

PRIVATIZING THE PROVISION OF WATER: THE HUMAN RIGHT TO WATER IN INVESTMENT-TREATY ARBITRATION

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Despite its critical importance, the fulfillment of the human right to water is far from the reality for many today. One in three people do not have access to safe drinking water and more than half of the world’s population does not have access to safe sanitation. Achieving the international community’s commitment of universal access to safe water and sanitation by 2030 would cost states approximately \$150 billion per year. Meeting those funding needs inevitably entails private, and often foreign, investment. When investments do not go as planned, foreign investors may turn to international arbitration for relief. While intended to protect investments, this legal regime has allowed investors to challenge regulatory measures that further human rights and to wield undue power over states. This Note analyzes investment-treaty disputes involving drinking water to understand how states have invoked, and tribunals have considered, the human right to water. The cases show an important evolution on the part of tribunals. Nevertheless, almost all of the tribunals fall short of integrating the human right to water in their analysis of substantive treaty claims. Interestingly, the cases also reveal that, despite invoking human rights defenses, states engage in actions that are difficult to justify as furthering the right to water. In turn, this Note argues that the “fair and equitable treatment” standard can and should include relevant human rights law as part of “investors’ legitimate expectations.” Such an integration creates opportunities for accountability on both sides of the ledger: Investors are expected to engage in human rights legal due diligence, and states are taken to task when they invoke human rights in perfunctory fashion. The fair and equitable treatment standard presents an opportunity to expand fairness and equity in international arbitration not only for the disputing parties, but also for the people who stand to lose from their actions.

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INTRODUCTION

Water is essential for all life forms on earth.¹ While humans can survive approximately one month without food, they would perish within a matter of days without water.² Access to adequate water and sanitation has intersectional and carry-over effects that may not be apparent at first blush, including greater personal safety, increased school attendance, reduced medical costs, improved economic productivity, reduced rates of infectious diseases, and greater food security.³ Given the critical importance of access to adequate water and sanitation, all member states of the United Nations have adopted the goal of ensuring the “availability and sustainable management of water and sanitation for all” by 2030 as one of their seventeen interlinked global goals, known as the Sustainable Development Goals (SDGs).⁴ Nevertheless, one in three people do not have access to safe drinking water.⁵

¹ Molly Sargen & Daniel Utter, *Biological Roles of Water: Why is Water Necessary for Life?*, HARV. UNIV. GRADUATE SCH. OF ARTS & SCIS. BLOG (Sept. 26, 2019), <https://sitn.hms.harvard.edu/uncategorized/2019/biological-roles-of-water-why-is-water-necessary-for-life> [<https://perma.cc/F4J4-VLVJ>].

² *Id.*

³ *Fact Sheet: Drinking Water*, WHO (June 14, 2019), <https://www.who.int/news-room/fact-sheets/detail/drinking-water> [<https://perma.cc/DEV4-YC8K>]; *Water and Food Security*, U.N., (Oct. 23, 2014) https://www.un.org/waterforlifedecade/food_security.shtml [<https://perma.cc/7LDD-MTH7>]; *Global WASH Fast Facts*, CTNS. FOR DISEASE CONTROL & PREVENTION, (Dec. 8, 2021) https://www.cdc.gov/healthywater/global/wash_statistics.html [<https://perma.cc/VPT4-NCSW>].

⁴ *The 17 Goals: History*, U.N. DEP'T OF ECON. & SOC. AFFS., <https://sdgs.un.org/goals> [<https://perma.cc/5S2Y-BZQU>]. The Sustainable Development Goals are “a shared blueprint for peace and prosperity for people and the planet” to be achieved by 2030. *Id.*

⁵ Léo Heller, *10th Anniversary of the Recognition of Water and Sanitation as a Human Right by the General Assembly*, U.N. OFF. HIGH COMM'R FOR HUM. RTS. (July 28, 2020),

Approximately 4.2 billion people, more than half of the world's population, lack access to safe sanitation.⁶ The drinking-water sources of at least 2 billion people are contaminated with feces,⁷ and an estimated 485,000 people die every year as a result of contamination.⁸ These “numbers show that . . . the international community is far from being on track to uphold its commitment to achieve universal and equitable access to safe and affordable drinking water for all by 2030.”⁹ Unfortunately, the increasing threat of climate change makes achieving that SDG all the more challenging.¹⁰

Without access to water, many of the rights contained in human rights instruments would be devoid of any practical effect. Human rights progress, however, often comes at a steep cost that many states cannot meet with national budgets alone. It is estimated that any given state must spend, on average, US\$150 billion per year to achieve the SDG of access to safely managed water and sanitation services by 2030.¹¹ It is therefore unsurprising that private (and often foreign) investment has become a critical factor in achieving human rights progress and the SDGs.¹² While attractive, foreign investment comes with

[https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26116&LangID \[https://perma.cc/G2QY-8BWM\]](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26116&LangID [https://perma.cc/G2QY-8BWM]).

⁶ *Id.*

⁷ *Fact Sheet: Drinking Water*, *supra* note 3.

⁸ *Id.*

⁹ Heller, *supra* note 5.

¹⁰ *Water and Climate Change*, U.N. WATER, [https://www.unwater.org/water-facts/climate-change \[https://perma.cc/SDY8-8JQM\]](https://www.unwater.org/water-facts/climate-change [https://perma.cc/SDY8-8JQM]) (“Climate change is projected to increase the number of water-stressed regions and exacerbate shortages in already water-stressed regions.”).

¹¹ Press Release, World Bank, Millions Around the World Held Back by Poor Sanitation and Lack of Access to Clean Water (Aug. 28, 2017), [https://www.worldbank.org/en/news/press-release/2017/08/28/millions-around-the-world-held-back-by-poor-sanitation-and-lack-of-access-to-clean-water \[https://perma.cc/PAT7-PN87\]](https://www.worldbank.org/en/news/press-release/2017/08/28/millions-around-the-world-held-back-by-poor-sanitation-and-lack-of-access-to-clean-water [https://perma.cc/PAT7-PN87]).

¹² See U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2014, ch. 4 (2014), [https://worldinvestmentreport.unctad.org/wir2014/wir2014-ch4-promoting-private-sector-contributions \[https://perma.cc/BE5X-F74Y\]](https://worldinvestmentreport.unctad.org/wir2014/wir2014-ch4-promoting-private-sector-contributions [https://perma.cc/BE5X-F74Y]) (“Reaching the SDGs will require a step-change in both public and private investment. Public sector funding capabilities alone may be insufficient to meet demands across all SDG-related sectors.”); U.N. DEP’T OF ECON. & SOC. AFFS., COVID-19 AND BEYOND: SCALING UP PRIVATE INVESTMENT FOR SUSTAINABLE DEVELOPMENT 1 (2021), [https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/PB_97.pdf \[https://perma.cc/JUK7-KV9T\]](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/PB_97.pdf [https://perma.cc/JUK7-KV9T]) (“[I]t is essential to unlock opportunities for the private sector to invest in sustainable development and to better align investments and business operations with the SDGs.”); *The Road to SDG Financing: A New Destination for Private Investment*, INTER-AM. DEV. BANK (Oct. 2, 2019), [https://www.iadb.org/en/news/road-sdg-financing-new-destination-private-investment \[https://perma.cc/LW3B-LU8G\]](https://www.iadb.org/en/news/road-sdg-financing-new-destination-private-investment [https://perma.cc/LW3B-LU8G]) (“Implementing the Sustainable Development Goals (SDGs) anywhere in the world will require private investment. Cognizant of this, the SDGs dedicated Goal #17 to an explicit call for partnership and private sector engagement in sustainable development.”).

strings attached. This Note focuses on one of those strings: the investor-state dispute settlement system.

In an era of unprecedented globalization and the growth of multinational corporations, an international investment law regime has emerged, containing a complex web of international investment agreements (“IIAs”) that protect investors and their interests. Such protection may incentivize the investment needed to further human rights. IIAs, however, can also be used by investors as legal mechanisms that elevate their property rights and wield undue power over states’ regulatory decisions.¹³ Investors have not hesitated to use international arbitration to directly challenge regulatory measures that further human rights¹⁴ or to pressure governments into ceasing actions that affect investments.¹⁵ Further, international arbitration can have broader chilling effects that are difficult to measure.¹⁶ Policymakers may take into account the general risk of international arbitration even before they begin to draft a policy, thereby prioritizing dispute avoidance over the development of legitimate public policy and human-rights-centered regulation.¹⁷ While binding precedent does not

¹³ See LISE JOHNSON, LISA SACHS, BROOKE GÜVEN & JESSE COLEMAN, COLUM. CTR. ON SUSTAINABLE INV., *COST AND BENEFITS OF INVESTMENT TREATIES: PRACTICAL CONSIDERATIONS FOR STATES* 6–10 (2018), https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr_0.pdf [<https://perma.cc/9YXX-FR3P>] (discussing the common rationale (i.e., purpose) for having IIAs, including to increase inward and outward investment and depoliticize disputes); *id.* at 11–14 (discussing the costs of IIAs, including reduced policy space, distorted power dynamics between investors and states, and the reduced role for domestic law-making as a result of tribunal interpretations of IIAs).

¹⁴ See Luke Eric Peterson, *French Company, Veolia, Launches Claim Against Egypt Over Terminated Waste Contract and Labor Wage Stabilization Promises*, INV. ARB. REP. (June 27, 2012), https://www.bilaterals.org/spip.php?page=print-art&id_article=36085 [<https://perma.cc/GUN4-U4KA>] (challenging minimum wage increases); *Vattenfall AB v. Fed. Republic of Ger.*, ICSID Case No. ARB/09/6, Award, at 4–6 (Mar. 11, 2011) (challenging water quality measures); *Vattenfall AB v. Fed. Republic of Ger.*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, at 5 (Aug. 31, 2018) (challenging the phasing out of nuclear energy); *Clayton v. Gov’t of Can.*, Award on Jurisdiction and Liability, Case No. 2009-04, para. 5 (Perm. Ct. Arb. 2015) (challenging environmental impact assessment processes); *Philip Morris Brands Sàrl v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, Award, at 2 (July 8, 2016) (challenging measures to reduce tobacco usage).

¹⁵ In 2002, a group of mainly foreign-owned mining companies used the threat of arbitration in response to Indonesia’s ban on the practice of open-pit mining in protected forests. Stuart G. Gross, *Inordinate Chill: Bits, Non-NAFTA MITs, and Host-State Regulatory Freedom—An Indonesian Case Study*, 24 MICH. J. INT’L L. 893, 894 (2003). Six months later, Indonesia expressed a “willingness to reconsider the ban altogether” and exempted those companies’ mining sites within the protected forest. *Id.*

¹⁶ See JOHNSON ET AL., *supra* note 13, at 14.

¹⁷ See Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 607

exist in this regime, investment-treaty tribunals have come to exercise a lawmaking function.¹⁸ As Benedict Kingsbury and Stephan Schill have persuasively argued, investment-treaty tribunals as an aggregate are exercising power by “influencing the development of a body of global administrative law[,] . . . customary international law[,] and approaches taken in other sub-fields such as trade law or human rights.”¹⁹ Further, “their approaches to balancing different investor and public interests . . . affect public policy and the future conduct of States and investors alike.”²⁰

With these stakes in mind, this Note explores how tribunals have considered the right to water in investment-treaty disputes and whether existing substantive treaty standards give tribunals space to consider relevant human rights law. The cases demonstrate an evolution on the part of tribunals in their engagement with human rights. Nevertheless, almost all fall short of integrating the human right to water in the evaluation of substantive treaty claims.²¹ In turn, this Note argues that tribunals already have at their disposal a substantive treaty standard that allows human rights law, and in particular the right to water, to be considered: the “fair and equitable treatment” (“FET”) standard. The focus of this Note, however, is not solely on investment-treaty tribunals but on the role of states as well. The cases reveal that states, despite invoking human rights defenses, engage in actions that are not only detrimental to investors but also difficult to justify as furthering the right to water. Such state-sponsored actions can have damaging consequences for the normative authority of human rights arguments in these forums and do little to advance systemic integration between the human-rights and investment-treaty

(Chester Brown & Kate Miles eds., 2011). The effects of the *Philip Morris v. Australia* case provide an instructive example. Philip Morris contested Australia’s tobacco plain packaging rules, which were intended to reduce smoking. See generally *Philip Morris Asia Ltd. v. Australia*, Case No. 2012-12, Award on Jurisdiction and Admissibility, Case No. 2012-12, ¶¶ 5–7 (Perm. Ct. Arb. 2015), <https://pcacases.com/web/sendAttach/1711> [<https://perma.cc/6ECX-R27Y>]. As the case bore out, it was reported that in neighboring New Zealand new regulations that were intended to protect citizens’ health were delayed until after the outcome of the Australian case. Jesse Coleman, Kaitlin Y. Cordes & Lise Johnson, *Human Rights Law and the Investment Treaty Regime*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 290, 295 n.33 (Surya Deva & David Birchall eds., 2020).

¹⁸ See D. Brian King & Rahim Moloo, *International Arbitrators as Lawmakers*, 46 N.Y.U. J. INT’L L. & POL. 875, 877, 882–85 (2014) (noting that arbitrators do perform a lawmaking function and give precedential effect to decisions by other tribunals).

¹⁹ Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in [14] 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 7 (Albert Jan van den Berg ed., 2009).

²⁰ *Id.*

²¹ See *infra* Part II.

regimes.²² If states take seriously their obligation to prevent third parties from violating the right to water, then they must examine what more can be done *ex ante* to protect that right. This Note argues that robust and genuine consideration of human rights law on the part of tribunals is only half the battle; states must also be willing to create and adhere to a legal regime that protects the right to water.

This Note proceeds in three Parts. Part I provides a general overview of the right to water in international law. Part II broadly describes the investor-state-dispute-settlement (ISDS) system and analyzes the ten publicly available disputes involving the provision of drinking water. Special attention is paid to state actions and arguments that implicate the right to water and how tribunals respond, if at all. By presenting the cases chronologically, this Part demonstrates the evolution of tribunal engagement with human rights law from complete avoidance of the right to water to accepting jurisdiction over a human rights counter-claim brought by a state.²³ Finally, Part III proposes that the FET standard presents an opportunity to incorporate human rights law in substantive treaty considerations. By including existing human rights law and regulations as part of the legal regime which informs investors' expectations, the investment-treaty regime can catalyze greater accountability for investors and states alike.

I

THE RIGHT TO WATER IN INTERNATIONAL LAW

The status of the right to water has evolved considerably over the last fifty years. While treaty references to water provision date back to as early as the 1949 Geneva Conventions,²⁴ explicit references to

²² See Vienna Convention on the Law of Treaties (with Annex), art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 (requiring the interpretation of treaties to consider “[a]ny relevant rules of international law applicable in the relations between the parties”); see generally Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54(2) INT’L & COMPAR. L.Q. 279–81 (2005) (analyzing the role of Article 31(3)(c) in treaty interpretation). Regarding temporality of treaty interpretation, tribunals and courts have not hesitated to reference law that enters into force subsequent to the treaty in question. See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Rep. 16, 31 (June 21) (“[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.”).

²³ See *infra* notes 75–76 and accompanying text.

²⁴ Geneva Convention Relative to the Treatment of Prisoners of War arts. 20, 26, 29, 46, Aug. 12, 1949, 75 U.N.T.S. 135 (requiring the provision of sufficient water for prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 85, 89, 127, Aug. 12, 1949, 75 U.N.T.S. 287 (requiring the provision of sufficient water for internees).

water in human rights treaties did not materialize until 1979.²⁵ Since then, the right to water for specific groups of people has been recognized in various international and regional agreements.²⁶ Even so, it was not clear that these treaties, alone or in conjunction, amounted to a stand-alone right to water for all because they focused on specific populations like women, children, and persons with disabilities.²⁷ Considerable progress was made, however, with the adoption of General Comment No. 15 (“GC 15”) in 2002 by the Committee for Economic, Social and Cultural Rights.²⁸ The Committee recognized that the right to water is “a prerequisite for the realization of other human rights” and derives from the human right to an adequate standard of living, and the right to health as guaranteed in the International Covenant on

²⁵ Convention on the Elimination of All Forms of Discrimination Against Women art. 14, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

²⁶ See, e.g., *id.* (establishing water supply as part of the right to enjoy adequate living conditions for rural women); Convention on the Rights of the Child art. 24, *opened for signature* Nov. 20, 1989, 1557 U.N.T.S. 3 [hereinafter CRC] (establishing clean drinking water and sanitation as part of the right to health for children); Convention on the Rights of Persons with Disabilities art. 28, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 [hereinafter CRPD] (establishing equal access to clean water as part of the right to an adequate standard of living for persons with disabilities); African Charter on the Rights and Welfare of the Child art. 14, July 11, 1990, CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) (establishing safe drinking water as part of the right to health for children); Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 15, July 11, 2003, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> [<https://perma.cc/F9KJ-NHU8>] (entered into force Nov. 25, 2005) (establishing an agreement between fifty-three state parties in Africa to provide women access to clean drinking water); African Union Assembly, Decision on the Draft Protocol to the African Charter on Human and Peoples’ Rights Relating to Women, Dec. 19, 2007, <https://archives.au.int/handle/123456789/1039> [<https://perma.cc/WB97-JMRK>]; *OAU/AU Treaties, Conventions, Protocols & Charters*, AFRICAN UNION, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> [<https://perma.cc/9W3X-NZV5>].

²⁷ See generally CEDAW, *supra* note 25, art. 14 (establishing the right to water for rural women); CRC, *supra* note 26, art. 24 (recognizing the right to clean drinking-water for children); CRPD, *supra* note 26, art. 28 (recognizing the right of persons with disabilities to equal access to clean water services).

²⁸ U.N., Econ. & Soc. Council, Comm. on Econ., Social & Cultural Rts., General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the Int’l Covenant on Econ., Soc. & Cultural Rts.), ¶¶ 1–3, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter GC 15]. The CESCR is the body responsible for monitoring State compliance, authoritatively interpreting the International Covenant on Economic, Social and Cultural Rights, and clarifying the content of the human rights therein. CATARINA DE ALBUQUERQUE, *REALISING THE HUMAN RIGHTS TO WATER AND SANITATION: A HANDBOOK BY THE UN SPECIAL RAPporteur* 24 (2014). For a discussion of the “legal weight” of General Comments in particular, see WORLD BANK, *THE HUMAN RIGHT TO WATER* 48–53, <https://documents1.worldbank.org/curated/en/219811468157522364/pdf/302290PAPER0Human0right0to0H20.pdf> [<https://perma.cc/GSB4-XWZW>].

Economic, Social and Cultural Rights (“ICESCR”).²⁹ Further, the right to water entitles “everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”³⁰

In 2010, the United Nations General Assembly explicitly recognized “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.”³¹ The United Nations Human Rights Council later affirmed the view that the right is rooted in the right to an adequate standard of living and “inextricably related” to the right to life, among other rights.³² While an actualized right to water is far from the reality for many today, these resolutions catalyzed further commitments by the international community and interpretations by human rights treaty-bodies. In 2011, the World Health Organization recognized the right to water and called on member states to ensure that their national health strategies supported the progressive realization of the right.³³ In 2015, 193 states reaffirmed the right to water and committed to ensure the availability of water and sanitation for all by 2030, by adopting the SDGs.³⁴ In 2018, the United Nations Human Rights Committee³⁵ adopted General Comment No. 36, which recognizes access to water as included in the right to life.³⁶ The right to water is also recognized in various national constitutions and domestic

²⁹ GC 15, *supra* note 28, ¶ 1; International Covenant on Economic, Social and Cultural Rights arts. 11–12, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The ICESCR has 117 State parties, none of which have made reservations with respect to the right to water and its relation to the right to an adequate standard of living, including for States who have acceded or ratified since the General Comment’s publication. *See* U.N., STATUS OF TREATIES, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=en [<https://perma.cc/5XJE-BX9J>].

³⁰ GC 15, *supra* note 28, ¶ 2.

³¹ G.A. Res. 64/292, at 2 (July 28, 2010).

³² Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9, at 2 (Oct. 6, 2010).

³³ World Health Organization [WHO], *Drinking-Water, Sanitation and Health Res. 64/24*, ¶ 1(3), WHO Doc. WHA64/24 (May 24, 2011), https://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_R24-en.pdf [<https://perma.cc/XCW6-6TRN>].

³⁴ *See* G.A. Res. 70/1, at 1, 3, 14 (Sept. 25, 2015); *see also supra* note 4 and accompanying text.

³⁵ The Human Rights Committee is the treaty body for the International Covenant on Civil and Political Rights’ (ICCPR), which has 117 State Parties. *Status of Ratification Interactive Dashboard*, U.N., <https://indicators.ohchr.org> [<https://perma.cc/R4UT-L99Q>].

³⁶ U.N., Hum. Rts. Comm., Gen. Comment No. 36 on Article 6: of the Int’l Covenant on Civ. & Pol. Rts., Art. 6: Right to Life, ¶ 26, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) (“The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water . . .”).

legal frameworks.³⁷ The aforementioned suggests that the right to water is a nascent or existing rule of customary international law,³⁸ in addition to being a right derived from the International Bill of Human Rights.³⁹

Nevertheless, human rights are contextual;⁴⁰ the lack of clear standards in treaties regarding the right to water affirms that each person's requisite intake depends on a variety of factors, including age, health, gender, and their surrounding climate.⁴¹ Still, each right enshrined in the ICESCR contains "minimum core" obligations that are immediately, and at all times, incumbent on every state party.⁴² The minimum core represents a floor below which a state party must not perform, "even in unfavourable conditions or against any compelling interests."⁴³ The floor described in GC 15 involves three factors: availability, quality, and accessibility.⁴⁴ Availability refers to the

³⁷ See Heller, *supra* note 5 (referencing various countries that have included the right to water in their constitutions and legal frameworks since 2010); CTR. ON Hous. Rts. & Evictions, LEGAL RESOURCES FOR THE RIGHT TO WATER AND SANITATION: INTERNATIONAL AND NATIONAL STANDARDS 58–224 (2d ed. 2008) (referencing various national legal standards related to the right to water); Ndjodi Ndeunyema, *Unmuddying the Waters: Evaluating the Legal Basis of the Human Right to Water Under Treaty Law, Customary International Law, and the General Principles of Law*, 41 MICH. J. INT'L L. 455, 477 n.135 (2020) (referencing South Africa, Kenya, Zimbabwe, and Uruguay, as providing "an explicit enforceable right to water" in their respective constitutions).

³⁸ This position remains a topic of debate. See, e.g., Ndeunyema, *supra* note 37, at 475–76 (finding that while some scholars believe sufficient state practice and opinion juris exists to support a customary rule of international law, others conclude that state practice is currently inadequate to support a rule of customary international law).

³⁹ OFF. U.N. HIGH COMM'R FOR HUM. RTS., FACT SHEET NO. 2 (REV. 1), THE INTERNATIONAL BILL OF HUMAN RIGHTS (1948), <https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf> [<https://perma.cc/M8KK-VN7V>] ("The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the [ICESCR], and the [ICCPR] and its two Optional Protocols."). See *supra* notes 29, 35 and accompanying text for interpretations of these instruments as including the right to water. For further discussion on the status and normative content of the right to water, compare Amanda Cahill, 'The Human Right to Water – A Right of Unique Status': *The Legal Status and Normative Content of the Right to Water*, 9 INT'L J. HUM. RTS. 389 (2005) (arguing that the legal basis for a right to water is unclear under current international human rights law), with Adele J. Kirschner, *The Human Right to Water and Sanitation*, 15 MAX PLANCK Y.B. U.N. L. 445 (2011) (analyzing the legal implications of a human right to water and sanitation).

⁴⁰ See Léo Heller (Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation), *Progressive Realization of the Human Rights to Water and Sanitation*, ¶ 7, U.N. Doc. A/HRC/45/10 (July 8, 2020) (finding that the progressive realization of the right to water and sanitation requires an analysis of country-specific service provisions).

⁴¹ *Id.* ¶ 33.

⁴² U.N. ESCOR, 5th Sess., 48th mtg. at 86, U.N. Doc. E/1991/23 (Dec. 11, 1990) [hereinafter GC 3].

⁴³ Heller, *supra* note 40, ¶ 31; see also GC 3, *supra* note 42, at 85–86 (describing the minimum core obligation requirement).

⁴⁴ GC 15, *supra* note 28, ¶¶ 12, 37.

requirement that each person have a supply that is “sufficient and continuous for personal and domestic uses.”⁴⁵ Quality requires that water be free from substances “that constitute a threat to a person’s health.”⁴⁶ And water must be accessible to all, without discrimination, along physical, economic, and information dimensions.⁴⁷

States parties also have the specific legal obligation to respect, protect, and fulfill the right to water.⁴⁸ Importantly, “[t]he obligation to protect requires States parties to prevent third parties from interfering in any way with the enjoyment of the right to water.”⁴⁹ When water services “are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.”⁵⁰ As will be seen in Part II, affordability is a recurring source of contention in the cases considered. To this point, GC 15 makes clear that the principle of equity applies regardless of who provides water services; states must always ensure services “are affordable for all.”⁵¹

While the human rights framework is in theory agnostic as to the type of provider or economic model chosen in realizing the right to water,⁵² mandate-holders,⁵³ scholars, and affected communities alike have expressed a range of concerns with privatization and its effects.⁵⁴ Nevertheless, private participation in public services has increased, due in part to the “economic and social philosophy of governance” of the late twentieth century and the role of international financial insti-

⁴⁵ *Id.* ¶ 12(a).

⁴⁶ *Id.* ¶ 12(b).

⁴⁷ *Id.* ¶ 12(c).

⁴⁸ *Id.* ¶ 20.

⁴⁹ *Id.* ¶ 23 (emphasis omitted).

⁵⁰ *Id.* ¶ 24.

⁵¹ *Id.* ¶ 27.

⁵² *Id.*; Catarina de Albuquerque (Independent Expert on the Right of Safe Drinking Water and Sanitation), *Rep. of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, ¶ 15, U.N. Doc. A/HRC/15/31 (June 29, 2010).

⁵³ Mandate-holders are independent human rights experts, appointed by the U.N. Human Rights Council, who report on thematic or country-specific issues. *Special Procedures of the Human Rights Council*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> [<https://perma.cc/Y6LS-MWF3>].

⁵⁴ *See, e.g.*, Léo Heller (Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation), *Human Rights and the Privatization of Water and Sanitation Services*, ¶¶ 2–7, 17–19, 31, U.N. Doc. A/75/208 (July 21, 2020) (noting affordability implications of private profit maximization, natural monopolies, power imbalances, and information asymmetry, among other concerns).

tutions.⁵⁵ Renationalization movements have proved to be an important countervailing force, but significant budget deficits (particularly in light of COVID-19) and the SDGs have “renewed pressure for increased private sector involvement.”⁵⁶ For example, gaps in funding to achieve universal access to water and sanitation are sixty-one percent on average for twenty developing countries.⁵⁷ As states turn to private and foreign investments, they may find solutions to these gaps, but they also take on investment obligations. Investment obligations, particularly ones protected by IIAs, can have significant ramifications for the right to water.

II

CONTESTING THE RIGHT TO WATER IN INVESTOR STATE DISPUTE SETTLEMENT

International investment agreements (“IIAs”) often take the form of bilateral investment treaties (“BITs”), but also exist as multi-lateral agreements.⁵⁸ IIAs seek to promote investment flows between signatory states by providing standard protections for their respective investors.⁵⁹ To date, there are 3,238 IIAs in force globally, the vast majority of which are BITs.⁶⁰ While there have been new developments in the formulations and substantive protections provided in BITs,⁶¹ the majority of them share similar standards intended to pro-

⁵⁵ *Id.* ¶¶ 10–13 (quoting Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, at 2, U.N. Doc. A/73/396 (Sept. 26, 2018)).

⁵⁶ *Id.* ¶¶ 4, 14; *see also* David McDonald & Susan Spronk, *COVID-19 Has Decimated Water Systems Globally, but Privatization Is Not the Answer*, CONVERSATION (Mar. 17, 2021, 1:41 PM), <https://theconversation.com/covid-19-has-decimated-water-systems-globally-but-privatization-is-not-the-answer-155689> [<https://perma.cc/V4UD-76HZ>] (detailing the worldwide loss of revenue by public water utilities due to COVID-19).

⁵⁷ U.N., THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2020, at 37 (2020), <https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf> [<https://perma.cc/9KKF-TKFK>].

⁵⁸ *See* U.N. CONF. ON TRADE & DEV., INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES VOLUME 1, at 1–4, U.N. Doc. UNCTAD/ITE/IIT/2004/10, U.N. Sales No. E.05.II.D.6 (2004) (describing the widespread network of BITs and the increasing prominence of regional and multilateral agreements).

⁵⁹ *See id.* at 3 (“Host countries appear to be increasingly inclined to provide assurances of fair treatment to future investors . . .”).

⁶⁰ *See International Investment Agreements Navigator*, U.N. CONF. ON TRADE & DEV., INV. POL’Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements> [<https://perma.cc/K3UJ-6WJK>].

⁶¹ *See* U.N. Conf. on Trade & Dev., IIA Issues Note, Taking Stock of IIA Reform: Recent Developments (June 2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf [<https://perma.cc/G23W-FSY3>] (including conditioning applicability of treaties on investment in the home state economy and excluding measures

tect investors against detrimental government actions.⁶² Substantive protections are commonly supplemented by procedural rights, including a dispute resolution mechanism, ISDS, that allows investors to bring treaty claims before international arbitration tribunals.⁶³

Despite the supposed benefits of IIAs,⁶⁴ human rights experts express concerns that IIAs can “aggravate the problem of extreme poverty, jeopardize fair and efficient foreign debt renegotiation, and affect the rights of indigenous peoples, minorities, persons with disabilities, older persons, and other persons leaving [sic] in vulnerable situations.”⁶⁵ The norm for ISDS are disputes brought by developed-country investors against developing and transition economy states.⁶⁶ ISDS presents not only the risk of costly and lengthy proceedings, but also a constriction of regulatory capacity, which may prevent or delay the passage of policies that further human rights.⁶⁷ While the literal

taken by local governments from coverage under BITs as examples of recent BIT developments).

⁶² See U.N. CONF. ON TRADE & DEV., *supra* note 58, at 1 (“[IIAs] are highly standardized . . . Their principal focus has been from the very start on the protection of investments against nationalizations and on free transfer of funds.”). Common provisions include protections against expropriations, nationalizations, and discrimination as compared to domestic investors (“national treatment”) and third country investors (“most-favoured-nation”). BITs also typically include guarantees of free transfer of earnings, full protection and security, and fair and equitable treatment. *Id.* at 3, 18, 93.

⁶³ See *id.* at 349–50. Parties to the disputes retain relative control over the constitution of tribunals by appointing which and how many arbitrators will make up a tribunal. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, art. 37 (entered into force Oct. 14, 1966) (“The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators . . . as the parties shall agree. . . . [Or] the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third who shall be the president of the Tribunal, appointed by agreement of the parties.”); International Centre for Settlement of Investment Disputes [ICSID], *Rules of Procedure for Conciliation Proceedings*, Rule 3 (Sept. 25, 1967) (“The request [to institute conciliation or arbitration proceedings] may . . . set forth any provisions agreed by the parties regarding the number of conciliators or arbitrators . . .”); G.A. Res. 31/98, art. 5 (Dec. 15, 1976).

⁶⁴ See, e.g., RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 20–22 (2d ed. 2012) (describing IIAs as a mechanism to address the risk of long-term investment by providing a stable and predictable legal regime, therefore incentivizing investment).

⁶⁵ *UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights*, OFF. U.N. HIGH COMM’R FOR HUM. RTS. (June 2, 2015) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031> [<https://perma.cc/JC4A-L3C4>].

⁶⁶ U.N. Conf. on Trade & Dev., IIA Issues Note, Fact Sheet on Investor-State Dispute Settlement Cases in 2018 (May 2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf [<https://perma.cc/59NQ-WJK4>] (noting that, “[a]s in previous years,” most cases in 2018 were brought by developed-country investors against developing countries and transition economies).

⁶⁷ See JOHNSON ET AL., *supra* note 13, at 11–14 (discussing how IIAs and their ISDS mechanisms reduce policy space and the role governments and judicial organs have in

text of IIAs does not limit the sovereign right to regulate, IIAs often fail to recognize the human rights obligations of states and the policy space needed to achieve them.⁶⁸ A 2014 study covering 2,107 IIAs found that only 0.5% contained overt references to human rights, the majority of which were relegated to language in treaty preambles.⁶⁹ While seven percent of treaties sampled made reference to reserving state policy space, these related entirely to environmental issues.⁷⁰ Further, arbitral tribunals lack “any systematic methodology as to how to respond to human rights argumentation” when invoked by states.⁷¹

In theory, a state’s investment obligations should not interfere with their human rights obligations, but in practice this line blurs when human rights issues arise from the very investments made. The

domestic law-making, in addition to distorting power dynamics between investors and states); *see also supra* notes 14–17 and accompanying text; *UN Expert: UN Charter and Human Rights Treaties Prevail over Free Trade and Investment Agreements*, OFF. U.N. HIGH COMM’R FOR HUM. RTS. (Sept. 17, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16439&LangID=E> [<https://perma.cc/4323-3XTL>] (“Over the past decades free trade and investment agreements have had adverse impacts on the enjoyment of human rights by interfering with the State’s fundamental functions to legislate in the public interest and regulate fiscal, budgetary, labour, health and environmental policies.” (quoting Alfred de Zayas, UN Independent Expert on the Promotion of a Democratic and Equitable International Order)).

⁶⁸ *See* U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rts., Gen. Comment 24 (2017) on State Obligations Under the Int’l Covenant on Econ., Soc. & Cultural Rts. In the Context of Bus. Activities, ¶ 13, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) (encouraging States to include in future investment treaties a provision “explicitly referring to their human rights obligations” and ensure that investor–state tribunals consider international human rights in their treaty standard interpretations); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, ¶ 30, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (“[R]ecent experience suggests that some [investment] treaty guarantees . . . may unduly constrain the host Government’s ability to achieve its legitimate policy objectives, including its international human rights obligations.”); Off. U.N. High Comm’r for Hum. Rts., Guiding Principles on Business and Human Rights, ¶ 9 cmt., U.N. Doc. HR/PUB/11/04 (2011) [hereinafter Guiding Principles], https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [<https://perma.cc/3PPM-3LHR>] (“[T]he terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so.”).

⁶⁹ Kathryn Gordon, Joachim Pohl & Marie Bouchard, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* 18 (Org. for Econ. Coop. & Dev. Working Papers on Int’l Inv. 2014/01, 2014), https://www.oecd.org/investment/investment-policy/WP-2014_01.pdf [<https://perma.cc/6ZBA-YBX2>]. Note that the sample size “cover[ed] more than 70% of the global investment treaty population” as of November 2013. *Id.* at 10 & n.12.

⁷⁰ *Id.* at 18.

⁷¹ Vivian Kube & E.U. Petersmann, *Human Rights Law in International Investment Arbitration*, 11 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 65, 65 (2016).

following Sections focus on ten ISDS cases involving the privatization of drinking water.⁷² The cases demonstrate how tribunals have evolved in their engagement with the right to water over time. These disputes are not resounding wins for the right to water. Of the ten cases discussed, nine were decided in favor of the investor (two of which resulted in no damages), and only one was decided in favor of the state.⁷³ While these tribunals do not take issue with either the legal status or content of the right to water, the vast majority fail to involve relevant human rights law in their analysis of substantive treaty claims.⁷⁴ Nevertheless, we see tribunals evolve from outright avoiding discussion of the right to water⁷⁵ to accepting jurisdiction over a human rights counterclaim brought by the state.⁷⁶

⁷² As of July 31, 2019, 938 ISDS cases have been decided and published, of which thirty-eight cases fall within the UNCTAD Economic Sector “Water Supply, Sewerage, Waste Management and Remediation Activities.” Of those thirty-eight cases, fourteen involve the privatization of drinkable water services, four of which either settled outside of court or involved non-public proceedings. See UNCTAD, Investment Dispute Settlement Navigator: full data release as of 31/07/2019 (excel format), available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> [https://perma.cc/4VRZ-MRNT] (on file with author). The two cases that settled are: *Aguas del Tunari S.A. v. Republic of Bol.*, ICSID Case No. ARB/02/3, and *Aguas Cordobesas S.A., Suez, & Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/18. For information regarding settlement of these cases, see *Case Details: Aguas del Tunari v. Republic of Bolivia (ICSID Case No. ARB/02/3)*, INT’L CENTRE FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/02/3> [https://perma.cc/NVH8-CR2Y]; *Case Details: Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic (ICSID Case No. ARB/03/18)*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/03/18> [https://perma.cc/AXS7-R9MG].

⁷³ This does not, however, track with the average success rate of respondents in ISDS writ-large but may suggest that human rights arguments have not been particularly persuasive. See Matthew Hodgson & Alastair Campbell, *Damages and Costs in Investment Treaty Arbitration Revisited*, GLOB. ARB. REV. 4 (Dec. 14, 2017), https://www.allenoverly.com/global/-/media/sharepoint/publications/sitecollectiondocuments/14-12-17_damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf [https://perma.cc/JKZ6-JAPJ] (noting that respondent States win, on average, fifty-five percent of the time).

⁷⁴ See *infra* Sections II.A–C.

⁷⁵ See generally *Compañía de Aguas del Aconquija, S.A. v. Argentine Republic (Vivendi I)*, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000) (decision annulled on other grounds) (mentioning rights only in context of the claimant’s contractual rights); *Compañía de Aguas del Aconquija S.A. v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) (mentioning the right to water only as a justification offered by respondent, but not as a basis for decision).

⁷⁶ See *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶¶ 1110–211, (Dec. 8, 2016) (accepting jurisdiction of Argentina’s counterclaim alleging the concessionaire’s failure to provide the requisite level of investment in the concession violated the human right to water, but ultimately concluding that the concessionaire did not have a positive human right obligation).

The cases also reveal that states, despite invoking human rights defenses or arguments, engage in actions that not only breach their obligations to investors but are also difficult to justify as furthering the right to water. These actions are highlighted to demonstrate that states should be held accountable, as actors in the investment-treaty regime, when they hollowly invoke human rights law. Using human rights law as cover for actions that do not further the right to water undermines the normative authority of human rights arguments in these forums, and tribunals are well placed to take states to task accordingly. As will be seen in Part III, this Note argues that the FET standard can be used to harmonize the human-rights and investment-treaty regimes and may promote accountability for investors and states alike.

A few introductory matters are worth clarifying. All the cases discussed, except *Tallinn*,⁷⁷ involve traditional concession contracts. This common form of private-public partnership often spans twenty- to thirty-year investment terms and involves the operation, improvement, and expansion of water and sewage systems in exchange for charging tariffs to consumers.⁷⁸ The contracts are, of course, tailored to the specific needs of the contracting parties. For the sake of brevity, this Note conflates “concessionaire,” “claimant,” and the name of the particular claimant to represent both the party to the dispute and the entity that, under the contract, would fund the improvement and expansion of water and sewage systems in exchange for tariffs.⁷⁹ Although a country is always the respondent in an investment-treaty dispute, it is often a city or province that enters into agreements with an investor for the privatization of drinking water. Whereas a “province,” “municipality,” or the local government will be a main actor in the facts underlying the dispute, it is a “state,” “respondent,” or the name of the country that is a party to the arbitration. Finally, the following Sections are not intended to be all-encompassing case summa-

⁷⁷ See *United Utils. (Tallinn) B.V. v. Republic of Est.*, ICSID Case No. ARB/14/24, Award, ¶¶ 132, 154 (June 21, 2019) (involving the sale of shares in a state-owned entity in charge of water services).

⁷⁸ See *Water and Sanitation PPPs*, WORLD BANK (June 15, 2021), <https://ppp.worldbank.org/public-private-partnership/water-and-sanitation/water-sanitation-ppps> [<https://perma.cc/X9AS-L9SA>] (mentioning customer tariffs as a revenue-stabilizing tactic for public-private partnerships); *Water and Sanitation Concession / BOT / DBFO*, WORLD BANK (Dec. 2, 2020), <https://ppp.worldbank.org/public-private-partnership/sector/water-sanitation/concessions-and-bots> [<https://perma.cc/NWM9-7TXR>] (describing goals of concession contracts as maintenance, upgrade of systems, and expansion of access).

⁷⁹ Technically, the claimant is not always the concessionaire, as disputes can be brought by partial owners of the relevant domestic subsidiary.

ries. They deliberately exclude claims and tribunal analyses that are outside of this Note's scope.⁸⁰

A. *The Baseline: Azurix v. Argentina*

Azurix v. Argentina sets the stage for this Note's consideration of investor-state disputes involving the provision of drinking water. While *Vivendi v. Argentina* was decided six years prior, the tribunal's award was annulled shortly thereafter⁸¹ and resubmission proceedings were not finalized until a year after *Azurix* was decided.

In 1999, Azurix entered into a concession agreement with the province of Buenos Aires in Argentina.⁸² As is the case with several of the disputes considered herein, the concessionaire increased tariffs after taking over the water system and experienced significant public backlash.⁸³ In turn, the provincial regulator limited tariffs, required the concessionaire to provide customer credits, significantly delayed re-categorizing customers into higher tariff scales, and rejected the concessionaire's appeal.⁸⁴ During this time, various capital investment issues arose.⁸⁵ One such issue involved algae blooms in a water reservoir, which was exacerbated by the province's failure to remove algae in the reservoir prior to transferring the concession as contracted.⁸⁶ Despite representing the removal project as ninety-eight percent complete during the bidding process, the reservoir project remained in progress and under provincial control a year later.⁸⁷ While the province's algae removal project was underway, an extraordinary algae bloom resulted in "hazy" water with an "earth-musty taste and odor."⁸⁸ Officials responded by inviting customers to withhold payments and later mandated 100% discounts, therefore leaving the concessionaire to suffer the financial consequences of the province's history of disinvestment and failure to remove the algae.⁸⁹

⁸⁰ This includes, for example, violations of Full Protection and Security or tribunal discussions on jurisdiction, among others.

⁸¹ The annulment committee found that the tribunal's dismissal of the Tucumán claims were a manifest excess of powers, per Article 52(1)(b) of the ICSID Convention. *Vivendi I*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶¶ 93–115 (July 3, 2002).

⁸² *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 38–41 (July 14, 2006).

⁸³ *Id.* ¶¶ 78, 82.

⁸⁴ *Id.* ¶¶ 83, 93–97.

⁸⁵ *See id.* ¶¶ 120–60.

⁸⁶ *Id.* ¶ 143.

⁸⁷ *Id.* ¶ 143.

⁸⁸ *Id.* ¶ 124.

⁸⁹ *Id.* ¶¶ 125–26, 144.

In late 2001, the concessionaire terminated the agreement and filed for arbitration.⁹⁰ During the arbitral proceedings, Argentina argued that a conflict existed between the BIT and human rights treaties that, supported by expert testimony, “must be resolved in favor of human rights.”⁹¹ The tribunal, however, could not see how rights were affected by termination when service continued uninterrupted past the time of transfer to the province.⁹² The tribunal provided no further details, noting only that the issue was not “fully argued,” so it remains unclear whether the right to water was explicitly invoked by Argentina.⁹³ Ultimately, the tribunal found that the province’s refusal to accept termination, politicization of the tariff regime, and calls for customer non-payment together violated the FET standard.⁹⁴ The tribunal noted that “the provincial authorities show[ed] a total disregard for their own contribution to the algae crisis and a readiness to blame the [c]oncessionaire for situations that were caused by years of disinvestment.”⁹⁵ While the tribunal recognized that “governments have to be vigilant and protect the public health of their citizens” they found the province’s actions “contributed to the crisis rather than assist[ing] in solving it.”⁹⁶ These violations, among others, resulted in a US\$165 million award for the claimant.⁹⁷

This case provides the baseline from which this Note assesses the evolution of tribunal engagement with the right to water. The tribunal acknowledged Argentina’s human rights arguments in curt fashion and the right to water played no role in the tribunal’s analysis of substantive treaty claims. This may be due to the issue not being “fully argued.” Tribunals rarely act *sua sponte*; they consider what is raised by the parties. In this sense, tribunal engagement with human rights law would seem predicated on the arguments raised by states. As will be seen in the cases that follow, however, raising an issue does not guarantee it will be addressed.

This case demonstrates a tension that will reappear throughout the vast majority of the cases considered in this Note: the tension inherent when states invoke human rights arguments to defend actions that either directly undermine the right to water or that have little to do with furthering the right. Here, Argentina failed to repair

⁹⁰ *Id.* ¶¶ 3, 244.

⁹¹ *Id.* ¶ 254.

⁹² *Id.* ¶ 261.

⁹³ *Id.*

⁹⁴ *Id.* ¶¶ 374–77.

⁹⁵ *Id.* ¶ 144.

⁹⁶ *Id.*

⁹⁷ *Id.* ¶ 442.

critical water infrastructure despite having received notice from both the concessionaire and province-hired contractors regarding algae levels several months before the controversial algae bloom occurred.⁹⁸ Robust tribunal engagement with human rights law could have not only clarified the role of the right to water in the dispute but also scrutinized Argentina's human rights arguments alongside their contradictory actions.

B. The Ebb and Flow of Tribunal Engagement with the Right to Water

Since *Azurix*, eleven cases were decided or settled involving the provision of drinking water. *Vivendi v. Argentina II* was decided shortly after *Azurix* in 2007 and bears similarities in both the tension between state actions and human rights arguments and the tribunal's reluctance to engage with human rights arguments.

Vivendi is a resubmitted dispute involving a concession agreement with the Argentinian province of Tucumán.⁹⁹ Politicized from its very inception, the agreement was a point of contention in local elections and engendered substantial public criticism for its expected tariff increases.¹⁰⁰ Through February 1996, various episodes of turbidity occurred in the Tucumán drinking water, which led the provincial Minister of Health to falsely proclaim the water was "bacteriologically contaminated" and could cause "cholera, typhoid and hepatitis."¹⁰¹ The Minister perpetuated these unsubstantiated claims even though the provincial regulator's own laboratory confirmed the water was safe.¹⁰² Investigations, mandated periods of free service, and regulatory fines for supposed water quality control breaches ensued.¹⁰³ The arbitral proceedings revealed, however, that the fines were intended to pressure the concessionaire to renegotiate rates.¹⁰⁴ Government officials concurrently encouraged customers to not pay their bills for

⁹⁸ *Id.* ¶ 143.

⁹⁹ *Vivendi I*, ICSID Case No. ARB/97/3, Award, ¶¶ 24–26 (Nov. 21, 2000).

¹⁰⁰ *See, e.g., Vivendi II*, ICSID Case No. ARB/97/3, Award, ¶¶ 4.8.1–2 (Aug. 20, 2007) ("[T]he Concession Agreement had become some test thing of a political flashpoint in the provincial election campaign that had begun earlier the year. The longstanding opposition of the Fuerza Republicana party . . . is key to an understanding of the events that occurred . . ."); *id.* ¶¶ 4.3.8, 4.10.3, 4.11.4, 4.11.5. It is interesting to observe that, in this instance, low income populations were mostly unaffected by the tariff increases. *Id.*

¹⁰¹ *Id.* ¶¶ 4.12.1, 4.13.13.

¹⁰² *Id.* ¶¶ 4.12.7 & n.130, 4.13.11–15.

¹⁰³ *Id.* ¶¶ 4.13.3–7, 4.13.19, 4.14.6–8, 4.16.9.

¹⁰⁴ *See, e.g., id.* ¶ 4.13.8 ("As far as the 78 fines . . . my superiors are asking me to put pressure on [concessionaire] to renegotiate the rates. . . . [U]ntil the rates are renegotiated like the government wants, the order from higher up is to keep applying pressure with whatever we've got.").

the period in which turbidity occurred.¹⁰⁵ After failed attempts at renegotiation and unsuccessfully protesting the province's unilateral modification of the concession agreement, the concessionaire gave notice of termination in August 1997.¹⁰⁶ The province responded by rejecting termination, interfering with payment collection efforts, and, among other retaliatory actions, issuing backdated resolutions documenting the concessionaire's alleged breach.¹⁰⁷

During the proceeding, Argentina argued that it had both the "the right and the responsibility" to "ensure the availability of safe drinking water for its population on an affordable and accessible basis."¹⁰⁸ By providing "black, undrinkable and potentially unhealthy water," the state argued that the concessionaire had materially breached the agreement and destroyed public confidence of the region's "impoverished population."¹⁰⁹ Argentina characterized a reliable supply of water as a "fundamental human need"¹¹⁰ and argued that the BIT did not protect investors from state regulation particularly with respect to services "as vital as the provision of water and sewage."¹¹¹ The language used by Argentina invokes important aspects of the right to water, namely affordability, accessibility, and quality.

In comparison to *Azurix*, here we see the state directly invoking the right to water and tying the concessionaire's alleged performance deficiencies to specific aspects of the right's content. Unfortunately, the tribunal failed to address those arguments, and indeed, the right to water played no role in the tribunal's analysis of the substantive treaty claims. In turn, Argentina requested an annulment of the award due to, inter alia, the tribunal's disregard of this "fundamental" issue.¹¹² The ad hoc committee considering the annulment, however, similarly declined to address the right-to-water argument in finding insufficient grounds for annulment.¹¹³ *Vivendi*, therefore, can be seen as a regression from the level of tribunal engagement with right-to-water arguments seen in *Azurix*.

Importantly, by avoiding Argentina's human rights arguments, the tribunal missed a vital opportunity to underscore the dissonance

¹⁰⁵ *Id.* ¶¶ 4.14.19, 4.15.15, 4.16.12–.13, 4.17.5.

¹⁰⁶ *Id.* ¶¶ 4.15.10–.17.18, 4.18.5.

¹⁰⁷ *See generally id.* ¶¶ 4.19.1–.6, 4.21.1–.7, 4.22.1–.3.

¹⁰⁸ *Id.* ¶ 3.3.5.

¹⁰⁹ *Id.* ¶ 3.3.2.

¹¹⁰ *Id.* ¶ 6.5.1(iii).

¹¹¹ *Id.* ¶ 3.3.3.

¹¹² *See Vivendi I*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award, ¶ 57, § d (Aug. 10, 2010).

¹¹³ *Id.*

between Argentina's actions and arguments. The tribunal could have found the human rights defense to be unconvincing in the face of state actions that bore little connection to the right to water (i.e., misrepresenting the safety of the water quality or engaging in unilateral modifications of the concession agreement). The tribunal could have pressed Argentina to explain why they would, in the first place, negotiate 110% tariff increases that they later claim violate the affordability dimension of the right to water. Although a change in politics may explain the province's about-face on the tariffs, requiring such explanations from the state may provide clarity as to why provincial officials did not contest the concession agreement on human rights grounds in local courts before engaging in conduct that ran afoul of the BIT. It may be that the government officials did not think the constitutional and international right to water is sufficiently specific or persuasive enough to invalidate already-negotiated concession agreements. If so, this highlights the need for greater and more specific legal protections for the right to water, *ex ante*. However, it does not provide a justification for the government to use enforcement mechanisms to coerce the renegotiation of rates. Ultimately, tribunals that ignore human rights arguments forego the opportunity to take states to task when they invoke human rights merely as a post-facto justification for government action. With the annulment request dismissed, the US\$105 million award in favor of the claimants stood.¹¹⁴

In the years that followed *Azurix* and *Vivendi*, the extent to which tribunals engaged with right-to-water arguments increased only incrementally. At the same time, states continued to make human rights arguments to defend actions that often did little to further the right to water. *Biwater v. Tanzania* provides an example of this trend. There the concessionaire was tasked to improve and expand the Dar es Salaam water system, but experienced significant performance failures.¹¹⁵ Despite running into financial difficulties early on, the concessionaire did not use the multiple contractual mechanisms that allowed for tariff revisions.¹¹⁶ Within two years, the concessionaire owed Tanzania TSH billions in rental fees and tariffs, and had not made a single payment into a trust intended to subsidize connection costs for

¹¹⁴ *Vivendi II*, ICSID Case No. ARB/97/3, Award, ¶ 7.6.2, 11.1(v)–(vi) (Aug. 20, 2007).

¹¹⁵ See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶¶ 3–6, 8 (July 24, 2008). For a detailed account of the myriad problems faced by the concessionaire, see *id.* ¶¶ 147–75.

¹¹⁶ *Id.* ¶¶ 118; see also *id.* ¶¶ 129–33, 158–75 (illustrating the failure to successfully use the enhanced monitoring period, interim review, and annual review mechanisms).

low-income users.¹¹⁷ After a failed renegotiation process, Tanzania moved to terminate the agreement.¹¹⁸

As was the case in *Azurix* and *Vivendi*, the Tanzanian government took actions that are difficult to rationalize as furthering the right to water, including taking over the concessionaire's offices and deporting senior management.¹¹⁹ The tribunal found that those actions, among others taken by Tanzania, amounted to an expropriation of the concessionaire's investment.¹²⁰ Fortunately for the state, the investment was of "no economic value" well before these actions took place, so the tribunal did not award damages.¹²¹

Interestingly, the *Biwater* tribunal allowed five non-governmental organizations, focused on environmental, gender, sustainable development, and human rights issues, to provide amicus curiae submissions.¹²² Allowing amicus curiae submissions or attendance during hearings is not required of tribunals,¹²³ but the tribunal's acceptance of written submissions in *Biwater* was justified by the recognition that the issues at stake "may raise a variety of complex public and international law questions, including human rights considerations."¹²⁴ The amicus submissions explicitly invoked the right to water and argued that human rights "condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations as between the investor and the host State."¹²⁵ Tanzania made similar, although less direct, human rights arguments that the concessionaire "created a real threat to public health and welfare,"¹²⁶ and that the state had "a moral and perhaps even a legal obligation" to protect water and sanitation services.¹²⁷

Nevertheless, these human rights arguments did not result in greater or more nuanced discussions of the right to water by the tribunal. Despite characterizing the amicus submissions as "useful" and

¹¹⁷ See *id.* ¶¶ 124–28 (outlining concessionaire's various monetary obligations under the contract); *id.* ¶ 227 (providing specific amounts owed, equating to roughly US\$2.1 million). These amounts were in addition to other arrears. *Id.*

¹¹⁸ For a narrative on the failed negotiation process, see *id.* ¶¶ 185–200, 204–09.

¹¹⁹ See *id.* ¶¶ 218, 221–24.

¹²⁰ See *id.* ¶¶ 500–03, 511.

¹²¹ *Id.* ¶¶ 792, 797.

¹²² *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Procedural Order No. 5, ¶ 1 (Feb. 2, 2007).

¹²³ *Id.* ¶ 17.

¹²⁴ *Id.* ¶ 52 (citing *Aguas Argentinas, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ¶¶ 19–21 (May 19, 2005)).

¹²⁵ *Id.* ¶ 380.

¹²⁶ *Id.* ¶ 436.

¹²⁷ *Id.* ¶¶ 434–35.

“inform[ing] the analysis,”¹²⁸ the tribunal did not engage with human rights law in their substantive treaty discussions. Instead, relying on testimony that the concessionaire did not threaten service disruption, the tribunal found “there was no necessity or impending public purpose to justify the Government’s intervention in the way that took place.”¹²⁹ However, the tribunal offered no guidance on what would constitute such an impending public purpose. The tribunal could have clarified, in dictum, whether violations of the right to water would have provided a legitimate basis for any of Tanzania’s actions. Instead, state actions that did not violate the BIT were discussed solely along contract terms, as “ordinary” counterparty responses to the concessionaire’s contractual failures.¹³⁰ As seen in the prior cases, the *Biwater* tribunal also missed the opportunity to question how certain actions by the state, such as deporting management, furthered the right to water.

After *Biwater*, seven additional cases were decided involving the provision of drinking water. Five of these cases involve issues related to the Argentine financial crisis from 1998 to 2002. This economic collapse resulted in a series of government actions which form, in part, the basis for the treaty violations alleged in *Suez and Interagua v. Argentina* (hereinafter “*Suez Santa Fe*”), *Suez and Vivendi v. Argentina* (hereinafter “*Suez Buenos Aires*”), *AWG v. Argentina*, *Impregilo v. Argentina*, and *Urbaser v. Argentina*.¹³¹

As characterized by Argentina in *Impregilo*, this time period was “the worst economic, political and social crisis ever experienced.”¹³² In a span of less than ten days, Argentina had five presidents¹³³ and made history as the largest sovereign debt default at the time.¹³⁴ Soon

¹²⁸ *Id.* ¶ 392.

¹²⁹ *Id.* ¶ 515.

¹³⁰ For specifics on the tribunal’s discussion see *id.* ¶¶ 492, 494.

¹³¹ *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic (Suez Santa Fe)*, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010); *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (Suez Buenos Aires)*, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010) (providing the findings for both *Suez Buenos Aires* and *AWG Group Ltd.*); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011); *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016). Note that while the concessions considered in *Azurix* and *SAUR* were also held during the financial crisis, the emergency measures were not alleged to be a source of treaty violations. *SAUR* is discussed chronologically.

¹³² *Impreglio*, ICSID Case No. ARB/07/17, Award, ¶ 210.

¹³³ *Id.* ¶ 348.

¹³⁴ See Ben Bartenstein, Sydney Maki & Marisa Gertz, *One Country, Nine Defaults: Argentina Is Caught in a Vicious Cycle*, BLOOMBERG (May 24, 2020, 8:02 AM EDT), <https://www.bloomberg.com/news/photo-essays/2019-09-11/one-country-eight-defaults-the-argentine-debacles> [<https://perma.cc/Q9NF-SDBE>].

thereafter, unemployment rates rose to 22%,¹³⁵ poverty and indigence levels reached the highest in Argentine history (54% and 25%, respectively),¹³⁶ and a staggering 25% of the population was unable to access the minimum food required for survival.¹³⁷ The specific measures enacted at the national level in response to this crisis (collectively the “Original Emergency Measures”) included: (1) Decree No. 1570/01 of 3 December 2001, known as “corralito,” which limited cash withdrawals and prohibited transfers of currency abroad;¹³⁸ and (2) Emergency Law No. 25,561 of 6 January 2002, which: (i) unpegged the Argentine peso from the U.S. dollar,¹³⁹ thereby depreciating the peso; (ii) abolished public service contract adjustments, thereby freezing all tariff rates; and (iii) authorized the executive branch to renegotiate all public service contracts.¹⁴⁰

In 2006, a Suez-led¹⁴¹ consortium brought three separate cases against Argentina for investments made in the province of Buenos Aires and Santa Fe. *Suez Santa Fe* and *Suez Buenos Aires* continued through annulment proceedings, while *Aguas Cordobesas v. Argentina* settled privately.¹⁴² *Suez Santa Fe* and *Suez Buenos Aires* share similar facts and findings and were heard in parallel by the same tribunal.¹⁴³ In each case, concessions were granted for the management of the province’s water and sanitation systems.¹⁴⁴ Leading up to the financial crisis, the concessionaires made substantial improvements to

¹³⁵ *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 73.

¹³⁶ *Id.* ¶ 72.

¹³⁷ *Id.*

¹³⁸ *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶ 348 (June 21, 2011). For a description of these policies and their impact on these respective cases, see, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic (Suez Santa Fe)*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 125 (July 30, 2010); *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (Suez Buenos Aires)*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 136 (July 30, 2010); *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 634.

¹³⁹ Commonly referred to as “pesification” in international arbitration. *E.g.*, *Impreglio*, ICSID Case No. ARB/07/17, Award, ¶ 28.

¹⁴⁰ For the impact of this expanded executive power on each of these disputes see *id.*; *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 43; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 44; *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 641.

¹⁴¹ Suez, a French-based utility company, is the largest private water provider worldwide, by number of people served. See *infra* note 279 and accompanying text.

¹⁴² *Aguas Cordobesas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/18, Order Taking Note of the Discontinuance of the Proceeding (Jan. 24, 2007).

¹⁴³ *Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales de Agua S.A. v. Arg. Republic (Suez Santa Fe)*, ICSID Case No. ARB/03/17, Decision on Argentina’s Application for Annulment, ¶ 21 (Dec. 14, 2018) (noting that “an identically composed tribunal” was agreed to by the parties to hear the other *Suez* cases).

¹⁴⁴ *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 34; *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 36.

access and production of drinking water and sewage services.¹⁴⁵ However, once the financial crisis began and the Original Emergency Measures were instituted, the relationship between the respective provinces and concessionaires significantly deteriorated. From March 2001 to early 2006, the concessionaires attempted to renegotiate the tariff freeze to no avail.¹⁴⁶ In both cases, the concessionaires were fined, either for operating deficiencies or for failing to meet investment targets.¹⁴⁷ Having failed to renegotiate, the concessionaires attempted to terminate their concession contracts but their requests for termination were rejected by the respective provinces.¹⁴⁸ Eventually, in 2006, the provinces terminated the concession contracts and retook possession of the water systems.¹⁴⁹

In both *Suez Santa Fe* and *Suez Buenos Aires*, Argentina argued that its human rights obligations must be taken into account in assessing treaty violations because those obligations informed the context in which the state acted.¹⁵⁰ The measures were intended to safeguard the population's right to water, which plays a fundamental role "in sustaining life and health."¹⁵¹ Argentina called for a "broader margin of discretion" because "water cannot be treated as an ordinary commodity."¹⁵² As in *Azurix*, Argentina made a hierarchy of laws

¹⁴⁵ See, e.g., *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 36 (noting, among other improvements, that 2.3 million more people had access to drinking water); *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 38 (noting, among other improvements, that 200,000 more people had access to drinking water).

¹⁴⁶ See *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 44–50; *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 44–51. In *Suez Santa Fe*, the province did propose a modest tariff increase in 2005, but the offer was coupled with "substantially increased investment obligations." *Id.* ¶ 48.

¹⁴⁷ See *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 138 (suffering various fines for operating deficiencies); *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 49–51 (suffering fines for failure to meet investment targets). Note that the implications of these failures on water access were not discussed. *E.g.*, *id.*

¹⁴⁸ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 49–50; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 53.

¹⁴⁹ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 51–52; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 56.

¹⁵⁰ For the state's position in both cases see *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 232; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 252.

¹⁵¹ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 232; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 252. The tribunal in *Suez Buenos Aires* summarized the amici curiae submission in largely the same terms. *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 256.

¹⁵² *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 232; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 252.

argument in favor of human rights.¹⁵³ Unlike in *Azurix* and the cases prior, the tribunal directly addressed those arguments. The tribunal noted that it found no support in either the BITs or international law for concluding that the right to water “trumps” investment obligations.¹⁵⁴

Despite recognizing that the crisis was an “almost total breakdown of the political system” and that the provision of water and sewage services is an essential interest of the state, the tribunal remained unconvinced in both cases that the measures taken were the only way Argentina could safeguard that essential interest.¹⁵⁵ The tribunal found strong evidence that there were “more flexible means” that would have protected both interests, such as (i) temporarily relieving the concessionaire’s investment commitments in exchange for freezing tariffs, and (ii) subsidizing or freezing tariffs for the poor while allowing increases for other consumers.¹⁵⁶ The tribunal concluded that the availability of more flexible means and Argentina’s alleged contribution to the emergency situation through prior economic policies ultimately precluded the defense of necessity.¹⁵⁷

While the tribunal addressed Argentina’s hierarchy argument and recognized that the state has “ultimate responsibility” for providing the population water, it still failed to meaningfully involve human rights law in the discussion of substantive treaty violations.¹⁵⁸ The parties in both cases put forth arguments on the relevance of the right to water in determining BIT violations—claimants argued human rights law was irrelevant to the determination,¹⁵⁹ while Argentina argued its actions must be analyzed in view of all the circumstances, including its water obligations to the population.¹⁶⁰ The tribunal, however, did not address whether human rights law was relevant in determining BIT violations. Instead, the tribunal in both cases cabined the considera-

¹⁵³ See *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 240; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262; see also *supra* note 91 and accompanying text.

¹⁵⁴ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 240; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262.

¹⁵⁵ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 235, 238; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 257, 260.

¹⁵⁶ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 215; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 235.

¹⁵⁷ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 217; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 265.

¹⁵⁸ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 225; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 245.

¹⁵⁹ See *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 217; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 255.

¹⁶⁰ See *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 190, 232; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 202, 252.

tion of water to the exacting necessity defense.¹⁶¹ Importantly, this discussion did not discuss human rights law; the tribunal noted the overall importance of water to the population, therefore qualifying water as an essential interest of the state, for purposes of analyzing the necessity defense.¹⁶² Human rights law relevant to water was of no moment in this discussion or in the consideration of substantive treaty standards.

Ultimately, the tribunal decided that the character of the negotiation process¹⁶³ and Argentina's persistent refusal to revise tariffs in accordance with the contracts and regulatory framework amounted to FET violations.¹⁶⁴ Of importance to the tribunal was the provinces' continued intransigence beyond crisis abatement and the return of economic growth.¹⁶⁵ Claimants in *Suez Buenos Aires* and *Suez Santa Fe* were awarded US\$383.60 million and US\$225.70 million, respectively.¹⁶⁶

A year after the *Suez* cases were decided, the tribunal in *Impregilo v. Argentina* similarly ruled in favor of the claimants.¹⁶⁷ *Impregilo* involved a concession agreement to provide water and sewage services to seven municipalities in Buenos Aires.¹⁶⁸ The area

¹⁶¹ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 238; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 260; see also Dmitry V. Krasikov, *The Evolving Role of the Human Rights Factor Within the State of Necessity Test in Investment Arbitration*, 13 J. POL. & L. 12, 13 (2020) (“[The defense of necessity] is subject to a stringent test and is available only in exceptional circumstances. . . . [It] is only rarely successful and largely useless, and in those instances when it works, this is usually not due to any human rights concerns.”).

¹⁶² *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 238; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 260.

¹⁶³ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 222; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 242 (noting that governmental decrees structured negotiations in a way that curtailed the concessionaire's contractual freedom).

¹⁶⁴ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 218; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 238, 242. Expropriation was not found in either case. See *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 129, 134, 142–45, 151; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 140, 145, 156–57.

¹⁶⁵ *Suez Santa Fe*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 218; *Suez Buenos Aires*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 238.

¹⁶⁶ *Investment Dispute Settlement Navigator: Suez and Vivendi v. Argentina (II)*, U.N. CONF. ON TRADE & DEV., INV. POL'Y HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/121/suez-and-vivendi-v-argentina-ii-> [https://perma.cc/T5LN-NFX6]; *Investment Dispute Settlement Navigator: Suez and Interagua v. Argentina*, U.N. CONF. ON TRADE & DEV., INV. POL'Y HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/120/suez-and-interagua-v-argentina> [https://perma.cc/9TJ8-WQCE].

¹⁶⁷ *Impregilo S.p.A. v. Arg. Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011).

¹⁶⁸ *Id.* ¶¶ 14–15.

covered 1.7 million mostly low-income people with significantly limited access to services: Only 35% had access to drinking water, and 13% had access to sewage services.¹⁶⁹ Within the first two years, the concessionaire faced difficulties in meeting its obligations due to high customer non-payment rates.¹⁷⁰ This challenge limited the concessionaire's capacity to reach agreed-upon goals, invest in expansions, and access financing.¹⁷¹ As a result, the province agreed to temporarily suspend the concessionaire's expansion obligations.¹⁷² Shortly thereafter, the Argentine financial crisis began, and the country implemented the Original Emergency Measures. In turn, the province rejected tariff increase requests, prevented the concessionaire from billing certain charges, and prohibited interrupting service to non-paying customers.¹⁷³ Soon thereafter, the province terminated the agreement and assumed the concession.¹⁷⁴

In *Impregilo*, the tribunal continued the trend of avoiding right-to-water arguments. Argentina argued that its actions constituted legitimate exercises of regulatory power aimed at preserving the right to water and that BIT obligations must be construed in accordance with the protection of human rights.¹⁷⁵ Although the tribunal underscored the concessionaire's "gross[]" failure to fulfill its obligations in dismissing expropriation claims, the right to water played no part in this analysis.¹⁷⁶ In considering the concessionaire's FET claims, the tribunal similarly avoided the right to water. The tribunal found that the Original Emergency Measures altered the economic balance of the agreement, and Argentina's failure to restore that equilibrium constituted a breach of the FET standard.¹⁷⁷ Human rights law and right-to-water obligations played no part in the tribunal's substantive treaty analyses.

As in the *Suez* cases, the *Impregilo* tribunal cabined discussions of the right to water to consideration of Argentina's necessity defense. Doctrinally, the defense of necessity can only be invoked when an act is "the only way for the State to safeguard an essential interest against

¹⁶⁹ *Id.* ¶¶ 362–63.

¹⁷⁰ *Id.* ¶ 21.

¹⁷¹ *Id.*

¹⁷² *Id.* ¶¶ 21–25.

¹⁷³ *Id.* ¶¶ 27–28, 31, 33, 39, 44.

¹⁷⁴ *Id.* ¶ 48.

¹⁷⁵ *Id.* ¶¶ 228–31.

¹⁷⁶ *Id.* ¶¶ 278, 283. Note, however, that the tribunal acknowledged that respondent's failures, such as the failure to deliver plants on time, in part contributed to *Impregilo*'s failure to perform. See *id.* ¶ 280 (conceding that the delivery delay affected *Impregilo*'s "ability to expand sewage connections in certain areas").

¹⁷⁷ *Id.* ¶ 331.

a grave and imminent peril; and . . . [d]oes not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”¹⁷⁸ Even if a state can meet those requirements, it still cannot invoke the necessity defense if “[t]he State has contributed to the situation of necessity.”¹⁷⁹ Despite characterizing the need to provide the population with water as an “essential interest” and recognizing that a “grave and imminent peril” existed, the *Impregilo* tribunal was persuaded that Argentina’s prior economic policies contributed significantly to the crisis.¹⁸⁰ As in the *Suez* cases, Argentina’s contribution to the crisis precluded the defense of necessity.¹⁸¹ *Impregilo* demonstrates the hesitancy of tribunals to consider human rights arguments beyond the stringent doctrine of necessity. It also shows the inadequacy of relying on this doctrine to give due regard to human rights law. Even when a state can persuade a tribunal that an essential interest, like the fundamental human right to water, faces grave and imminent peril, a tribunal can still rely on the benefit of hindsight to conclude that prior policies contributed to the situation and therefore preclude the defense of necessity.

Three years after *Impregilo* was decided, the tribunal in *SAUR v. Argentina*¹⁸² rendered another award in favor of an investor. The dispute involved a 1998 concession contract for the operation of Mendoza province’s water and sewage system.¹⁸³ Following the initiation of arbitration proceedings, the parties reached a settlement agreement that included a model for setting and reviewing tariffs, yearly investment requirements, and a settling of debts between the parties.¹⁸⁴ As a result of governmental delays, the settlement agreement did not enter into force until ten months after signing.¹⁸⁵ In the interim, the concessionaire continued to use 1991 rates, resulting in staggering losses and placing the system at the brink of collapse.¹⁸⁶ The concessionaire made various urgent requests for relief to no avail.¹⁸⁷ Thereafter, the province failed to comply with payment obli-

¹⁷⁸ G.A. Res. 56/83, annex, art. 25, Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001).

¹⁷⁹ *Id.*

¹⁸⁰ *Impregilo*, ICSID Case No. ARB/07/17, Award, ¶¶ 346, 350, 358.

¹⁸¹ *Id.* ¶ 358.

¹⁸² *SAUR Int’l S.A. v. República Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (June 6, 2012).

¹⁸³ *Id.* ¶ 29.

¹⁸⁴ *Id.* ¶¶ 1, 17, 113.

¹⁸⁵ *Id.* ¶¶ 114–15.

¹⁸⁶ *Id.* ¶ 116.

¹⁸⁷ *Id.* ¶¶ 116–18, 120–21.

gations, delayed agreed-upon subsidies by multiple years, and denied the concessionaire's legitimate requests for rate increases.¹⁸⁸ During this time, the concessionaire also defaulted on payment obligations to the province and invested outside of required parameters.¹⁸⁹ In September 2010, the province officially terminated the contract and assumed the concession.¹⁹⁰

Argentina defended its actions as in accordance with its police power and obligation to guarantee the right to water.¹⁹¹ Once again, the state argued that the obligations resulting from the BIT must be harmoniously interpreted with human rights norms.¹⁹² In a significant shift from the tribunals considered thus far, the *SAUR* tribunal agreed with Argentina regarding the relevance of human rights law. It noted that "human rights in general, and the right to water in particular" must be considered, on account of their status in both the Argentine constitution and general principles of international law.¹⁹³ Reaffirming the "fundamental" nature of the right to water,¹⁹⁴ the tribunal held that "the legal system can and must reserve to the public authority legitimate functions of planning, supervision, police, sanction, intervention and even termination, in order to protect the public interest."¹⁹⁵ While the tribunal did not dispute Argentina's power "to intervene or even nationalize the public water supply service" for reasons of public interest, it viewed those powers as compatible with BIT protections and the investors' "right to be compensated" when subject to treaty violations.¹⁹⁶ In the end, intervention, termination, and transfer of the concession amounted to expropriation.¹⁹⁷ The unjustifiable and politically induced delays of the settlement agreement and tariff increases, coupled with intervention in management, resulted in an FET violation.¹⁹⁸

Nevertheless, acknowledging the relevance of human rights law represents a significant tribunal shift; it is a necessary first step towards integrating the human rights and investment-treaty legal regimes. The *SAUR* tribunal was prepared to consider the right to

¹⁸⁸ *Id.* ¶¶ 133, 135, 137, 139–41.

¹⁸⁹ *Id.* ¶ 166.

¹⁹⁰ *Id.* ¶ 224.

¹⁹¹ *Id.* ¶ 328.

¹⁹² *Id.*

¹⁹³ *Id.* ¶ 330.

¹⁹⁴ *Id.* ("Access to drinking water constitutes, from the point of view of the State, a basic public service and, from the point of view of the citizen, a fundamental right.")

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* ¶¶ 331, 408.

¹⁹⁷ *Id.* ¶ 382–84.

¹⁹⁸ *Id.* ¶¶ 502–03, 505.

water in assessing the police powers of the government,¹⁹⁹ but the province's breach of the settlement agreement prevented its actions from being characterized as either an exercise of police power or a legal expropriation.²⁰⁰ The tribunal underscored that the province was "fully aware of the financial strangulation" and near collapse of the system that this was causing.²⁰¹ In another significant shift, the tribunal hinted at the tension this Note has underscored regarding state actions that do not comport with human rights arguments. While it is not clear whether Argentina's right-to-water arguments explicitly implicated affordability as the reason for rejecting the concessionaire's tariff increase requests, the tribunal found it "highly revealing" that tariff increases were accepted on the same day that the government decided to intervene in the concession.²⁰² Ultimately, the violations resulted in a US\$39.9 million award.²⁰³

C. *The Evolution: Urbaser v. Argentina*

In the eight cases considered thus far, this Note has demonstrated the reluctance of tribunals. The right to water and related human rights law rarely appeared in the substantive treaty analyses of awards. In the scant instances in which human rights arguments were directly addressed, tribunals either dismissed the arguments in curt fashion or relegated its brief consideration to the exacting necessity defense. At this point, *SAUR v. Argentina* represents the most robust engagement a tribunal has had with the right to water, but the case still fell short of fully engaging with human rights law within the substantive treaty analysis. The case of *Urbaser v. Argentina* significantly challenges this narrative. Decided in 2016, *Urbaser* represents a fundamental evolution and involves a groundbreaking human rights counterclaim.

The claims considered in *Impregilo v. Argentina* and *Urbaser v. Argentina* arise from the same concession agreement, despite being brought by different investors at different times.²⁰⁴ *Impregilo* and

¹⁹⁹ *Id.* ¶ 396 (agreeing with Argentina that the legal system can grant the state special regulatory and police powers over companies that operate in certain economic sectors, in which the wrongdoing of a private company may cause harmful collateral effects for the common good).

²⁰⁰ *Id.* ¶¶ 405–13 (explaining how the province's breach and expropriation does not fall within the exceptions listed in the APRI).

²⁰¹ *Id.* ¶ 505.

²⁰² *Id.*

²⁰³ *SAUR Int'l S.A. v. République Argentine*, ICSID Case No. ARB/04/4, Laudo [Award], 84, ¶ 1 (June 6, 2012), <https://www.italaw.com/sites/default/files/case-documents/italaw3190.pdf> [<https://perma.cc/L4SH-RW8F>].

²⁰⁴ *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 64, (Dec. 8, 2016).

Urbaser formed part of a consortium that was awarded the Buenos Aires concession discussed previously.²⁰⁵ In both cases, Argentina argued that the actions constituted legitimate exercises of regulatory power aimed at preserving the right to water.²⁰⁶ In *Urbaser*, Argentina underscored that “[t]he worsening of poverty significantly affected the poorest areas” and that “[e]fforts had to be made to guarantee the exercise of the population’s most basic human rights,” namely the right to water.²⁰⁷ The *Urbaser* tribunal came to the same conclusion as the *Impregilo* tribunal in dismissing expropriation claims without discussing the right to water. While both tribunals found FET violations,²⁰⁸ their engagement with the right to water differed markedly.

The *Urbaser* tribunal recognized Argentina’s obligation to “guarantee the continuation of the basic water supply to millions of Argentines” and concluded that “[t]he protection of this universal basic human right constitutes the framework within which Claimants should frame their expectations.”²⁰⁹ Importantly, when measures “have as their purpose and effect” the implementation of “fundamental rights protected under the Constitution, they cannot hurt the [FET] standard because their occurrence must have been deemed to be accepted by the investor when entering into the investment.”²¹⁰ The tribunal used a regulatory order as an illustration of when the concessionaire’s expectations “had to be adjusted to prevailing concerns of public interests,” which the “fair and equitable treatment standard cannot move away.”²¹¹

The tribunal then quoted, at length, the regulator’s correspondence with the concessionaire explaining water and public health obligations as the basis for the order.²¹² This level of engagement with human rights obligations represents a fundamental evolution from the *Azurix* baseline discussed at the beginning of this Note. To be clear,

²⁰⁵ See *supra* notes 168–74 and accompanying text; *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶¶ 56–57, 99, 477, 537.

²⁰⁶ See *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶¶ 228–29, 231 (June 21, 2011) (claiming that adoption of these measures was the only viable option in order to prevent Argentina’s disappearance as a state); *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 993 (explaining that a crisis warranted emergency measures that altered the regulatory framework).

²⁰⁷ *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶¶ 648–49.

²⁰⁸ See *Impregilo*, ICSID Case No. ARB/07/17, Award, ¶¶ 326–29 (stating that the new regulatory framework changed the balance in a manner that was clearly disadvantageous to the concessionaire and that there was unwillingness to renegotiate); *Urbaser*, ICSID Case No. ARB/07/26, Award ¶ 845.

²⁰⁹ *Urbaser*, ICSID Case No. ARB/07/26, Award ¶ 624.

²¹⁰ *Id.* ¶ 622.

²¹¹ *Id.* ¶ 625 (discussing an order to not suspend water services for low-income users while the economic emergency persisted).

²¹² *Id.*

incorporating the right to water in the FET analysis did not absolve Argentina of liability for all of their actions. Argentina's "reluctant" renegotiation efforts, governmental decrees that tilted the balance of the concession, and lack of transparency caused FET violations in both cases.²¹³ Nevertheless, *Urbaser's* approach makes progress in the direction of regime integration between human rights and ISDS. Importantly, the *Urbaser* approach to the FET standard signals to states that codifying fundamental human rights, as the Argentine constitution does with the right to water, puts investors on notice that their investment expectations must consider *all* of the existing legal environment—including human rights.

The *Urbaser* tribunal also differed in its consideration of Argentina's necessity defense. With the benefit of hindsight, Arbitrator Brigitte Stern's dissent in *Impregilo* aptly foreshadowed what was to come. Therein, she suggested that tribunals should tread lightly in assessing sovereign contribution to crises as a "matter of principle."²¹⁴ Stern remained unconvinced that a substantial contribution was proven by "strong and convincing evidence."²¹⁵ The *Urbaser* tribunal seemed to agree. For the *Urbaser* tribunal, it was insufficient to point to internal factors that contributed to the crisis; a causal link was needed.²¹⁶ The tribunal underscored the logical tension that exists when an investor claims that internal factors caused the crisis and yet were not recognizable when they made their investment.²¹⁷ The claimants invoked the same reasoning used in *Impregilo*, and Argentina responded by highlighting the daunting proportion of poverty in the region and invoking the human rights to water, food, housing, and an adequate standard of living.²¹⁸ The measures prevented those rights

²¹³ See *Impregilo*, ICSID Case No. ARB/07/17, Award, ¶¶ 326–29 (elaborating on several reasons for an FET violation); *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 845. For the *Impregilo* tribunal an FET breach lay in Argentina's failure to "restore an equilibrium on a new or modified basis." *Impregilo*, ICSID Case No. ARB/07/17, Award, ¶¶ 330–31. For the *Urbaser* tribunal, it was a failure to accord "transparent treatment" in negotiations. *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 845. While Argentina attributed the failed negotiations to the concessionaire's excessive tariff-increase requests, the *Urbaser* tribunal was provided little evidence of either (1) why those requests were excessive considering the improving economy, or (2) how the province notified the concessionaire of its position. See *id.* ¶¶ 813–14, 817.

²¹⁴ *Impregilo*, ICSID Case No. ARB/07/17, Award, ¶ 360.

²¹⁵ *Id.*

²¹⁶ See *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶¶ 711, 714 (describing what must be proved to find Argentina substantially contributed to the state of necessity).

²¹⁷ See *id.* ¶ 715 (contextualizing that Argentina's risk factors that resulted in crisis would have to have been recognizable when investors chose to invest).

²¹⁸ See *id.* ¶¶ 689, 702 (noting that Argentina responded that its measures protected human rights to water, adequate standard of living, food, and housing, but also failed to show that these measures were the only way to safeguard these human rights).

from being “adversely affected” and recognized that “[a] water price increase in those conditions would have been impossible to afford.”²¹⁹ Against this backdrop, the tribunal took issue with the claimant’s myopic conception of alternative measures, which was confined to the investment and BIT without consideration for the needs of the Argentine people.²²⁰

The tribunals aptly questioned how Argentina could have provided subsidies when the state’s finances were at the “center of the crisis” such that public debts could not be met.²²¹ How could Argentina obtain legislative “approval of a budget reserving special credit for users of a privatized water and sewage network, while no money would remain available for other needs of the population, which were to be met by other providers, not protected by a BIT?”²²² The tribunal found that the claimants failed to resolve the conflict between obligations to the concessionaire and the “vulnerable population” when access to water could not “be ensured otherwise than by failing to comply with” investor obligations.²²³ In theory, Argentina could fulfill both obligations, but the tribunal failed to see how this could have been done in practice. This represents an important clarification of an investor’s burden: to prove that a measure is not the “only way for the State to safeguard an essential interest against a grave and imminent peril.”²²⁴ Unlike *Impregilo*, the *Urbaser* tribunal accepted the defense of necessity for the Original Emergency Measures.²²⁵

In addition to considering the right to water within the FET analysis, the *Urbaser* tribunal made the unprecedented decision to accept jurisdiction over a human rights counterclaim.²²⁶ The counterclaim alleged that the concessionaire’s failure to provide the requisite level

²¹⁹ *Id.*

²²⁰ See *id.* ¶¶ 716–17 (asserting that alternative measures must take two perspectives, a nation-wide one and a narrower one focusing on investors).

²²¹ *Id.* ¶ 725.

²²² *Id.*

²²³ *Id.* ¶ 720.

²²⁴ G.A. Res. 56/83, *supra* note 178, annex, art. 25.

²²⁵ *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 718. The tribunal, however, did not find that the necessity defense applied to actions that occurred after the crisis had abated. See *id.* ¶ 719.

²²⁶ Edward Guntrip, *Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EJIL:TALK! (Feb. 10, 2017), <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration> [https://perma.cc/KGH7-372K] (“The tribunal in *Urbaser v Argentina* is the first to accept jurisdiction over a human rights counterclaim.”). See *id.* for discussion on how the tribunal interpreted the Spain-Argentina BIT and the ICSID Convention in finding jurisdiction for this counterclaim.

of investment led to violations of the right to water.²²⁷ The tribunal rejected the notion that “the BIT is to be construed as an isolated set of rules of international law for the sole purpose of protecting investments.”²²⁸ Rather, the BIT is contextualized by other rules of international law.²²⁹ The tribunal was also “reluctant to share” the claimant’s view that as a non-state actor, they never have human rights obligations.²³⁰ In analyzing, inter alia, human rights treaties, GC 15, and General Assembly resolutions, the tribunal concluded that both public and private parties have an obligation “not to engage in activity aimed at destroying such rights.”²³¹

Nevertheless, the tribunal concluded that the concessionaire’s failure to achieve system expansions could not result in a violation of international law because it does not have the same affirmative human rights obligations as states.²³² The tribunal clarified that a performance obligation under the concession which has “the effect of supplying the services that are part of the population’s human right to access to water” does not therefore create a positive human right obligation for the concessionaire based in international law.²³³ While the counterclaim was ultimately rejected on the merits, the tribunal engaged with applicable human rights law with detail and nuance and has, at the very least, paved the jurisdictional way for future human rights counterclaims. *Urbaser* demonstrates that tribunals are capable of engaging with human rights arguments on their merits.

Since *Urbaser*, only one dispute has been decided involving water privatization: *Tallinn v. Estonia*.²³⁴ The case did not implicate human

²²⁷ See *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 1156 (stating that failing to make required investments detrimentally affected basic human rights and the health and living conditions of many impoverished people).

²²⁸ *Id.* ¶ 1189.

²²⁹ See *id.* ¶ 1192 (negating the idea that the BIT is a set of rules defined independently of other international law).

²³⁰ See *id.* ¶ 1193. The tribunal found such a principled position, that corporations “are by nature” not capable of holding human rights obligations, to be at odds with the BIT itself which views such entities as right-holders deriving from international law. *Id.* ¶ 1194. As subjects of international law, corporations could correspondingly bear obligations. See *id.* With reference to recent developments in corporate social responsibility, the tribunal concluded that “a corporation’s specific activities as they relate to the human right at issue” must be contextualized “in order to determine whether any international law obligations attach to the non-State individual.” *Id.* ¶ 1195.

²³¹ See *id.* ¶¶ 1196–99 (stipulating that all parties, both private and public, are obligated not to destroy certain human rights like those to adequate housing and living conditions).

²³² See *id.* ¶ 1210 (affirming that the human right to water is an obligation imposed on states, not investors).

²³³ See *id.* ¶¶ 1206–07 (clarifying that despite the concession’s connection to supplying water, the concessionaire has no obligation to actively protect the human right to water).

²³⁴ *United Utils. (Tallinn) B.V. v. Republic of Est.*, ICSID Case No. ARB/14/24, Award (June 21, 2019).

rights arguments, but the tribunal's discussion of the right to regulate and how contract provisions can influence investor expectations is worthy of mention. Estonia privatized its water and sewage system in 2000²³⁵ and within a few years began questioning tariff rates and the private entity's earned rate of return.²³⁶ By the end of 2010, the Estonian Parliament significantly revised the regulatory regime, adopted new tariff methodologies, and ordered lower tariffs.²³⁷ Having failed before Estonian courts and the European Commission, the investors filed for international arbitration in 2014, alleging a breach of the FET standard, among others.²³⁸

The *Tallinn* tribunal concluded that the claimant failed to demonstrate legitimate expectations based on either the privatization process or post-privatization events.²³⁹ Not only did the agreements lack stability clauses on which the investor could rely, but the very text of the agreements "exclude[d] any expectation of legal or regulatory stability."²⁴⁰ Therefore, the specificity of the tariff regime in the agreements could not bind the government "to a legislative or regulatory freeze."²⁴¹ The tribunal underscored that investors cannot reasonably expect "a static legislative and regulatory regime," absent an express commitment to that end.²⁴² A sovereign's legislative power includes the "right to enact, modify or cancel a law at its own discretion."²⁴³ Tallinn's FET claims were categorically dismissed, making it the first case considered herein where the tribunal found in favor of the state.²⁴⁴ While human rights were not invoked, the preservation of a state's sovereign right to regulate, particularly in the realm of tariffs, is of consequence for the affordability dimension of the right to water. Further, the *Tallinn* tribunal's reliance on the anti-stability clause demonstrates the capacity of contract provisions to preserve regulatory space.

²³⁵ See generally *id.* ¶ 154 (noting 2,000 preparations for privatization).

²³⁶ See *id.* ¶¶ 211, 225–27, 230, 236–40 (noting various proposals to reform tariff regulations and investigations concluding the rate of return was excessive and incompatible with applicable law).

²³⁷ See *id.* ¶¶ 259–63, 270, 291 (detailing amendments and tariff applications entering into force in 2010).

²³⁸ See generally *id.* ¶¶ 6, 292–306, 316 (explaining investors' failings before other courts and ensuing arbitration claims).

²³⁹ *Id.* ¶¶ 711, 761 (stating the tribunal was not persuaded that investors formed legitimate, protected expectations).

²⁴⁰ *Id.* ¶ 715.

²⁴¹ *Id.* ¶ 710.

²⁴² *Id.* ¶ 575.

²⁴³ *Id.* (quoting *Parkerings-Compagniet AS v. Republic of Lith.*, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sep. 11, 2007)).

²⁴⁴ *Id.* ¶ 939 (dismissing all claims presented in the arbitration).

III

CREATING SPACE FOR THE RIGHT TO WATER IN THE
FAIR AND EQUITABLE TREATMENT STANDARD

Solutions aimed at harmonizing the human rights and investment-treaty regimes abound. Scholars have proposed wide-ranging and often transformative solutions aimed at both states and tribunals.²⁴⁵ This Note explores a more modest form of making change, specifically how existing substantive standards can include the right to water. While incremental, such an expansion has the capacity to bring about immediate changes in tribunals' analyses, as they are not bound by precedent. This Part argues that including human rights law relevant to the right to water as part of the FET standard analysis can create accountability for investors and states alike, albeit in varying forms.

The FET standard is ubiquitous in international investment agreements (IIAs) and often outcome-determinative in disputes. The standard "has emerged as the most relied upon and successful basis for . . . investors."²⁴⁶ With respect to treaty practice, there is no singular definition to the FET standard. IIAs employ a variety of FET definitions that can broadly be categorized into the following formulations: (i) an unqualified obligation to accord FET; (ii) an obligation linked to an external source, such as principles of international law or the customary international law minimum standard of treatment ("MST"); or (iii) an obligation linked to additional substantive content, such as prohibiting the denial of justice or arbitrary measures.²⁴⁷ Nevertheless, the FET standard remains rather amorphous and subject to tribunal interpretation.²⁴⁸ The standard's content and what

²⁴⁵ Others have masterfully surveyed these solutions. See, e.g., Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. INT'L DISPUTE SETTLEMENT 277, 300–06 (2015) (elucidating several tools to include human rights in investor-state arbitrations).

²⁴⁶ U.N. Conference on Trade and Development, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, U.N. Doc. UNCTAD/DIEA/IA/2011/5 (2012) [hereinafter *Fair and Equitable Treatment*].

²⁴⁷ *Id.* at 17–18 (listing common approaches to the FET standard in treaty practice). Note that what constitutes the customary international law standard has itself given rise to varying interpretations. See *id.* at 57–58 (describing the three arbitral approaches taken by tribunals under NAFTA in identifying the content of the minimum standard of treatment).

²⁴⁸ See Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment*, 50 INT'L ARB. L. LIB. 1, 3 (2019) ("[T]he FET standard is like a 'black box full of surprises', the scope of its obligation being difficult to predict."). There are, however, new agreements which have deliberately constrained the interpretation and/or use of the FET standard, such as the 2020 United States-Mexico-Canada Agreement ("NAFTA 2.0") and the 2016 Comprehensive Economic and Trade Agreement (CETA). See Thomas J. Schoenbaum, *The Art of the Deal and North American Free Trade: Advantage for the United States?*, 14

conduct gives rise to violations has been developed on a case-by-case basis, which continues to this day.²⁴⁹ Despite the differing positions taken by tribunals on the relationship between FET and the MST,²⁵⁰ there has been some convergence on the content of the standard. According to the United Nations Conference on Trade and Development (UNCTAD), types of state action that would violate FET include: (a) defeating investors' legitimate expectations (in balance with the host state's right to regulate in the public interest); (b) denial of justice and due process; (c) manifest arbitrariness in decisionmaking; (d) discrimination; and (e) outright abusive treatment.²⁵¹ Scholars and tribunals have also considered transparency as an element of FET or closely related to protecting legitimate expecta-

OHIO ST. BUS. L.J. 100, 110 (2020) (noting that save for "a special benefit [that] is granted to U.S. companies doing business with the [Mexican] government," FET violations are no longer grounds for arbitration in NAFTA 2.0); Flavien Jadeau & Fabien Gélinas, *CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation*, 13 TRANSNATIONAL DISPUTE MANAGEMENT 1 (2016) (describing the ways in which the FET definition is circumscribed in CETA); U.N. Conference on Trade and Development, *IIA Issues Note: Recent Developments in the International Investment Regime*, 5, U.N. Doc. UNCTAD/DIAE/PCB/INF/2018/1 (May 2018), https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf [<https://perma.cc/U7EG-6KWL>] (noting that new treaties "aim more broadly at preserving regulatory space" by, inter alia, clarifying obligations like FET). While new IIA's and more constrained definitions of FET are important, they represent only a small portion (about ten percent) of the IIAs in force today. See U.N. Conference on Trade and Development, *IIA Issues Note: Taking Stock of IIA Reform: Recent Developments*, 4, U.N. Doc. UNCTAD/DIAE/PCB/INF/2019/5 (June 2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf [<https://perma.cc/TB9T-PXMN>] (noting that old-generation BITs represent ninety percent of those in force today). Further, standard survival clauses extend an IIA's validity past the date of termination, on average between five and twenty years. See U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2018, at 88, U.N. Sales No. E.18.II.D.4 (2018), https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [<https://perma.cc/UP5Y-9H9Q>]. As such, this Note focuses on FET interpretations applicable to old-generation BITs in force today.

²⁴⁹ See *Fair and Equitable Treatment*, *supra* note 246, at 43 (highlighting that a wide range of factual situations have warranted FET violations and that a goal for the future is to understand the FET obligation more fully); Meg Kinnear, *The Continuing Development of the Fair and Equitable Treatment Standard*, in INVESTMENT TREATY LAW: CURRENT ISSUES III, REMEDIES IN INTERNATIONAL INVESTMENT LAW THE EMERGING JURISPRUDENCE OF INTERNATIONAL INVESTMENT LAW 209, 223 (Bjorklund, Laird & Ripinsky eds., 2009) (arguing that the meaning of the standard has developed incrementally, case-by-case).

²⁵⁰ *Compare Vivendi I*, ICSID Case No. ARB/97/3, Award, ¶ 7.4.7 (Nov. 21, 2000) ("[T]he [FET standard's] reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone."), with *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 361 (July 14, 2006) ("[T]he minimum requirement to satisfy this standard has evolved [and] its content is substantially similar whether the terms are interpreted in their ordinary meaning . . . or in accordance with customary international law.").

²⁵¹ See *Fair and Equitable Treatment*, *supra* note 246, at 62.

tions,²⁵² but according to UNCTAD, the concern and criticism that position has engendered suggest it does not have sufficient support.²⁵³ Nevertheless, resolving the constitutive elements of FET is beyond the scope of this Note, as the “legitimate expectations” element is the central focus.

A. Investors’ Legitimate Expectations

The concept of legitimate expectations has become “the dominant element” of the FET standard.²⁵⁴ It has been used in arbitral awards spanning every textual type of FET clause²⁵⁵ and is an element tribunals are still working to define.²⁵⁶ Nevertheless, tribunals have also converged on certain aspects of this element. Arbitral practice indicates that the legitimacy of investor expectations can be assessed by (i) the representations made by the state (either specifically to the investor or generally to induce foreign investment), and (ii) the legal, social, and economic conditions existing at the time of investment.²⁵⁷

²⁵² See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 150 (2d ed. 2012) (asserting that states must provide transparent frameworks to investors such that they may rely on those representations); Kinnear, *supra* note 249, at 225 (stating that tribunals consistently find an obligation of transparency in FET clauses).

²⁵³ See *Fair and Equitable Treatment*, *supra* note 246, at 63 (acknowledging that while transparency has been raised as an element of FET, this view lacks sufficient support).

²⁵⁴ *Saluka Invs. B.V. (Neth.) v. Czech Republic*, UNCITRAL (1976), ¶ 302; King & Moloo, *supra* note 18, at 887 (“[I]nvestors and states can now say with some confidence that [FET] requires investors’ legitimate . . . expectations to be respected.”); AUGUST REINISCH & CHRISTOPH SCHREUER, *INTERNATIONAL PROTECTION OF INVESTMENTS: THE SUBSTANTIVE STANDARDS* 481 (2020) (discussing the “widespread acceptance in investment jurisprudence” that FET includes the protection of investor’s reasonable and legitimate expectations and that many tribunals see it as central to FET). *But see id.* (claiming that “the protection of legitimate expectations remains one of the most contested aspects of FET,” despite its widespread acceptance). New IIAs, however, like the 2018 Dutch Model BIT, suggest there may be some movement away from legitimate expectations. See Netherlands Model Investment Agreement art. 2, ¶ 2, Mar. 22, 2019, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> [<https://perma.cc/44Z4-P9L2>] (limiting investor expectation only to specific representations made by the state to the investor and specifically excluding regulations that interfere with expectations as breaching the BIT). Nevertheless, new IIAs remain only a small proportion of agreements in force today. See *supra* note 248 and accompanying text.

²⁵⁵ *Fair and Equitable Treatment*, *supra* note 246, at 64.

²⁵⁶ Kinnear, *supra* note 249, at 209 (“Arbitral awards since 1999 have made significant progress in clarifying the meaning of FET, and its elaboration continues at a rapid pace . . . [Despite this trend,] the FET standard continues to defy precise definition.”).

²⁵⁷ Kinnear, *supra* note 249, at 228; DOLZER & SCHREUER, *supra* note 252, at 149; *Fair and Equitable Treatment*, *supra* note 246, at 69. Tribunals do diverge with respect to how targeted legislation, rules, regulations, and state representations must be to give rise to legitimate expectations, but most require that investors must have relied upon those expectations in deciding to invest. Kinnear, *supra* note 249, at 228–29; *Fair and Equitable Treatment*, *supra* note 246, at 68–71.

The latter dimension presents an opportunity to involve the right to water and human rights law more broadly. A related but separate concept is often discussed when assessing investors' legitimate expectations: the sovereign right to regulate. Tribunals can balance this sovereign right with a state's obligation to provide a stable business environment.²⁵⁸ At first blush it may seem that the right to regulate duly covers human rights, but, as will be discussed, the varied approaches taken by tribunals make sole reliance on this balancing unsound.

1. *Legitimate Expectations Based on Pre-Investment Conditions*

The legal regime existing at the time of investment sets the backdrop against which investors base their expectations. This is often viewed as an investor's due diligence obligation; investors are expected to understand the political and economic risk of a host country and its regulatory environment before investing.²⁵⁹ The widely cited *Methanex v. United States* tribunal aptly explained such a "presumption of awareness"²⁶⁰ and how it relates to investor expectations and FET:

Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, nongovernmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.²⁶¹

Such pre-investment conditions could not legitimately give rise to expectations of restraint on future regulatory actions.²⁶² While tribunals are comfortable assessing the economic and political instabilities of a host state to determine pre-investment conditions, the cases discussed in Part II show little appetite for including the respondent

²⁵⁸ See *Fair and Equitable Treatment*, *supra* note 246, at 72–73.

²⁵⁹ Kinnear, *supra* note 249, at 232 ("The investor . . . has an obligation to assess realistically the riskiness of the market it is entering . . . [including evaluating] political and economic stability . . ."); *Fair and Equitable Treatment*, *supra* note 246, at 71; REINISCH & SCHREUER, *supra* note 254, at 493 ("Numerous tribunals have emphasized the importance of . . . investor due diligence for the emergence of legitimate expectations.").

²⁶⁰ *Fair and Equitable Treatment*, *supra* note 246, at 71.

²⁶¹ *Methanex Corp. v. United States*, ICSID, Final Award of the Tribunal on Jurisdiction and Merits, pt. IV, ch. D, ¶ 9 (Aug. 3, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> [<https://perma.cc/RA7F-7X49>].

²⁶² See *id.* pt. IV, ch. D, ¶ 10 (noting that Methanex entered the United States market aware of the regulatory environment).

state's human rights legal framework in that assessment.²⁶³ Using Argentina as an example reveals a rich tapestry of human rights laws that existed at the time of those investments. Argentina is party to all nine core international human rights treaties,²⁶⁴ many of which are given explicit constitutional equivalency in Article 75(22) of the Argentine Constitution.²⁶⁵

Recall GC 15 discussed in Part I, which clarifies the nature of Argentina's obligations as a party to the ICESCR: "States parties must prevent [third parties] from compromising equal, affordable, and physical access to sufficient, safe and acceptable water."²⁶⁶ A failure to do so violates the obligation to protect the right to water.²⁶⁷ Further, "unaffordable increases in the price of water" and a "failure to adopt mechanisms for emergency relief" violate the obligation to respect and fulfill the right to water.²⁶⁸ When one considers these human rights obligations as part of the legal regime existing at the time of investment,²⁶⁹ it becomes difficult to characterize an investor's expectation of increasing tariffs in the midst of an economic crisis as legitimate.

By considering human rights law as part of the pre-investment conditions that inform investor expectations, the right to water becomes part of substantive treaty analyses. This approach avoids relegating human rights arguments to the novel (and still unsuccessful) human rights counterclaim. It also avoids cabining human rights arguments to the exacting necessity defense,²⁷⁰ which subjects states to the

²⁶³ See *supra* Part II.

²⁶⁴ *UN Treaty Body Database*, OFF. U.N. HIGH COMM'R FOR HUM. RTS., https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN [<https://perma.cc/PU5U-HDUS>]. Argentina is also party to relevant regional agreements, such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. *Signatories and Ratifications*, DEP'T OF INT'L L. OF SECRETARIAT FOR LEGAL AFFS. OF OAS, <https://www.oas.org/juridico/english/sigs/a-52.html> [<https://perma.cc/C5WZ-T6ND>].

²⁶⁵ ARGENTINA'S CONSTITUTION OF 1853, REINSTATED IN 1983, WITH AMENDMENTS THROUGH 1994, art. 75(22), https://www.constituteproject.org/constitution/Argentina_1994.pdf?lang=EN [<https://perma.cc/356E-5QES>]. All other human rights treaties signed thereafter receive the same standing after a two-thirds vote of Congress. *Id.*

²⁶⁶ GC 15, *supra* note 28, ¶ 23–24.

²⁶⁷ *Id.* ¶ 44(b).

²⁶⁸ *Id.* ¶¶ 44(a), (c).

²⁶⁹ While some of the investments in these cases predate GC 15, it is important to note that GC 15 does not create new obligations. Rather, it gives "definition to certain of the ICESCR's explicit provisions" and "elaborates upon rights and obligations acceded to by States Parties, rights that the States Parties have already undertaken to realize." WORLD BANK, *supra* note 28, at 78. Further, investors themselves have made use of GC 15 in their arguments even when their investments predate the comment. See *infra* note 282 and accompanying text.

²⁷⁰ See *supra* note 161.

problematic assessment of their prior policies (i.e., whether they contributed to the state of necessity) and overlooks the reality that a state must do more than simply prevent a catastrophe in order to meet its human rights obligations.²⁷¹ Including relevant human rights law in the FET analysis might also avoid the thorny issue of whether human rights trump investment obligations. While states and advocates argue human rights must prevail,²⁷² the tribunals mentioned in Part II were hesitant to recognize that a conflict existed, let alone adopt a hierarchy of legal regimes.²⁷³ While many of the tribunals agreed in principle that the legal, social, and economic environment of a host state must inform the legitimate expectations of an investor, only the *Urbaser* tribunal went as far as to explicitly include human rights law in its assessment.²⁷⁴ The approach taken in *Urbaser* remains far from the norm in arbitration involving water privatization.

The sophistication of the investor is also related to the concept of legitimate expectations and presents yet another place to create investor accountability for the right to water within the FET assessment. Tribunals have relied on the experience of investors as a proxy for what can be expected in terms of due diligence.²⁷⁵ When investors fail to properly assess the markets they invest in, tribunals hold them to account by reminding investors that “[BITs] are not insurance policies against bad business judgments.”²⁷⁶ Human rights due diligence should similarly be expected of investors that specialize in investments intrinsically related to human rights, such as water privatization.

²⁷¹ See *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (Suez Buenos Aires)*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, ¶ 37 (July 30, 2010) (“[I]t is not for the Tribunal to determine the alternative measures that could have been adopted, because it cannot ex post facto substitute itself for the Argentine Government when it had to address the serious crisis that hit the country.”); see, e.g., GC 15, *supra* note 28.

²⁷² See *supra* notes 91, 153, 192 and accompanying text; see also *UN Expert: UN Charter and Human Rights Treaties Prevail over Free Trade and Investment Agreements*, OFF. U.N. HIGH COMM’R FOR HUM. RTS. (Sept. 17, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16439&LangID=EN> [<https://perma.cc/9BEB-T7CH>] (“States that ratify human rights treaties also enter into agreements that prevent them from fulfilling their human rights obligations. Revision of the investment treaties must ensure that in case of conflict, human rights prevail.”).

²⁷³ See *supra* notes 91–92, 153–54 and accompanying text.

²⁷⁴ See *supra* notes 209–13 and accompanying text.

²⁷⁵ See *Olguín v. Republic of Para.*, ICSID Case No. ARB/98/5, Award, ¶ 65(b) (July 26, 2001), 18 ICSID Rev.—Foreign Inv. L.J. 160 (2003) (noting that “an accomplished businessman, with a track record . . . going back many years [with] experience . . . in various countries” could hardly claim to be “unaware of the situation in Paraguay”).

²⁷⁶ *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 372 (July 24, 2008) (citing *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000)).

While there has been an expansion of South-South cooperation²⁷⁷ and domestic investment in water services, the market was long dominated by a few European operators. “[B]y 2001 just six operators accounted for 85% of the population served under [private-public partnership] contracts in developing countries.”²⁷⁸ It would be reasonable for a tribunal to expect that an investor like Suez, the largest global private water provider,²⁷⁹ would engage in due diligence to understand the host country’s right to water obligations. The Suez company, in fact, has already demonstrated its capacity to engage with human rights law and bodies relevant to the right to water. Suez participated in discussions preceding the drafting of GC 15 and contributed to consultations of the United Nations High Commissioner for Human Rights on water issues.²⁸⁰ Suez and other water investors have recognized the right to water²⁸¹ and have not hesitated to point to the human rights obligations of states when arguing that such duties do not fall to private companies.²⁸² Private sector participation in human rights forums is the new normal,²⁸³ and their involvement should cut

²⁷⁷ This term is used by policymakers and academics to describe investment by developing country firms in other developing countries, also known as countries of the Global South. See, e.g., *About South-South and Triangular Cooperation*, OFF. U.N. FOR S.-S. COOP., <https://www.unsouthsouth.org/about/about-sssc> [<https://perma.cc/C2N2-GM7J>] (“South-South cooperation is a broad framework of collaboration among countries of the South in the political, economic, social, cultural, environmental and technical domains.”).

²⁷⁸ *Urban Water Sanitation*, PPP KNOWLEDGE LAB, <https://pppknowledgelab.org/sectors/urban-water-sanitation> [<https://perma.cc/JN6C-5V6B>].

²⁷⁹ *The World’s Top 50 Private Water Operators*, GLOB. WATER INTEL. MAG., Aug. 2019, at 10, 11 (Aug. 2019), <https://www.spml.co.in/download/media/2019-2020/global-water-intelligence-august-2019-03132.pdf> [<https://perma.cc/4EH5-SBAR>].

²⁸⁰ Heller, *supra* note 54, ¶ 20; SUEZ ENVIRONMENT, HUMAN RIGHTS AND ACCESS TO DRINKING WATER AND SANITATION: CONTRIBUTION TO OHCHR CONSULTATION (2007), <https://www2.ohchr.org/english/issues/water/contributions/PrivateSector/Suez.pdf> [<https://perma.cc/Q6ND-YME3>] (responding to the High Commissioner’s consultation request).

²⁸¹ *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 379 (July 24, 2008) (“BGT itself has acknowledged the existence and importance of this right, stating that ‘every man, woman and child has the right to a reliable system of clean water and good sanitation.’”); *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (Suez Buenos Aires)*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 255 (July 30, 2010) (“Claimants respond that they have never questioned the right of the population to water. They point out that Argentina’s decision to privatize the Buenos Aires water service . . . was precisely to make that right more effective for larger numbers of Argentine inhabitants”); *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1161, (Dec. 8, 2016) (“[The right to water] is a fundamental right that the leading companies of the world have adopted in the Global Compact as being part of their corporate social responsibility.”).

²⁸² See, e.g., *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 693 (making use of GC 15 and General Assembly Resolution 64/292 to argue that undertaking the costs of fulfilling the human right to water “is a duty of the State, not of private companies”).

²⁸³ Heller, *supra* note 54, ¶ 20 (“The UN has allowed corporations to have a huge say in discussions and decisions.’ Particularly in the water and sanitation sector, . . . corporate

both ways; if investors can represent their interests before human rights bodies and dig into human rights law to disclaim obligations, they should be expected to understand the regulatory risk they face when investing in water. Expecting this kind of due diligence is a form of accountability.²⁸⁴ Investors should not be able to use states' human rights obligations to disclaim responsibility while also claiming that those obligations do not inform their expectations.

There is, of course, another side to this coin. One can imagine that over the long term, there would be effects on required rates of return and investment decisions if a state were free to breach contract terms by merely invoking human rights obligations. These are matters states must balance *ex ante* with appropriate legal frameworks that safeguard both human rights and the economic discretion of government in deciding which financial ventures to pursue in fulfilling those rights. States, as the ultimate duty-bearers, have an obligation to "ensure that the private business sector . . . [is] aware of, and consider[s] the importance of, the right to water in pursuing their activities."²⁸⁵ Importantly, states' human rights obligations cannot inform investor expectations if they do not exist to begin with. States must be willing to commit to international and domestic obligations and create supportive regulatory regimes that respect, protect, and fulfill the right to water. States cannot rely solely on tribunals to decide what informs investors' expectations. Further, sole reliance on broad obligations, like those in the ICESCR and the Argentine Constitution, may not be enough to convince conservative tribunals. As the *Urbaser* tribunal noted, "the investor's obligation to ensure the population's access to water is not based on international law . . . [and] is framed by the legal and regulatory environment under which the investor is admitted to operate on the basis of the BIT and the host State's laws."²⁸⁶

As states become more sophisticated in their invocation of human rights laws, the same can be expected of investors. Should tribunals consider human rights law in the FET analysis, states should be prepared to respond to investors that take issue with the lack of specificity and with the normative content of states' human rights obli-

representatives in international bodies . . . show more capacity to defend their interests and views than other civil society representatives.").

²⁸⁴ This may also further the use of the human rights due diligence framework put forth by the UN Guiding Principles, which expects companies to "identify, prevent, mitigate and account for how they address their impacts on human rights." Guiding Principles, *supra* note 68, ¶ 15(b).

²⁸⁵ GC 15, *supra* note 28, ¶ 49.

²⁸⁶ *Urbaser*, ICSID Case No. ARB/07/26, Award, ¶ 1209.

gations. States should similarly expect investors and tribunals to take issue with actions that cannot be justified as furthering human rights. Deporting management, as Tanzania did in *Biwater*, is hardly an act corresponding to the right to water.²⁸⁷ Failing to maintain water systems and execute required repairs, as Argentina did in *Azurix*, arguably goes a step further in that such failures directly undermine water quality.²⁸⁸ Human rights arguments will hardly prove persuasive in the face of state actions that directly (e.g., not addressing algae issues in reservoirs) or indirectly (e.g., negotiating contracts that significantly increase tariffs) undermine the right to water. In this way, including the right to water in the FET analysis can create accountability for states and investors alike.

2. *Balancing a Stable Business Environment with the Right to Regulate*

Tribunals have begun to converge on an important qualification to the legitimate expectations of investors: the sovereign right to regulate.²⁸⁹ In effect, tribunals balance a state's obligation to maintain a stable legal and business environment for investors with a state's right to regulate.²⁹⁰ One might assume that the right to regulate adequately encompasses the right to water, and that tribunals therefore already consider human rights in their substantive analyses. A closer look at this balancing, however, reveals the instability of relying on this presumption alone. As there is no binding precedent in ISDS, tribunals maintain discretion in whether and how they engage in such bal-

²⁸⁷ See *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 679(f) (July 24, 2008) (calling Tanzania's act of deporting City Water's senior management "one of the clearest examples of the abuse of sovereign power in this case").

²⁸⁸ See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 144 (July 14, 2006).

²⁸⁹ See *Fair and Equitable Treatment*, *supra* note 246, at 72–73 (noting the *Saluka* tribunal's recognition of the host state's legitimate right to regulate and the requirement to weigh claimant's legitimate expectations with the state's regulatory interests); *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (Suez Buenos Aires)*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 236 (July 30, 2010) (noting that legitimate and reasonable expectations must be balanced with "Argentina's right to regulate the provision of a vital public service"); *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic (Suez Santa Fe)*, ICSID Case No. ARB/03/17, ¶ 216 (July 30, 2010) (noting the tribunal must balance claimants' legitimate and reasonable expectations with Argentina's right to regulate).

²⁹⁰ See *DOLZER & SCHREUER*, *supra* note 252, at 145–48 (recognizing a state's right to determine its own legal and economic order while at the same time acknowledging the need for a stable legal and business environment when looking at fair and equitable treatment); Kinneer, *supra* note 249, at 233–36 (noting a failure to maintain a stable business environment potentially results in a breach of FET on the one hand while acknowledging states' regulatory powers on the other).

ancing. The water cases herein demonstrate just a few of the various approaches taken. With respect to the stable business environment obligation, the *Azurix* tribunal expected “pro-active [State] behaviour . . . to encourage and protect [foreign investment].”²⁹¹ In comparison, the *Vivendi* tribunal employed a “do no harm” approach that requires governments “not to disparage and undercut a concession” that has been properly granted.²⁹² With respect to the right to regulate, the *Tallinn* tribunal underscored that investors cannot reasonably expect “a static legislative and regulatory regime” absent an express commitment to that end,²⁹³ as a sovereign’s legislative power includes the “right to enact, modify or cancel a law at its own discretion.”²⁹⁴ For the *Urbaser* tribunal, the right to regulate domestic matters must be given a “high measure of deference” as generally accorded by international law.²⁹⁵ As can be seen, tribunal approaches differ. One can find numerous cases that adopt different or opposing approaches in giving content to and balancing these two factors.²⁹⁶ Further, the sovereign right to regulate includes much more than just human rights considerations and does not require tribunals to deliberately consider the human rights legal framework in their analysis. Relying on tribunals to consider human rights law within the right to regulate leaves, in essence, the discussion of the right to water to chance.

²⁹¹ *Azurix*, ICSID Case No. ARB/01/12, Award, ¶ 372.

²⁹² *Vivendi II*, ICSID Case No. ARB/97/3, Award, ¶ 7.4.39 (Aug. 20, 2007).

²⁹³ *United Utils. (Tallinn) BV v. Republic of Est.*, ICSID Case No. ARB/14/24, Award, ¶ 575 (June 21, 2019).

²⁹⁴ *Id.* But see *infra* note 296.

²⁹⁵ *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 594 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf [<https://perma.cc/YF48-ENNH>]. But see *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, ¶ 397 (Feb. 19, 2019), <https://www.italaw.com/sites/default/files/case-documents/italaw10692.pdf> [<https://perma.cc/R7EW-8YNJ>] (explaining that the commitments on which legitimate expectations are based are also exercises of sovereign power and the right to regulate).

²⁹⁶ For example, some tribunals have taken an opposing position to that taken in *Tallinn*, finding that where there is a legal regime intended to attract investment, express commitments or intent are not necessary. See, e.g., *Novenergia II – Energy & Env’t (SCA) (Grand Duchy of Lux.)*, *SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Final Arbitral Award, ¶ 548 (Feb. 15, 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf> [<https://perma.cc/BUQ3-A358>] (looking beyond Spain’s intended conduct towards the investor and considering “prospective laws as well as laws which aim at attracting foreign investors” as a basis for legitimate expectations); *Micula v. Rom.*, ICSID Case No. ARB/05/20, Award, ¶ 669 (Dec. 11, 2013), <https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf> [<https://perma.cc/4ZNR-GWSR>] (“It is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance.”).

CONCLUSION

Would such an expansion of legitimate expectations, and therefore the FET standard, be outcome-determinative for the water cases discussed? Many of the state actions considered make it difficult to answer that question affirmatively. Deporting management after interceding in operations or scaring the public into falsely believing that murky water is unsafe are hardly the kinds of actions investors would expect a state to take in furthering the right to water. Some tribunals might also adopt the minority view that investors' legitimate expectations are not the core inquiry of the FET analysis.²⁹⁷ This Note's proposal will have little effect for tribunals that do not look to investors' legitimate expectations in analyzing FET. Further, some cases may not require an assessment of legitimate expectations; this may happen when, for example, the facts indicate a state engaged in treatment that clearly violates the FET standard (denial of justice and due process, manifest arbitrariness in decisionmaking, outright abusive treatment, etc.).²⁹⁸ The application of the FET standard continues to be a fact-specific inquiry. The very nature of the standard is that of a gap-filler, providing investors the level of protection intended by treaties for state conduct which might otherwise be left out by more specific standards.²⁹⁹

Nevertheless, it is imperative that tribunals genuinely engage in cross-regime consistency to balance investment and noninvestment concerns. Such an integration creates opportunities for accountability on both sides of the ledger. In addition to realistically expecting investors to engage in human rights legal due diligence, expanding FET can also hold states accountable when they invoke human rights in perfunctory fashion. Such window-dressing on the part of states can have damaging consequences for the normative authority of human rights arguments in investment-treaty forums and does little to advance systemic integration between these two regimes. Ultimately, if we cannot convince arbitral tribunals to discuss human rights law when the investment itself is fundamentally connected to a human right like water, then what hope is there that the ISDS regime will evolve to

²⁹⁷ See REINISCH & SCHREUER, *supra* note 254, at 484 ("One should not overlook, though, that the inclusion of 'legitimate expectations' as an element of the FET standard has not remained unchallenged."); *id.* at 486 ("The majority of commentators point out that legitimate expectations have become an accepted element of FET.").

²⁹⁸ See, e.g., SAUR Int'l S.A. v. République Argentine, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 498 (June 6, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1015.pdf> [<https://perma.cc/36WS-J8MA>] (concluding that determining whether FET is tied to legitimate expectations is irrelevant to the case as only the events following the signing of the SLU could give rise to a breach).

²⁹⁹ DOLZER & SCHREUER, *supra* note 252, at 132.

consider investments' secondary or spillover effects on human rights? The fair and equitable treatment standard presents an opportunity to expand fairness and equity in ISDS not only for the disputing parties, but also for the *people* who stand to lose because of their actions.

APPENDIX

A. Case Chart

Available at: <https://perma.cc/9TZ2-HYDY>.

B. Acronyms

BIT	Bilateral Investment Treaty
CESCR	Committee on Economic, Social and Cultural Rights
FET	Fair and Equitable Treatment
ICESCR	International Covenant on Economic, Social and Cultural Rights
IAs	International Investment Agreements
ISDS	Investor State Dispute Settlement
MST	Minimum Standard of Treatment
SDGs	Sustainable Development Goals
UNCTAD	United Nations Conference on Trade and Development
WHO	World Health Organization
