Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond

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forthcoming in

Journal of International Dispute Settlement, 2015**

Human rights arguments are increasingly being raised by parties in investor-State arbitrations, despite the fact that investment arbitration tribunals arguably "lack the jurisdiction to hold states liable for breach of their human rights obligations",[1] and the widespread concerns about their suitability to pronounce on such issues in a process that is often viewed as lacking accountability and transparency. Investment arbitration tribunals are also increasingly relying on human rights norms and jurisprudence of human rights courts in evaluating such arguments, thereby implicitly recognizing the interconnectedness between human rights and foreign investment protection and that the former can, and should, inform the latter.

However, one area of investor-State arbitration in which tribunals have thus far failed to adequately address human rights concerns is the water privatization sector. While the existence of an independent human right to water may be controversial, such a right is certainly evolving as a result of the vital importance and growing scarcity of freshwater, and it has been recognized in various domestic and international instruments. Moreover, in several water-related investor-State arbitrations host States and third party *amicus curiae* have raised the human right to water as a justification for State actions, and this is likely to increase in the future. However, the arbitration tribunals in these cases have refrained from explicitly recognizing this right or discussing in any meaningful way its impact on States' investment protection obligations. Rather, when it comes to host States' defences, they seem to treat these two areas of international law as entirely separate.

However, as governments generally fail to address human rights issues in investment treaties and agreements, and in light of the considerable influence that investor-State arbitration can exert on domestic policy-making in matters of public interest, arbitration tribunals are

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[1] Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties*, International Centre for Human Rights and Democratic Development (2009) at 25.

uniquely placed to strengthen and promote important human rights norms, such as the human right to water, that may be negatively impacted by investment protection measures. To this end, however, they must be more sensitive not only to the interests of foreign investors but also to those of local populations, and focus on how these interests overlap rather than conflict. By so doing, investment arbitration tribunals can reinforce both the human right to water and their own legitimacy as ultimate arbiters of investor-State disputes affecting the public interest.

Part I of this paper will briefly introduce the human right to water, its sources, and its content. Part II will examine the main investment arbitration decisions in which this right has been raised as a defence by the host State, evaluate the restrictive approach that the arbitration tribunals have adopted toward such arguments, and discuss its potential implications for both the human right to water and the legitimacy of investor-State arbitration. Part III will suggest several procedural tools that States could employ in order to have human rights adequately considered in investment arbitration decision-making, as well as interpretive tools for investment arbitration tribunals in order to legitimately address the human right to water and balance this right against investors' interests.

I. THE HUMAN RIGHT TO WATER

Water has long been recognized as a fundamental human need that is not only physical, but also spiritual, economic, and cultural.[2] Unfortunately, not all people enjoy equal access to water in order to meet these needs, as is most clearly illustrated in the developing world. This "unequal nature of water resource distribution demonstrates the need for the protection of those lacking access",[3] and has resulted in the notion of a 'human right to water' in order to reinforce the human demands related to freshwater and to articulate the obligations of States toward individuals within their jurisdiction and in neighbouring countries.[4] While water has yet to be explicitly recognized as a self-standing human right in international treaties, such an independent right is emerging and international law imposes specific obligations on States related to access to

[2] Rebecca Bates, "The Road to the Well: An Evaluation of the Customary Right to Water" (2010) 19(3) RECIEL, 282.
[3] Bates, *supra* note 2 at 282.
[4] Eyal Benvenisti, "Water, Right to, International Protection" in *Max Planck Encyclopedia of Public International Law* (2010) at para. 1.

safe drinking water.[5] Moreover, water-related rights have been recognized as early as the 1970s in international conventions, non-binding declarations, and regional treaties,[6] as well as in the general principles of international water law.[7] The right of access to water is also said to be "indispensible" to the realization of an adequate standard of living provided for in Article 11 of the International Covenant on Economic, Social and Cultural Rights,[8] and has been recognized in State practice.[9]

While not free of controversy,[10] the notion of a human right to water best conveys the fact that "without water, other human rights become meaningless."[11] Therefore, defining human water needs in terms of a human right to water is considered here as "an essential step in the process of meeting the needs of under-served communities" since the recognition of such a right "will prompt individual governments and the international community to renew their efforts to meet their water and sanitation targets and 'transform' the right into specific national and international legal obligations."[12] In any event, regardless of whether a human right to water is recognized as an independent right in customary international law, "the nature of water…should,

[5] United Nations, *The Right to Water*, Fact Sheet No. 35 (2010) at 3; Sara De Vido, "The Right to Water: From an Inchoate Right to an Emerging International Norm" (2012) 45(2) Belgian Review of International Law, 517.

[6] E.g., the 1977 Mar Del Plata Action Plan, *Report of the United Nations Water Conference, Mar del Plata, 14–25 March 1977* (UN Publication, E77 II A 12, 1977); the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Copenhagen, 17 July 1980); the 1989 Convention of the Rights of the Child (UN General Assembly Resolution 44/25, 20 November 1989); the 1986 Declaration on the Right to Development adopted by the United Nations General Assembly (GA RES 41/128, 4 December, 1986); the 2003 General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights (E/C 12/2002/11, 20 January 2003), the United Nations General Assembly Resolution 64/292, The Human Right to Water and Sanitation, and Ministerial Declaration of the 6th World Water Forum, 13 March 2012.

[7] E.g., the International Law Association Rules on Water Resources of 2004, Art. 14, Knut Bourquai, *Freshwater Access from a Human Rights Perspective* (Martinus Nijhoff Publishers, 2008) at 48.

[8] Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 15 (E/C 12/2002/11, 20 January 2003) at para. 3.

[9] 178 countries have recognized the right to water and sanitation at least once in an international resolution or declaration, Amnesty International, "United Nations: Historic re-affirmation that rights to water and sanitation are legally binding", 1 October 2010, available at: http://www.amnesty.org/en/library/asset/IOR40/018/2010/en/9b411b3d-35e0-4185-b900-4cdea1cbb6ae/ior400182010en.pdf. Many States have also applied the right through national constitutions, legislation, regional agreements, subsidies, and the establishment of environmental management regimes aimed at safeguarding and improving the levels of water services to consumers. Finally, the right to access clean water has also been recognized by some domestic courts as included in the right to life or the right to healthy environment prescribed in the national constitutions or derived from international legal instruments, Bates, *supra* note 2 at 290-292; Benvenisti, *supra* note 4 at paras. 13-18; De Vido, *supra* note 5 at 545-546, 552-554.

[10] See, e.g., Henri Smets, "Economics of Water Services and the Right to Water" in Edith Brown Weiss et al, eds., *Freshwater and International Economic Law* (2005).

[11] Stephen C. McCaffrey, "The Human Right to Water" in Edith Brown Weiss et al, eds., *Freshwater and International Economic Law* (2005) at 95.

[12] Peter Gleick, "The Human Right to Water" (1999) 1(5) Water Policy, 487, cited in Bates, *supra* note 2 at 283.

of itself, be sufficient to influence treatment of water contracts by investment tribunals, even while the human right to water remains nascent."[13] This is particularly so where host States have assumed domestic or international obligations concerning access and provision of water, which are reflected in the notion of a human right to water.

The human right to water as expressed in various international and national legal instruments is chiefly understood as a right of access to water "in the amount and quality sufficient to meet vital human needs" such as "drinking, the production of food, and sanitation". Such accessibility entails the "physical aspect" of having water within safe physical reach, the "economic aspect" of having water and water facilities and services affordable for all, and the aspect of "non-discriminatory access". Additional rights that may be regarded as related to the human right to water include "the right to seek, receive, and impart information concerning public decisions and policies that affect the right to water, the right to effective review mechanisms, including judicial review, of such decisions, and the right to remedies for the violation of these rights."[14]

The right to water also corresponds to the obligation of States "to respect, protect, and fulfil" it within their jurisdiction.[15] This obligation requires States to refrain from interfering with individuals' enjoyment of the right of access to water; to take positive measures to ensure individuals' right of access by providing water to its citizens; to allow individuals to participate in decision-making processes that may affect their right to water and seek judicial protection in the case of deprivation of their rights; to ensure adequate supply of water to poorer households who are unable to afford market prices; and to manage resources upon which individuals depend in a sustainable way, thereby also ensuring the rights of future generations.[16] These obligations are not merely theoretical. For instance, in June 2014 community groups from Detroit filed a complaint to the United Nations High Commissioner for Human Rights regarding widespread water disconnections of households unable to pay water bills. In response, UN experts issued a statement emphasizing that the "disconnection of water services because of failure to pay due to lack of means constitutes a violation of the human right to water and other international human

[13] Emma Truswell, "Thirst for profit: Water privatization, investment law and a human right to water" in Chester Brown & Kate Miles, eds., *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) at 572.
[14] Benvenisti, *supra* note 4 at paras. 2-3; UN, *The Right to Water*, *supra* note 5 at 7-11.
[15] Benvenisti, *supra* note 4 at para. 4; UN, *The Right to Water*, *supra* note 5 at 27-28.
[16] Benvenisti, *supra* note 4 at para. 4.

rights" and that "according to international human rights law, it is the State's obligation to provide urgent measures, including financial assistance, to ensure access to essential water and sanitation."[17] Moreover, following a visit to Detroit in October 2014, the UN experts stated that "the city of Detroit must restore access to water for its citizens who remain unable to pay their bills" and that "a failure to do so would be a violation of the most basic human rights of those residents."[18]

States' responsibility to protect the human right to water also extends to potential violations by third parties. For instance, in the UN Human Rights Council Resolution 7/22 on Human Rights and Access to Safe Drinking Water and Sanitation,[19] the Council appointed an independent expert "on the issue of human rights obligations related to access to safe drinking water and sanitation".[20] The expert's second report in 2010[21] focused on "clarifying the human rights obligations and responsibilities in the context of the participation of non-State service providers in water and sanitation service delivery".[22] It noted that "the delegation of water and sanitation service delivery does not exempt the State from its human rights obligations" and therefore "the State must adopt specific measures which take account of the involvement of non-State actors to ensure that the rights to sanitation and water are not compromised", including "clearly defining the scope of functions delegated to them, overseeing their activities through setting regulatory standards and monitoring compliance."[23] Therefore, international human rights law requires States to "ensure that any form of [water] service provision guarantees equal access to affordable, sufficient, safe and acceptable water."[24] These obligations with respect to the

[17] United Nations Office of the High Commissioner for Human Rights, News and Events, "Detroit: Disconnecting water from people who cannot pay - an affront to human rights, say UN experts", 25 June 2014, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14777&LangID=E.
[18] United Nations News Centre, "In Detroit, city-backed water shut-offs 'contrary to human rights,' say UN experts", 20 October 2014, available at: http://www.un.org/apps/news/story.asp?NewsID=49127#.VE56mRbp-Q5.
[19] UN Human Rights Council, "Human rights and access to safe drinking water and Sanitation" (Resolution 7/22), 28 March 2008, available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf, cited in Benvenisti, *supra* note 4 at para. 11.
[20] UN Human Rights Council Resolution 7/22 on Human Rights and Access to Safe Drinking Water and Sanitation, Art. 2.
[21] Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, A/HRC/15/31 (29 June 2010), available at: http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/AnnualReports.aspx.
[22] Report, *supra* note 21 at para. 1.
[23] Report, *supra* note 21 at para. 16.
[24] UN, *The Right to Water*, *supra* note 5 at 35.

human right to water have also been reinforced in decisions of national[25] and international[26] courts and tribunals, as well as regional judicial and quasi-judicial bodies.[27]

II. THE HUMAN RIGHT TO WATER IN INVESTOR-STATE ARBITRATION

A. Human rights in investor-State arbitration

There is a growing recognition that investor-State arbitration is not "splendidly isolated from the dynamics and tensions of the rest of the legal universe",[28] and therefore has the potential to impact human rights.[29] As a result, both academic commentators and investment arbitration tribunals have acknowledged the need for the latter to be sensitive to the human rights implications of their decisions, particularly when addressing cases of great social and political instability.[30] Indeed, claims of human rights violations by individual or corporate foreign investors against host States are increasingly being raised in investor-State arbitrations.[31] While

[25] E.g., the decision of the South African High Court in *Residents of Bon Vista Mansions* v. *Southern Metropolitan Local Council*; the decision of the Supreme Court of India in *Subhash Kumar* v. *State of Bihar*, UN, *The Right to Water*, *supra* note 5 at 40.

[26] For instance, the *Case of Taşkin and others v Turkey* (Judgment, 30 March 2005), the *Case of Giacomelli v. Italy* (Judgment, 26 March 2007), the *Case of Dzemyuk v. Ukraine* (Judgment, 4 September 2014), and the *Case of Dubetska and Others v. Ukraine* (Judgment, 10 May 2011) before the European Court of Human Rights, Benvenisti, *supra* note 4 at para. 9.

[27] For instance, the cases of *Free Legal Assistance Group and Others v Zaire* and *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* before the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights in its 1997 Report, cited in Benvenisti, *supra* note 4 at para. 10; Pierre Thielbörger, "The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?" in PM Dupuy, F Francioni & EU Petersmann, eds., *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) at 490.

[28] Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" (2011) 60 ICLQ 576.

[29] Filip Balcerzak, "Jurisdiction of Tribunals in Investor–State Arbitration and the Issue of Human Rights" (2014) 29(1) ICSID Review 216; Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law" in PM Dupuy, F Francioni & EU Petersmann, eds., *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) at 46.

[30] Jorge Daniel Taillant & Jonathan Bonnitcha, "International Investment Law and Human Rights", in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds., *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) at 78.

[31] While the human rights of corporate investors are more limited, they do enjoy some human rights protections, at least under the European Convention on Human Rights, Peterson, *supra* note 1 at 23. See, e.g., *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (1995) ILR 183, Award of Jurisdiction and Liability (27 October 1989); *Channel Tunnel Group Ltd and France- Manche SA v France and United Kingdom*, PCA—UNCITRAL, Partial Award on Jurisdiction and Dissenting Opinion (30 January 2007); *Grand River Enterprises Six Nations Ltd, et al v United States of America*, UNCITRAL, Award (12 January 2011); *Mondev International Ltd. v. USA*, ICSID Case no. ARB/(AF)/99/2, Award of Oct 11, 2002; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (Case no. ARB(AF)/00/2), Award of May 29, 2003; *Hulley Enterprises v Russia*, PCA Case No AA 226, Final Award (18 July 2014); *Yukos Universal v Russia*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009); *Veteran Petroleum v Russia*, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility (30 November 2009); *Desert Line*

some claims of this sort have been dismissed by arbitral tribunals for lack of jurisdiction where the arbitration agreement was narrowly or restrictively worded, these tribunals still emphasized the importance of human rights and their potential relevance to investor-State arbitration notwithstanding their refusal to interpret and apply these rights. It seems, therefore, that any limits to an arbitral tribunal's jurisdiction set out in an investment treaty or agreement do not "imply that the tribunal cannot, as a matter of principle, take into consideration human rights issues."[32] Rather, "if and to the extent that [these issues] affect the investment, [they] will become a dispute 'in respect of' the investment and must hence be arbitrable."[33] Indeed, where investors' claims of human rights violations by host States were raised as part of alleged breaches of the standards of investment protection guaranteed in the substantive provisions of an investment treaty or agreement, they have generally been accepted by arbitral tribunals as falling within the scope of their jurisdiction.[34]

States may also rely on human rights obligations they owe to non-parties to the arbitration proceedings, such as individuals or groups under their jurisdiction,[35] as a defence to investors' allegations of investment protection violations. As mentioned above, these obligations do not only prohibit States from engaging in human rights violations, but also impose on them a duty to prevent such violations by others.[36] Unlike human rights arguments raised by investors, the implications of arbitral tribunals accepting such arguments when raised as a defence by host States are more far reaching as they may allow the host State to avoid liability for breach of investment protection obligations, or reduce the compensation due for such breaches.[37] Therefore, while host States are beginning to raise such claims as a defence to alleged investment protection violations, these have led to contradictory and inconsistent results.[38] In general, it

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Projects LLC v Republic of Yemen, ICSID Case No ARB/05/17, Award (6 February 2008); *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award (22 April 2009)

[32] Balcerzak, *supra* note 29 at 225.

[33] Clara Reiner & Christoph Schreuer, "Human Rights and International Investment Arbitration" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni, eds., Human Rights in International Investment Law and Arbitration (Oxford University Press, 2009) at 84.

[34] Balcerzak, *supra* note 29 at 224.

[35] Peterson, *supra* note 1 at 26; Dupuy, *supra* note 29 at 53.

[36] Reiner & Schreuer, *supra* note 33 at 89.

[37] Balcerzak, *supra* note 29 at 226.

[38] See, e.g., *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005 (where the tribunal found, without elaborating, that fundamental human rights were not affected); *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 (Award, 11 June 2012) (where the tribunal concluded that Argentina's violation of the concession agreement was not "necessary to guarantee human rights" without analyzing its human rights arguments on their

seems that investment arbitration tribunals are more inclined to uphold human rights claims where these are raised by investors rather than as a defence to actions taken by host States, although some tribunals have entertained the latter claims as well. In any event, the willingness of investment arbitration tribunals to entertain human rights claims does not seem to extend to the human right to water, which is less relevant to investors and has thus far been raised only by host States as a defence to an alleged breach of protection standards..

B. The human right to water in investor-State arbitration

As a result of a growing trend among States of privatizing formerly public services, foreign investors have begun to provide essential services, including the operation and maintenance of water infrastructure and supply. Where disputes arise between foreign investors and States in connection with such services, the investors are usually able to avoid domestic courts and instead turn to international investment arbitration.[39] Since in some countries public services may be the only mechanism for providing essential services,[40] such arbitrations increasingly give rise to a human right to water defence invoked by host States. Unlike other human rights, which might be incidentally violated as a result of investment activities, the relevance of the human right to water to such disputes "stems from the fact that the scope of the investment activity itself encompasses the satisfaction of a basic human right."[41] Although arguments based on a human right to water can "affect the investment" and form part of a

merits); *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award of September 28, 2007 (where the tribunal recognized the "complex relationship between investment treaties, emergency and the human rights of both citizens and property owners" but refused to proclaim on the relevance of such human rights obligations); *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award of Sept.5, 2008 (where the tribunal held that the extreme social and economic hardship and dislocation suffered by Argentina led the government to act out of a state of necessity, and noted that arbitrators should accord a significant margin of appreciation to states acting in times of such grave crisis rather than second-guess the policy choices of governments); *Siemens AG v Argentina*, Award, 6 February 2007, ICSID Case No ARB/02/08 (where the tribunal found that while the concept of 'margin of appreciation' was included in the European Convention on Human Rights, it was not found in customary international law or the relevant investment treaty); *Glamis Gold Ltd. v. United States of America (UNCITRAL)*, Award (June 8, 2009) (where the tribunal refused to address the *amicus curiae* arguments or the "tension sometimes seen between private rights in property and the need of the State to regulate the use of property").

[39] Danielle E.H. Allen, "'This Business Will Never Hold Water' International Investment Arbitration on Public-Private Water Service Provision - A Comment on Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania" (January 13, 2010) at 2-3, 14, available at SSRN: http://ssrn.com/abstract=1540256.

[40] Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" (2008) 41 Vanderbilt Journal of Transnational Law, 799.

[41] Attila Tanzi, "Public Interest Concerns in International Investment Arbitration in the Water Services Sector" in Tullio Treves et al, eds., *Foreign Investment, International Law and Common Concerns* (Routledge, 2014) at 320-321.

dispute "in respect of" an investment,[42] arbitral tribunals have been reluctant to address such arguments on their merits or pronounce on the relationship between States' human rights and investment protection obligations, which they tend to treat as entirely separate.

This section will briefly survey the main investor-State arbitration cases decided thus far in which this defence was raised by a host State[43] and evaluate the tribunals' approach to it. It should be noted that this analysis is limited to the tribunals' consideration, or lack thereof, of this defence and does not analyze the merits or quality of the host States' human right to water defence.[44] While these issues are important, they can only be addressed once investment arbitration tribunals meaningfully consider State claims based on the human right to water.

Azurix Corp. v. Argentine Republic[45]

This arbitration arose out of a 30-year concession for the distribution of potable water and sewage services between Azurix, a U.S. corporation, and the Argentine Province of Buenos Aires. As part of the agreement, the Province was to complete infrastructure repairs before Azurix took over the concession. The repairs were never completed, which caused an algae bloom in the reservoir "resulting in the water appearing cloudy and hazy and with earth-musty taste and odor."[46] Following the outbreak, the Province blamed the investor for the algae bloom

[42] Balcerzak, *supra* note 29 at 227.

[43] These are the relevant decisions in this context that have been made public. Still pending is *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26). A relevant but somewhat less helpful decision for present purposes is *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011). In this case, Argentina argued that the "regulatory powers of the State were particularly important in order to guarantee its inhabitants the human right to water." Moreover, Argentina submitted that "the obligations assumed by the Argentine Republic as regards investments do not prevail over the obligations assumed in treaties on human rights. Therefore, the obligations arising 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." While the arbitral tribunal rejected Impregilo's expropriation claim, it did not even mention these arguments in its analysis.

[44] For instance, the weight to be given to possible violations of this right by the States themselves, whether prior to or by virtue of, the investments at issue, or to the fact that a particular human rights obligation of a State may be voluntary or undertaken after the obligation toward the investor. See on the former issue, Thielbörger, *supra* note 27 at 501-502, and on the latter issue, Moshe Hirsch, "Interactions Between Investment and Non-investment Obligations" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds., *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), at 173. In any event, it is not argued here that the human right to water should be a complete defense against allegations of States' violation of investment protection standards. It is entirely possible that, in some cases, the State itself would be guilty of violating its citizens' human right to water as much as, if not more than, the investor. This should be taken into account by investment arbitration tribunals in determining a State's 'true' intentions in undertaking the challenged measure impacting the investor and the relationship between the State's breach of the investor's rights and its stated goal of protecting the human right to water.

[45] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006).

[46] *Azurix*, *supra* note 45 at para. 124.

and encouraged water users not to pay their water bills.[47] Azurix filed a request for arbitration with ICSID against Argentina under the Argentina-United States BIT.

In its submissions, Argentina argued that its intentions, namely the protection of the public interest and the right to water, were critical to determining whether its actions amounted to expropriation.[48] It also raised the issue of a conflict between the BIT and human rights treaties that protect consumers' rights and claimed that this conflict was to be resolved in favour of human rights.[49] The arbitral tribunal accepted that the challenged measure was made in the public interest, and defined the contested issue as whether "being legitimate and serving a public purpose, [the measure] should give rise to a compensation claim."[50] Although it acknowledged the public purpose of the measure, the tribunal refused to discuss Argentina's human rights argument, noting that this argument "has not been fully argued" and that it "fail[ed] to understand the incompatibility in the specifics of the instant case. The services to consumers continued to be provided without interruption…during five months after the termination notice and through the new provincial utility after the transfer of service."[51]

This decision has been considered as "regrettable with regard to the human right to water" since it could have played a "decisive role" in the "weighing of values" as between investment protection and regulation in the public interest.[52] Interestingly, the tribunal did find that the reference in the *Tecmed v. Mexico* case to a judgment of the European Court of Human Rights constituted "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation."[53] However, this reliance on human right jurisprudence was limited to the interpretation of the *investor's* property rights and whether these were violated by Argentina's regulatory actions, and was not used to evaluate Argentina's human right to water defence.

Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic[54]

[47] *Azurix*, *supra* note 45 at para. 283.
[48] *Azurix*, *supra* note 45 at para. 278; Thielbörger, *supra* note 27 at 497.
[49] *Azurix*, *supra* note 45 at para. 254.
[50] *Azurix*, *supra* note 45 at para. 310.
[51] *Azurix*, *supra* note 45 at para. 261.
[52] Thielbörger, *supra* note 27 at 497-498.
[53] *Azurix*, *supra* note 45 at para. 312.
[54] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (August 20, 2007).

This dispute arose out of a 30-year water/sewage service concession entered into in 1995 by the Tucuman Province of Argentina with an Argentinean subsidiary of the French water company Vivendi International. Early into the contract, water tariffs increased and due to public controversy the province placed a limit on Vivendi's ability to increase water rates and cut off service to non-paying customers. Vivendi pulled out of the service contract, alleging that the province had unilaterally changed the contract terms, and brought an ICSID claim under a BIT between France and Argentina. Argentine argued that the actions of the province were legitimate since, *inter alia*, the supply of quality water was a fundamental human need which the state has a responsibility to safeguard.[55] The first tribunal held that, in accordance with the forum selection clause in the concession contract, Vivendi must first apply to a domestic provincial court before bringing a claim to ICSID. After this first decision was annulled, the second tribunal held that Argentina breached treaty obligations and awarded Vivendi $105 in compensation.[56] Argentina's Application for Annulment of this decision was rejected in 2010.[57]

Neither of the decisions discussed Argentina's human right to water defence. However, its annulment application of the second decision clarified that such an argument was in fact made, since one of the grounds for Argentina's annulment application was that the tribunal had disregarded fundamental issues related to the dispute between the parties, including that "the dispute between the parties related to the right to water as an essential human right".[58] This argument was not explicitly addressed by the Annulment Committee, however, which merely noted that "not all arguments need to be addressed but only the fundamental ones"[59] and that "there was neither procedural impropriety in the manner in which the Tribunal narrowed the issues and chose to explain its findings nor insufficiency in its reasoning".[60] The decision of the

[55] *Compañía* Award, *supra* note 54 at paras. 3.3.3, 3.3.5, 6.5.1(iii), 6.5.9; Thielbörger, *supra* note 27 at 493.
[56] Allen, *supra* note 39 at 18.
[57] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007 (10 August 2010).
[58] *Compañía* Decision, *supra* note 57 at paras. 57, 243.
[59] *Compañía* Decision, *supra* note 57 at para. 248.
[60] *Compañía* Decision, *supra* note 57 at para. 265. Commentators have noted that this case is an example of a host State ignoring its human right to water obligations when concluding an investment contract and relying on this defense only after the investment has been made. It has been argued that in such cases, if the resulting consequences were foreseeable, then the host State should not be allowed to "hide" behind the human right to water defense, Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012) at 294. Be that as it may, in order to reach such a conclusion an investment arbitration tribunal would still need to analyze the content of the State's human right to water obligations, whether the results were in fact 'foreseeable', and the implications for its investment protection obligations toward the investor.

annulment committee does make clear, however, that it will be difficult for States to bypass ICSID arbitration by granting exclusive jurisdiction over the interpretation of concession contracts to local courts, even where these contracts concern issues of public interest such as access to water.[61]

Biwater v Tanzania[62]

In the 1990's, Tanzania began to privatize public services and utilities. Water and wastewater services in Dar es Salaam were described by the arbitral tribunal as "precarious".[63] The Tanzanian government negotiated a joint funding arrangement to upgrade water and wastewater services in Dar es Salaam. Roughly 5% of the funding for the upgrade would come from a private operating company that would enter three 10-year contracts for the project.[64] In 2003, the project was awarded to BGT, which was partially owned the Biwater Group, a British water company. The project ran into organizational and financial trouble and was not meeting performance targets. As a result, water rates had increased substantially in Dar es Salaam while services had not improved. The city's public water authority decided to terminate the contract with BGT, to which the latter responded with a notice of arbitration pursuant to the contract. The public water authority together with the government then proceeded to deport and detain executives of the company, after which BGT accepted the contract repudiation and commenced arbitration under ICSID against Tanzania based on its BIT with the U.K.[65]

In the arbitration proceedings, Tanzania did not invoke a human right to water defence directly, however it did argue that BGT had created "a real threat to public health and welfare" and that "considering the importance of the issue at hand…[it] acted well within the Republic's margin of appreciation under international law."[66] This 'margin of appreciation' argument, invoked also by Argentina in the *Suez* cases, is based on a doctrine developed by the European Court of Human Rights, which holds that "sovereign nations should be afforded some latitude or discretion when making decisions about how to resolve conflicts between individual human

[61] Thielbörger, *supra* note 27 at 495.
[62] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008).
[63] *Biwater*, *supra* note 62 at para. 5.
[64] Allen, *supra* note 39 at 19-20; Truswell, *supra* note 13 at 580.
[65] Allen, *supra* note 39 at 20-22.
[66] *Biwater*, *supra* note 62 at para. 436.

rights and national interests, as national States are sometimes in a better position than an international judge to assess a particular situation."[67]

In addition, five non-governmental organizations submitted petitions to the tribunal as *amici curiae*, claiming that "given the nature of the Project, the issue of investor responsibility in this case must be assessed in the context of sustainable development and human rights." The *amici* argued that access to clean water is "characterized as a basic human right by the United Nations Committee on Economic, Social and Cultural Rights in 2002",[68] and that taking into account such human rights considerations should lead to the conclusion that the contract was validly terminated, since "the Government, carrying the duty to provide access to water to its citizens, had to take action under its obligations under human rights law to ensure access to water for its citizens."[69]

Although the arbitral tribunal "found the *Amici's* observations useful" and noted that "their submissions have informed [its] analysis of claims",[70] it failed to directly address their human right to water argument and the effect of this right on the apportionment of responsibility between the State and the investor. While the tribunal ultimately dismissed the investor's damages claims on other grounds, it also failed to address Tanzania's submission that it was acting in the public interest to ensure the safety and continuance the water supply in Dar es Salaam. It merely found in this regard that the State's occupation of the investor's facilities and the usurpation of management control was "unreasonable and arbitrary, unjustified by any public purpose",[71] and that "there was no necessity or impending public purpose to justify"[72] its deportation of the investor's executive staff. The tribunal based its reasoning on a number of previous arbitral awards on similar actions by governments, none of which were with regard to water provision or essential public services.[73]

[67] Allen, *supra* note 39 at 23.
[68] *Biwater, supra* note 62 at para. 379.
[69] *Biwater, supra* note 62 at para. 387.
[70] *Biwater, supra* note 62 at para. 392.
[71] *Biwater, supra* note 62 at para. 503
[72] *Biwater, supra* note 62 at para. 515.
[73] Allen, *supra* note 39 at 24-25.

Suez v Argentina[74]

Several arbitrations arose out of this dispute between Argentina and Aguas Argentinas S.A., a local entity created by a consortium of foreign investors, which entered into a 30 year contract to manage a water and sewage concession for the municipality of Buenos Aires. As Argentina's financial crisis deepened, disagreement arose between the investor and the government over the freezing of water prices charged to consumers. The Argentine Government terminated the concession, alleging technical failures by Aguas Argentinas, and the foreign investors commenced arbitration proceedings, alleging that Argentina's actions violated protections in BITs between Argentina and the investors' home countries of France, Spain, and the United Kingdom.[75]

In both arbitrations, Argentina argued, *inter alia*, that it had adopted the contested measures in order to safeguard the human right to water of the inhabitants of the country. Because of its importance to the life and health of the population, Argentina stated that water could not be treated as an ordinary commodity. Moreover, because of the fundamental role of water in sustaining life and health and the consequent human right to water, Argentina maintained that in judging the conformity of governmental actions with treaty obligations, the tribunal must grant Argentina a broader margin of discretion than in cases involving other commodities and services. In order to judge whether a treaty provision has been violated, Argentina argued that the tribunal must take account of the context in which Argentina acted and that the human right to water informed that context.[76]

In addition, in one of the arbitrations arising from the dispute, five non-governmental organizations argued before the tribunal in support of the human right to water as *amici curiae*. They claimed that human rights law recognized the right to water and its close linkages with other human rights, including the right to life, health, housing, and an adequate standard of living, and required that Argentina adopt measures to ensure access to water by the population. Since human rights law provided a rationale for the crisis measures, the *amici curiae* argued that the tribunal should consider that rationale in interpreting and applying the provisions of the BITs

[74] *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010); *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 (July 30, 2010).
[75] Paterson, *supra* note 1 at 27.
[76] *Suez* (ARB/03/19), *supra* note 74 at para. 252.

in question.[77] In reply, the claimant argued, *inter alia*, that the issue in the case was whether Argentina had breached its legal commitments under the BITs and that human rights law was irrelevant to that determination.[78]

The arbitral tribunals noted that "the protection and promotion of foreign investment" was not the only purpose of the relevant BITs." Rather, "through these treaties, the Contracting States pursue the broader goals of heightened economic cooperation between the two States concerned with a view toward achieving increased economic prosperity or development."[79] The tribunals also recognized that "[t]he provision of water and sewage services…certainly was vital to the health and well-being of [the population] and was therefore an essential interest of the Argentine State." However, they disagreed that "the only way that Argentina could satisfy that essential interest was by adopting measures that would subsequently violate the treaty rights of the Claimants' investments to fair and equitable treatment."[80] Therefore, the tribunals rejected the arguments of Argentina and the *amici curiae* "suggest[ing] that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations".[81] The tribunals instead found that Argentina was "subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive."[82]

While the tribunals acknowledged Argentina's obligations with respect to water supply and did not explicitly deny the nature of the right to water as a human right,[83] their rather superficial discussion and dismissal of it as a defence is regrettable. Moreover, even though the tribunals' rejection of Argentina's argument may have been "predictable" since accepting it "would be tantamount to maintaining the incompatibility between the two bodies of law in point while giving prevalence to that of human rights",[84] the tribunals could arguably devise a way,

[77] *Suez* (ARB/03/19), *supra* note 74 at para. 256.
[78] *Suez* (ARB/03/19), *supra* note 74 at para. 255.
[79] *Suez* (ARB/03/19), *supra* note 74 at para. 218.
[80] *Suez* (ARB/03/19), *supra* note 74 at para. 260.
[81] *Suez* (ARB/03/19), *supra* note 74 at para. 262.
[82] *Suez* (ARB/03/19), *supra* note 74 at para. 262.
[83] De Vido, *supra* note 5 at 556.
[84] Tanzi, *supra* note 41 at 326.

through interpretive and other means discussed further below, of balancing these competing interests. At the very least, the tribunals should have analyzed the content of Argentina's human right to water obligations and their relationship with its investment protection obligations even if such analysis would result in the same final determination on the merits. In fact, prior to the release of these decisions some commentators viewed these arguments as likely to compel the tribunals "to grapple with human rights issues in any ruling in that case",[85] and after the decision was rendered some continued to argue that the relevant BITs should have been "interpreted and applied taking into account all the international rules applicable to the relations between the host State and the State of nationality of the claimants."[86] Instead, the tribunals failed to pronounce on the relationship between investment protection and the human right to water,[87] and refused to find that Argentina's human rights obligations informed, or should inform, its investment protection obligations, much less provide guidance on how states may balance these obligations or when the former might serve to limit the latter.

SAUR International S.A. v. Argentine Republic[88]

This dispute arose between Saur, a French corporation engaged in the business of production, processing, distribution and water sanitation, and the Argentine Province of Mendoza as a result of an international bidding process for a concession agreement for the operation of water and sewage services. Following Argentina's enactment of emergency measures in 2001, the investor sought to raise water tariffs. The province refused, and the investor argued that this prevented it from covering its operating expenses and made it impossible to manage the concession.

In the arbitration proceedings, Argentina argued that the investment protection regime did not displace its human rights obligations under international treaties and under its domestic legal system. Therefore, it submitted that its investment obligations were to be interpreted in harmony with the standards of protection of human rights, particularly the human right to water. It further

[85] E.g., Peterson, *supra* note 1 at 31.
[86] Attila Tanzi, "Recent Trends in International Investment Arbitration and the Protection of Human Rights in the Public Services Sector" in Nerina Boschiero et al, eds., *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser Press, 2013) at 593.
[87] Tanzi, *supra* note 41 at 328 .
[88] *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4 (Decision on Jurisdiction and Liability, 6 June, 2012 and Award, 22 May, 2014), available in French and Spanish. The analysis here is based on an unofficial translation of the original decisions in Spanish and on secondary sources, e.g., Tanzi, *supra* note 43.

argued that the actions of the authorities of the province were consistent with obligations to ensure basic human rights such as water supply, and therefore could not be considered unfair or expropriation.[89]

The tribunal explicitly acknowledged that human rights in general, and the right to water in particular, are one of several sources that it should take into consideration to settle the dispute, as these rights were embedded in the Argentine legal system and also formed part of the general principles of international law. Moreover, the tribunal recognized that access to clean water is, from the standpoint of the State, a public service, and from the perspective of the citizen, a fundamental right. Therefore, the law can and should reserve for the public authority legitimate functions of planning, supervision, police, and punishment for the protection of the public interest in this matter.[90] However, the tribunal concluded that these powers are also consistent with the rights of investors. According to the tribunal, the fundamental right to water and the right of an investor to protection of its investment operate on different planes. While the government has special powers to guarantee the fundamental right to water, the exercise of these powers is not omnipotent and must be adapted according to the rights and guarantees granted to foreign investors.[91] Although the tribunal noted that its task was to balance these two principles when analyzing the substantive relief sought by the investor,[92] it ultimately failed to do so both in its decision on liability and in its final award on compensation. Therefore, while the tribunal clearly supported the human right to water as such, it refused to recognize its potential impact on Argentina's investment protection obligations, thereby largely applying the same restrictive and limited approach of the *Suez* tribunal. This approach is one of "acknowledgment rather than integration of non-investment concerns into the international legal framework on investments."[93]

C. Evaluating the human right to water in investor-State arbitration

As is evident from the above review of investor-State arbitrations involving the human right to water defence, arbitral tribunals have thus far refrained from directly addressing its potential effects on States' investment protection obligations. This section will discuss some of

[89] *SAUR*, *supra* note 88 at para. 328.
[90] *SAUR*, *supra* note 88 at para. 330.
[91] *SAUR*, *supra* note 88 at para. 331.
[92] *SAUR*, *supra* note 88 at para. 332.
[93] Pia Acconci, "The integration of non-investment concerns as an opportunity for the modernization of international investment law: is a multilateral approach desirable?" in Giorgio Sacerdoti et al, eds., *General Interests of Host States in International Investment Law* (Cambridge University Press, 2014) at 181.

the possible reasons for this restrictive approach and why these reasons should not necessarily be accepted as "inevitable reproaches"[94] of a more integrative approach to the human right to water and investment protection.

One possible reason for investment arbitration tribunals' constrained approach toward the human right to water defence is the "characteristics of international investment arbitration",[95] such as party consent as the basis of the jurisdiction or authority of arbitral tribunals.[96] The significance of consent is that if a tribunal renders an award without having jurisdiction, or if it exceeds the scope of its jurisdiction as defined by the parties, subsequent recognition and enforcement of the award may be denied or, if an ICSID arbitration, the award may be annulled.[97] Investment treaty cases must therefore be decided within this legal framework of the agreement or treaty providing for arbitration and on the ground of the applicable law.[98] Where these instruments do not include specific human rights-based provisions or do not provide for human rights as part of the applicable law,[99] and they rarely do,[100] arbitral tribunals may fear exceeding their authority if they admit human rights-based claims or incorporate human rights considerations in their decision-making.

However, admitting such claims and considering human rights in deciding investor-State disputes does not necessarily exceed the authority of arbitral tribunals or amount to deciding *ex aequo et bono*. This is so since the legal framework applicable to investor-State disputes is broader than merely the relevant investment treaty or contract and incorporates also general international law,[101] including human rights law.[102] As some have observed, "[i]nvestment treaty arbitrators resort to customary international law…to interpret the primary rule, i.e., the treaty obligation undertaken by the state. In fact, in most cases the treaty standards of treatment are

[94] Reiner & Schreuer, *supra* note 33 at 96.
[95] Eric De Brabandere, "Human Rights Considerations in International Investment Arbitration" in M. Fitzmaurice & P. Merkouris, eds., *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff Publishers, 2012) available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230305> at 3.
[96] Balcerzak, *supra* note 29 at 219-220.
[97] Balcerzak, *supra* note 29 at 218-219.
[98] Balcerzak, *supra* note 29 at 217-218; Dupuy, *supra* note 29 at 56.
[99] Simma, *supra* note 28 at 581.
[100] Reiner & Schreuer, *supra* note 33 at 82, 84.
[101] Dupuy, *supra* note 29 at 56. This is explicitly provided in some BITs, such as the Chinese Model BIT (2003) and the US Model BIT (2004), Reiner & Schreuer, *supra* note 33 at 85.
[102] Susan L. Karamanian, "The Place of Human Rights in Investor-State Arbitration" (2013) 17 Lewis & Clark L. Rev. 433.

expressed in general clauses whose content must be defined through the principles on interpretation of treaties…".[103]

The ICSID Convention, for instance, has been interpreted as granting arbitral tribunals the authority to resort to international law "not only as a functional element of the choice of law process but also as a body of substantive rules",[104] for instance where "the subject matter or issue is directly regulated by international law" and where "despite [the parties'] decision for domestic law, this law is nonetheless not exclusively applied but still leaves room for international law to fill loopholes."[105] Similarly, international law clearly applies to disputes under NAFTA Chapter 11[106] and under some BITs.[107] Investment arbitration tribunals have also recognized the relevance of international law and States' obligations under it beyond investment protection. For instance, in the case of *SPP v. Egypt,*[108] the arbitral tribunal found that the UNESCO Convention for the Protection of the World Cultural and Natural Heritage was relevant to the investor's claims, and that even if the parties agreed to apply domestic law "such an agreement cannot entirely exclude the direct applicability of international law in certain situations."[109] Based on the application of the UNESCO Convention, the arbitral tribunal found the investor's activities to be "internationally unlawful",[110] and therefore Egypt's cancellation of the investor's project to be a lawful right "exercised for a public purpose".[111] Accordingly, while the tribunal found that Egypt's actions with respect to the project amounted to lawful expropriation giving rise to compensation, it decided not to award compensation based on profits that might have accrued to the investor after the date Egypt became obligated by the Convention to protect and conserve

[103] Paolo Bertoli & Zeno Crespi Reghizzi, "Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes" in Tullio Treves et al, eds., *Foreign Investment, International Law and Common Concerns* (Routledge, 2014) at 34.
[104] Dupuy, *supra* note 29 at 56-57; Reiner & Schreuer, *supra* note 33 at 85.
[105] Kulick, *supra* note 60 at 14-15.
[106] NAFTA, Article 1131(1), Karamanian, *supra* note 102 at 432.
[107] *See, e.g.,* Agreement for the Promotion and Protection of Investments, Ger.-India, art. 9(2) (b) (ii), July 10, 1995; Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Rom. art. XIII(7), May 8, 2009, cited in Karamanian, *supra* note 102 at 433.
[108] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (Award on the Merits, May 20, 1992). This case arose out of a contract signed between the investors and Egypt and the parties contested the choice of law, which some argue makes it a unique example, Luigi Crema, "Investor Rights and Well-Being" in Tullio Treves et al, eds., *Foreign Investment, International Law and Common Concerns* (Routledge, 2014) at 64.
[109] *SPP*, *supra* note 108 at paras. 78, 80.
[110] *SPP*, *supra* note 108 at para. 157.
[111] *SPP*, *supra* note 108 at para. 158.

antiquities on the site of the investor's project.[112] By the same token, while arbitrators may "not have jurisdiction to rule that a state has breached its human rights obligations" there is arguably no reason why they should not "express opinions as to what those human rights obligations require and demand of governments, and whether they excuse or mitigate actions affecting foreign investors."[113]

Furthermore, the fact that investors and host States raising human rights arguments in investment arbitrations must "demonstrate substantively that the human rights at issue effectively impact on the implementation of the investment as stake" acts as a safeguard against investment arbitration tribunals exceeding their jurisdiction when considering the potential relevance of human rights to a particular investment dispute.[114] Therefore, "if the activity of foreign investors causes human rights violations, the host State's responsibility to protect human rights must be taken into account"[115] since this responsibility requires States to prevent violations of human rights by non-State actors by taking legislation and administrative measures to control, regulate, investigate and prosecute activities that violate the human rights within its jurisdiction.[116] Therefore, "if the host State intends to invoke its human rights obligations to justify an alleged breach of the investment treaty, 'there is no reason why the Tribunal so established under the investment agreement would be barred from taking such argument into consideration as a matter of principle'."[117] Therefore, it seems that assessing "the possible impact of the States' obligation to respect, protect and fulfil human rights on the standards of protection alleged by the investors to be breached and which constitute the cause of action of the proceedings"[118] falls within the scope of investment arbitration tribunals' jurisdiction. Accordingly, they are unlikely to be viewed as exceeding their jurisdiction where they entertain human rights-based arguments raised by host States.

Another characteristic of investor-State arbitration that arguably weighs against arbitral tribunals deciding issues of public interest such as the human right to water is that "the procedures for resolving investment treaty disputes do not provide for the same levels of transparency seen in other areas of international law, particularly those in the human rights

[112] *SPP*, *supra* note 108 at paras. 154, 250-521.
[113] Peterson, *supra* note 1 at 43. See also, Dupuy, *supra* note 29 at 55, 59.
[114] Dupuy, *supra* note 29 at 62.
[115] Balcerzak, *supra* note 29 at 226-227.
[116] Balcerzak, *supra* note 29 at 227.
[117] Balcerzak, *supra* note 29 at 227.
[118] Balcerzak, *supra* note 29 at 227.

system." Investment treaties have thus far been silent on transparency issues, and the procedural rules that govern these arbitrations, such as the UNCITRAL or ICSID Rules, "have not been designed with transparency or openness in mind". Therefore, it is not always possible for interested parties "to monitor, much less have a stake or influence in, this system."[119] However, this lack of transparency argument is gradually losing ground since the confidentiality of arbitration proceedings has increasingly been challenged in trade agreements. For instance, the new Canada-EU Free Trade Agreement (CETA) introduces "full transparency" to all investor-State arbitration proceedings, which requires all documents to be made publicly available, all hearings to be made open to the public, and interested parties such as NGOs and trade unions to be allowed to make submissions.[120]

Increased transparency may also be achieved under existing agreements through domestic access to information laws or human rights mechanisms. For instance, in 2009 the Republic of Chile was held in violation of the American Convention on Human Rights by virtue of its failure to provide the Chilean public with information about a major forestry development project, including contracts concluded with foreign investors.[121] It is therefore "easy to envision alleged human rights violations which might be raised by media organizations, non-governmental organizations, or concerned citizens, in relation to the non-disclosure by a given government of relevant information about foreign investor arbitrations mounted against that government", and this has already occurred in the North American context.[122] Moreover, some procedural rules governing investment arbitration have been revamped recently to reflect the increased demand for transparency. For instance, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration reversed the presumptions of confidentiality and privacy in investment treaty arbitration in favour of a presumption of openness.[123] Similarly, the 2006 amendments to the ICSID Arbitration Rules allowed greater participation of third parties in investment arbitration

[119] Peterson, *supra* note 1 at 41; Marc Jacob, *International Investment Agreements and Human Rights*, INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010, Duisburg: Institute for Development and Peace, University of Duisburg-Essen (2010) at 23-24.

[120] Article x.33, Consolidated CETA Text, 26 September 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[121] *Claude-Reyes, et al. v. Chile*, Judgment of September 19, 2006, Inter-American Court of Human Rights; the NGO CELS, Peterson, *supra* note 1 at 42.

[122] Peterson, *supra* note 1 at 42.

[123] Stephan Schill, "Transparency as a Global Norm in International Investment Law", Kluwer Arbitration Blog (15 September 2014), available at: http://kluwerarbitrationblog.com/blog/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/.

proceedings in Rule 37(2), and this provision was relied upon by several investment arbitration tribunals in water-related disputes.[124]

In addition to the growing irrelevance of the above-mentioned arguments, there are also other distinct characteristics of investment arbitration that arguably make it a legitimate mechanism for the resolution of investor-State disputes involving public interest issues such as the human right to water. First, the arbitrator selection process results in different views and approaches to the law being represented on the arbitral panel. As a result, "before a decision is reached, the arbitral tribunal will generally have discussed at length various approaches to the dispute and the applicable law, as well as the strengths and weaknesses of those approaches, and will have carefully and thoughtfully formed a view on the most appropriate outcome, even if it is a compromise between potentially divergent initial positions."[125] Moreover, the adversarial nature of the arbitral process "allows an arbitral tribunal the benefit of testing the merits and demerits of the various positions being advanced by the parties, which facilitates the rendering of a well-reasoned and thoughtfully considered award…[and] qualitatively better results." [126] In addition, "arbitral tribunals, more often than not, come to a unanimous decision…[that] will be informed by the rigorous submissions of the parties and the arbitrators' own prior experiences."[127] Finally, it may be argued that in deciding investor-State disputes, arbitral tribunals carry out a 'lawmaking' function by developing "normative rules that, while not binding, influence future awards, shape party expectations, and thereby affect the future behaviour of both arbitral panels and economic actors."[128] By allowing foreign investors to circumvent domestic law and national courts, investment arbitration also effectively serves as the single and final adjudicator of broad, and at times vital, public issues.[129] Therefore, investment arbitration should be viewed "not only [as] a mechanism to settle disputes" but also as "a form of global governance",[130] and such a view further supports the legitimacy of investment arbitration tribunals considering issues of public interest, including the human right to water.

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[124] E.g., *Biwater v. Tanzania*, discussed above.
[125] D. Brian King & Rahim Moloo, "International Arbitrators as Lawmakers" (2014) 46 International Law and Politics 891-892.
[126] King & Moloo, *supra* note 125 at 892-893.
[127] King & Moloo, *supra* note 125 at 893.
[128] King & Moloo, *supra* note 125 at 883.
[129] Thielbörger, *supra* note 27 at 507.
[130] E.g., Benedict Kingsbury & Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law" (2009) New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 09-46.

Moreover, if investment arbitration tribunals ignore such issues this could discourage States from recognizing human rights and from adopting legislation and policies to protect them, which may result in a 'human rights regulatory chill'.[131] As discussed above, it is widely accepted that States have a three-part obligation with respect to all human rights, regardless of their 'category' or 'generation', namely the obligation to respect, protect, and fulfil human rights.[132] It is also increasingly recognized that it takes "positive measures, including expenditures, by States, to implement most internationally recognized human rights."[133] Therefore, "States should be encouraged to invoke human rights obligations in their defence in international treaty-governed investor-State dispute settlement, as it is reflective of their good faith effort to respect different international obligations simultaneously".[134] Failure of investment arbitration tribunals to give due consideration to such arguments "may have a chilling effect on host State regulatory initiatives that are needed to address non-investment policy objectives"[135] such as the protection of human rights, and may "undermine a State's ability to fulfil its human rights obligations."[136]

Finally, a more progressive approach toward the human right to water defence of host States could also contribute to overcoming the so-called 'legitimacy crisis' of investment treaty arbitration.[137] Investor-State arbitration seems to be increasingly perceived by States as biased in favour of foreign investors at the expense of the public interest,[138] and it has been widely

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[131] Balcerzak, *supra* note 29 at 217; Kyla Tienhaara, "Regulatory chill and the threat of arbitration: A view from political science" in Chester Brown and Kate Miles, eds., *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) at 606-627; Chester Brown, "Resolving international investment disputes" in Natalie Klein, ed., *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press, 2014) at 419; Jarrod Hepburn & Vuyelwa Kuuya, "Corporate Social Responsibility and Investment Treaties" in Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds., *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) at 606.

[132] Balcerzak, *supra* note 29 at 226.

[133] Brunno Simma & Theodore Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology" in Christina Binder et al, eds., *International Investment Law for the 21st Century* (Oxford University Press, 2009) at 679.

[134] Jasper Krommendijk & John Morijn, "'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni, eds., *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) at 446.

[135] Suzanne A. Spears, "Making way for the public interest in international investment agreements" in Chester Brown & Kate Miles, eds., *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) at 272.

[136] Simma & Kill, *supra* note 133 at 679.

[137] Spears, *supra* note 135 at 274; Brown, *supra* note 131 at 419.

[138] Venezuela, Bolivia, and Ecuador have denounced the ICSID Convention, and South Africa has denounced investment treaties altogether, Balcerzak, *supra* note 29 at 217; Acconci, *supra* note 93 at 174. In 2011, the

criticized for "neglecting the larger implications and the substance of what is at stake" in such disputes.[139] For instance, in 2010, dozens of academics published a Public Statement on the International Investment Regime, in which they called on governments, *inter alia*, to "review their investment treaties with a view to withdrawing from or renegotiating them [and] take steps to replace or curtail the use of investment treaty arbitration."[140] Similarly, in 2011 the former United Nations Special Representative of the Secretary-General for Business and Human Rights, John Ruggie, urged States in the *Guiding Principles on Business and Human Rights* to "ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of" international investment agreements.[141]

These recommendations are rooted in various concerns, including that "investment treaties have been given unduly pro-investor interpretations", that "investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes", and that it is "hampering the ability of governments to act for their people in response to the concerns of human development and environmental sustainability."[142] It seems, therefore, that investor-State arbitration is increasingly perceived by States as pro-investor and as impeding their regulatory freedom, despite statistics showing that in fact more investor-State arbitrations have been decided in favour of States than in favour of investors.[143]

Australian government released a 'Trade Policy Statement' in which it stated that: "In the past, Australian Governments have sought the inclusion of investor–state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.", Brown, *supra* note 131 at 421. See also the general attitude of some South American States, which adopted the 'Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests' in April 2013, <http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf>, Balcerzak, *supra* note 29 at 217.

[139] Allen, *supra* note 39 at 4.

[140] Andrew Newcombe, A Brief Comment on the "Public Statement on the International Investment Regime" (3 September 2010), Kluwer Arbitration Blog, available at: http://kluwerarbitrationblog.com/blog/2010/09/03/public-statement-on-the-international-investment-regime/.

[141] John Ruggie, Special Representative of the U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, pt. I(B) (9) cmt., U.N. Doc. A/HRC/17/31 (Mar. 21,2011), cited in Karamanian, *supra* note 102 at 424-425.

[142] Newcombe, *supra* note 140.

[143] In 2014, the overall number of concluded investment arbitration cases reached 274. Of these, approximately 43% were decided in favor of the State and 31% in favor of the investor. Approximately 26% of cases were settled. UNCTAD, IIA Issues Note No. 1, April 2014, available at: http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf. See also Schultz and Dupont, who find that between 1972 and 2010 "investors have in fact won fewer cases (87 cases) than host states (102 cases)", Thomas Schultz & Cédric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A

This suggests that it is not only the final outcome of investor-State arbitrations that impacts States' negative perceptions of it, but also the reasoning of investment arbitration tribunals and the extent to which such reasoning accounts for States' interests. Therefore, a more balanced and integrative approach adopted by arbitral tribunals towards vital issues of public interest, such as the human right to water, may serve to dispel these concerns and restore the confidence of States in the investment arbitration system.

III. INTERPRETIVE AND PROCEDURAL TOOLS

The most appropriate and straightforward way for States to have human rights issues considered in investor-State arbitrations is to introduce explicit language to this effect in treaties and agreements. The CETA, for instance, provides that a Party may deny benefits to a service supplier if it adopts or maintains measures with respect to the non-Party "that are related to maintenance of international peace and security, including the protection of human rights".[144] Similarly, the Canada–South Africa BIT recognizes the right of the state to adopt or maintain measures "necessary to protect human, animal or plant life or health".[145] Such language clearly enables investment arbitration tribunals to consider the relevance of human rights law to the dispute and allows them to determine how the investment protection obligations of States should be interpreted and understood in light of their human rights obligations.[146]

In addition, States could explicitly include broader goals and objectives in the preamble of investment treaties. Many treaties currently refer to the protection of investments as their sole object and purpose, which has led some tribunals to adopt an interpretation focusing primarily on investors' interests. States could prevent this by clearly stipulating that investment protection is not an end in itself, but rather serves as a "means to facilitate sustainable development and reaffirm a State's right to regulate in the public interest."[147] This has been done, for instance, in

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Quantitative Empirical Study" (2014), King's College London Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-16, at 16, available at SSRN: http://ssrn.com/abstract=2399179.

[144] Article x.07, Consolidated CETA Text, 26 September 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[145] Canada–South Africa BIT (n 44) Art XVII 2, 3(b), cited in Susan L. Karamanian, "Human Rights Dimensions of Investment Law" in Erika De Wet & Jure Vidmar, eds., *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, 2012) at 246.

[146] Peterson, *supra* note 1 at 45; Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012) at 187.

[147] UNCTAD, IIA issues Note No. 3, December 2011, at 9, available at: http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf.

the U.S.-Uruguay BIT, which includes in its preamble the desire to "achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labour rights."[148] However, since the practice of explicitly referring to human rights protection in investment treaties remains relatively rare,[149] this section proposes additional procedural and interpretive tools that States and investment arbitration tribunals could adopt to better address these issues where such explicit language is absent.[150]

With respect to procedure, States planning to adopt measures in protection of the human right to water that may violate investors' rights should explicitly state the link between the measure and the State's obligations under international human right law. They may also wish to include an analysis of "the reasons why the State authorities consider that the measure is required or fully authorized by" a human rights treaty, and a cost-benefit analysis of "the implications of the different options available to the State" to reach the human rights objective pursued.[151] In addition, States may choose to appoint arbitrators with human rights law expertise. The CETA, for instance, provides for a list of arbitrators pre-agreed by the European Union and Canada and ensures that they have always agreed to at least two of the three arbitrators that will decide investor-State disputes under the agreement.[152] Alternatively, arbitrators may consult external human rights experts or specialized agencies on any human rights issues implicated in a case. Although investment treaties do not explicitly provide for such referrals, governments have in the past requested that arbitrators seek the input of other agencies or tribunals. For instance, in the *Eastern Sugar v. Czech Republic*[153] arbitration, the Czech Republic urged the arbitrators to refer the matter to the European Court of Justice or the European Commission in order to seek an opinion on certain questions, although the tribunal refused to do so.[154] Arbitrators in investor-State disputes should be encouraged to seize such opportunities to seek external expert support

[148] U.S.-Uruguay BIT, available at: http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf; UNCTAD, *supra* note 147.
[149] Jacob, *supra* note 119 at 9.
[150] On using interpretive techniques to give effect to human rights norms within the context of investor-state disputes see Karamanian, *supra* note 102 at 425, footnote 10.
[151] Viñuales, *supra* note 146 at 185; Thielbörger, *supra* note 27 at 509.
[152] Article x.25, Consolidated CETA Text, 26 September 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
[153] *Eastern Sugar B.V. v. Czech Republic*, Partial Award of March 27, 2007.
[154] Peterson, *supra* note 1 at 45.

where the parties allow them to do so. Moreover, States should consider including in treaties mandatory referral procedures providing for consultation with expert agencies or human rights adjudicative mechanisms on human rights law issues.[155]

With respect to interpretation, States could become more involved in the arbitral decision-making process by adopting joint and unilateral instruments that clarify the meaning of certain treaty provisions in order to ensure that investment protection does not trump broader public objectives.[156] Unlike complicated and time consuming treaty re-negotiation, modification, or denunciation procedures, such instruments may be an efficient option to improve predictability of awards.[157] However, in order to ensure "equality of arms between the disputing parties" when States become involved in interpreting investment treaties, this should be done proactively, in advance, and outside of a particular dispute.[158] For instance, at the conclusion of an investment treaty, States can adopt additional joint instruments such as side-agreements, protocols, understandings, or exchanges of letters to address interpretive issues and goals, as well as unilateral instruments such as statements made in the course of treaty ratification.[159]

In addition to States' interpretive activities, investment arbitration tribunals also have interpretive tools at their disposal in order to account for the human right to water in resolving investor-State disputes. Taking into account human rights obligations does not necessarily mean that investment arbitration tribunals must find that they prevail over international investment protection norms, or vice versa. Rather, "[t]he solution is to be found on a case-by-case basis through the use of the appropriate conflict techniques."[160] One such technique that may be helpful in the context of the human right to water and investment protection is "mutual supportiveness", which can be used by tribunals to "play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared - "systemic" – objective."[161] This "systemic integration" principle "points to a need to take into account the normative environment more widely,"[162] which in turn "points to the need to carry

[155] Peterson, *supra* note 1 at 45.
[156] UNCTAD, *supra* note 147.
[157] UNCTAD, *supra* note 147 at 4.
[158] UNCTAD, *supra* note 147 at 4.
[159] UNCTAD, *supra* note 147 at 10.
[160] Viñuales, *supra* note 146 at 34.
[161] International Law Commission, "Report of the Study Group on the Fragmentation of International Law", finalized by Martin Koskenniemi (13 April 2006), Doc. A/CN.4/L.682, at 207, available at: http://legal.un.org/ilc/guide/1_9.htm.
[162] International Law Commission, *supra* note 161 at 209.

out the interpretation so as to see the rules in view of some comprehensible and coherent objective..."[163] There are at least two ways in which investment arbitration tribunals can use systemic integration in order to incorporate the human right to water defence of a host State. The first is Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), and the second is identifying overlap between competing public and private interests of States and investors.

The fact that "all international law exists in systemic relationship with other law" means that "although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment - that is to say 'other' international law."[164] To this end, investment arbitration tribunals may, and some argue must,[165] rely on the VCLT, and specifically Article 31(3)(c), as authorizing them to interpret treaty obligations in light of "relevant rules of international law applicable in the relations between the parties."[166] Moreover, they should do so irrespective of whether the relevant State has ratified the VCLT or whether the particular investment treaty explicitly provides for its application, since the rules it codifies are considered to be customary international law.[167]

While this authority is only interpretative in nature[168] and may be controversial where such "rules of international law" concern more contentious issues such as a human right to water that may not be strictly "applicable in the relations between" a State and a foreign investor,[169] it nonetheless opens "a wide path…for arbitrators to consider human rights…in the course of interpreting the obligations contained in investment protection treaties."[170] This is so since "rules relating to a State's obligations to meet the basic materials needs of its own citizens can…become a matter of community concern, so that they may be 'applicable in the relations' of all States…even if there is no independent treaty obligation running between the States in question, and even if we assume that such obligation are not owed *erga omnes*".[171] Moreover,

[163] International Law Commission, *supra* note 161 at 211.
[164] International Law Commission, *supra* note 161 at 212-213 (emphasis in original).
[165] UNCTAD, *supra* note 147 at 2, 9.
[166] Peterson, *supra* note 1 at 22; Viñuales, *supra* note 146 at 38; Jacob, *supra* note 119 at 29.
[167] UNCTAD, *supra* note 147 at 5; Tanzi, *supra* note 86 at 587-588; Simma & Kill, *supra* note 133 at 691.
[168] Simma & Kill, *supra* note 133 at 694.
[169] Simma & Kill, *supra* note 133 at 695-701.
[170] Peterson, *supra* note 1 at 22.
[171] Simma & Kill, *supra* note 133 at 701-702.

when applying the VCLT the fact that its preamble "proclaims the States Parties' 'universal respect for, and observance of, human rights and fundamental freedoms for all'" may further "tip the scales towards a broader conception of applicability" for the purpose of Article 31(3)(c).[172]

Article 31(3)(c) and the principle of systemic integration that it reflects "call upon a dispute-settlement body…to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case."[173] While this does not mean that a customary norm is applied to replace a treaty norm,[174] this principle can nonetheless "mak[e] sure that the outcome is linked to the legal environment, and that adjoining rules are considered - perhaps applied, perhaps invalidated, perhaps momentarily set aside...".[175] It does so by "effectively transmit[ting] the normative content of external rules in a way that promotes coherence among legal regimes should not be discounted."[176] To the extent that the human right to water forms part of the relevant 'legal environment' in a particular investor-State dispute, therefore, the arbitral tribunal should be authorized and mandated to consider the State's obligations with respect to this human right when deciding on its alleged investment protection violations. Such an interpretive approach could shift the analysis, which has thus far been centred on "the mere compatibility and separation" of investment law and human rights law, to a "more integrated interpretation of investment obligations in relation to those stemming from the relevant human rights rules."[177]

The second way for investment arbitration tribunals to interpret investment protection law and human rights law as mutually supportive is to focus on the overlapping interests of investors in both regimes, rather than interpret investment treaties exclusively from an investment perspective.[178] Reinforcing the 'legitimacy crisis' of investor-State arbitration discussed above is the so-called division "between those who will assert public interests through human rights, and those who will defend the settled autonomy or normative specialization of international investment law,"[179] which presents the public interest in protecting human rights

[172] Simma & Kill, *supra* note 133 at 702.
[173] International Law Commission, *supra* note 161 at 243 (emphasis in original).
[174] Christina Binder, "Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis" in Christina Binder et al, eds., *International Investment Law for the 21st Century* (Oxford University Press, 2009) at 618.
[175] International Law Commission, *supra* note 161 at 244 (emphasis in original).
[176] Simma & Kill, *supra* note 133 at 694.
[177] Tanzi, *supra* note 41 at 329-330.
[178] Choudhury, *supra* note 40 at 831.
[179] Simma, *supra* note 28 at 592.

and the interests of foreign investors as mutually exclusive and therefore as incapable of being reconciled by investment arbitration tribunals. However, such a dichotomous division of interests is artificial.

Even assuming that international investment law is first and foremost intended to protect the interests of foreign investors,[180] it cannot ignore their broader interests beyond the protection of a particular investment and an investor's own human rights. These interests extend to "an environment based on cooperation between local communities, investors and States",[181] and complying with international legal standards and expectations that include respect and protection of the human rights of those who may be affected by its investment.[182] Such standards are reflected in voluntary instruments such as the United Nations Global Compact,[183] the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development,[184] and other initiatives.[185] While such instruments do not "establish direct human rights obligations in a strictly legal sense", they show "a strong political commitment" and highlight that "this is what States expect from business enterprises in relation to human rights."[186] With the advent of international norms of corporate social responsibility and rising global awareness of the potentially negative impact of foreign investment on the human rights of local populations, including their right to water, failure on the part of an investor to account for such impact may result in both legal liability and grave financial and reputational costs.[187] Protecting such human rights is therefore not only in the interest of citizens and their State, but also falls within the broader interests of foreign investors.

This is reflected, for instance, in the UN Global Compact's CEO Water Mandate launched by the UN Secretary-General in 2007, which is "designed to assist companies in the development, implementation and disclosure of water sustainability policies and practices" in

[180] Moshe Hirsch, "Investment Tribunals and Human Rights: Divergent Paths" in PM Dupuy, F Francioni & EU Petersmann, eds., *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) at 107.
[181] Acconci, *supra* note 93 at 183.
[182] Reiner & Schreuer, *supra* note 33 at 86; UN, *The Right to Water*, *supra* note 5 at 31-32; Hepburn & Kuuya, *supra* note 131; Angelica Bonfanti, "Applying Corporate Social Responsibility to Foreign Investments" in Tullio Treves et al, eds., *Foreign Investment, International Law and Common Concerns* (Routledge, 2014).
[183] Global Compact, Principles 1 and 2.
[184] OECD, "The OECD Guidelines for Multinational Enterprises: text, commentary and clarifications" (31 October 2001), at 11.
[185] E.g., the OECD Principles for Private Sector Participation in Infrastructure (2007); the Tripartite Declaration of Principles Concerning Multinational Enterprises of the International Labour Organization.
[186] Report, *supra* note 21 at para. 23.
[187] Hepburn & Kuuya, *supra* note 131 at 592-596.

light of the "formal recognition by governments of the human right to water and sanitation."[188] The responsibility of non-State service providers to respect and protect the human right to water was also clearly articulated in the Report of the independent expert appointed by the UN Human Rights Council.[189] The Report noted that "compared to other business activities, the provision of water and sanitation services is characterized by special features: the services relate directly to the fulfilment of human rights."[190] Part and parcel of their responsibility to respect human rights, non-state service providers must consider "the country and local context where their activities are carried out such as the institutional capacities of the Government", as well as "the actual and potential impact of their activities."[191] The Report concludes that "the obligations of States and the responsibilities of non-State actors are complementary. The latter can and should support the State in the realization of human rights."[192]

In sum, the perceived contradiction between protecting the interests of foreign investors and protecting human rights, which may prevent investment arbitration tribunals from pronouncing on their interrelationship, is misconceived. Moreover, the resulting view that investment arbitration tribunals accepting a host State's human right to water defence somehow overstep their mandate and undermine their legitimacy is misplaced. Rather, "the success and legitimacy of an adjudicative model is reliant on its capacity to navigate and prioritise competing claims and connect the technical legal arguments with the substance of what is at stake in a decision".[193] The legitimacy of investment arbitration tribunals is therefore rooted in their unique ability to balance the parties' interests within the broader applicable legal framework, which includes not only the particular investment protection instrument but also the international obligations of the host State *and* the investor. Even if rooted in different rationales, both have an interest in, and a duty to protect, the human rights of local populations, including their human right to water.

[188] The CEO Water Mandate, http://ceowatermandate.org/.
[189] See above, page 4.
[190] Report, *supra* note 21 at para. 28.
[191] Report, *supra* note 21 at para. 27.
[192] Report, *supra* note 21 at para. 63.
[193] Allen, *supra* note 39 at 4.

IV. CONCLUSION

As the investment arbitration decisions surveyed above indicate, "...investment tribunals are inclined to…emphasize the obligations included in the investment agreement",[194] at times to the exclusion of other international obligations of a host State. However, this inclination is arguably misguided where human rights, and particularly the human right to water, are concerned. First, the fields of international investment law and human rights are interrelated, and such interrelation "even if finally declined, cannot be totally ignored and left without analysis".[195] Moreover, it is often the case in water privatization contracts that the investor is in a superior position to the State,[196] at least in the pre-contractual and contractual stages,[197] and it is up to investment arbitration tribunals to fix this imbalance in a way that accounts for the broader public interest, including the protection of human rights. Finally, it must be remembered that the proper goal of investor-State arbitration should not be "to interpret clauses exclusively in favor of investors", but rather to give "due consideration to the balance of rights and obligations".[198]

The inclusion of the human right to water in investment arbitration decision-making may admittedly be problematic to the extent that it is viewed as merely an 'emerging' human right[199] and uncertainty persists with respect to the link between broadly stated norms that fall under it and the "specific domestic measures adopted under [its] umbrella." This means that "domestic measures seldom refer to their grounding" in the human right to water, which in turn makes it difficult to establish that domestic measures challenged by an investor were required by this right.[200] Therefore, States must do their part in ensuring that their domestic legislation, as well as international investment agreements, protect human rights such as the right to water. At the same time, however, even without widespread recognition as an independent human right, investment arbitration tribunals ought to view the right to water as a general or guiding principle of international law,[201] particularly in light of the fact that human access to water, which underlies the notion of a human right to water, is increasingly affected by foreign investment in domestic

[194] Hirsch, *supra* note 180 at 108.
[195] Balcerzak, *supra* note 29 at 230.
[196] Thielbörger, *supra* note 27 at 503-504.
[197] Tanzi, *supra* note 41 at 332.
[198] UNCTAD, *supra* note 147 at 4.
[199] Thielbörger, *supra* note 27 at 489.
[200] Viñuales, *supra* note 146 at 184.
[201] De Vido, *supra* note 5 at 563.

public water sectors and that water-related investor-State disputes are arising with greater frequency as a result.[202]

This is not to say that the authority of investment arbitration tribunals to consider and interpret the human right to water should be arbitrary or limitless.[203] Rather, rules and principles should be devised to guide tribunals in giving effect to this, and other, human rights that may be affected by investment protection measures.[204] However, such rules and principles will only be relevant and useful when investment arbitration tribunals, rather than "cleverly acknowledg[ing]" arguments based on the human right to water only to then dismiss them as irrelevant,[205] accept that investment treaties do not exist in a "lock-box".[206] These tribunals must also realize that they have the mandate and duty, as final adjudicators of investor-State disputes, to balance human rights and investment protection[207] if they are to serve the function "for which most international courts and tribunals are created – that is, to strengthen the international rule of law."[208] Failing to do so as some sort of a "de-politicizing strategy"[209] disguised as illegitimacy may undermine both the human right to water and the ability of investment arbitration to effectively adjudicate future investor-State disputes in which it is invoked.

[202] Thielbörger, *supra* note 27 at 507.
[203] For instance, it is debatable whether investment arbitration tribunals should prioritize competing human rights in investor-State disputes when these are invoked by both parties. However, the approach advocated for in this paper, which has been referred to as the "integrationist approach" elsewhere, "should be used in cases in which the contested regulations defend against or repair outrageous offenses" to human rights. Crema, *supra* note 108 at 69.
[204] E.g., rules regarding hierarchy of norms, Karamanian, *supra* note 102 at 435-436; Karamanian, *supra* note 145; principles of proportionality, Kingsbury & Schill, *supra* note 130, Kulick, *supra* note 60 at 168-220; principles of reasonableness, Acconci, *supra* note 93 at 182; and principles of due diligence, good faith, and reciprocity, Tanzi, *supra* note 41 at 332-334.
[205] Karamanian, *supra* note 145 at 252.
[206] Karamanian, *supra* note 145 at 246.
[207] Dupuy, *supra* note 29 at 61.
[208] Schultz & Dupont, *supra* note 143 at 28.
[209] Hirsch, *supra* note 180 at 113.