

## ARTICLE

# The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaser and Beyond

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The privatisation of water through foreign investment has become a common occurrence throughout the world. In developing economies like Argentina, many people depend on their water supply from private companies, including foreign investors. Using Argentina as a case study, this article analyses how the human right of access to water is applied and interpreted in international investment law. To this end, four Argentinian investment water disputes *Azurix v. Argentina*, *AWG v. Argentina*, *Impregio v. Argentina* and *Urbaser v. Argentina* concluded in the last 20 years are subjected to a comparative analysis. The evaluation of four tribunals' decisions signals the reformative evolution that is taken place in international investment law. The most recent of the four cases (*Urbaser v. Argentina*) belongs to the body of recent jurisprudence, where the state's right to regulate as well as investors' responsibilities have been acknowledged by tribunals. Drawing on more recent policy developments in investment law, it is argued that *Urbaser* case is not an exception, but an indication of gradual transformation of investment regime to a more balanced system.

**Keywords:** IIAs; human rights; water privatisation; ISDS; FDI

## 1. Introduction

The privatisation of water resources through foreign investment has become a common occurrence throughout the world.<sup>1</sup> In fact, 10 percent of people in the world obtain their water supply from private companies.<sup>2</sup> This implies that the right of access to water for many people depends on how effectively private actors can manage and operate water resources. In developing economies, like Argentina, the right of access to water controlled by foreign investors in some regions has been negatively affected during the lifetime of investment.<sup>3</sup>

This has resulted in a number of investment disputes between foreign investors and host states. The issue raised by many tribunals in water privatisation disputes – and which is discussed in this paper – concerns the legal application of the right of access to water of host states' population against the economic rights of foreign investors under International Investment Agreements (IIAs). Tribunals have adopted different positions on the legal status of the right of access to water (from avoiding discussion of this right to recognizing responsibilities of companies in securing this right) in the context of foreign investment. The demonstrative examples in this regard are the Argentinian water disputes.

Between 1998–2002 Argentina underwent a major economic and financial crisis that triggered a range of state emergency measures in the interest of stabilising the economy.<sup>4</sup> These emergency measures were

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<sup>1</sup> P. Thielborger, 'The Human Right to Water Versus Investor Rights: Double-Dilemma of Pseudo-Conflict?' in P.-M. Dupuy, F. Francioni, E.-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2010) 487.

<sup>2</sup> C. Titi, 'The right of the host state to regulate water services' in J. Chaisse (ed), *Charting the Water Regulatory Future: Issues, Challenges and Directions* (Edward Elgar Publishing, 2017) 92.

<sup>3</sup> *ibid* 92.

<sup>4</sup> V. Beker, 'Argentina's Debt Crisis' in B. Moro and V. Beker (eds), *Modern Financial Crises* (Springer, 2016) 31–42; J. Alvarez, G. Topalian, 'The Paradoxical Argentina Cases' (2012) 4 *World Arbitration and Mediation Review* 491–544.

disputed by foreign investors making Argentina the number one respondent state in investor-state dispute settlement (ISDS) cases.<sup>5</sup> Some of these cases concerned the human right to water. Argentina is one of the countries that in the 1990s had privatised the water and sanitation services, making numerous private foreign companies responsible for providing water to a large group of Argentinian population.<sup>6</sup> Upon enforcement of the emergency measures, some of the foreign investors that were a part of water concessions initiated arbitration cases against Argentina under IIAs.

In the context of investment law, the steady growth in investment treaties and arbitration cases has resulted in limitations being placed on state sovereignty.<sup>7</sup> Consequently, a number of sovereignty issues have surfaced. Disputes in the areas of human rights, environment and public health have instigated a discussion on the extent to which investment agreements are able to limit a state's internal sovereignty. The notion of public interest has a growing importance in the context of the internal sovereignty of the state.<sup>8</sup> Within the restrictions laid down by international law, the state is free to choose its methods for achieving its regulatory objectives, e.g. to ensure the effective access to water.<sup>9</sup> At the same time, states are under obligations to observe their commitments under IIAs. In this article these conflicting human rights and investment obligations are addressed with the example of four Argentinian water cases.<sup>10</sup> The analysis of four Argentinian water cases aims to provide a better understanding of how investor's rights under IIAs and human rights to water have been applied and interpreted by arbitral tribunals.

These four cases have been selected because in all of them the human rights argument relating to the access to water had been raised during the proceedings. Despite similarities in the facts of these cases, the arbitral tribunals had divergent approaches towards an examination of the human right to water. Therefore, the other goal of this article is to review these differences and to evaluate them in a broader context of an ongoing reform to humanize the field of international investment law.<sup>11</sup>

Recently, states have undertaken efforts to rebalance their IIAs in order to, on the one hand, provide the policy space for host states to regulate in the public interest e.g. to ensure the human right to water and, on the other, to ensure the effective protection of investors.<sup>12</sup> As part of these attempts, the growing importance has been attributed to the Corporate Social Responsibility (CSR) of foreign investors.<sup>13</sup> The notion of CSR is gaining momentum in international investment law as states increasingly attempt to balance the rights and obligations of states and investors in their investment treaties.<sup>14</sup> To this end, the CSR provisions stipulating the direct obligations addressed to investors have been included in some recent IIAs.<sup>15</sup> By taking

<sup>5</sup> Over the years, Argentina received the largest number of claims, see: UNCTAD, Fact Sheet on Investment State Dispute Settlement Cases in 2018, 2 <[https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf)>.

<sup>6</sup> For example, in *AWG v. Argentina* case, foreign investors were responsible for providing water distribution and wastewater treatment services to the city of Buenos Aires and related areas. Only in Buenos Aires lives more than 2 million people.

<sup>7</sup> J. Karl, 'International Investment Arbitration: A Threat to State Sovereignty' in W. Shan et al. (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing, 2008) 230.

<sup>8</sup> L. Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge, 2016) 99. See also M. Shaw, *International Law* (Cambridge University Press, 2008) 55, who has argued that the responsibility of the state towards its citizens in providing public welfare has increased.

<sup>9</sup> L. Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge, 2016) 32.

<sup>10</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award [14 July 2006]; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 Decision on Liability [30 July 2010]; *Impreglio S.p.A v. Argentina*, ICSID Case No. ARB/07/17 Award [21 June 2011]; *Urbaser and CABB v. Argentina*, ICSID Case No. ARB/07/26 Award [8 December 2016].

<sup>11</sup> E.g. the reform of investor-state dispute settlement. See: UNCTAD (2019) *Reforming Investment Dispute Settlement: A Stocktaking*, Issue Note, No 1, 2019; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), <<https://undocs.org/en/A/CN.9/930/Rev.1>>.

<sup>12</sup> European Commission (2019). European Commission, *Investment: Objectives of the EU Investment Policy*, <<http://ec.europa.eu/trade/policy/accessing-markets/investment/>>.

<sup>13</sup> The CSR for the purpose of the article is defined as 'the responsibility of enterprises for their impacts on society. The enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of maximising the creation of shared value for their owners/shareholders and civil society at large and identifying, preventing and mitigating possible adverse impacts.' A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM/2011/0681 final, 2014 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681>>.

<sup>14</sup> N. Bernasconi-Osterwalder, Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements in J. Chaisse et al. (eds), *Handbook of International Investment Law and Policy*, (Springer, 2020), <[https://doi.org/10.1007/978-981-13-5744-2\\_56-11](https://doi.org/10.1007/978-981-13-5744-2_56-11)>.

<sup>15</sup> The UNCTAD IIAs Mapping Project states that out of 2,577 IIAs, 40 included CSR provisions. See UNCTAD 'IIA Mapping Project' (2020), <<https://investmentpolicy.unctad.org/international-investment-agreements/ii-a-mapping>>. For more detailed analysis of CSR obligations of foreign investors see: Y. Levashova, 'The Accountability and Corporate Social Responsibility of Multinational

into account the latter development, this article will also reflect on the implications of investors' human rights obligations in the context of a growing discussion on the importance of investor obligations under international investment law.

To this end, the following Section 2 will briefly outline how the right to water intersects with international investment law. Section 3 will provide a comparative analysis of several water investment disputes where the legal status of the right of access to water in the context of the investment has been discussed. Further, the legal implications of these decisions on the investors' obligations under international investment law are addressed in Section 4. Several concluding remarks are offered in Section 5.

## 2. The intersection between international investment law and the right of access to water

Companies acting as foreign investors use water resources as an object for their investment in a host state. Foreign investors often acquire access to operate water management resources and sewage systems through privatisation schemes under the national laws of the host state. Water concessions are a typical form of investment regulated by International Investment Agreements (IIAs) and investment contracts.<sup>16</sup> Considering that water is the 'subject of an emergent human right,'<sup>17</sup> the conflict of legal norms regarding the state's obligations under human rights treaties and investment obligations has arisen in investment water disputes. These investment disputes usually occur when the companies under the water privatisation schemes are unable to secure their returns on their investments. This can be due to the specific circumstances in the host state, such as the economic crisis in Argentina and/or the poor infrastructure in the host state or the political situation etc. From the perspective of the state, it has often been argued that companies were unable to provide effective access to water resources due to a substantial increase in water tariffs, lack of investment in water management systems, and sometimes the inability to secure safe drinking water to consumers. From the perspective of investors, companies often allege various violations under IIAs committed by states, such as direct or indirect expropriation of investor's investments by a state, or unfair and inequitable treatment by a state. Both perspectives, the rights of investors under IIAs and the right of states to regulate in a public interest, e.g. to provide the access to water, are briefly explained below.

### 2.1. Protection of foreign investors under international investment agreements

International investment law regulates the legal relationship between states and foreign investors. It contains a network of more than 3,332 IIAs, general principles of law, and rules of customary international law.<sup>18</sup> IIAs are often referred to as the main source of the rights and obligations of states and investors. On the bilateral level, IIAs include Bilateral Investment Treaties (BITs). On the multilateral and regional levels, IIAs consist of Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs). These types of agreement contain either investment chapters or investment provisions.

Foreign investors have the right to benefit from the investment protection guarantees, such as prohibition of expropriation, laid down in IIAs. Even though the contracting parties to the IIAs are states, these agreements confer certain rights to foreign investors. Foreign investors have the ability to enforce these rights through an investor-state dispute settlement system (ISDS). This option is provided for in most of IIAs.<sup>19</sup> The rights of foreign investors are primarily formulated in the substantive investment protection clauses contained in IIAs.<sup>20</sup> To exemplify, states are obliged to afford fair and equitable treatment (FET) to investors.<sup>21</sup>

Corporations for Transgressions in Host States through International Investment Law' (2018) 2(14) Utrecht Law Review; <<https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.441/>>.

<sup>16</sup> Water concessions are typically awarded to 'private concessionaire to supply water and/ or wastewater services to customers in a city or defined service area. Whilst these could involve greenfield new build systems, they have typically been concessions for existing systems, with obligations to upgrade and improve facilities and expand access.' See: World Bank Group, PPP LRC, <<https://ppp.worldbank.org/public-private-partnership/sector/water-sanitation/concessions-and-bots>>.

<sup>17</sup> E. Truswell, 'Thirst for Profit: Water privatisation, investment law and a human right to water' in K. Miles and C. Brown (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 570.

<sup>18</sup> UNCTAD, 'World Investment Report 2018' (2018) p. xii. The report provides that currently, there are 3,322 concluded IIAs.

<sup>19</sup> A. Roberts, 'Triangular Treaties: The Extend and Limits of Investment Treaty Rights' (2015) 2(56) *Harvard Law Review*; S. Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 2(50) *Harvard International Law Journal* 442. Note that the host state cannot initiate arbitration proceedings against an investor.

<sup>20</sup> A. Diehl, *The Core Standard of International Investment Protection* (Kluwer, 2012) 307.

<sup>21</sup> Art. 2(2) of the Albania-Bosnia and Herzegovina BIT (2008) which states that 'Investments of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.'

The FET standard implies that a foreign investor investing in a host state should be treated fairly and equitably.<sup>22</sup> The importance of this notion is supported by the inclusion of FET standard in virtually all current IIAs, as well as its invocation in the vast majority of investment disputes.<sup>23</sup> Also, states have to provide investors with full protection and security,<sup>24</sup> and to treat them in a way that is non-discriminatory, etc. By contrast, the obligations of investors towards host states, e.g. the environmental obligations, are rarely expressed in the text of these IIAs.<sup>25</sup>

This asymmetry in IIAs, expressed in the imbalance between rights and obligations of states and investors, has led to criticisms by states, international organisations and scholars, who argue that IIAs may impose limitations on a host state's right to regulate and create a lack of accountability by foreign investors operating in host states.<sup>26</sup> The critique is primarily based on several investment cases, that are further discussed in this article, in which investors have successfully challenged the state's regulations or policies in the areas of water management and sanitation.<sup>27</sup>

## 2.2. The right of states to regulate: the access to water

The state has the right to regulate in the public interest, e.g. ensuring the access to water resources, while complying with its obligations under IIAs. The state's right to regulate has its legal basis in the international legal principle of state sovereignty. Within international law, sovereignty has internal and external dimensions.<sup>28</sup> The right to regulate is an expression of internal sovereignty. This right includes the state's right to 'prescribe the laws that set the boundaries of the public order of the state' on its territory.<sup>29</sup> The right also protects the public interest of the state's citizens that includes, for example, the protection of the right of access to water. The state has to ensure that water, essential for human life, is available to people in its territory, and specifically to certain vulnerable groups.<sup>30</sup> There are a number of international treaties that obliges the state to secure access to water for all.<sup>31</sup> The obligations of states in relation to access to water have been elaborated by the United Nations (UN) Committee on Economic, Social and Cultural Rights which has adopted General Comment No. 15, 2002 (hereby 'General Comment').<sup>32</sup> The key message of the General Comment is that 'the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'<sup>33</sup> Furthermore, in the more recent UN Resolution adopted by the General Assembly in 2010, the human right to water and sanitation has been explicitly

<sup>22</sup> R. Klager, 'Revisiting Treatment Standards – Fair and Equitable Treatment in Light of Sustainable Development' in S. Hindelang, M. Krajewski (eds), *Shifting Paradigms in International Investment Law* (Oxford University Press, 2016) 65.

<sup>23</sup> S. Schill, 'Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law' in S. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) p. 151. Schill states that the FET standard features in 2,600 BITs and numerous regional and multilateral agreements; C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015) 70. With reference being made to numerous scholars, Henckels indicates that the FET standard appears in most investment treaties and is the most frequently employed and most successfully argued standard.

<sup>24</sup> Art. 4(1) of the Afghanistan-Germany BIT (2005) which states that 'Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.'

<sup>25</sup> In some IIAs, investors are required to act in accordance with the domestic law of the host state. This has, however, been formulated as a pre-condition for investor protection, rather than an obligation towards the host state.

<sup>26</sup> A. Titi, *Right to Regulate in International Investment Law* (Nomos, 2014) 72; M. Chi, *Integrating Sustainable Development in International Investment Law* (Routledge, 2018) (e-book) 14–15.

<sup>27</sup> ICSID Case No. ARB/01/12, *Azurix Corp. v. The Argentine Republic*, Award (14 July 2006); ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Liability (30 July 2010); ICSID Case No. ARB/07/17, *Impreglio S.p.A v. Argentina*, Award (21 June 2011).

<sup>28</sup> I. Brownlie, *Principles of Public International Law* (4<sup>th</sup> edn, Oxford University Press, 1990; 5<sup>th</sup> edn, Oxford University Press 1998; 7<sup>th</sup> edn, Oxford University Press, 2008); J. Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn, Oxford University Press, 2012); R. Brand, 'External Sovereignty and International Law' (1995) 18 *Fordham Journal of International Law* 1685.

<sup>29</sup> C. Staker, 'The Scope of Sovereignty' in M. De Evans (ed) *International Law* (Oxford University Press, 2014) 316.

<sup>30</sup> E. Truswell, 'Thirst for Profit: Water privatisation, investment law and a human right to water' in K. Miles and C. Brown (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) p. 572. As author explains, the international instruments made explicit that the right to water should be secured for such groups as prisoners of war, children and women.

<sup>31</sup> E.g. International Covenant on Economic, Social and Cultural Rights, (ICESCR), G.A. Res. 2200A (XXI), Articles 11 and 12, (entry into force 1976) <<https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>>; UN Convention on the Elimination of Discrimination against Women (CEDAW), Article 14, entry into force 3 September 1981 <<https://www.ohchr.org/documents/professionalinterest/cedaw.pdf>>; United Nations Convention on the Rights of the Child, Article 24, entry into force 2 September 1990. <<https://www.unicef.nl/files/English%20child%20friendly%20convention.pdf>>.

<sup>32</sup> General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11), see <<http://www.refworld.org/pdfid/4538838d11.pdf>>.

<sup>33</sup> *ibid* [2].

recognised.<sup>34</sup> This Resolution provides that ‘the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.’<sup>35</sup>

In the context of investment law, the steady growth in investment treaties and arbitration cases has resulted in limitations being placed on state sovereignty.<sup>36</sup> Consequently, a number of sovereignty issues have surfaced. Disputes regarding the privatisation of water have instigated a discussion on the extent to which investment agreements are able to limit a state’s internal sovereignty to regulate an effective access to water and sanitation services. In this paper, four Argentinian cases concerning water privatisation investment disputes are discussed,<sup>37</sup> namely *AWG v. Argentina*, *Impregilo v. Argentina*, *Azurix v. Argentina*, and *Urbaser and CABB v. Argentina*. In all four cases, the human rights argument relating to the access to water has been raised either by Argentina, as a respondent state, or in the submission of *amici curiae*. These cases and the tribunals’ analysis of the right to water is evaluated in the following section.

### 3. Argentinian cases: The right of access to water

In all four of the aforementioned cases: *AWG v. Argentina*, *Impregilo v. Argentina* and *Azurix v. Argentina*, *Urbaser and CABB v. Argentina*, the conflicts arose out of concession rights to operate water systems granted by Argentina to foreign investors. In these cases, foreign investors challenged Argentina’s measures including the renegotiation of tariffs for water. Due to the Argentinian economic and financial crisis in 2000,<sup>38</sup> Argentina introduced a number of emergency measures,<sup>39</sup> severely impacting the profitability of foreign companies operating water management systems. The investors sought to renegotiate the terms of the concession and to receive adjustments on the tariffs from the government. The investors attempted to raise the tariffs for water distribution and wastewater services, which was subsequently refused by Argentina because of its public policy goal to ensure affordable water to its citizens. The specifics of each case are discussed below.<sup>40</sup>

#### 3.1. *AWG v. Argentina*

In *AWG v. Argentina*,<sup>41</sup> following the privatisation of water and wastewater services in 1991,<sup>42</sup> Argentina awarded a 30-year concession to operate water and waste services in the city of Buenos Aires and surrounding municipalities. By means of a bidding process, the concession was granted to a consortium of companies including certain foreign investors.<sup>43</sup> In 2002, as a reaction to the severe crisis, an emergency law was enact-

<sup>34</sup> UN, Resolution adopted by the General Assembly on 28 July 2010, 64<sup>th</sup> session, agenda item 48, A/RES/64/292, 3 August 2010, <<http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E>>.

<sup>35</sup> UN, Resolution adopted by the General Assembly on 28 July 2010, [2].

<sup>36</sup> J. Karl, ‘International Investment Arbitration: A Threat to State Sovereignty’ in W. Shan and others (eds) *Redefining Sovereignty in International Economic Law* (Hart Publishing, 2008) 230.

<sup>37</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award (14 July 2006); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 Decision on Liability (30 July 2010); *Impreglio S.p.A v. Argentina*, ICSID Case No. ARB/07/17 Award (21 June 2011); *Urbaser and CABB v. Argentina*, ICSID Case No. ARB/07/26 Award (8 December 2016).

<sup>38</sup> V. Beker, *Argentina’s Debt Crisis* in ed. B. Moro and V. Beker, *Modern Financial Crises* (Springer, 2016) pp. 31-42; J. Alvarez, G. Topalian, ‘The Paradoxical Argentina Cases’ (2012) 6 *World Arbitration and Mediation Review* 491-544.

<sup>39</sup> For example, one of such emergency measures was ‘pesification of the utility tariffs.’ Pesification refers to the conversion of dollars into pesos. This measure entailed ‘the elimination of the fixed link to the US dollar—necessarily also entailed the de-dollarisation of the public utilities’ tariff regimes on the same terms, so that all tariff-related dollar denominated debt as well as future prices were converted into pesos at the previously fixed and official exchange rate of 1:1. Utilities were treated the same as all other holders of contractual rights, salary holders, etc. in Argentina.’ See: *Total v. Argentina*, ICSID Case No. ARB/04/01 Decision on Liability (27 December 2010) [123].

<sup>40</sup> The analysis of the first three cases is based on the analysis undertaken in Y. Levashova, *The Right of States to Regulate in International Investment Law: The search for balance between public interest and fair and equitable treatment*, Kluwer Arbitration, 2019.

<sup>41</sup> Note that *AWG v. Argentina* is one of three cases where the tribunal issued one consolidated decision on liability for three separate, but procedurally consolidated cases in 2010. These three cases are *Suez, Sociedad General de Aguas de Barcelona S.A., Vivendi Universal v. Argentina* ICSID Case No. ARB/03/19 Decision on Liability (30 July 2010); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17 Decision on Liability (30 July 2010); *AWG Group v. Argentina* UNCITRAL Arbitration, Decision on Liability (30 July 2010). These three cases will hereafter be referred to as *AWG v. Argentina* and the ‘AWG tribunal.’

<sup>42</sup> For more information on privatization of water in Argentina, see: International Environmental Law Research Centre, Working Paper 2007, A. Oletta, *The World’s Bank Influence on Water Privatization in Argentina, 2007*, <<http://www.ielrc.org/content/w0702.pdf>>.

<sup>43</sup> Suez, AGBAR, Vivendi and AWG, together with the Argentinian companies Banco de Galicia y Buenos Aires S.A., Sociedad Comercial del Plata S.A., and Meller S.A., formed a consortium in 1992 to participate in the bidding for the concession, see *Suez, Sociedad*

ed.<sup>44</sup> This law abolished the currency board that had linked the Argentinian peso to the US dollar. The crisis and the measures taken resulted in a substantial depreciation of the Argentinian currency. The investors attempted to renegotiate the terms of the concession and to modify the tariffs granted by the government. The investors wanted to increase the tariffs for water which was refused by Argentina. Unable to reach an agreement with the Argentinian authorities, the investors submitted the dispute to an arbitral tribunal in 2003. They claimed that the state's measures relating to the financial crisis had destroyed the value of their investment. In addition, the investors argued that the forceful renegotiations of the concession and the unwillingness of Argentina to raise the tariffs for water services undermined the fair and equitable treatment of the investors in Argentina.<sup>45</sup>

In the *AWG* case, the human rights objectives of Argentina's measures had been raised in an *amici curiae* brief submitted by five NGOs.<sup>46</sup> In the *amici curiae* submission, it was argued that the contested state measures, namely its unwillingness to increase the tariffs, were motivated by the state's objective of ensuring that the local population has access to water.<sup>47</sup> The *amici curiae* underlined that 'human rights law recognises 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.'<sup>48</sup> It further emphasised that, in interpreting BITs, the tribunal should take into account the rationale for the crisis measures based on human rights law.<sup>49</sup>

The *AWG* tribunal admitted the legitimate nature of the state's objectives. It underlined the severity of the crisis experienced by Argentina.<sup>50</sup> The *AWG* tribunal also agreed that the provision of water and sewage services was 'vital to the health and well-being of nearly ten million people' and was thereby an 'essential interest of the Argentine State.'<sup>51</sup> At the same time, the *AWG* tribunal was not convinced that the only way to secure this vital interest (that is, the provision of water to the population) was by refusing to adjust the tariffs and by engaging in 'forceful' treatment of the company in the state's attempt to renegotiate the concession contract.<sup>52</sup> With regard to the human rights argument raised in the *amici curiae* brief, the tribunal made a few important observations. The tribunal disagreed with the *amici* that there was a conflict between the human rights obligations and the investment obligations. It stressed that Argentina is subject to its international human rights obligations, as well as to its obligations stemming from this international investment treaty and 'must respect both of them equally (...).'<sup>53</sup> In this line of reasoning, the tribunal pointed out that Argentina's human rights obligations and its investment treaty obligations were 'not inconsistent, contradictory, or mutually exclusive (...) [t]hus (...) Argentina could have respected both types of obligations.'<sup>54</sup> It can therefore be observed that in the *AWG* case, the tribunal recognised the legitimacy of the state's objectives motivated by the protection of the right to have access to water.<sup>55</sup> The tribunal, however, declined to establish a hierarchy between the state's obligation towards the investors under IIAs and the state's human rights obligation to provide access to water for its population.<sup>56</sup> It implied, however, that Argentina should have looked at other solutions that could have fulfilled both the human rights obligations and the obligations under investment treaties. In the view of the *AWG* tribunal, alternative measures could have been adopted without harming investors and their investments. The tribunal explained that if the Argentinian authorities were concerned about protecting the disadvantaged population from increasing water prices, 'it might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor, a solution

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*General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 Decision on Liability (30 July 2010) [23].

<sup>44</sup> The Public Emergency and Exchange Regime Reform Act N° 25.561 was enacted on 6 January 2002 (Executive Order No. 50/2002).

<sup>45</sup> *AWG v. Argentina* [2010] UNCITRAL Arbitration, Decision on Liability (30 July 2010) [44–57].

<sup>46</sup> In 2007, five NGOs submitted the *amici curiae* brief. These were Asociación Civil por la Igualdad y la Justicia, Centro de Estudios Legales y Sociales, Center for International Environmental Law, Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores. See *AWG v. Argentina* [2010] UNCITRAL Arbitration, Decision on Liability (30 July 2010) [256].

<sup>47</sup> *AWG v. Argentina* [2010] UNCITRAL Arbitration, Decision on Liability (30 July 2010) [256].

<sup>48</sup> *ibid* [256].

<sup>49</sup> *ibid* [256].

<sup>50</sup> *ibid* [257].

<sup>51</sup> *ibid* [260].

<sup>52</sup> *ibid* [260].

<sup>53</sup> *ibid* [262].

<sup>54</sup> *ibid* [262].

<sup>55</sup> *ibid* [260].

<sup>56</sup> J. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012)180.

clearly permitted by the regulatory framework.<sup>57</sup> However, such argument is problematic. Tribunals do not have competence and expertise to assess the visibility of alternative measures. As tribunals in *Philip Morris v. Uruguay*, *Chemtura v. Canada*, *Apotex v. US* underlined – it is not the task of the tribunal to discuss whether the alternative measures should have been taken.<sup>58</sup> Because by doing so, a tribunal steps into a position of a state's regulator that is not his job and which exceeds his authority as an adjudicatory body. The risk of a necessity test in the words of Henckels is that it 'imposes greater restrictions on regulatory autonomy (...), because it narrows the pool of potential measures available to a state to achieve its objective.'<sup>59</sup>

### 3.2. *Impregilo v. Argentina*

In *Impregilo v. Argentina*, a consortium of international companies was awarded a concession for water and sewage services for 30 years in seven municipalities of the Buenos Aires region.<sup>60</sup> The consortium incorporated an Argentinian company, Aguas del Gran Buenos Aires (AGBA), which provided water services to consumers.<sup>61</sup> AGBA, in which the Italian company Impregilo (the investor) had a dominant interest, presented a five-year plan that was approved by the Argentinian authorities.<sup>62</sup> This five-year plan included substantial investment goals on a part of AGBA that would allow 74% of the people to be connected to the water network. AGBA also had a plan to construct two sewer treatment plants and to revive five existing treatment plants.<sup>63</sup>

From the start, AGBA encountered difficulties in obtaining payments from its customers, who among others were economically disadvantaged citizens.<sup>64</sup> The non-collection rate was 60% and this had significantly affected the financial position of AGBA. This development made it impossible for the company to reach its planned five-year economic goals. The financial crisis and the unwillingness of the Argentinian authorities to raise the tariffs and to interrupt the water services of those customers who had not paid – because of the state's public policy goal to ensure access to water for its citizens – had escalated the dispute between the governmental authorities and AGBA. Argentina argued that it objected to the tariffs being increased because of its obligation to guarantee that its citizens have a right to affordable water.<sup>65</sup> In 2006, AGBA was fined for various violations under the concession agreement and the concession was ultimately terminated by Argentina. The investor claimed that this termination was unlawful.<sup>66</sup> In 2007, the investor initiated arbitral proceedings for violations of the treaty provisions under the Argentina-Italy BIT.<sup>67</sup>

In *Impregilo v. Argentina*, the state argued that its regulatory actions were proportionate and were 'particularly important to guarantee its inhabitants the human right to water.'<sup>68</sup> The state contended that its investment obligations:

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.<sup>69</sup>

However, the tribunal did not respond to these arguments. The state, in this case, also argued that increasing the prices for water would particularly harm the economically disadvantaged people of the region.<sup>70</sup> The tribunal found this argument to be legitimate, by providing that '[i]n the face of the acute crisis, the Argentine Republic and the Province took a series of measures that were fully justified by the need to

<sup>57</sup> *AWG v. Argentina* [2010] UNCITRAL Arbitration, Decision on Liability (30 July 2010) [235].

<sup>58</sup> *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7 Award (8 July 2016) [419].

<sup>59</sup> C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015) 154.

<sup>60</sup> *Impregilo S.p.A v. Argentina*, ICSID Case No. ARB/07/17 Award (21 June 2011).

<sup>61</sup> *ibid* [14].

<sup>62</sup> *ibid* [20].

<sup>63</sup> *ibid* [215].

<sup>64</sup> *ibid* [21].

<sup>65</sup> *ibid* [261].

<sup>66</sup> *ibid* [67].

<sup>67</sup> *ibid* [5].

<sup>68</sup> *ibid* [228].

<sup>69</sup> *ibid* [230].

<sup>70</sup> *ibid* [328–329].

reduce as much as possible its effects on the country in general and on investments in particular.<sup>71</sup> Nevertheless, it concluded that in this circumstance, Argentina could have chosen other measures to achieve this goal that would not result in the 'disturbance of the equilibrium between the rights and obligations in the concession.'<sup>72</sup> The tribunal, similarly to *AWG* case, suggested the use of alternative measures, without explaining them, to protect the public interests and to ensure the financial returns to investors.

### 3.3. *Azurix v. Argentina*

In *Azurix v. Argentina*, a US-based water services company (the investor) obtained an exclusive 30-year concession to run the water and sewage systems in the province of Buenos Aires in 1999.<sup>73</sup> Winning the bid for the concession, the investor operated under the name Azurix Buenos Aires S.A. (ABA).<sup>74</sup> The dispute between the state authorities and the investor occurred primarily due to a disagreement concerning an increase in water tariffs for consumers. The argument of the state was based upon its public policy goal to ensure affordable water for its citizens. The conflict had escalated after an algae outbreak in Bahia Blanca that led to the alleged contamination of the water supply. This had – as a result – provoked public outrage.<sup>75</sup> The state authorities blamed the investor for the incident, thereby discouraging people from paying their water bills.<sup>76</sup> The investor, on the other hand, argued that the state was responsible for failing to complete the infrastructural works and repairs that, according to ABA, led to the incident.<sup>77</sup> The state authorities eventually terminated the concession contract in 2002 on the basis that ABA failed to provide satisfactory services. In its turn, an investor initiated arbitration proceedings against Argentina for a violation of the FET standard, non-discrimination, full protection and security under the US-Argentina BIT.

In *Azurix v. Argentina*, human rights arguments were invoked by Argentina in order to justify its measures. In particular, these human rights arguments were invoked in relation to Argentina's reluctance to increase the water tariffs. The tribunal in this case examined arguments concerning the refusal of the state to raise its tariffs. Unlike in *Impregilo v. Argentina*, however, the tribunal came to the conclusion that the government of Argentina, by refusing to negotiate an increase in prices, was motivated primarily by the 'forthcoming elections' and not by a concern for its people.<sup>78</sup> In its ruling the tribunal found that the government of Argentina had politicised the concession. The tribunal also declined to explore the argument raised by the state's experts that the 'consumers' public interest must prevail over the private interest of the service provider.<sup>79</sup> The tribunal noted that, firstly, 'this matter has not been fully argued' by the government of Argentina.<sup>80</sup> Secondly, it noted that 'the tribunal fails to understand the incompatibility in the specifics of the instant case.'<sup>81</sup>

### 3.4. *Interim conclusions*

In these three cases, Argentina made the argument that the emergency measures introduced by the state were in conformity with Argentina's obligations to ensure access to clean water for its population. In deciding whether the state's measures violated the obligations of investors under the IIAs, the arbitral tribunals considered arguments relating to the human right to water only to a limited extent, focusing primarily on the rights of investors and the impact on the investments. Tribunals in these cases have chosen not to examine the arguments related to the right of access to water. A view held by these and many other tribunals is that it is not their task to establish a hierarchy between human rights obligations and obligations towards foreign investors. Their task is to interpret the provisions of an applicable IIA, which is the legal

<sup>71</sup> *Impregilo S.p.A v. Argentina*, ICSID Case No. ARB/07/17 Award (21 June 2011) [229].

<sup>72</sup> *Impregilo S.p.A v. Argentina*, ICSID Case No. ARB/07/17 Award (21 June 2011) [330].

<sup>73</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award (14 July 2006) [41].

<sup>74</sup> Indirect subsidiaries of Azurix – Azurix AGOSBA S.R.L. (AAS) and Operadora de Buenos Aires S.R.L. (OBA) – had incorporated Azurix Buenos Aires S.A. that acted as a concessionaire.

<sup>75</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award (14 July 2006) para. 124, 'Algae bloom in the reservoir on April 10-11, 2000 resulted in the water appearing cloudy and hazy and with earth-musty taste and odor.'

<sup>76</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award (14 July 2006) [125].

<sup>77</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award (14 July 2006) [124].

<sup>78</sup> J. Bonniticha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, 2014) section 4.7.4, 195. He underlines that in this case the measures adopted by the state were considered by the tribunal to not be 'related to a rational policy.'

<sup>79</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award (14 July 2006) [254].

<sup>80</sup> This argument was raised in the expert opinion of Dr. Solomon. This opinion is not publicly available, which makes it problematic to judge whether this argument had been fully considered by the tribunal.

<sup>81</sup> *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award (14 July 2006) [254].

basis of a dispute. The aforementioned water cases are based on the old generation of IIAs. These treaties, in their majority, have no elaboration on the scope of the key investment protection clauses, also these IIAs contain no provisions dealing with protection of human rights or CSR obligations of investors. Therefore, the design and the content of IIAs that reflect the balance between investor's protection provisions and provisions strengthening the state's right to regulate in a public interest is of utmost importance. This point is discussed further in Section 1.4.

### 3.5. *Urbaser and CABB v. Argentina*

The *Urbaser v. Argentina* case concerned a water and sewage concession awarded to a foreign investor as a part of Argentina's privatisation program.<sup>82,83</sup> A Spanish company, Urbaser (the investor), was one of the main shareholders of a concession Aguas Del Gran Buenos Aires SA (AGBA) that provided water services in Buenos Aires. As a result of the severe economic crisis experienced by Argentina between 1998 and 2002, Argentina introduced emergency measures that impacted the financial position of the investment. The problems persisted as the investor and the state's authorities could not agree on a renewed assessment of the tariffs and a review of the concession.<sup>84</sup> After several unsuccessful attempts to renegotiate the concession, the authorities of Buenos Aires terminated it in 2006. Urbaser and other claimants initiated arbitration proceedings under the Spain-Argentina BIT. The investor argued that Argentina had violated the FET standard under Article IV of the Spain-Argentina BIT by terminating the concession and denying the investors any 'possibility to restore the economic-financial equilibrium of the Concession.'<sup>85</sup>

In assessing the FET standard, the tribunal noted that in privatising water resources, the important objective of the government was 'to ensure the population's health and access to water' according to its Constitution.<sup>86</sup> The tribunal noted that a host state is 'bound by obligations under international and constitutional laws,' i.e. the right to water.<sup>87</sup> The tribunal emphasised:

When measures had been taken that have as their purpose and effect to implement such fundamental rights protected under the Constitution, they cannot hurt the fair and equitable treatment standard because their occurrence must have been deemed to be accepted by the investor when entering into the investment and the Concession Contract. In short, they were expected to be part of the investment's legal framework.<sup>88</sup>

In assessing the state's objective to provide water to its population, the tribunal underlined that the state's conduct should be compatible with the FET standard.<sup>89</sup> At the same time, the investor cannot invoke 'the protection of its own interests as a prevailing objective, because these interests were part of a legal environment also covering core interests of the host State, as protected by sources of law prevailing over the Contract based on international or on constitutional law.'<sup>90</sup> Therefore, the state's objective to provide water to its citizens constitutes a part of Argentina's regulatory framework in which the investor had made its investment.<sup>91</sup> The tribunal concluded that the termination of the concession was in the legitimate public interest. However, the tribunal found that the investor had violated the FET standard because of the non-transparent conduct of the state in the negotiation process concerning the concession.<sup>92</sup>

The important part of the *Urbaser* decision concerns the state's counterclaim. Under IIA, a host state may not initiate arbitration proceedings against an investor. However, a respondent state can file a counterclaim against an investor. The counterclaims filed by a state should have a connection to the primary claim filed by

<sup>82</sup> The analysis of this case is based on the article by the author 'Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 2(14) Utrecht Law Review.

<sup>83</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016).

<sup>84</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Award (8 December 2016) para. 34.

<sup>85</sup> *ibid* [562].

<sup>86</sup> *ibid* [622].

<sup>87</sup> *ibid* [621].

<sup>88</sup> *ibid* [622].

<sup>89</sup> *ibid* [622].

<sup>90</sup> *ibid* [622].

<sup>91</sup> *ibid* [624].

<sup>92</sup> *ibid* [845].

an investor against a state.<sup>93</sup> The content of the counterclaims filed by the respondent states usually contain the ‘allegedly faulty performance or some other wrongdoing on the part of the claimant.’<sup>94</sup> In this regard, the possibility of bringing a counterclaim against an investor offers a state an opportunity to remedy the asymmetrical nature of investment treaties and to bring the direct claims against investors for violations, including human rights abuses.

Argentina filed a counterclaim against the investor for an alleged failure to provide the necessary financing to the concession. This failure – according to the state – resulted in the violations of the human right to water. The *Urbaser* tribunal assumed jurisdiction over Argentina’s human rights counterclaim, by rejecting the investor’s argument that the examination of its human rights obligations was outside the tribunal’s jurisdiction.<sup>95</sup> By assessing the state’s arguments regarding the alleged human rights violations by an investor, the tribunal took a significant step in recognising the responsibility of an investor for possible human rights violations concerning the disputed investment. In deciding on the merits of the counterclaim, the tribunal made several observations regarding the nature of the investor’s obligations. Firstly, the tribunal rejected the claimant’s argument that the ‘human right to water is a duty that may be borne solely by the State, and never borne also by private companies like the Claimants.’<sup>96</sup> The tribunal explained that firstly, international law considers Corporate Social Responsibility (CSR) to be of crucial importance for companies operating in the field of international commerce. Secondly, CSR involves ‘commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation.’<sup>97</sup> Thirdly, the tribunal observed that it is not the case anymore that ‘companies operating internationally are immune from becoming subjects of international law.’<sup>98</sup> In making these observations, the tribunal nevertheless acknowledged the shortcomings of CSR, underlining that:

[e]ven though several initiatives undertaken at the international scene are seriously targeting corporations’ human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation’s specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.<sup>99</sup>

The tribunal proceeded with an examination of whether the companies have obligations relating to the human right of access to water. The tribunal found that the right of access to water is a human right under international law and that private parties have an obligation to comply with this right. To this end, the tribunal referred to a number of international instruments, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Social Economic and Cultural Rights (ICESCR), the UN Guiding principles on Business and Human Rights, and the International Labor Office’s Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy. The tribunal applied Article 30 of the UDHR and Article 5(1) of the ICESCR to establish that companies can have human rights obligations under these instruments. Article 5(1) of the ICESCR provides that ‘nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.’<sup>100</sup> In interpreting this provision, however, the tribunal determined that there were no clear indications that the investor was involved in the destruction that prevented people from having access to water. Only if such a negative obligation, could have been established, the investor, according to the tribunal, could in principle be held accountable under international human rights law treaties.<sup>101</sup> In terms of the positive obligation, i.e. to provide water to people, the tribunal found that

<sup>93</sup> C. Schreuer et al, *The ICSID Convention: A Commentary* (CUP, 2009 second ed.) 750.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016) para. 1155.

<sup>96</sup> *ibid* [1193].

<sup>97</sup> *ibid* [1195].

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> 1966 International Covenant on Economic, Social and Cultural Rights, 993 *United Nations Treaty Series*, Art. 5(1), <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>>.

<sup>101</sup> See *Urbaser v. Argentina*, [1210].

such an obligation could not be imposed on a private party under international human rights law.<sup>102</sup> The latter obligation could be imposed on the investor only if provided for in domestic contractual obligations or the text of an applicable BIT. Thus, the tribunal concluded that the positive obligation to enforce the human right to water could be imposed only upon states and not the companies. Consequently, the tribunal did not grant the counterclaim.

The *Urbaser v. Argentina* counterclaim decision has important implications for companies. Through this decision, the *Urbaser* tribunal demonstrated that counterclaims filed by host states against investors based on human rights violations may fall within the jurisdiction of investment tribunals. It clearly emphasised that companies cannot escape liability on the basis of the argument that they are not subjects of international law. The assessment of the human rights arguments posed by the *Urbaser* tribunal is clearly different from *AWG v. Argentina*, *Imregilo v. Argentina* and *Azurix v. Argentina*. Whereas the latter tribunals primarily abstained from examining the human rights arguments relating to the right to water, the *Urbaser* tribunal considered these human rights arguments in detail. By examining the alleged violations of an investor under human rights treaties, the *Urbaser* tribunal not only stressed the investor's responsibilities but also emphasised that a state's right to regulate in providing adequate access to water may take precedence over the rights of investors under IIAs.

#### 4. The right of access to water in the broader discourse of companies' responsibilities

The *Urbaser* case is noteworthy on several accounts. Firstly, *Urbaser* illustrates the shift in the tribunals' reasoning concerning the role of the obligations of investors under human rights treaties. The *Urbaser* tribunal, in contrast to the earlier Argentinian water investment disputes as considered in 1.3, applied the human rights treaties – i.e. Article 5(1) of the ICESCR – in assessing the substantive obligations of a foreign investor. To this end, the tribunal concluded that companies have negative human rights obligations to abstain from activity directed at the destruction of the human right of access to water to third persons. However, such activity on the part of the company had not been established, and therefore the counterclaim of Argentina was not sustained. What is nevertheless interesting, is that the tribunal indicated the possible circumstances in which such negative human rights obligations can be imposed on a company. It stated that 'the situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties.'<sup>103</sup> So, for example, in circumstances when an investor is involved in actions that interrupt access to water (e.g. drilling or improper waste disposal), it would be possible to argue, in principle, for a violation of an international obligation under the human right to water in accordance with Article 5(1) of the ICESCR.

Secondly, the *Urbaser* decision has implications for the broader discourse concerning investor's obligations under international investment law. Currently, a number of states have taken steps to include the investors' obligations into the text of their IIAs. Empirical research undertaken by the UNCTAD demonstrates that the number of treaties incorporating CSR provisions is growing.<sup>104</sup>

In several recent IIAs, CSR provisions have emerged that address investors directly. To name a few, direct CSR obligations for investors have been incorporated into the 2016 Morocco-Nigeria BIT,<sup>105</sup> the 2016 Argentina-Qatar BIT,<sup>106</sup> the 2016 Pan-African Investment Code,<sup>107</sup> the 2016 Iran-Slovakia BIT,<sup>108</sup> and the 2012 South African Development Community (SADC) Model Bilateral Investment Treaty Template.<sup>109</sup>

<sup>102</sup> See *Urbaser v. Argentina*, [1210].

<sup>103</sup> See *Urbaser v. Argentina*, [1210].

<sup>104</sup> The UNCTAD IIAs Mapping Project states that out of 2,571 IIAs, 39 included CSR provisions into the operative part of the treaty. Most of these IIAs were concluded after 2000. See UNCTAD, 'IIA Mapping Project' (2018), <<https://investmentpolicyhub.unctad.org/IIA/mappedContent>>.

<sup>105</sup> Morocco-Nigeria BIT (signed 3 December 2016), <<http://investmentpolicyhub.unctad.org/IIA/treaty/3711>> (accessed 20 January 2019).

<sup>106</sup> Argentina-Qatar BIT (signed 6 November 2016), <<http://investmentpolicyhub.unctad.org/IIA/treaty/3706>> (accessed 20 January 2019).

<sup>107</sup> United Nations Economic Commission for Africa, 'Conference of African Ministers of Finance, Planning and Economic Development', UN Doc. E/ECA/CM/50/1 AU/STC/FMEPI/MIN/1(III) (2017).

<sup>108</sup> Iran-Slovakia BIT (signed 19 January 2016), <<https://investmentpolicyhub.unctad.org/Download/TreatyFile/3601>> (accessed 20 January 2019).

<sup>109</sup> South African Development Community (SADC) Model BIT Template of 2012 with Commentaries, <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875>> (accessed 20 January 2019).

The 2016 Morocco-Nigeria BIT is an example of the new generation of IIAs with a number of provisions focusing on the obligations of the investor.<sup>110</sup> This BIT includes a CSR provision addressed to the investor,<sup>111</sup> pre-establishment obligations requiring investors to conduct environmental and social impact assessments and to apply the precautionary principle,<sup>112</sup> post-establishment obligations requiring investors to comply with environmental and labour standards,<sup>113</sup> investor obligations to abstain from corruption practices,<sup>114</sup> and a provision on investor liability etc.<sup>115</sup>

The recent 2018 Dutch Model BIT has included in its text a provision entitled 'Behavior of the investor.'<sup>116</sup> It provides that 'a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.' Although, the language of this provision is permissive language, as opposed to obligatory, it does demonstrate the possibility of enforcing the CSR under IIAs. There are investment cases, where tribunals not only reduced compensation because of unethical behavior of an investor, but also declined jurisdiction due to a violation of social and environmental obligations by an investor. In *Cortec Mining v. Kenya*, the tribunal declined jurisdiction over an investor's claim for an unlawful revocation of the mining license under the Kenya-United Kingdom BIT. The tribunal sustained the position of Kenya that the investor had failed to comply with the environmental impact assessment requirements imposed for the mining projects under Kenyan law.<sup>117</sup> The illegality under the domestic environmental requirements had constituted the ground for denying jurisdiction of the company's claim. The tribunal also stressed that the investor's efforts to go around the requirements under Kenyan law demonstrated 'serious disrespect for the fundamental public policies of the host country in relation to the environment and resource development.'<sup>118</sup>

In other decisions, tribunals have clearly emphasised the investor's duty to conduct proper socio-economic and political due diligence in a host state before making an investment.

One example is *Isolux v. Spain*. In this case, the tribunal had to decide whether Spain had frustrated the investor's legitimate expectations based on the notion of regulatory stability for a renewable energy regime relied on by an investor at the time of investment. The tribunal found that in order for an investor to rely on legitimate expectations, he should have conducted a proper due diligence investigation into the regulatory framework before making an investment. An investor's legitimate expectations can only be considered to have been violated if the new regulatory changes were not foreseeable by 'a prudent investor'.<sup>119</sup> In this case, the tribunal established that the investor had made his investments in a photovoltaic (PV) plant in 2012, at the time when Spain had already introduced significant modifications to the regime that regulates renewable energy. The investor could have foreseen that additional state reforms were coming.<sup>120</sup> On this basis, the tribunal rejected the investor's claim that his legitimate expectations arising out of the stability of a regulatory framework should have been protected.<sup>121</sup>

The aforementioned examples illustrate the growing importance of investor's human rights and environmental obligations in the context of new IIAs and in a number of investment decisions. In this regard, the *Urbaser* case is not an isolated instance, but one of many developments in the field of international investment law, where the notion of CSR is transforming from voluntary commitments to legal obligations.

<sup>110</sup> For the extensive discussion on the CSR obligations of foreign investors, see: Y. Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 14(2) Utrecht Law Review <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3204456](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204456)>.

<sup>111</sup> Art. 24, Morocco-Nigeria BIT (2016).

<sup>112</sup> Art. 14, *ibid*.

<sup>113</sup> Art. 18, *ibid*.

<sup>114</sup> Art. 17, *ibid*.

<sup>115</sup> Art. 20, *ibid*.

<sup>116</sup> Article 23, Dutch Model BIT, 2018 <<https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden>> (accessed 20 January 2019).

<sup>117</sup> *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018).

<sup>118</sup> *ibid* [349].

<sup>119</sup> *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Award (17 July 2016) para. 781.

<sup>120</sup> *ibid* [787].

<sup>121</sup> *ibid* [796]. At the same time, the tribunal underlined that the investor could expect a reasonable return on his investment in view of the new regulatory framework. On the topic of due diligence see: Y. Levashova, 'The Fair and Equitable Treatment and Investor's Due Diligence under International Investment Law' (2020) 67(2) Netherlands International Law Review, (open access) <<https://link.springer.com/article/10.1007/s40802-020-00170-7>>.

## 5. Conclusion

The goal of this article was to assess how the human right of access to water was applied and interpreted in international investment law with the examples of four Argentinian investment water disputes. The article has also analysed the implications of investors' human rights obligations in the context of the growing discussion regarding investors' obligations under international investment law.

Four Argentinian water disputes were analysed in this article. In *Azurix v. Argentina*, *AWG v. Argentina* and *Impregio v. Argentina*, tribunals were reluctant to consider the arguments based on the right of access to water brought by Argentina. For example in *AWG v. Argentina*, the tribunal refused to establish a hierarchy between the state's obligation towards the investors under IIAs and the state's human rights obligation to provide access to water for its population.<sup>122</sup> Focusing on the adverse impact on the investor caused by the Argentinian emergency measures, the tribunal concluded that Argentina should have considered other solutions that could have fulfilled both the human rights obligations and the obligations under investment treaties.

However, in the more recent water case *Urbaser v. Argentina*, the tribunal took a different approach towards the human right to water, in comparison to the earlier awards.<sup>123</sup> In the *Urbaser* case, the tribunal in assessing the FET claim asserted that the state's constitutional obligation to guarantee the human right to water is not only an important state's objective, but also a part of the law applicable to the water concession. Furthermore, in examining the state's counterclaim, the tribunal emphasised that companies are not immune from international law obligations, including obligations relating to the human right of access to water.<sup>124</sup>

The human right to water, as well as other human rights, inevitably interact with investment obligations of states under IIAs. The investment disputes often occur because of the state's interference with a foreign investment. In most cases, such interference has been the result of the state's regulatory measures, e.g. a new legislation directed at the protection of consumer's rights during the crisis, which affected an investment in an adverse way. Therefore, in numerous ISDS cases investment tribunals are face with the task of weighing both: a state's right to regulate in the public interest and the economic interests of investors under IIAs.

In balancing the state's right to regulate and the state's obligations towards an investor, tribunals in many decisions have assessed whether a disputed state's measure has pursued a legitimate objective, e.g. providing access to water resources. In some cases, the relevant factors that determine the legitimacy of a state's objective include considerations of whether a state's measure was based on a public interest and whether it had been reasonably justified by the state. Therefore, an assessment of the human right to water in investment cases depends not only on the content of such right, but on the way this right has been implemented by a state vis-à-vis the impact on investors.<sup>125</sup> The concept of deference or margin of appreciation in regard to the choice of measures in achieving the public interest objective play an important role in tribunals' assessments of a human right in question. In affording deference to state's objectives, tribunals exercise restraint 'where there is uncertainty as to what the "right" conclusion to an issue should be, by attaching weight to the primary decision-maker's view and refraining from making or from acting on the adjudicator's assessment of the matter.'<sup>126</sup> In cases *AWG v. Argentina*, *Impregilo v. Argentina* and *Azurix v. Argentina*, tribunals afforded limited deference to the selected means to achieve state's objective.<sup>127</sup> For example, in *AWG v. Argentina* and *Impregilo v. Argentina*, tribunals provided that a state's goal to secure access to water was a legitimate objective of the state.<sup>128</sup> However, tribunals placed limited weight on a state's choice to select the conduct or measure in pursuing such objective.<sup>129</sup> In contrast, in the *Urbaser* decision the greater deference to state's actions to pursue a state's objective has been afforded to the state by the tribunal. *Urbaser* belongs

<sup>122</sup> J. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012) 180.

<sup>123</sup> E. Guntrip, *Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of Urbaser v. Argentina*, Brill Open Law, 2018, 4.

<sup>124</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016) [1195].

<sup>125</sup> *AES Summit v. Hungary*, ICSID Case No. ARB/07/22 Award (23 September 2010) para. 10.3.7.

<sup>126</sup> C. Henckels, *Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference in* (ed. A. Bjorklund) *Yearbook on International Investment Law & Policy 2012–2013*, (OUP, 2014) 311.

<sup>127</sup> *E.g. AWG v. Argentina* [2010] UNCITRAL Arbitration, Decision on Liability (30 July 2010) [236].

<sup>128</sup> *Ibid.*

<sup>129</sup> C. Henckels, *Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference in* (ed. A. Bjorklund) *Yearbook on International Investment Law & Policy 2012–2013*, (OUP, 2014) 127.

to the body of some recent jurisprudence, where the state's right to regulate has been acknowledged by tribunals.<sup>130</sup> Also, in a growing number of decisions, tribunals have stressed the significance of a state's measures adopted in the state's legitimate public interest, e.g. the protection of public health or to remedy the negative consequences of a financial and/or economic crisis. Tribunals indicated that such arguments clearly have to be taken into consideration when judging the fairness of a host state's conduct towards an investor.<sup>131</sup>

The *Urbaser* case is not an exception, but part of a transformation that is taking place in international investment law.<sup>132</sup> Until recently, IIAs have not imposed any obligations and responsibilities on investors.<sup>133</sup> However, in the last five years, a reference to investor obligations and responsibilities has appeared in the arbitral awards and several recent agreements, primarily through the incorporation of provisions concerning CSR.

Recent treaties, e.g. the Morocco-Nigeria BIT, establish binding obligations on investors, imposing the requirement of undertaking an environmental and social impact assessment before making an investment according to the national law and international standards.<sup>134</sup> In some investment decisions, the unlawful conduct of an investor and a lack of proper due diligence has been the ground for denying protection under the treaty.

To further strengthen the aforementioned positive developments, states should continue to include specific obligations directly directed towards an investor. The same recommendation can be applied to the right of access to water. As recommended by the UN Committee on Economic, Social and Cultural Rights and emphasised in the *Urbaser* decision 'States parties should ensure that the right to water is given due attention in international agreements.' (...) This includes the possibility to consider matters related to the human right to water in the dispute resolution mechanisms provided for in such agreements.'<sup>135</sup>

## Competing Interests

The author has no competing interests to declare.

<sup>130</sup> Numerous tribunals have reaffirmed that states have the right to change and modify their laws as an integral part of their right to regulate. See: Y. Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance between Public Interest and Fair and Equitable Treatment* (Kluwer International, 2019) 34–37.

<sup>131</sup> *Ibid.*

<sup>132</sup> For example, tribunals in assessing a FET standard tend to take a state's right to regulate into account by recognizing the legitimacy of state's objectives and by balancing the factors related to state's public interests and the factors pertinent to fairness of a state's conduct. See: Y. Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance between Public Interest and Fair and Equitable Treatment*, Kluwer, International Arbitration Law Library, 2019.

<sup>133</sup> G. Bottini, 'Extending Responsibilities in International Investment Law' in *The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development* (2015) 1.

<sup>134</sup> See: Y. Levashova, *Imposing Conditions on Investor Protection: A role of investor's due diligence*, Kluwer Blog, June 2019 <<http://arbitrationblog.kluwerarbitration.com/2019/06/20/imposing-conditions-on-investor-protection-a-role-of-investors-due-diligence/>>.

<sup>135</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), para. 35 and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016) [1209].

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