 Content of the Right

Since the 1990s a wide number of General Comments have been passed by the UN expert monitoring body for the ICESCR the Committee on Economic Social and Cultural Rights (CESCR) recognizing the right to water as a derivative right under the Covenant. In Art General Comment No. 4 on the right to right to adequate housing under Art. 11 (1) the CESCR underlined as early as *1991* that access to safe drinking water was an essential part of the right to adequate housing.[263] The 2000 General Comment No. 14 on the highest attainable standard of health makes several statements on the 'access to safe and potable drinking water' as part of the 'underlying determinants of health' which includes accessibility, quality, adequacy and a healthy environment.[264]

Of particular significance was the 2002 General Comment No. 15[265] (hereafter GC15) which established a thorough legal basis for the right to water under the ICESCR Art. 11(1) and art. 12.[266] GC15 established that 'everyone' under the right to health and the right to adequate standard of living has a right to '*sufficient, safe, acceptable, physically accessible and affordable water*' and set out a norm prioritizing the allocation of water "for personal and domestic uses" and "to prevent starvation and disease".[267] The legal status of instruments UN general comments and resolutions are not legally binding on States but are 'soft law' tools which provide recommendations that function as important authoritative sources of interpretation of already existing, and legally binding human rights.[268] State parties to the

[263] General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant),13 December 1991 E/1992/23, http://www.refworld.org/docid/47a7079a1.html (4 April 2018), para. 8 (b)
[264] Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art.12)* 11 August 2000, E/C.12/2000/4, paras. 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 50
[265] *CESR, General Comment No. 15 (2002),*
[266] Ibid.
[267] Ibid., para. 6.
[268] *Charter of the United Nations (24 October 1945),* (The functions and powers of the UN General Assembly is set out in Chapter IV Art. 9 – 17 does not mention any authorization to issue legally binding comments, but emphasise its role in making "recommendations".); Human Rights Council : resolution / adopted by the General

Covenant are inclined to accept the committee's expert interpretation through their obligation to take the necessary steps to set realize the rights in the ICESCR as set out in Art. 2 (1), and because the state parties have "agreed", as provided in Art. 23 of the ICESCR, that achievement of full realization necessitates the "adoption of recommendations".[269]

Hence, the obligations deriving from resolutions and general comments would depend on the level of acceptance by the State of such obligations. In 1995 the Argentine Supreme Court explicitly required local courts to take account of international interpretative guidelines when interpreting domestic law, such as UN General Comments.[270] GC15 confirms its justiciability states that "incorporation in the domestic legal order of international instruments recognizing the right to water[…]enables courts to adjudicate violations of the right to water, or at least the core obligations, by direct reference to the Covenant."[271]. In a case from 2004 CG15 was directly invoked in a civil lawsuit against the local and provincial government by several NGOs in relation to contamination of water services that was managed by the private concessionaire *Suez* in the provincial town of Cordoba.[272] The plaintiffs invoked their right to water, arguing with reference to GC15 that irrespective of the privatization of water utilities in the province, the State was the guarantor of human rights.[273]

Therefore, I safely conclude that the CG15 and other UN instruments contain obligations on behalf of the Argentine State and rights for the citizens.

5.4 Applicability vis-à-vis Claimants in International Disputes

Argentina ratified the ICESCR *before* the privatization and before entering into any of the BITs invoked by the foreign investors in the disputes. This was also true for the all the

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Assembly, (3 April 2006); Institution-building of the United Nations Human Rights Council, 18 June 2007,A/HRC/RES/5/1, http://www.refworld.org/docid/4ae9acbbd.html (2 April 2018) (These founding documents of the Human Rights Council does not mention any authorization for issuing legally binding documents); see also Thielbörger, *The Right(s) to Water : The Multi-Level Governance of a Unique Human Right*. 60.; Stephen Hall, "Researching International Law," in *Research Methods for Law*, ed. Mike McConville and Wing Hong Chui (Edinburgh: Edinburgh: Edinburgh University Press, 2007), 202.

[269] *ICESCR (1966),*

[270] *Horiacio David Giroldi* (No.32/93) 7 April, 1995, discussed in Bronwen Morgan, "Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law," *European Journal of International Law* 17, no. 1 (2006): 233.

[271] *CESR, General Comment No. 15 (2002),*

[272] *CEDHA v Provincial State and Municipality of Cordoba (AC) October 2004*, discussed in "Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law," 232-233.

[273] *CEDHA v Provincial State and Municipality of Cordoba (AC) October 2004*, discussed in ibid.

contracting States to the BITs.[274] As such, the State parties to all of the BITs had obligations under the ICESCR upon negotiation and enactment. Hence, interpretation of BIT clauses should be done with due regard for the States obligation to the ICESCR, and if necessary be used to limit the scope of a BIT clause as it cannot be presumed that either State party indented to silently contract away other treaty obligations. Particularly obscure would such an interpretation become as the treaties have corresponding objectives: economic development. Additionally, as the nature of the Covenants' right and obligation are of progressive nature it must be presumed that they can be informed by new interpretative developments as well as in line with advancements in economy, technology, science and so on.

Chapter 6. The Impact of the Recognition of the Human Right to Water – Case Study

«*Wars of the future will be fought over water, as they today over oil, as the source of all life enters the global marketplace and political arena. Corporate giants, private investors, and corrupt governments vie for control of our dwindling fresh water supply, prompting protests, lawsuits, and revolutions from citizens fighting for the right to survive. Past civilizations have collapsed from poor water management*»

Blue Gold: World Water Wars (2009), documentary by Sam Bozzo

6.1 Introduction

In 2002 Argentina was hit by a severe financial crisis that triggered the largest number of investor-State claims taken to the ICISD directed at a single state in the history of investment treaties.[275] Some of the earlier awards stemming from the crisis have been criticized for the regulatory restraints placed on Argentine to respond in a suitable way without risking lawsuits by foreign investors to international arbitration. The earlier lawsuits over privatized water utilities have been criticized for not sufficiently taking into account the public interests at stake, particularly the States obligations to protect the human right to water for its citizens.[276]

[274] Argentina-France BIT (1991) - France ratified ICESCR in 1980, Argentina-Spain BIT (1991) - Spain ratified the ICESCR in 1977; Argentina-Italy BIT (1990) - Italy ratified the ICESCR in 1978; Argentina-UK BIT (1990) – UK ratified the ICESCR in 1976.
[275] Alvarez, "Lessons from the Argentina Crisis Cases." P. 248
[276] Kube and Petersmann, "Human Rights Law In International Investment Arbitration," 82, 83, 84, . (As the decision is not available in English I rely on Petersmann and Kubes' accounts of *SAUR International S.A. v. The Argentine Republic* (ICSID Case No. ARB/04/4) Decision on Jurisdiction and Liability, para. 328 (Tribunal agreed that Argentina has a responsibility in relation to the human right to water but refused to recognize its impact on the BIT provision);

The criticism has also targeted Argentines failure to sufficiently substantiate the arguments invoking its own obligation to safeguard the human right to water for its citizens.[277]

However, since the earlier awards several reforms have taken place within the ICSID related to increased transparency and codification the tribunals discretion to allow *amicus* submissions.[278] There also seems to have taken place positive development in the case law as to taking more balanced approach to the States interest to regulate in the public interest, particularly in cases concerning water disputes because of the close relationship between the purpose of the investment in realizing access to safe drinking water. Furthermore, a substantial amount of academic writing has been produced on relationship between human rights and investment protection. Perhaps most importantly is the elevation of the human right to water in 2010 through United Nations General Assembly Resolution 64/292 'recognizing' by consensus that the human right to water is an independent right essential to the full enjoyment of life and all human rights.[279] This chapter analysis three of the latest, publicized decisions available in English, rendered between 2010 and 2016..

6.2 Summary of disputes Suez[280], Impregilo[281] & Urbaser[282]

In the following I will give a general introduction to all three disputes as they are highly comparable, particularly the *Impregilo* case and the *Urbaser* cases as they were over the same concession. The lawsuits were triggered by transnational water companies against the Argentine State in the aftermath of the financial crisis. The claims were over privatized water services in the City and Province of Buenos Aires, and surrounding municipalities, of which one was the largest concession in the world serving almost 10 million people. The concessions were given for 30 years, with exclusive rights. The concessions for water and sewage provisions were operated by locally registered companies as requested by Argentine in the bidding terms. The claimants in the disputes were transnational water companies as investors and foreign shareholders whom had created or held shares in local entities formally operating the concession. The concessions were under the control and regulation of a public regulatory entity responsible for monitoring compliance, penalize, approve tariff adjustments

[277] *Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12) Award*, para. 260. (Tribunal noted that Argentina's human right to water had "not been fully argued")
[278] Antonietti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules."
[279] *A/HRC/RES/15/9,*
[280]
[281] *Impregilo v Argentine (ARB/07/17) Award (2011).*
[282] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016).*

and protect the rights of users. The objectives for the concessions were to improve water services, maintenance and expansion of safe drinking water and sanitation services. The concessionaires were responsible for maintenance, project design, construction, rehabilitation and expansion of all works required for service provision. Before the crisis broke out in full, the concessions started running in to financial trouble and requested tariff adjustment and revised expansion goals. When the 2002 financial crisis hit the country, the government passed a number of emergency laws that impacted negatively on the concessions. The emergency law repealed and modified important provisions of national Argentine law affecting the whole country. The most significant for the privatized utilities with foreign investors being (i) the abolishment of the currency board that had linked the Argentine Peso to the U.S. dollar to a 1:1 exchange resulting in a significant reduction in the value of the Peso; (ii) abolishment of the adjustment provisions of Tariffs in public service contracts leading to a 'tariff freeze' until a New Regulatory Framework had been set up; and (iii) authorization to the Executive branch of the Argentine Government to renegotiate all public service contracts. The law also prohibited any suspension or alterations of contractual obligations. In 2003 the Province of Buenos Aires enacted a New Regulatory Framework under which the renegotiations of the concession contracts were to take place. None of the Concessions were successfully renegotiated after several years of trying and were finally prematurely terminated by Argentine government in 2006.

The investors brought claims of damages, arguing that Argentines response to the financial crisis and its failure to renegotiate the concessions had amounted to internationally wrongful acts under different BITs. The main points of issue were Argentines' denial to adjust the tariff pursuant to the legal framework in order for the Concessionaire to recover all expenses and make a reasonable return, and that the NRF were regarded as less advantageous to the Concessionaire. Argentina rejected all claims in all three cases arguing that the emergency measures were of a general nature adopted in the context of the most systematic and serious crisis ever experienced by the country that affected all inhabitants of Argentine equally. Argentina also invoked the customary state of necessity defence arguing that the emergency measures had been necessary to in order for the economy to be reconstructed, and specific to these cases, to safeguard its populations fundamental human right to access affordable drinking water. The decisions on the merits were rendered between 2010 and 2016. In all three cases, Argentina was found to have frustrated the investors *legitimate expectations*

amounting to a violation Argentina's obligation to guarantee to the investors' "fair and equitable treatment." All other claims were dismissed.

6. 3 Did the Tribunal Accord Legal Impact to its Recognition of Argentina's Human Rights Arguments?

In all of the cases under analyses Argentine State advanced human rights arguments under the FET standard and the defence of necessity when it was found in breach of providing the investor with FET.

The explanation for Argentina's advancement of the human right to water under the FET standard is twofold. First of all, the FET standard usually focus on the 'legitimate expectations' of the investor' which often encompass "all circumstances". It thus allows foreign investors to rely on promises or guarantees that the State made to the investor anchored in the domestic framework and as such elevate domestic law to the international level.

Simultaneously, it allows the State to invoke human rights concerns, facts and obligations that is argued *should also* inform investors' expectations deriving from the domestic context on which he basis his claim. Another solution would be *unfair*. This way the State can invoke human rights without encountering significant jurisdictional obstacles of the agreed applicable law or admissibility of human rights-based arguments as to the mandate of the Tribunal, but rather argue on an interpretive basis of harmonization and systemic integration of its parallel duties. Second of all, the reason why human right arguments was frequently argued under the FET *and* the customary law defence of necessity was presumably because the investor claim ultimately challenged the States regulations *pursued with a human rights objective*. Additionally, as BITs don't accord right to States or obligations to investors, the status quo is that States always defend themselves in investor-State disputes with a 'right to regulate for a 'public purpose.' However, the content of this doctrine is highly unclear and disputed. It represents a business risk and public policy risk. What makes human right arguments different is that it is not first and foremost a question of the States right to regulate, but its *duty* to regulate vis-à-vis citizens most fundamental needs. A human rights duty has legal basis and is often enshrined in law and internationally recognized. Therefore, it can be argued that the

investor could have *expected* that the human right to water would be safeguarded if it was at risk. In disputes over water services this becomes even clearer a the very act of investing in public water utilities is in the furtherance of the human right to water.

The following sections has divided the nature of Argentines arguments into four "groups" and outlines the response of the Argentine State to these arguments, but also some of Argentina's arguments for the purpose of clarity. I will also in the identify relevant circumstances in the cases for the realization and recognition of the human right to water.

6.3.1 The Measures to Safeguard the Human Right to Water was Within the Police Power of the State[283] – no tension

The *Suez* Tribunal agreed that Argentina's obligation to the human right to water and its obligation to provide relief for the concessionaire were "not inconsistent, contradictory, or mutually exclusive."[284] The reason for this stance was that the Tribunal found 'strong evidence' for the availability of 'alternative measures' to restore the financial equilibrium of the CC when the emergency law was passed.[285] However, in the award five years later the Tribunal acknowledged that "in the circumstances of the crisis" Argentina would face "a major problem deciding how to provide the Concessionaire with relief of its liquidity problem that was both immediate and would not provoke insurmountable public and political opposition."[286] As such it *did* appear to the Tribunal a significant tension. This had no impact at the time of the award as the decision on the merits had been rendered in 2010, five year prior to the Tribunals acknowledgement of tension. Both Argentina and the *amicus* had argued in the 2010 decision that Argentina's human right to water obligations should inform the context, however the Tribunal in 2015 avoided this argument by allowing the generality of the crisis to inform the decision and thereby fails to identify the States competing *obligations* to prevent a situation that would lead a situation of political turmoil. GC15 sets out a non-derogable obligation on the State to "ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses"[287] The tribunal did not make a

[283] *Suez (ARB/03/19) Decision on Liability* paras. 202, 203.; *Impregilo v Argentine (ARB/07/17) Award (2011)*, Para. 210.; *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, paras. 594 and 596.
[284] *Suez (ARB/03/19) Decision on Liability* para. 262.
[285] Ibid.
[286] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19) Award*, (7 July 2015).para. 51
[287] *CESR, General Comment No. 15 (2002), para. 44 (c) and 37 (a)*

connection to the public 'interests' that might explain why it found it reasonable to expect a public outrage in case of significant tariff hikes, despite that its reasoning had been a direct response to Argentines argument that a tariff increase "*would have been unrealistic and unfeasible in view of the high levels of poverty experienced by the Buenos Aires population at the time of the crisis*".[288]

The Tribunal in the Impregilo case did not *explicitly* recognize Argentina's human right obligations, but had 'no doubt that drastic measures were required in the crisis for Argentina's ability to provide the population with their *fundamental needs* to water and sewage services'.[289] This can be taken as a recognition that of Argentina's human rights defence with reference to the importance of its regulatory power to guarantee inhabitants the human right to water."[290]

The Tribunal in the Urbaser Case reasoning stands out compared to the two other cases it goes on to find that the investor had to rely on the Argentina's constitutional and international delimitations of a fundamental character "such as the Governmental responsibilities under the federal constitution to ensure the populations health and access to water and to take all measures required to that effect."[291]

6.3.2 The Human Right to Water must Inform the Context[292]

In the *Suez* case the Argument that had been advanced by Argentina was that it should be given a wider margin of discretion in this case due to the crisis, and that its human rights obligations should inform the context. Furthermore, the *amicus* submission had argued that Argentina's obligation to provide a human right to water must provide 'a rationale' for the crisis measures when interpreting the BITs. However, the Tribunal seem to have understood this argument in a different way, as its response was that the right to water could not 'trump' other international obligations.

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[288] *Suez (ARB/03/19) Award*.
[289] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 336 and 346.
[290] Ibid., para. 228.
[291] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, para. 624.
[292] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 230.; *Suez (ARB/03/19) Decision on Liability* para. 252.; *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, Para. 706.

The Tribunal in the *Urbaser* case rejected that there was not a tension (as argued by the Claimant) because the water access "cannot be ensured otherwise than by failing to comply with the host State's obligations toward the Concessionaire."[293] This conclusion was preconditioned by the finding that there were *no alternative measures available*, which the Tribunal in the Suez case had found that there was.

In the *Impregilo* case Argentine argued that "on the one hand, obligations assumed by the Argentine Republic as regards to investments do not prevail over the obligations assumed in treaties on human rights[…]the obligations rising from the BIT must not be construed separately but in accordance with the rules on protection of human rights[…]treaties on human rights providing for the human right to water must be especially taken into account in this case." [294] The Tribunal did not respond to the matter.

6.3.3 The Human Right to Water Prevails (Suez and Urbaser)

The Tribunal in the *Suez* case rejected that the 'mere existence' of a human right to water trumped other obligations nor that it 'implicitly authorized' Argentina to disregard its obligations to the investor. The reference nevertheless confirms that the tribunal recognizes the HRW.

Under the necessity defence, Argentina made a broad international constitutional argument to the general body of human rights law stating that "no obligation, either under domestic or international law[…]may override Argentina's duty to guarantee the free and full exercise of the rights of all persons who are subject to its jurisdiction."[295] In furtherance of the hierarchal approach Argentina argued that a strict interpretation of the necessity defence would *prevent* Argentina from safeguarding "the life of a population" as such interpretation would lead to an "absurd situation." [296] Argentina further pointed to the positive effects of its measures as they "prevented the human right to water from being adversely affected and, with it, the right to an adequate standard of living, food and housing" [297] and that the effect of raising the tariffs for the poor "would have resulted in a massive violation of basic human rights". [298] In contrast to

[293] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, para. 720.
[294] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 230.
[295] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, para. 706.
[296] Ibid., para. 701.
[297] Ibid., para. 702.
[298] Ibid.

the *Suez* case, the *Urbaser* tribunal clearly recognized Argentina's Constitutional and International fundamental responsibility to ensure "the populations health and access to water" and that such obligations "must prevail" over the concession contract in times of financial crisis.[299] The Tribunal also recognized the Argentina's fundamental constitutional duties as invoked and prevailing the concession. One of the BITs in the *Suez* case were the same as in the Urbaser case.

6.3.4 Only Way to Safeguard the Human Right to Water[300]

The Tribunal in the *Urbaser* case accepted that Argentina had no other way to safeguard water access than to adopt the emergency measures and consequently could not provide immediate financial relief to the investors. It also noted that Argentina's emergency measures had been 'of reasonable proportions'.

In Suez the *Amicus* argued that Argentina's obligations to the human right to water had required adaptation of the emergency measures and that the measures fully conformed with human rights law to ensure 'physical and economic access to water for the population'.[301]

The *Impregilo* and *Suez* Tribunal recognized that water provision was an essential interest of the State and that there was a need to provide water services for millions of people in a time of crisis. However, the *Suez* Tribunal found that Argentina did not fulfil all the criteria's set out in the codified customary on State Responsibility. Both the *Suez* and *Impregilo* case rejected Argentina state of necessity defence, finding that Argentina had significantly contributed to the crisis.

It could be expected by the *Suez* Tribunal to give more consideration to the public interests at stake as it had recognized that the public would be impacted by the decision in its reasoning granting *amicus* the right to submissions:

"*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*

[299] Ibid., para. 622.(italics added)
[300] Ibid., 698.; *Suez (ARB/03/19) Decision on Liability* paras. 256.; *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 231.
[301] *Suez (ARB/03/19) Decision on Liability* para. 256.

Respondent, has the potential to affect the operation of those systems and thereby the public they serve.»[302]

As the citizens would be affected by "any" decisions, their concerns should have been taken into account in a better way by the Tribunal. A failure to do so risks violating their constitutional and international rights, based on 'expectations' founded on provincial law. The denial of access to documentation and hearings was a denial of their right to "full and equal access to information concerning water, water services and the environment, held by public authorities *or third parties*." [303]

6.4 Alternative Measures and General Comment No. 15

The existence of the alternative measures by the *Suez* Tribunal provided the basis for (i) the tribunals conclusion that Argentina had breached its FET obligation, (ii) that it had failed to satisfy the "only way" condition in the necessity defence (iii) the rational calculation of damages. However, it seems unlikely that the measures proposed measures could not have been carried out without compromising Argentina's fundamental obligation to provide access to water for 9 million people in the midst of a financial crisis.

The alternative measures suggested by the *Suez* Tribunal was the revision of AGBAs expansion goals, increasing the Tariffs at the rate of inflation, and granting the Claimants an immediate interest free loan of Argentine Peso (ARS) 132,6 million.[304] The Tribunal made no further inquiry into the availability of funds for such a loan in the midst of the crisis. As to the Tariffs the Tribunal found that the Claimants request for an 87% increase was "*unfeasible for both political and functional reasons*,"[305] but that at tariff increase at the rate of inflation of 41% had been necessary to restore the financial equilibrium of the Claimant.[306] The Tribunal

[302] *Suez v Argentina (ARB/03/19) Order in response to amicus curie* para. 19.
[303] *CESR, General Comment No. 15 (2002), para. 48*
[304] *Suez (ARB/03/19) Award*, para. 43. (These were the *immediate* measures, additionally the Tribunal held: "3) AASA's Capital Expenditure Plan would be adjusted for the remainder of the Concession period to the level actually implemented or proposed by AASA; and 4) a full review of the economics of the Concession Contract would be conducted in 2003 whereby the tariff would be adjusted to ensure that the Concession Contract was in financial equilibrium of revenues and expenditures.")
[305] Ibid., para. 51.
[306] Ibid., para. 43. (These were the *immediate* measures, additionally the Tribunal held: "3) AASA's Capital Expenditure Plan would be adjusted for the remainder of the Concession period to the level actually implemented or proposed by AASA; and 4) a full review of the economics of the Concession Contract would be conducted in 2003 whereby the tariff would be adjusted to ensure that the Concession Contract was in financial equilibrium of revenues and expenditures.")

made no inquiry into the effects such tariff hikes would have on the people, despite Argentina's and the *amicus'* contention that it would make water unaffordable.

The Tribunal in the *Suez* case nonetheless concluded that in order for the State to avoid liability the State should have granted the concessionaire higher tariffs. This is in stark contradiction to GC15 which sets out that "discriminatory or unaffordable increases in the price of water" would amount to a violation of the obligation to respect the right to water.[307] Had it been carried out it would have amounted to a violation of the States 'core' and non-derogable obligation to the guarantee access to safe drinking water for all.

Another alternative measure suggested by the *Suez* Tribunal was to revise the expansion goals of the concessionaire. However, his would not necessarily change the situation as *Suez* had failed to make investments and expansions since 1998. *Suez* was asking for a relief of commitments due to Argentina's imposition of penalties for the concessions continuous breaches of contract.[308] Relieving the water provider of legally established expansion goals appears to be a 'retrogressive measure' in relation to the 'right to system of water supply and management that that provides equality' which is in contradiction to the States "progressive" obligations under ICESCR Art. 2(1).[309] Under GC15 a retrogressive action could amount to a violation of the right to water in the case of a "formal repeal or suspension of legislation necessary for the continued enjoyment of the right to water" that is "incompatible with the core obligations."[310] One 'core' and 'non-derogable obligation' set out under GC15 is to "ensure access to[…]*water facilities and services on a non-discriminatory basis*, especially for disadvantaged or marginalized groups."[311] Investment commitments are commitments to expand water infrastructure and services to areas where it does not yet exist.[312] The areas that

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[307] *CESR, General Comment No. 15 (2002), para. 44 (a)*

[308] *Suez (ARB/03/19) Decision on Liability* para. 196 and 208. .

[309][309] *ICESCR (1966), Art. 2(1)*; *CESR, General Comment No. 15 (2002), paras. 10 and 19*

[310] *ICESCR (1966), Art. 2(1)*; *CESR, General Comment No. 15 (2002), para. 19* ("There is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant»); *CESCR, General Comment No. 3 (1990), para. 9* ("any deliberately retrogressive measures…would require the most careful consideration and would need to be fully justified..")

[311] *CESR, General Comment No. 15 (2002), Para. 37(b) and 40* (italics added) (para. 40 sets out that "it should be stressed that a State party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable". Para. 37 sets out a number of "core obligations" which are of "immediate effect" including "(b) To ensure the right to access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups."). (

[312] *Suez (ARB/03/19) Decision on Liability* para. 148. ("AASA's right to continue to[…]continue to operate the water and sewage system[…]were subject to various conditions concerning such matter as[…]achievement of investment commitments for improvement and expansion of the system"), para. 35 ("Concessionaire was

don't have infrastructure are typically areas where the most vulnerable populations live. Under GC15 'inappropriate resource allocation' such as investments that 'disproportionately favor water supply services…to a small, privileged fraction of the population' would amount to "de facto discrimination."[313] ICESCR Art. 2(2) confirms that under-privileging a part of a population as to "social origin, property, birth or other status" would amount to discrimination. Discrimination in the undertaking of advancing the right to water is prohibited with "immediate effect."[314] As such, relieving *Suez* of its investment commitments would amount to a violation of Argentines 'core and 'non-derogable' obligation to "ensure access" to "*water facilities and services"* on a "*non-discriminatory basis*."[315]

In contrast, the Tribunal in the *Urbaser* case found that Argentine had no alternative measures available during the time of the crisis to guarantee the continuation of the basic water supply.[316] Therefore, the Tribunal dismissed all claims relating to the illegality of the emergency measures including claims that Argentine should have restored the financial equilibrium of the concession *during* the crisis.

6.5 Investor Misconduct

The Tribunals recognized that there was significant misconduct on part of the concessionaires in all the disputes under analysis. These violations led the Tribunal to dismiss the investors claim for protection under the BIT. The decision to terminate the concessions appeared to the Tribunal to have been done pursuant to the clauses provided in the Concession Contracts. The terminations had been legal which exempted the Tribunals jurisdiction on this issue. To reach this conclusion the Tribunal referenced to the misconduct of the concessionaires. The Tribunal in the *Impregilo* case referenced the Decree terminating the concession, which it found "mainly accurate", and which concluded that the concessionaire had "failed to comply with nearly all the goals undertaken" causing

obligated under the Concession Contract to undertake major investments for expansion and improvement of the system.")

[313] *CESR, General Comment No. 15 (2002), para. 14*

[314] *CESCR, General Comment No. 3 (1990), para. 1*; *CESR, General Comment No. 15 (2002), para. 17*; *ICESCR (1966), Art. 2(2)*

[315] *CESR, General Comment No. 15 (2002), Para. 37(b) and 40* (italics added) (para. 40 sets out that "it should be stressed that a State party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable". Para. 37 sets out a number of "core obligations" which are of "immediate effect" including "(b) To ensure the right to access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups."). (

[316] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, para. 622.

"irreparable[…]damage to the public interest".[317] The Tribunal also acknowledged that the "the drinking water samples show that the level of nitrate ion exceeds the parameters established in the Concession Contract" [318] and was "thus posing a constant threat to the life and health of the population, with no corrective measures being adopted in order to rectify the situation as soon as possible" [319] The *Urbaser* Tribunal referenced the evidence provided showing that the concessionary had failed to comply with the goals undertaken to secure sufficient funding leaving the undertaken goals "impossible to reach", adding that "the failure to ensure compliance with the required Nitrate levels appears of some gravity, in light of the threat to the populations health and in particular small children and other vulnerable people".[320] In the *Suez* case, the concessionaire had unsuccessfully requested termination six months before Argentine abruptly cancelled the contract with allegations of high nitrate levels in the water. Tribunal stated that this "may" have been an unjustified pretext, but that there nonetheless "is evidence in the record that such high levels may have existed".[321] Furthermore, the Tribunal noted that the concessionaries request for termination may have been an important factor in the decision to cancel the contract as it left fear that the concessionaire would abruptly quit the country "leaving an unprepared Argentine government to provide a basic service to nearly ten million people in a large metropolitan area".[322] On the other hand, the Tribunal noted that the Argentine authorities refusal to accord the concessionaire with fair and equitable treatment had put the Claimants in the position where they "felt that had to give up the Concession". [323]

6.5.1 Impact on the Calculation of Damages

The Tribunal in the *Suez* case had concluded that the termination was lawful, but damages were calculated as if "*the revenue stream would continue for another 21 years*" because a legal termination "*cannot exonerate it [Argentina] from its obligation to repair the consequences of its wrongful act*".[324]

[317] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 279 and 265.
[318] Ibid., para. 263.
[319] Ibid.
[320] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, paras. 944 and 947.
[321] *Suez (ARB/03/19) Decision on Liability* para. 244 and 246.
[322] Ibid., para. 245 and para. 1008.
[323] Ibid., para. 245.
[324] *Suez (ARB/03/19) Award*, para. 35.

Tribunal awarded full compensation for *Impregilos'* investments of USD21,294 million. However, the Tribunal did not, as is custom, award Impregilo damages for its shares' potential gains from the concession in a thirty-year perspective as there was not sufficient reason to believe that such gains would have been obtained even if Argentina's measures had not taken place.[325] It then found that the Impregilo and Argentine had a shared responsibility for the failure of the concession.

Despite finding that Argentina had violated the FET standard, the *Urbaser* Tribunal did *not* award any damages because "the protection afforded by the standard of fair and equitable treatment cannot provide redress where the failure of the Concession is predominantly attributable to the failure on part of Claimants." [326]

6.6 Regulatory Framework, Tariffs and General Comment No. 15

The significance of the regulatory framework in the *Suez* case was that the economic equilibrium set out in the regulatory framework gave the concessionaire rights to make prices unaffordable:

"the prices and tariff shall *tend* to reflect the economic cost of the water and wastewater service, *including a margin of profit* for the Concessionaire and incorporating *all costs*" and that "the amount resulting from the tariff charged to users shall permit the concessionaire, when operating effectively, to obtain sufficient income to cover the implicit costs of the *operation, maintenance and expansion* of the services provided".[327]

The Tribunal noted that the term "tend" was flexible but "[o]n the other hand, it is clear that the legal framework of the Concession sought to protect the Concessionaire from changes in the legal parity of the Argentine peso and from significant increase in costs."[328] Such a framework would amount to a violation of the right to water on behalf of the State as it allows increased costs to be placed on the citizens without any upper limit or possibility for the State to influence the development of prices, and often without transparency. GC15 sets out that the State must adopt a 'national water strategy' that 'ensure that water is affordable to everyone'

[325] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 376.
[326] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, Para. 847.
[327] Decree 99/92 (June 30, 1992) Art. 44 b). «Water Decree» granted by Law No. 23696 (1989) (translated to English in decision)
[328] *Suez (ARB/03/19) Award*, para. 126.

through 'appropriate pricing policies' based on the 'principle of equity, whether privately or publicly provided'.[329] However, the tariff regime that was negotiated gave the non-derogable right to affordable water a subordinate role to economic principles in behalf of the company. The GC15 would hence *require* a renegotiation of this contract as it tried under a new framework. Notably GC15 was issued in the same year as the renegotiation decree.

The State's wrongdoing in the *Suez* case included renegotiation of the concession contract under a new regulatory framework. GC15 sets out that the State must review existing legislation to ensure it is compatible with the obligations arising from the right to water, and "should be repealed, amended or changed if inconsistent with the Covenant [ICESCR Art. 11(1) and Art. 12] requirements."[330] In light of the concern that decisions may lead to 'regulatory chills' the outcome of the case could impact on the governments incentives to regulate in the interest of the people with regards to tariffs and changing the legislative framework in the future. This would be contradiction to the larger body of law surrounding and prevailing the tariff adjustment clause.

The Tribunal in the *Impregilo* case found that Argentina's actions had altered the economic equilibrium in the concession contract, and that its failure to restore a reasonable balance amounted to a violation of the FET standard vis-a-vis shareholder *Impregilo*. The 'essential' clause read as follows:

"[t]he calculation of applicable tariffs […] shall be based on the general principle that tariffs shall cover all operating expenses, maintenance expenses and service amortization and provide a reasonable return on Concessionaire's investment *subject to efficient management* and operation by the Concessionaire and *strict* compliance with the applicable service quality and expansion goals" [331]

Similarly to the tariff clause in the *Suez* case the financial balance *and profit* of the water utility 'business' is to be recovered by the users. In contrast to the tariff regime in the *Suez* case there is a balance in the economic equilibrium in this case as it was strictly conditioned by the concessionaries own compliance with the undertaken quality and expansion obligations. This 'solution' can have the effect of balancing out the costs for users, because the more users are connected, the more income is generated, and the higher quality of service,

[329] *CESR, General Comment No. 15 (2002), paras. 26 and 27*
[330] Ibid., para. 48.
[331] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 324. (italics and emphasis added)

the more willingness to pay. This scenario works best in the long run, as the economic equilibrium becomes vulnerable and might to be unsustainable if the expansion, profit, maintenance, and continued operation of the water service relies *wholly* on income from users from day one, *particularly* in a case such as this where the concession was in a poor area. Expansion of the infrastructure is, as mentioned, extremely costly and one of the main purposes of privatization in this case was to attract investments to realize expansion. The rationale behind thirty-year contracts is that it will take time to recover expenses and start making a profit. The concession had only operated for 16 months before it requested negotiations of economic equilibrium and had failed severely to perform. This was before the crisis.

Additionally the Tribunal found that the concessionaire had failed to undertake most of the expansion goals.[332] It had also failed severely to comply with quality goals:

"the drinking water samples show that the level of nitrate ion exceeds the parameters established in the Concession Contract" [333] and was "thus posing a constant threat to the life and health of the population, with no corrective measures being adopted in order to rectify the situation as soon as possible."[334]

Argentina had an immediate obligation to "protect access to sufficient, safe and acceptable water".[335] The situation was also a severe violation of the citizens right to safe water. This was acknowledged by the Tribunal in the finding that the Termination of the CC has been legal. The factual circumstances imply that the concessionary was not in compliance with the criteria's in the tariff clause, but rather, in serious nonconformity. However, the Tribunal ignores this by linking the essential bases for the economic equilibrium exclusively to the *entitlements* in the tariff clause and uses it as a yardstick to measure if Argentina has committed an internationally wrongful act. This is also after acknowledging that the concession was a "risk area with a poor population,"[336] which was reference to business risk

[332] Ibid., para. 279 and 265. (that the concessionaire had "failed to comply with nearly all the goals undertaken" causing "irreparable[…]damage to the public interest")
[333] Ibid., paras. 263 and 279. (excerpts from the Decree terminating the concession contract which the Tribunal found to be "mainly accurate")
[334] Ibid., para. 263.
[335] *CESR, General Comment No. 15 (2002), Para. 24*(
[336] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 373.

The Tribunal in the *Urbaser* case resolved the tension between Argentines simultaneous treaty obligations with reference to clauses in the regulatory framework which set out to protect the rights of the users. These clauses implied awareness and acceptance of a fundamental human right. This indirectly bound the claimants in the region of the concession through their acceptance of the Regulatory Authority's mandate to guarantee these rights, and had thus justified intervention prohibiting the cutting-off of non-paying users. [337]

Another interesting question that was raised in the claims was who was to bear the *costs* for Argentina's emergency measures. The Claimants thus advanced the previous mentioned argument with direct reference to General Comment No. 15[338] and Resolution 64/292[339] invoking Argentina's obligation to "fulfil the burdens the rights to water entails, as Stated by the Committee on Economic, Social and Cultural Rights."[340] The regulatory framework set out that the State should grand subsidies in times of emergency. This makes the framework in line with GC15 and also the non-derogable duties of the State. The Tribunal found that it had not been proven that Argentina had the means to subsidies available or how such policy would be implemented during the crisis. This invoked Argentina's constitutional duty demanding Argentina to act as it did even if it implied an economic loss for the investor.

The *Urbaser* Tribunal also assessed in detail the balance between the contractual equilibrium and business risk, which was at the heart of the disputes and finding of wrongdoing in the two above cases. The Tribunal came to a different conclusion on this point compared to the *Impregilo* case. In this case the Tribunal took account of the obligation of 'strict compliance' and also that the tariff clause was governed by Argentina's constitution Art. 42 which set out a principle of "reasonable return" to protect the rights of users. In light of its failure to perform the Claimants economic situation was part of its business risk.[341] Its failure to perform could thus not allow the concessionaries to take higher tariffs from users. The users are thus and the national framework appears in line with the States obligations.

As to the failure of the renegotiation process Argentina held in the *Impregilo* case that the concessionaries request for a 93% rate increase was an unreasonable demand "that would

[337] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, paras. 721 and 722
[338] *CESR, General Comment No. 15 (2002),*
[339] *A/RES/64/292,*
[340] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, para. 693.
[341] Ibid., para. 512.

have negative effects for the customers whose economic interests required protection."[342] On this point, and after going through the elements in the renegotiation process which would put the concession under a new regulatory framework the Tribunal concludes, without regard for Argentina argument, that "it does not appear that Argentina took *any* measures to create for AGBA a reasonable basis for pursuing its tasks as a concessionaire which had been negatively affected by the emergency measures."[343] The act of renegotiation however appears as a measure taken to create a new basis for the economic equilibrium for the concessionaire as set out on the objectives of the New Regulatory Framework. With the Tribunals reasoning it appears that Argentina would have to renegotiate on *the concessionaries terms*, which could seriously impair the users and is a contradiction to its obligation to renegotiate contracts that do not protect the rights of users nor has any regard for the misconduct of the concessionaire.

The Tribunal dismisses *Impregilos'* claim that Argentina has violated its rights by suspending it from interrupting service to non-paying users during the crisis. However, this was not out of concern for the users, as Argentina has argued, but because it found that the Regulatory Authority had a mandate to suspend interruption in special cases.[344] Thus, if such an exception clause did not exist, it seems like the Tribunal could find the suspension *was* a Sovereign act that possibly would have contributed to the finding that Argentina had violated the FET standard. This would of course violate the right to access to minimum amounts of water regardless of ability to pay. The regulatory framework that initially allowed the concessionaire to suspend service is not necessarily in contradiction to human rights framework because the human right to water does not give a right to *free* water. However, those who cannot pay, cannot be disconnected and have a right to a minimum amount of water for personal and domestic purposes to avoid disease and to survive. Disconnection of people who are unable to pay would amount to discrimination of the vulnerable. In a poor area, the regulatory framework should perhaps be amended to assure that non-connection is not used as a go-to, frequent solution to 'encourage' payments as it could leave people with little money for other things. In this case there had been very high non-collectability which might indicate that the tariffs were higher than people could afford. Thus, a violation of the human right to water on behalf of the state for not having a national water strategy that was in line with the ICESCR.

[342] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 329.
[343] Ibid., para. 330.
[344] Ibid., para. 306.

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6.7 The Impact of Human Right to Water Arguments

The impact of the human right to water seemed insignificant in the Suez case as no tension was recognized when the decision on liability was made. In the Impregilo case the Tribunal did not explicitly recognize, however it did look at the investors misconduct, and not only the negative impacts on the investor in isolation. The Urbaser case stands out with significant weight. The Tribunals acceptance of both constitutional and international human rights concerns, facts and intensions progressively brides and harmonizes the relationship between different vital interests. One possible reason is of course that this decision was rendered after three UN Resolutions recognizing the human right to water in 2010 and 2015. The identification of the role of the regulatory framework in the case also shows the significance of making balanced tariff clauses and explicit references to user's rights and interests, and also to retain regulatory flexibility in case of strictly interpreted FET clauses. The perhaps most stinking thing identified is the high level of investor misconduct and what seems unreasonable balancing of interests by the Suez and Impregilo tribunals with much disregard for the interests and rights of the users. The inconsistency in the cases confirm the concern over the systems unpredictability, and perhaps dependence on reasonable arbitrators and holistic views on the interaction between international, national, private and public law and interests. The findings in this chapter will be further explained by detailed analysis of the tribunals interpretation and application of the FET standard.

Chapter 7. Suez, Agues de Barcelona and Vivendi v Argentina

"*What would happen if water was left to the private markets?"*
-Pierre Thielbörger (2014)

7.1 Summary of Case

This was the largest concession in Latin America serving almost 10 million people between 1993 to 2006. The first years it made substantial improvements, but the progress failed after 1998, well before the financial crisis erupted.[345] Five NGOs submitted a joint 'Petition for Transparency and participation as *amicus curie'* asserting that the case involved "matter of

[345] Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*
, 48.

basic interest and the fundamental rights if people living in the area affected by the dispute in the case"[346] They requested access to the hearings of the case, documentation and to present legal documents as *amicus curiae.*[347] They were denied access to hearings and documentation, but permitted to give a submission, making it the first *amicus curie* in the history of ICSID.[348]

A unanimous Tribunal found that the Argentine State failed to provide fair and equitable treatment by its refusal to revise tariffs according to the legal framework, and for pursuing forced renegotiation contrary to the legal framework.[349] The arbitrator appointed by Argentina, Prof. Pedro Nikken, agreed on the overall finding that Argentina had failed to provide the investors with FET, but disagreed with the Tribunals reasoning.[350]
An unanimous Tribunal rejected Argentina's necessity 'defence, however Arbitrator Nikken again disagreed to the reason given by the Tribunal which had been that the "*government policies and their shortcomings [since the 1980s – 2002] significantly contributed to the crisis*".[351] The tribunal decided to calculate the damages in a separate award as it wanted assistance from an independent expert. In 2015 the Tribunal awarded the four corporations damages totaling USD405 million, plus interests.[352] This makes it the largest award ever issued in an investment proceeding against Argentina. The annulment proceedings were unsuccessful.[353]

7.2 Fair & Equitable Treatment – Tribunal interpretation and application

7.2.1 Finding the Legal Rule

The Tribunal was dealing with three FET clauses in three different BITs[354] at the same time, and found that the ordinary meaning to be given to them were the identical in terms of 1)

[346] *Suez v Argentina (ARB/03/19) Order in response to amicus curie* para. 1.
[347] Ibid. (friend of the court. A third-party without party-rights)
[348] Ibid., para. 19.
[349] *Suez (ARB/03/19) Decision on Liability* para. 247.
[350] *Suez (ARB/03/19) Separate Opinion of Arbitrator Pedro Nikken* paras. 1-2
[351] *Suez (ARB/03/19) Decision on Liability* para. 264.
[352] *Suez (ARB/03/19) Award*.
[353] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19) Decision on Annulment* (5 May 2017).para. 435
[354] UK-Argentina BIT Art. 2(2) ("Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant protection in the territory of the other Contracting Party…"); Spain-Argentina BIT Art. IV (1) ("Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party"); France-Argentina BIT Art. 3 and 5 (1) (Article 3 "Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, in accordance with the principles of international law, to the investments of investors of the other Party and to ensure that the exercise of the right so granted is not impeded either de jure or de facto.". Art. 5(1) "Investments made by investors of one Contracting Party shall be fully and completely protected and

ordinary meaning of "fair and equitable" and "just and equitable"; 2) they must be interpreted in light of 'principles' of international law[355]; and 3) that their object and purpose were to promote and protect investments.[356] On a general note the Tribunal stressed the FET standard was ambiguous, flexible, fact specific, and adaptable, but also so painful to interpret that the previous case law on the Argentina crisis, as well as consideration of basic justice of equality before the law, and predictability in the development of investment law justified that "*a* tribunal should *always* consider *heavily* solutions established in a series of consistent cases".[357] The case law on the Argentine cases would dispute the alleged consistency.[358] The general statement of the Tribunal is itself part of that inconsistency, and not just with regard to case laws' subsidiary status as a legal source.[359] Just consider the Tribunal in the *Urbaser* case on the comparability with the *Impregilo* case which was over *the same* concession:

"[t]he Impregilo case *does* involve both AGBA and the Concession. This Tribunal, however is called to reach its own and independent judgement. The facts, evidence and legal argument brought before the Impregilo Tribunal were not the same as those submitted here".[360]

The opposing views confirms the inconsistency in investment arbitration. From this basis the Tribunal continues to interpret the FET standard with reference to the economic theorist Max Weber and several previous cases, but many of them *not* on Argentina. It finds that the FET standard protects the legitimate expectations of the investor resulting from "host government through its laws, regulations, declared policies, and statements[…]that influence *initial*

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safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in article 3 of this Agreement.")

355 *Suez (ARB/03/19) Decision on Liability* (Para. 183 "For purposes of these cases, the Tribunal finds that "fair and equitable" treatment and "just and equitable treatment" mean the same thing"; Para. 185. "Tribunal concludes that "in accordance with the principles of international law" means just what it says: that the tribunal is to interpret fair and equitable treatment under Article 3 of the Argentina-France BIT in accordance with all relevant sources of international law ; para. 186 "The Tribunal also concludes that the reference to "the principles of international" included in the Argentina-France BIT does not entail a different content in said treaty from that found in the other two BITs.")

356 Ibid.(Para. 188 "The fundamental purposes of investment treaties, as stated in their titles, are to promote and protect investments. Certainly, neither of those purposes could be achieved if treaties promised foreign investors treatment that was less than fair and less equitable")

357 Ibid., para. 189.

358 The Argentina cases have been controversial, and some argue that it led to the legitimacy crisis in ICISD. Several tribunals have come to different conclusions e.g. on Argentina's contribution to the financial crises. Several cases have been annulled.

359 *ICJ Statute (1946),* Art. 38 (1) (d) ("The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply d. subject to the provision of Art. 59, judicial decisions...as subsidiary means of interpretation")

360 *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, Para. 101.

investment decisions."[361] Consequently, the Tribunal ends up with a FET standard that protects expectations from the *time of the investment*, and thus creates a version of a 'freezing clause' that requires the initial expectations to be upheld throughout the *thirty-year* concession contract. The Tribunal creates a basis for some flexibility to be taken into consideration when it sets out the objective components of the standard which were meant to ensure that the expectations are reasonable. The objective variables of the standard means that the expectations must "be enforceable by law" and "*must* take into account *all* circumstances, including *not only* facts surrounding the investment, but also the political, *socioeconomic*, cultural and historical conditions prevailing in the host State".[362] Additionally, the investor "cannot fail to consider parameters such as business risk or *industry's regulation patterns*".[363] As such, being a concession in public water utilities which is part of a human rights framework that obligates all the State parties to the BITs in this case to progressively realize access to water for *all*,[364] one might expect the content of the expectation at the time of the investment to encompass possible modifications and changes in pricing.

In summary, the legitimate expectations, which determine the legality of the hosts States acts, must derive 1) at time of the investment 2) from sources enforceable by law 3) and taking account of all circumstances. The expectations from these sources are violated under the FET standard when the State makes sudden change in law and regulations.

7.2.2 The Legitimate Expectations Arising from The Regulatory Framework and The Concession Contract

The Tribunal did acknowledge the States regulatory space and said that it had to "balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service."[365] However, what the Tribunal meant, was that the Argentine States Sovereign right to regulate in times of crisis was confined within the provisions of the RF and CC which provided the mandate for the Regulatory Authority of the

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[361] *Suez (ARB/03/19) Decision on Liability* para. 222.

[362] Ibid., para. 229-230.

[363] Ibid., para. 229-230.

[364] Argentina-France BIT (1991) - France ratified ICESCR in 1980; Argentina-Spain BIT (1991) - Spain ratified the ICESCR in 1977; Argentina-UK BIT (1990) – UK ratified the ICESCR in 1976; General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) para. 8 (b) The comment from 1991, before the investment in 1993 sets out that the right to safe drinking water is part of the right to an adequate standard of living. All the rights enshrined in the ICESCR are of a progressive nature as set out in its Art. 2 (1).

[365] *Suez (ARB/03/19) Decision on Liability* para. 236.

concession.[366] Thus, the tribunal devoted its full attention to the stability of the concession contract and regulatory framework and holds that "the Claimants' expectations that Argentina would respect the Concession Contract throughout the thirty-year life of the Concession was legitimate, reasonable, and justified."[367] ~~."[368]~~ Then the Tribunal has established a 'framework' where the *legitimate* expectations of an investor are 1) established at the time of the investment (1993); 2) encompasses all the provisions of the Regulatory Framework and the Concession Contract; and 3) requires stability for 30 years. The paved the way for the Tribunal to find that the act of passing a law at the federal level, that denied the right to revision of tariffs (as set out in the CC) until the contract had been renegotiated and had negative effects on the concession, was outside of the mandate of the Regulatory Authority. Therefore, the Emergency Law of 2002 and resolution that required renegotiation amounted to a violation of Argentines duty to accord the corporations 'fair and equitable treatment'. The Tribunals reasoning and conclusion were not impacted by the *amicus* argument that Argentina's human rights obligations should provide a "rationale" for the crisis measures in "interpreting and applying the BITs".[369]

It seems then that the CC and RF functions like a "constitution" from where the legality of the States Emergency Measures is to be judged. Now, initially domestic contract provisions between a national company and a Provincial Authority is not international law protected under any of the Bilateral Investment Treaties, but the Tribunal has in quite a "goal oriented" way elevated these isolated expectations to the international level and giving them status as rights under international law, but with no regard to the laws prevailing the RF and CC in the domestic sphere or the rest of the objective criteria's set out when establishing the 'standard' or doctrine of 'legitimate expectations'.

Another perhaps noteworthy observation is that there were several provisions in the regulatory framework that sought to protect the rights and interests of the citizens. For instance the Art. 5.3 of the CC which regulated the relationship between the RA and the concessionaire set out that the Regulatory Authority shall exercise its "police, regulatory, and control powers in a reasonable manner*, considering especially the rights and interests of the*

[366] Ibid., para. 237. ("had the legitimate expectation that the Argentine authorities would exercise that regulatory authority and discretion within the rules of the detailed legal framework that Argentina had established for the Concession. But when faced with the crisis, Argentina refused to do this")
[367] Ibid., para. 229-230.
[368] Ibid.
[369] Ibid., para. 256.

users." [370] Or in the Basic Objectives of the RF which included "3) to regulate and protect the rights, obligations and attributions of the users of the system[…]5) protect public health, water resources and the environment".[371] Its challenging to understand why the Tribunal did not pay attention to the objective of the CC and RF when interpreting it. It seems to have cherry-picked the provisions which provided protection of the Claimants economic interests, placed it under the FET standard and then interpreted it in the light of the purposes of the BITs, giving the CC and RF provisions the purpose of exclusively protecting the investor in the name of a screwed interpretation of "economic cooperation". Moreover, no reference has been made to the intentions of the State parties and if they possibly gave their consent to such interpretations of the FET standard. The disregard for customary rules of interpretation in most of the tribunals reasonings confirms the concerns expressed in the literature as regards to fragmentation and inconsistencies.

Chapter 8. Impregilo S.p.A v. Argentina

8.1 Summary of Case

The claim was brought against Argentina in 2007 under the Argentine-Italy BIT (1990) by Impregilo, a company incorporated in Italy whom was a shareholder in a water and sewage concession in Buenos Aires, a high-risk region serving about 1.7 million people. There had been no other bidders for the concession. 16 months after takeover in 2000 the concession started running into trouble and failed, allegedly due to unforeseen high rates of non-collectability of tariffs in the region, to access credit and the necessary funding it had guaranteed. When the crisis erupted AGBA was on the brink of collapse and demanded the reversal of the pesification law, adjustments to the expansion plan, and tariff increase. The government refused and held that it would be unreasonable to make adjustments as it would have negative effect on the consumers whose interests required protection.
The termination of the Concession was found to be lawful.

The Tribunal that the Argentine State had failed to provide 'fair and equitable treatment' when it did not effectively restore the economic equilibrium of the contract after the emergency measures had further aggravated the economic situation for the concessionaries. A majority Tribunal rejected Argentina's 'State of Necessity' defence under the ILC Draft

[370] Ibid., para. 103.
[371] Ibid., para. 84.

Articles on State Responsibility Art. 25 para. 2 (b)[372] finding that Argentina had significantly contributed to the financial crises due to long term failure to regulate the market.[373]

The arbitrator appointed by Argentina, Professor of International Law Brigitte Stern was "*not convinced that a substantial contribution of the Argentine authorities to the crisis has been satisfactorily proven by strong and convincing evidence*".[374] She had also dissented on the majority conclusion that the Tribunal had jurisdiction over the case through the MFN clause.[375] The Arbitrator appointed by Impregilo, US judge and lawyer Charles N. Brower, dissented on several points including the Tribunals rejection that expropriation had taken place, the rejection of several grounds on liability under the FET standard, and the methodology used for the calculation of damages.[376] Annulment was dismissed.[377]

8.2. Fair & Equitable Treatment – Tribunal interpretation and application

8.2.1 Finding the Legal Rule

The Argentina-Italy BIT was signed on May 22, 1990 and entered into force on October 14, 1993.[378]

"Art. 2 Promotion and Protection of the Investment
1. …
2. Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment. ..."[379]

From those words the legality of the acts of Argentina during the financial crisis is to be evaluated. The *Impregilo* tribunal refers to two version of the FET standard found "in international law" with reference to two previous ICSID awards (both over US-Argentina BITs). However, it simply states that neither a minimum standard nor an autonomous

[372] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Art. 25
[373] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 358.
[374] Ibid., 360.
[375] *Impregilo S.P.A. V. Argentine Republic (Icsid Case No. Arb/07/17) Concurring and Dissenting Opinion of Professor Brigitte Stern*, (21 June 2011)
[376] *Impregilo S.P.A. V. Argentine Republic (ICSID Case No. ARB/07/17) Concurring and Dissenting Opinion of Judge Charles N. Brower* (21 June 2011)
[377] *IMPREGILO S.P.A. and ARGENTINE REPUBLIC (Applicant) (CSID Case No. ARB/07/17)Annulment Proceeding*, (24 January 2014)
[378] *Impregilo v Argentine (ARB/07/17) Award (2011)*, p. 3-6. (Translated to From Spanish and Italian to English in Award)
[379] Ibid. (Translated to From Spanish and Italian to English in Award) (italics added)

standard will be decisive in the case and then moves on to define the content of the FET standard on its own.[380] The tribunals finding of two standards in international law is in contrast to the Suez case finding of *three* standards. The tribunal considered that the words 'fair and equitable treatment' gives reference to the investors 'legitimate expectations' simply because "the Tribunal considers that *as it appears* in the BIT, *and in other similar BIT*s, is intended to give protection to the investors legitimate expectations."[381] Five paragraphs further down the Tribunal is less assertive but also ends its inquiry stating that "*if* fair and equitable treatment is indeed linked to the legitimate expectations, these have to be evaluated considering all circumstances."[382]

The *Impregilo* tribunal explicitly takes a stance *against* assigning FET the characteristics of a stabilization clause. It also explicitly recognizes that the investor *cannot* expect immutability of the *legal framework* but must expect changes in the socioeconomic universe "especially in times of crisis".[383] As such, the Tribunal has implicitly confirmed the States right to regulate, particularly in this case, but does not elaborate more on this point.

With reference to ICSID case law and Christoph Schreuer, one of the most cited writers in investment law, the tribunals rule to differentiate between contractual rights, which falls outside the tribunals jurisdiction, and acts that can breach legitimate expectations is:

"whether the State or its entities act as holder of sovereign power or as parties to a contract."[384]

Additionally to requiring it to be a Sovereign act that changes the legal framework, the standard requires the act to have some degree of unreasonableness and negative economic effect.[385] Thus, since the emergency laws were acts of the legislative branch of government that changed the framework the rest of the conclusion relies upon how reasonable these modifications were vis-à-vis the expectations. The question of degree seems to rely on how far away the expectation were from what happened, so the reasonableness is very much reliant on the determination of the basis for the expectation and not necessary if the act was

[380] Ibid., para. 289.
[381] Ibid., para. 285.
[382] Ibid., para. 290.
[383] Ibid., para. 291.
[384] Ibid., para. 296.
[385] Ibid., para. 291.

reasonable in light of the intention, crisis or suffering of the population. Obviously, this can require the State, in order to avoid a corporate lawsuit, to avoid taking measures leading to unreasonable inaction from a human rights law perspective, such as allowing the continuation of the concession despite severe misconduct or the give the investors financial needs top priority. In the annulment proceeding Argentina argued that the Tribunal had contradicted itself when it had stated that the investor could not expect the state never to modify the framework and at the same time find that renegotiation was a violation of the FET.[386]

In summary the legitimate expectations, which is to determine the legality of the States acts, must derive from 1) legal framework; 2) at the time of the investment; 3) that includes use of Sovereign powers; 3) and take account for natural changes in the legal framework. The expectations from these sources are violated under the FET standard when the State takes a measure that in violation of these expectations which are unreasonable and misuse of Sovereign power.

8.2.2 The Legitimate Expectations Arising from The Regulatory Framework and The Concession Contract

Despite referring to the relevancy of more than *one* circumstance the Tribunal does not mention any other specific source for the investor expectations other than the regulatory framework and concession contract and in it the first part of the tariff clause, as discussed above under 8.2.2. The Tribunal found that this clause in the 'tariff regime' in the Concession Contract 'may' to be regarded as an "essential basis for the concession which would have to be upheld *even* in a changing economic climate."[387] The tribunal finds that the negative effects of the emergency measures and the unfavorable new regulatory framework over which negotiations had additionally failed, further aggravated the economic situation of the concessionaire and amounted to a breach of the FET clause.[388] The basis for the economic equilibrium no longer existed due to the devaluation of the peso which had damaging effect on the concessionaire, and therefore the Tribunal found that Argentina should have offered a "reasonable adjustment of its[the Concessionaire]obligations under the Concession Contract."[389]

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[386] *IMPREGILO S.P.A. and ARGENTINE REPUBLIC (Applicant) (CSID Case No. ARB/07/17)Annulment Proceeding*, para. 60.
[387] *Impregilo v Argentine (ARB/07/17) Award (2011)*, para. 324.
[388] Ibid., para. 330.
[389] Ibid., para. 325.

Thus, the Tribunal in its *finding* of a FET violation does not balance the investors duties/misconduct with this rights. However, The tribunal is not entirely consistent and ascribes part of the responsibility for the failure of the concession to the Impregilo

"when assessing the situation *as a whole*, the Arbitral Tribunal cannot find it established with a sufficient degree of probability that the concession, even in the absence of acts violating the standard of fair and equitable treatment, would have been Profitable."[390]

If the Tribunal had evaluated these facts prior to establishing a FET breach it might have influence the decision on liability. Nevertheless, the Tribunals limits the damages awarded to Impregilo due to the cited circumstance.

Chapter 9 Urbaser and CABB v. Argentina

9.1 Summary of case

The claim was brought by three shareholders (hereafter joint Urbaser) under the Argentina-Spain BIT (1991), for the same concession as in the Impregilo case. The Tribunal dismissed the comparability between the cases.[391] The facts are the same as in the *Impregilo* case as to *Urbasers'* blaming Argentina for its failure to obtain financing, failure to perform under the concession contract prior to the crisis and unforeseen low collectability rate. *Urbaser* argued that it had been hindered from cutting off non-paying users which increased non-collectability. Urbaser argued that the economic measures were not part of its business risk, and that its failure to get sufficient funding was due to the authorities' rejection to renegotiate the contractual equilibrium and grant tariff increases according to the regulatory framework. This was because tariffs had become the concessions *only* source of income. Argentina has denied tariff hike for the fear that it would have caused social distress and that the claimant *could not expect* tariff hikes due to a constitutional principle demanding balancing and safeguarding people's right to health, safely and economy.[392] Urbaser argued that Argentina had violated to the human right to water by failing to restore its contractual equilibrium.

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[390] Ibid., para. 376.
[391] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, Para. 101.
[392] Constitution of the Argentine Nation (revised version of 1994), (1994 (adopted 1 May, 1853)) Art. 42 ("The authorities shall provide for the protection of said rights, the education for consumption, the defense of competition against any kind of market distortions, the control of natural and legal monopolies, the control of quality and efficiency of public utilities, and the creation of consumer and user associations. Legislation shall establish efficient procedures for conflict prevention and settlement, as well as regulations for national public utilities")

Argentina advanced a counterclaim holding that Urbaser had violated its human rights responsibilities. The counterclaim set a new 'precedent' for clarifying the requirements for counterclaims, but was eventually unsuccessful. A unanimous Tribunal found that Argentina had failed to provide Urbaser with 'fair and equitable treatment'. A unanimous Tribunal accepted Argentina's 'State of Necessity' defence under the ILC Draft Articles on State Responsibility Art. 25 para. 2 (b)[393] for the claimant'*s* failure to show a link of causality between the countries economic policies in the 1990s and "their necessary outcome the outbreak of the crisis".[394]

9.2 Fair & Equitable Treatment – Tribunal interpretation and application

9.2.1 Finding the Legal Rule

The FET standard in Art. X (1) of the Argentina-Spain BIT set out that

"Each party shall guarantee in its territories fair and equitable treatment of investments made by investors of the other party."

Tribunal points out the extreme and legally unfounded positions of the parties' with regard to the FET standards relationship with the international law.[395] The Tribunal finds that the FET standard must be understood in light of the reference to 'general principles of international law' as set out in BITs 'applicable law clause' and that this is a reference to all of international law, as the ordinary meaning of the FET provision did not allow the finding of a reference to, nor the existence of, a 'minimum standard' nor a 'broader standard'.[396] The Tribunal acknowledges the relevancy of Argentina's question as to how the term 'legitimate expectations' is commuted into obligations and rights deriving from national law and reasons that

"As the fair and equitable treatment standard is framed as an obligation of the host State, it creates rights for the investor upon which it can rely. These rights ensure the investor that it will not be faced with acts or omissions of the host State that are outside

[393] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 25*
[394] *Urbaser and CABB v. Argentina (ARB/07/26) Award (2016)*, Para. 713.
[395] Ibid., para. 603.
[396] Ibid., paras. 610, 613.

the range of fair and equitable treatment[…]The next step is therefore to determine the scope of events, acts or omissions on part of the host State that[…]an investor[…]has to expect to be faced with. This is why the interpretation of this standard is usually focusing on the legitimate expectations of the investor, covering all acts and omissions of the host State that are embraced by the fair and equitable treatment standard."[397]

This explanation offers a clarifying understanding of the role played by the term 'legitimate expectations' under the FET standard compared to the previous Tribunals. Additionally, it is set out as a negative standard determined by restrictions of what is 'legitimate'.

As to the objective components of the expectations the Tribunal sets out that they have to represent a source of law of a normative character, such as promises, guarantees that were decisive for the investor decision to invest and that the investor can expect the State to protect. This includes contractual commitments but "the mere focus on the investment contract is too narrow."[398] The tribunal finds that the expectations of *shareholders* in the concession is not only founded in the contract, but are governed by the applicable law clause in the BIT, which includes reference to the laws of Argentina. As such, the tribunal widens the scope of the national law that the investor could 'legitimately' rely on to encompass also those laws that binds and governs the regulatory framework and is of a higher rang, such as international and constitutional law. Therefore the tribunal concludes that "the host State *is* legitimately expected to act in furtherance of rules of law of a fundamental character,"[399] which in this case "relates to the Government's responsibilities under the Federal Constitution to ensure the population's health and access to water and to take all measures required to that effect."[400] As such, in this case the State is *not* bound by the Regulatory Authority's' mandate under the regulatory framework to protect the communities and peoples interests of a fundamental character. Additionally, the tribunal creates a more flexible standard that takes account of changing circumstances that can trigger fundamental interests of any stakeholder, as this must have impacted on the expectations of the investor. By looking at the facts of the case and States obligations, and by asking what the investor *could* expect seems like an effective tool to assure coherence of different legal norms that is relevant in the case.

The relevant time for the expectations according to the tribunal must be evaluated in light of the actual state of the concession at the time of the alleged wrongdoing, and as such only those expectations that have remained from the time of the investment until the time of

[397] Ibid., paras. 614 and 615.
[398] Ibid., paras. 618.
[399] Ibid., para. 621.
[400] Ibid., para. 622.

the alleged wrongdoing that is protected as "the investor's protection for fair and equitable treatment cannot make contracts better than they were, nor can it restore rights or expectations that the investor has waived or lost due to its own negligence."[401] As such, the standard does not, in this case, legitimate expectation is not necessarily measured from the time of the investment, but includes an amount of business risk and obligations on part of the investor.

In summary, the legitimate expectations, which determine the legality of the hosts States acts, must derive from 1) promises or guarantees of a normative character 2) the actual state of the concession at the time of the alleged wrongful act 3), the fundamental legal rights and obligations of all stakeholders who might have an interest om the measure taken. The expectations from these sources are violated under the FET standard when the State measure of some importance violated norms or guarantees which has a negative effect on the investor of some gravity.

9.2.2 The Legitimate Expectations Arising from The National and International Laws of the host State of a Fundamental Character

The Tribunal separated the analysis of the different alleged wrongful act of the State at the time they occurred to measure them against the expectations the investor had at the relevant time under the FET standard. As mentioned above, the Tribunal dismissed that the emergency measures that froze the tariffs violated what the claimants could have expected. The protection of this universal basic human right constituted the framework for the expectation and with it the States duty and action to protect if need be.[402] As to the renegotiation under the new regulatory framework the Tribunal found that because the concessionaire had requested renegotiation, it had also accepted it, and could therefore not be heard that the new framework violated its 'legitimate expectations'. This acceptance had also created a new legitimate expectation that was violated when Argentina had entertained the renegotiation process knowing that it would not be successful. This had amounted to unreasonable and non-transparent behavior on the part of Argentina that could not have been legitimately expected.

[401] Ibid., para. 630.
[402] Ibid., para. 622.

The *Urbaser* Tribunal referenced the evidence provided showing that the concessionary had failed to comply with the goals undertaken to secure sufficient funding leaving the undertaken goals 'impossible to reach' adding that 'the failure to ensure compliance with the required Nitrate levels appears of some gravity, in light of the threat to the populations health and in particular small children and other vulnerable people[403]

Chapter 10. Does the Regulatory Stability Expected undermine the States Regulatory Duty?

The Tribunals in all the cases rejected the BITs reference to the customary minimum standard as well an 'autonomous 'standard and did not contribute to any clarification of these standards content nor their existence.

In the *Urbaser* case the tribunal confirmed the possibility, as discussed under Chapter 44, of a change in customary law in relation to the FET standard and Argentina's argument that the customary minimum standard should apply

> "Even if reliance on customary international law should prevail, it would still have to be examined whether this law has not been progressively developed towards a broader standard of investor protection, based on the legal practice and *opinio juris* related to international investment law".[404]

The arguments of the parties also demonstrated extreme positions in their interpretation of the FET standard in support of their positions. The Tribunals findings thus seem to be neutral stance and in line with the ordinary meaning of the FET clauses in light of their applicable law clauses and public international law. The standard applied in the cases had reference to the general body of international law. However, all the tribunals used ICSID case law, investment law scholars, economic scholars, and the ordinary meaning in light of the BITs object and purpose to interpret the standard. This gives it less of a character as a standard derived from general international law. However, if it is understood as giving *reference* to the body international law requiring interpretation in line with the principles and standards

[403] Ibid., paras. 944 and 947.
[404] Ibid., 605.

derived therefrom is seems to enable a harmonizing character between the two areas of law. Nevertheless, the tribunals interpretation of the standards was different in number of ways, despite similar facts and "general" interpretations of the BIT clauses. Therefore, these cases do not provide much added clarity as to how this standard will be applied in the future.

The *Urbaser* deliberation does however stand out as a transparent, well-crafted and persuasive interpretation of the standard. This is particularly from the point of view of harmonizing investment law with human rights law and avoiding outcomes that are overly restrictive on the States regulatory space in pursuit fundamental public rights and interests. The concern raised by States in this regard is evidenced in numerous new BITs and MITs with explicit references to the customary minimum standard and more specified FET clauses. The *Urbaser* case might be understood as a direct response to these concerns, perhaps particularly in light of the EUs scepticism toward the ISDS regime at the time of the judgement.

For the interpretation of the FET standard to be harmonious with human right law its seems dependent on two things. First of all, the legitimate expectation must not be interpreted as "freezing" an expectation at the time of the investment regardless of any factual circumstances. Second of all, the expectations must clearly distinguish between contractual rights and protected 'legitimate' expectations. These two components are interconnected. This is because, if an expectation is based on a contract, the contract in practice becomes the legal right under the FET standard, and the contractual right is frozen in time on the paper it as written. Such a solution does not take account of 'legitimate' expectations, because it is not influenced by the actual world.

All the Tribunals recognized that the FET clause did not freeze the legislative framework, however only the Urbaser tribunal applied this component. This enabled it to take account of circumstances at the time of the measure and identify what could *not* create expectations of protection and *had* to be expected in light of all circumstances, such as the investors own misconduct and the financial crisis. The two other tribunals state that the framework is not immutable, but then finds the contractual commitments immutable. They also state that they have to look at "all circumstances", but merely looks at the contract. This leaves no room for evaluating the reasonableness of still expecting the contract to be a reasonable basis for the expectations. Had for instance the *Impregilo* tribunal, in the context of determining

'legitimate' expectations, looked at the letters the concessionaire had sent to the Province asking to adjust the tariff regime in it would have been harder to be convinced that the concessionaire would still expect that contract stay the same for 30 years. Hence, giving actual application to the components of the standard, which all the tribunals agree upon, will give a clearer distinction between contractual rights and protected expectations by taking into account a larger set of circumstances.

The *Urbaser* Tribunal distinguished between different timing of the different acts of government vis-à-vis factual circumstances and then asked if it was legitimate to expect the States' action. This led it to conclude that the investors could *not* legitimately expect the state to remain passive when their populations' life, security and health were at stake. With this concern for the users of the water services is incorporated into the framework where the legitimate expectations derive. This outcome would not seemingly lead to a regulatory chill. However, the exceptional nature of the crisis also did two exceptional things which might have influenced the tribunals conclusion. First of all, it had invoked the States fundamental constitutional and international duties which legitimately prevailed most other concerns.

Second of all, the tribunal had concluded that the measures were the only way for the State to act because of its *financial* crisis vis-à-vis the claimant's request for *economic* relief. Thus, the combination of the invocation of fundamental duties and the lack of financial means did not make it hard to reject the claimants demand for financial support. The differentiation between the context of the crisis and the renegotiation period made this point clear. After the crisis there was no factual circumstances that would make it reasonable to for Argentina to act non-transparently. The legal rule adopted by the Tribunal does not seem to lead to a situation that is unpredictable for the investor. The essence is in the word 'legitimate'.

The Tribunal in the *Impregilo* case did not distinguish between different timing, but rather between the private or public character of the acts of Argentina. This left it searching for acts where public body other than the Regulatory Authority had taken measures that was outside of the police powers of the Regulatory Authority and if these acts had negatively affected a pre-established non-derogable expectation derived from the time of the investment. The Suez Tribunal similarly confines the States regulatory space within the mandate of the Regulatory Authority's police powers. The consequence seems to be that there is no space for the State to

act in furtherance of its duties and rights if this would in any way imply breaching the contract which has been elevated and equated under the FET standard.
The timing for the FET breach was pushed forward in each case corresponding it the assertiveness on the contracts stable nature. The *Suez* case determined that the breach had taken place with the passing of the emergency law on January 2002, while Urbaser distinguished between different act of government and corresponding expectations leading it to find a breach when Argentina acted in a non-transparent way during the renegotiations between 2003-2005. The Impregilo award is not explicit but it seems like breach occurred as Argentine failed to restore economic equilibrium, which pushed the time forward compared to Suez. The FET standard becomes unique in the Urbaser case because it allows invocation of both constitutional law and international law on behalf of the state.

Chapter 11. Summary

The system of investment law and arbitration can undermine human rights of citizens directly by not taking into account their right and interests in disputes that concerns them. Similarly, and in extension of this, is the disregard for facts, intentions behind measures and fundamental basic needs in conflict with the investor interests. The concerns relate to many

The case law analysis has identified that if human rights law and investment law is to be found by a tribunal as compatible it would require them to consider the substantive side of the States human rights obligations, as well as consider the severity of the human rights situation to be able to identify interests protected by human right law and establish whether the States duty to act preventatively has been triggered or not

From the perspective of human right to water the ultimate indicators of tension is the demand for absolute regulatory stability, the lack of concern for facts, the no concern for factual circumstances, the lack of concern for intent and isolated focus on effect on the investor, the uncertainty around inconsistent case law, States ability to contract away jurisdiction over key resources, lack of transparency and participation.

The question of conflicts of law and resolution is an area of tension in arbitration tribunals as raise key concerns related to the tension between the states duty to regulate and the limitations placed on the regulatory space when entering treaties. This, of course is just the same with

any treaty but if the it seems little regard for the fact that human rights treaties are positive rights and not simply moral norms.

The literature review revealed that the system of investment law and arbitration is full of controversy and unclarity. Despite this, it is still a go-to facility and renders cases with high frequency. The flexibility in anarchy, and the occasional “good award” should be used to progressively bridge more coherent bridges, as the Urbaser Tribunal set a precedent for. There are currently reforms undertaken in the system due to the critique rendered. I hope my contributing can be used as an example of the many pitfall, differences of approach’s that creates uncertainty, the possibilities within the framework and the demonstration of the wide discrepancy in two of these cases between the interests at stake and the interests addressed.