The human right to water: defences to investment treaty violations

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ABSTRACT

At times, and for a variety of reasons, states will regulate the market in the furtherance of public-policy objectives—including to implement specific human rights obligations. Where investment agreements are in place, these kinds of measures may trigger an investor’s claim for breach by the state of its treaty obligations. Over the course of the last few decades, these hitherto distinct areas of international law protecting international investment on the one hand, and human rights on the other, have intersected with increasing regularity. Investment arbitration tribunals tasked with adjudicating a state’s conduct vis-à-vis its treaty obligations are now engaging in in-depth analyses of international human rights issues, including questions of applicability and substance. This article charts the development of the ‘right to water’ as a stand-alone human right in international legal jurisprudence and examines the future implications arising from key international policy developments.

KEY REFERENCES

- (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965)
- Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case No. ARB/97/3
- Sociedad General de Aguas de Barcelona S., Vivendi Universal SA v Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae IIC 229 (2005)
- SAUR International v Argentine Republic, ICSID Case No. ARB/04/4
- PacRim v El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, IIC 543 (2012)
- UN Guiding Principles on Business and Human Rights (2011)

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1. INTRODUCTION

That the interaction between investment treaty law and human rights considerations has attracted significant recent interest cannot be gainsaid. Despite fitful attempts over the past few decades to achieve an international consensus on the rules governing flows of foreign investment, the existing system consists of a persistently ad hoc network comprising more than 3,000 separate investment instruments.\(^1\) Although the texts of these agreements provide individually varying degrees of protection for the investor, the absence of references to human rights has become more and more conspicuous.\(^2\)

Since the first cases brought under the investment chapter of the North American Free Trade Agreement (NAFTA) agitated issues such as public health, safety, and environment protection, the questions of whether, and to what extent, human rights obligations attach to the underlying investment issues in dispute are being raised (if not decided) with some level of consistency across the investment arbitration world.

This article will explore the background to the irregular relationship between human rights and treaty arbitration—with a focus on the development of the ‘right to water’ as a stand-alone and substantive entitlement. Cases where tribunals have had to grapple with the right to water as a defence to alleged breaches have, over the last decade, started to assume prominence, particularly for the water provision and sanitation industry, offering vital insights to the ‘water co-operation’ story.\(^3\) In this respect, a case (currently in the merits phase before the International Centre for Settlement of Investment Disputes [ICSID]) concerning the effects of mining and extractive activity on water security is likely to be a welcome development to the existing jurisprudence.\(^4\)

In parallel to the increasingly sophisticated case law, international standards and public policy are developing in-kind: rules on transparency, the UN Guiding Principles on Human Rights and Business and an institutional push towards more scrutiny of investor behaviour provide the broad and ever-changing context of this debate. How (if at all) investment treaty arbitrators engage with human rights norms remains to be seen, but investors, human rights advocates and practitioners alike can no longer consider these questions irrelevant.

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\(^1\) Including investment agreements at the bilateral and regional levels, see <http://www.ili.org>.
\(^2\) Note, however, a limited number of investment treaties in which human rights are expressly cited: ‘EU-Russia Agreement on Partnership and Cooperation’ (2007) commits the parties to cooperate on ‘matters pertaining to the observance of the principles of democracy and human rights, and hold consultations, if necessary, on matters related to their due implementation’.


See also, Fabrizio Marrella, ‘The Human Right to Water and ICSID Arbitration: Two Sides of a Same Coin or an Example of Fragmentation of International Law’ (2011) II Current Issues of Public International Law 11, 27.


\(^4\) PacRim v El Salvador, ICSID Case No ARB/09/12.
2. THE DEVELOPMENT OF HUMAN RIGHTS LAW IN THE TREATY INTERPRETATIVE PROCESS

The very existence of investment treaties is in itself an attempt to address the considerable asymmetries that exist between a sovereign state and a foreign investor. For obvious reasons, a host state has considerable leverage against any private investor by virtue of it being sovereign—and with sovereignty comes the power to regulate everyone and everything within that same sovereign territory.5

In this way, investment agreements and their detailed elaboration of investor rights can simply be seen as levelling the playing field between the parties. Indeed, rights attributed to foreign aliens (including their economic rights linked to property) can be seen as, if not the precursor to human rights,6 then at least sharing a common origin in their respective efforts to limit state sovereignty and protect third parties from abuse.7

If the twin objectives of investment treaties are understood to be (i) the protection of foreign direct investment through an interconnected set of rights and obligations applicable to both the investor and host state8; and (ii) the encouragement of further economic development, then in the furtherance of these objectives, investment treaties have put forth a type of lex specialis, designed to ‘supplement the under-developed rules of customary international law related to the treatment of aliens and alien property’.9 That is to say, treaties have evolved over time to comprise a reasonably standard set of rights: guarantee against expropriation without compensation; fair and equitable treatment; full protection and security and most-favoured nation treatment.

Of course, how these standards are interpreted and what they exactly mean for investors is another question altogether. As will be discussed below, it is through the interpretation of these investor rights that human rights principles become relevant in the first place.

2.1 Human rights law applied through ‘international law’

Rights created by treaties exist on the plane of international law. Accordingly, the applicable law to interpret a treaty and its provisions is necessarily international law—no provision of national law (contractual, statutory, or otherwise) may be deployed to construe these instruments.10

8 For example, the rights of investors to protection against political risk and instability and the obligation of the host state to provide a politically stable and risk-free (as much as possible) investment environment.
As for the law applicable to the disputes, however, this is done either through an explicit reference in the terms of the treaty itself,11 or, where the parties have not chosen an applicable law to the dispute, through the application of Article 42(1) of the ICSID Convention (assuming that the ICSID Convention is applicable to the dispute) or the rules of any other arbitral institution.12

Since the time the ICSID Convention was adopted in 1965, ‘international law’ has been understood to mean a reference to Article 38(1) of the Statute of the International Court of Justice and inclusive of (i) as primary sources, treaties, customary international law, and general principles; and (ii) as secondary sources, judicial decisions and opinions of international legal scholars.13 To be sure, international law includes ‘a set of obligations to protect fundamental human rights’ just as much as it includes investment protections and investment law.14

It is now accepted as perfectly permissible for a tribunal to draw upon (or at least recognize that there is no reason to exclude) general human rights considerations when applying international law (with all its constituent parts) to investment agreements provided that such consideration takes place in the context of the investment dispute.15 It should be noted however, that this evolution towards a human rights-based approach is not to be understood as an arbitral imperative—an ICSID Tribunal recently dismissed a petition by the European Centre for Constitutional and Human Rights (ECCHR) to act as amicus curiae in proceedings impacting indigenous communities in Zimbabwe on the grounds that international human rights law has no relevance to the dispute.16

2.2 Human rights law applied through analogous treaty provisions

Secondly, the case for a human rights-based analysis finds support in the investment protections themselves.

11 See eg that international law applies to disputes under the NAFTA Ch 11.
12 Washington Convention on the Settlement of Disputes between States and Nationals of Other States, 1965, art 42(1):
   ‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’
13 This reference to ‘rules of international law’ was defined in Report of the World Bank Executive Directors on the Convention, para 40, DOC ICSID/2, ICSID Rep 3 (1965) as:
   ‘The term “international law” as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.’
14 Dupuy (n 6) 56.
16 Borders Timbers Limited and ors v Republic of Zimbabwe, ICSID Case No ARB/10/25 and Bernhard von Pezold and ors v Republic of Zimbabwe, ICSID Case No ARB/10/15.
Commentators have reasoned that modern international human rights law, now commonly accepted as a source of both direct duties owed by states and indirect duties owed by corporations, grew out of obligations long ago imposed on host states originally for the benefit of those same third-party foreign investors. Commentators have, therefore, reasoned that investment guarantees relating to ‘fair and equitable treatment’ and ‘full protection and security’ require levels of observation and vigilance that fairly resemble the duty of a state to protect human rights. Even more significantly, the content of these absolute standards can (and should) be informed by the international human rights regime as functionally comparable rules, including protection against arbitrary detention, fair and equal standing before the law, protection from injury, and access to remedies.

To use another example, an investor’s protection against expropriation without due process and compensation finds its equivalent under the European Convention on Human Rights (ECHR), the ECHR Protocol I and the American Convention on Human Rights. In a watershed case using human rights norms (contained in other treaties) as a comparative argument by analogy, Tecmed v Mexico, the Spanish investor claimed that its investment in a hazardous waste treatment plant had been expropriated by Mexico. In assessing Tecmed’s claim, the ICSID Tribunal turned to the jurisprudence of the European Court of Human Rights (ECHR) and the court’s decisions on the meaning and extent of ‘expropriatory action giving rise to compensation’ to assist the Tribunal in the treaty interpretation process. Again, the inherent connections between these legal propositions is obvious when one considers that the Tribunal’s justification for recourse to the ECHR was a provision in the relevant BIT instructing the arbitrators to resolve the dispute pursuant to ‘international law’. 

3. HUMAN RIGHTS LAW AS DEFENCES

Accepting, therefore, the interface between human rights norms and investment law in defining the scope of protection ‘owed to investors’, what then of a state’s concurrent obligations towards non-investors—that is to say, its own citizens?

17 International law, whether by custom or by treaty, imposes on the state the primary duty to protect the rights of citizens from violations committed by non-state actors, including corporations. An indirect duty exists on corporations to observe human rights standards, whereas the direct obligation (and any liability for breach thereof) lies with the state. Accordingly, as a general proposition, a private corporation cannot be held accountable for its actions in an international law context.


19 Paparinskis (n 7) 175; See also Dupuy (n 6) 50.

20 Ioana Knoll-Tudor, ‘The Fair and Equitable Treatment standard and Human Rights Norms’ in Dupuy and others (eds) (n 6) 322–35.

21 1952, art 1.


23 Técnicas Medioambientales Tecmed, SA v The United Mexican States, (ICSID Case No ARB (AF)/00/2), Award of 29 May 2003.

24 Consistent with the Report of the World Bank Executive Directors on the Convention (n 13) the Tribunal interpreted this reference to ‘international law’ as meaning a reference to art 38(1) of the Statute of the International Court of Justice. ibid para 116.
In such a context, I propose two situations that can reasonably give rise to human rights inquiries in the context of investment disputes:

i. states that regulate the market and/or take expropriation action (ostensibly or not) to progressively fulfil its human rights obligations which result in a breach of the obligations owed to investors under a specific treaty; or

ii. alleged human rights violations on the part of a foreign investor that may disqualify, or at least militate against, the application of investment treaty protection.

While the two issues are often intimately linked, and scrutiny of investor conduct and activity is increasingly forming part of international norms (see Sections 8.4 and 8.5), this article is mainly concerned with an analysis of the former, and the extent that such human rights-related measures may be used to defend any treaty claim brought by an investor.25 After all, one of the state’s primary functions is to protect its citizens from rights violations by third parties, and it has been commented that ‘privatisation of essential goods and services does not mean privatisation of international responsibility’.26

It should be borne in mind, however, that the jurisdictional limits of an investment tribunal empowers it only to decide on issues brought by ‘investors’ (defined by the relevant treaty) relating (either directly or indirectly) to an ‘investment’ (defined by the relevant treaty). In these cases, both jurisdiction ratione personae and materiae will be satisfied.27

By contrast, individuals of the host state who may otherwise and legitimately have human rights complaints—and which human rights complaints may relate directly to an investment (defined by the relevant treaty) do not have autonomous standing before an investment tribunal to bring human rights claims before such tribunals.

4. THE RIGHT TO WATER AS A HUMAN RIGHT

Water: a limited natural resource with global use running at twice the level of population growth.28

The global water crisis, where at least 1.1 billion people in the world lack access to sufficient and sufficiently clean drinking water, has taken on increasing urgency.29 Despite some ambiguity over the last decade regarding the nature of its status as an international human right, in July 2010, the UN General Assembly recognized

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25 That is to say, human rights principles and laws are applied directly to the treaty, or allow a Tribunal to consider state’s specific responsibilities under human rights law or used to interpret the specific defences available to a state, including the defence of necessity or public policy.

26 Marrella (n 2) 24.

27 Note the one possible exception to this rule being counterclaims by host states.


'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'.

Several months later, in October 2011, the UN Human Rights Council adopted a substantively similar resolution that:

‘the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to . . . the right to life and human dignity’.

These elaborations have given a renewed force to the argument that human rights cannot be fully realized without access to clean and safe drinking water—a proposition previously articulated in key international human rights treaties including the Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination Against Women.

Some argue that, taken together, these instruments require states to progressively realize the right to water to the highest limit of their available resources. A more bold interpretation is that the instruments place specific and binding responsibilities upon governments to ensure that its citizens may enjoy sufficient, safe, accessible, and affordable water (without discrimination) by taking steps to ensure that ‘[e]xisting legislation, strategies and policies . . . are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements.

Such efforts to create a coherent set of rights relating to access to water and sanitation largely mirror states’ own national frameworks: 41 countries have now enshrined the right to water in their national constitutions or incorporated (implicitly or explicitly) the right to water and sanitation into national legislation. This has gone some way to elevating the status of the right to water to customary international law.

5. CASE STUDIES ON WATER AND SANITATION SERVICES

Developing nations wishing to attract capital, infrastructure expertise and better governance created a trend towards the privatization of public services (including and

32 art 24(2)(c)
33 art 14(2).
especially water utilities) in the 1990s. This practice, actively embraced by the World
Bank and International Monetary Fund who contemporaneously heralded the priva-
tization of state-owned utilities on the assumption that water is an economic good,\textsuperscript{37}
does not always co-exist easily with the fact that water resources (within sovereign
territorial boundaries) remain the property of a state, and that the general right to
regulate state property is traditionally an inherent part of sovereign-state powers.\textsuperscript{38}

Private actor participation in the water and services sector has always been a com-
plicated interaction. Sources claim that 5 per cent of the world’s population was served,
to some extent, by private players in 1999, forecast to go up to 16 per cent by 2015
and 21 per cent by 2025.\textsuperscript{39} To speak of water and sanitation services, therefore, is to
speak of a market that is currently worth several billion dollars—and growing.

Over the course of the last 15 years, a number of BIT arbitrations have emerged
in relation to the water provision and sanitation industries. Indeed, with the active in-
volvelement of private actors in water supply, it is not surprising that many, if not
most, of the disputes are startlingly similar: to modernize water supply/sanitation
systems a state outsources the operation of the local water distribution system or
wastewater treatment plant to a foreign investor (or consortium). The project seems
to work well until, for various reasons, it is derailed by claims of tariff increases, water
quality concerns, public health issues, and discrimination of access and provision—
all of which could potentially represent a violation of human rights. Naturally, those
claims then form the basis of the relevant governments’ decision to close down the
foreign investment activity and defend itself against claims of treaty breach.\textsuperscript{40}

From the time that the first proceeding based on the above scenario was brought,
and with increasing consistency, tribunals have been presented with investors’ claims
for suspended or terminated concessions/leases—typically through allegations of ex-
propriation on the one hand, and state rejoinders invoking the human right to water
and public health as a purportedly legitimate defence on the other.\textsuperscript{41}

5.1 Vivendi case

\textit{Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic
(Vivendi)},\textsuperscript{42} ICSID’s longest-running matter at over a decade in duration, was the

\textsuperscript{37} William Schreiber, ‘Realizing the Right to Water in International Investment Law: An Interdisciplinary

\textsuperscript{38} See Howard Mann, ‘Implications of International Trade and Investment Agreements for Water and
www.aguavisionsocial.org/documentos/libre%20comercio%20y%20agua/Howard_Mann_Implications_of
international_trade_and_investment_agreements_on_water.pdf> accessed 17 April 2015.

\textsuperscript{39} Pinsent Masons Water Yearbook (13th edn, 2011–12) xi.

\textsuperscript{40} Jorge E Viñuales, \textit{Foreign Investment and the Environment in International Law} (Cambridge: Cambridge

\textsuperscript{41} Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic (ICSID Case No ARB/
97/3); Azurix Corp v Argentine Republic (ICSID Case No ARB/03/30); Azurix Corp v Argentine Republic
(ICSID Case No ARB/01/12); Aguas del Tunari SA v Republic of Bolivia (ICSID Case No ARB/02/3);
SAUR International v Argentine Republic (ICSID Case No ARB/04/4); Biwater Gulf (Tanzania) Ltd v
United Republic of Tanzania (ICSID Case No ARB/05/22); Impregilo SpA v Argentine Republic (ICSID
Case No ARB/07/17).

accessed 17 April 2015.
first known investment treaty case to really canvass the idea that access to clean wa-
ter was a crucial element of human existence.

It concerned a water and sewerage services concession in the Tucuman province
of Argentina. Vivendi, a French investor, claimed that the Argentine provincial gov-
ernment breached the provisions of the France–Argentina BIT, including those on
fair and equitable treatment and expropriation, by repeated political and harrassing
behaviour, including imposing a unilateral tariff reduction and ‘encouraging cus-
tomers not to pay their bills’. Conversely, Argentina accused the investor of price
gouging and supplying water with unhealthy levels of bacteria and turbidity. Vivendi
commenced proceedings in 1997; however, the Tribunal dismissed the claim for ab-
sence of jurisdiction on the grounds that any adjudication required interpretation of
the provisions of the Concession Agreement (which was subject to the exclusive ju-
risdiction of the local courts of Tucuman province).

This award on jurisdiction was partially annulled in 2002, and three years later
Vivendi resubmitted the very same claims before a newly constituted tribunal. In its
2007 decision, the Tribunal found in favour of Vivendi and awarded $105 million in
damages.

In its defence, Argentina government did not explicitly adopt the language of
‘human rights’ or ‘water rights’. Instead it set out its obligation to safeguard public
health and the well-being of the population by referring to access to clean water as
‘a fundamental human need’, couching the issue in terms of essential public pol-
icy. In the absence of any pleaded arguments making the necessary connection to
the human right to water, the Tribunal did not address the relevance (or potential
application) of international human rights as a governing standard. What the
Vivendi Tribunal did do, however, was lay the groundwork for host states to use
the right to water as specific defences to claims of non-compliance with treaty
provisions.

5.2 Suez case
The opportunity to give further shape and direction to an emerging human rights-
based analysis of legal issues arose in Suez v Argentina. Here, a consortium of
foreign (and local) investors created a local entity that entered into a 30-year
concession contract in 1993 to manage the water and sewerage supply in Buenos
Aires. Following eight years of relatively peaceful co-existence, Argentina’s economic
crisis of 2000 provoked emergency preservation measures—in particular the
government sought to freeze the water tariffs to hold the prices steady and protect the population’s ‘right to water’. 48

In ruling on whether to allow a joint amicus curiae submission by intervening non-governmental organisations (NGOs) during the early stage of proceedings, the Tribunal pre-empted that the case would raise ‘a variety of complex public and international law questions, including human rights considerations.’ 49 Indeed, the Tribunal recognized the requirement to interpret the issues at stake and the legality of a state’s actions in accordance with international law (applicable as the law of the investment treaties and by virtue of Article 42(1) of the ICSID Convention). 50

Both Argentina and the intervening NGOs emphasized to the Tribunal the need to interpret treaty provisions and obligations in light of other international norms, including the right to water. Argentina then went on to cite those same human rights standards as providing the context for a legitimate and defensible response (which context is informed by the right to water) to rebut the allegation of treaty breach.

For its part, the Tribunal agreed that human rights law, specifically as it relates to the right to water, imposed relevant obligations through the mechanisms discussed at Section 2. However, the Tribunal found that Argentina’s human rights obligations and its investment obligations were not ‘inconsistent, contradictory or mutually exclusive’. 51

6. ONE OF THE RECENT CASES—SAURI V ARGENTINA

In June 2012, the relevance of human rights arguments to investment disputes was given another airing in the ICSID case SAUR International v Argentine Republic. 52 The dispute in question arose out of an investment by SAUR International (SAURI) in a provincially owned water company Obras Sanitarias de Mendoza (OSM). OSM was the holder of an administrative concession for the supply of drinking water, sanitation, and sewerage services in Mendoza, Argentina. SAURI had invested in OSM via minority holdings in a US–French–Argentine consortium led by Enron, and also through a 100 per cent owned local operating company, Aguas de Mendoza. As a result of these equity investments, OSM entered into a 95-year contract in June 1998 with the Mendoza province to manage the water and sanitation concession. Over the course of the following years, exacerbated by the effects of the 2002 financial crisis, the government issued a national emergency decree to freeze all water prices charged to consumers. SAURI maintained OSM was contractually entitled to increases in pricing on the grounds that the peso’s sustained devaluation made revenues insufficient to cover the ballooning costs—in other words, tariffs needed to be increased to maintain the ‘economic equilibrium’ of the project.

48 ibid para 252.
50 ibid.
51 Suez case (n 47) para 262.
In addition to, or perhaps because of, OSM’s inability to pay for the services required under the concession, the project suffered from problematic operational issues. An audit of OSM’s water services found breaches of drinking water quality, breaches in the provision of sewerage services (both in terms of quality and quantity) and breaches of basic levels of consumer service (including connection, pressure and access).

6.1 Commencement of ICSID Arbitration and suspension of proceedings
In 2004, SAURI initiated arbitration under the France–Argentina BIT claiming the governmental measures were tantamount to indirect expropriation and violated the guarantee of fair and equitable treatment under the treaty. Argentina contested the Tribunal’s jurisdiction on the grounds that the issue was a contractual claim, not a treaty claim. And since only OSM was a party to the concession contract, SAURI should not be able to bring a claim founded on the alleged breaches of those contractual commitments. Argentina contended that OSM (or SAURI’s local operating company) must pursue the dispute through the local Argentine courts rather than in an international investment forum.

In January 2006, the Tribunal issued a decision affirming its jurisdiction in the matter. It agreed with Argentina that the measures had been taken against OSM under the concession contract; however, it determined that the underlying question was whether such measures constituted a breach of SAURI’s rights (as a minority shareholder of OSM) under the France–Argentina BIT. The Tribunal answered this question affirmatively (again, in its decision on jurisdiction), stating that indirect minority shareholdings could be defined as ‘investments’ under the terms of the treaty.53

In April 2006, the arbitration was suspended at the request of both parties, pending settlement negotiations. Throughout the ensuing five years of back and forth, the Province of Mendoza implemented a series of ‘additional measures’ culminating in the termination and renationalization of the concession contract for technical and operational failures. By this time, and in anticipation of the Government’s likely actions, SAURI had reinvigorated its ICSID proceedings for BIT violation.

6.2 Relevance of human rights law and its application
In its defence to the merits of SAURI’s claims, Argentina made human rights obligations a central part of its arguments.

First, it maintained that the system of investment protection enshrined in the BIT cannot be interpreted without reference to the state’s other international obligations. Assuming general consensus that the law applicable to investment arbitrations comprise rules of ‘international law’,54 a government’s BIT obligations should be understood vis-à-vis its obligations under human rights treaties—including the obligation to safeguard the right to water. This argument gains particular legal strength in Argentina’s case, since the Universal Declaration of Human Rights, along with other

54 See discussion at Section 2.
instruments of international law, has acquired constitutional rank in the hierarchy of Argentine law.\textsuperscript{55}

Secondly, and in the practical application of this argument, Argentina made the point that since OSM failed to provide quality water and sewerage services to its citizens, Argentine authorities were, therefore, obligated to take measures to ensure their citizens’ fundamental rights to water and sanitation were protected against violation by third parties. These measures constituted, according to the government, both a legitimate and proportionate response to the threatened provision of water, and a direct and specific defence to the allegation of treaty violation.\textsuperscript{56}

By way of rejoinder, SAURI argued that the invocation of human rights in general, and the right to water especially, represented an attempt by the Argentine to post-facto justify its otherwise illegal acts: the motives of the government authorities were irrelevant in assessing whether an expropriation in fact occurred.\textsuperscript{57}

\textbf{6.3 Tribunal’s decision}

In its assessment of these questions, the Tribunal agreed with Argentina, first that human rights in general was a source of law applicable to the arbitration (through the mechanisms described at Section 2) and secondly that the right to water constitutes a human right within the meaning of the human rights law applicable to the proceedings.

Discussing the applicable law, the Tribunal stated that the provision of, and access to, safe drinking water constituted, from the state’s perspective, an essential service, and from a citizen’s perspective, a fundamental right. For that reason, the Tribunal was inclined to agree that the law can (and should) allow for a government to exercise its legitimate functions relevant to investment activity, including the planning, supervision, imposition of penalties and, where appropriate, termination.\textsuperscript{58}

However, appended to this right was a recognition, of sorts, that these kinds of governmental ‘powers’ place the nation state and foreign investor in an asymmetrical power relationship: an investor may often find itself dependent on the state to be able to carry out its own responsibilities. According to the Tribunal, therefore, state powers are not ‘absolute’ and must be balanced against the rights and guarantees granted to foreign investors under the BIT. Notably, the Tribunal did not give any indication as to how such a balance should be achieved, stating that:

\[1\]e droit fondamental à l’eau et le droit de l’investisseur à bénéficier de la protection offerte par l’APRI opèrent sur des plans différents.\textsuperscript{59}

As for the liability, the Tribunal ultimately determined that there can be no doubt that a sovereign state, in the public interest and acting in defence of what it believes

\textsuperscript{55} art 75(22) of The Constitution of the Argentine Nation.


\textsuperscript{57} ibid para 329.

\textsuperscript{58} ibid para 330.

\textsuperscript{59} ibid para 331.
to be the public good may, at any time, decide to nationalize a public service such as the supply of drinking water and sanitation. However, once an investment (which enjoys the benefit of the protection of a bilateral investment treaty) is deemed to be expropriated, the state cannot ignore its international obligations to provide full compensation. On balance, it found the Argentine Government had breached the BIT by adopting a series of measures of expropriation and nationalization (quantum to be decided at a later stage).

7. CASE INVOLVING THE EXTRACTIVE INDUSTRIES—PACIFIC RIM v EL SALVADOR

The above cases have all concerned activities of water and sanitation service providers. Of equal importance, however, are the activities of extractive industries. Mining activities have a similar, if not more statistically significant, effect on natural resource depletion and water security. For example, what of a state’s defence when it has nationalized the water industry on the grounds that the investor has polluted the environment or destroyed a water source?

The case of PacRim v El Salvador, only recently arrived at the merits stage, is currently before an ICSID Tribunal and takes place in the context of the increasing investment interest in Central America and its mineral and metal deposits.

In this case, Pacific Rim, a Canadian-based mining firm, proposed a gold mining project in the basin of the Lempa River using large quantities of water and cyanide to extract the gold from the excavated ore. In 2002, Pacific Rim (which had recently merged with Dayton Mining Corporation) acquired the exploration permits and began exploratory drilling in the areas known as ‘El Dorado’.

Several years later in 2004, Pacific Rim petitioned the El Salvador government to grant a mining exploitation concession pursuant to the Salvadoran mining law (which had, at least until that point, promoted foreign investment in metals mining). Among the documents required as part of this concession application, Pacific Rim submitted an Environmental Impact Assessment (EIA) and feasibility study supposedly to analyse the baseline environmental conditions and projected environmental impact of the mining activities. Following the publication of the EIA, and as part of the consultative process, the El Salvador Government received significant opposition from the public (including from environmental NGOs and civil society organizations) anchored in the conclusions contained in an independent report prepared by Dr Robert Moran (‘Moran Report’) which described the purported detrimental environmental impacts of the El Dorado mining activities.

60 ‘[I]l est indiscutable qu’un État souverain, pour cause d’utilité publique et agissant en défense de ce qu’il estime être l’intérêt général, peut décider à tout moment de nationaliser un service public essentiel comme l’est l’approvisionnement en eau potable et l’assainissement.’Ibid para 413.

61 Ibid.


Having reviewed Pacific Rim’s submissions in light of the Moran Report, the El Salvador Government refused to grant the relevant concessions unless and until Pacific Rim addressed concerns with the project’s excessive water usage, lack of access to clean drinking water and cyanide contamination within a comprehensive feasibility study.\(^{64}\)

Ultimately, in early 2008, the then El Salvador President Antonio Saca announced ‘in principle, I am not in favour of granting those permits’—a statement widely interpreted as imposing a \textit{de facto} ban on metals mining in El Salvador.\(^{65}\) Pacific Rim suspended all drilling activity in the El Dorado a few months later, and in early 2009, President Saca was quoted in the Salvadoran press as stating:

> While Elías Antonio Saca is in the Presidency, he will not grant a single permit [for mining exploration], not even environmental permits.\(^{66}\)

Taking this as confirmation of the Salvadoran executive’s \textit{de facto} mining moratorium, Pacific Rim filed a $315 million claim ($77 million wasted expenditure plus future revenue loss) under the US–Central America Free Trade Agreement (CAFTA) using an investment vehicle incorporated in Nevada, USA. In determining whether it could hear the case, the ICSID Tribunal ruled that it did not have jurisdiction under the CAFTA (on account of Pacific Rim being a Canada-based company and not a national under the CAFTA signatory states). The Tribunal, nevertheless, allowed the case to instead be brought pursuant to El Salvador’s investment law.\(^{67}\) Pacific Rim filed its first submissions in March 2013. El Salvador’s reply was submitted on 10 January 2014, in which water quality, pollution and the constitutional imperative to protect natural resources and public health was placed squarely before the Tribunal.\(^{68}\)

While the issues specific to the El Dorado project are currently playing out before an ICSID Tribunal, the case will be telling as one which takes account of the wider constellation of human rights in the context of mining and extractive industries.

The Tribunal in Pacific Rim will be faced with the novel task in determining how these rights measure up against one another, and the case could mark an important milestone in the development of investment treaty jurisprudence. There is ample opportunity for the Tribunal to devote extensive discussion to the issues relevant to the right to water: what, if any, obligations encumber foreign investors in ensuring that mining activities do not interfere with community water access and supply? To what extent may a government rely on any such failure as a defence to its own purported

\(^{64}\text{ibid. See also Republic of El Salvador’s Preliminary Objections Under Articles 10.20.4 and 10.20.5 of the CAFTA, paras 29–32, <http://italaw.com/documents/PreliminaryObjections.pdf> accessed 17 April 2015.}\)


breach of treaty? How can a balance be struck that accommodates both investment obligations and human rights objectives, including the right to water?

8. INVESTMENT POLICY AND TRENDS AFFECTING THE RIGHT TO WATER

Investment policy develops as a result of changes in the political and economic context which, in recent years, has been battered by a series of crises—economic, food security, climate, and environment.69 These challenges, the effects of which are felt at regional, state, and global levels alike, are having important consequences for the way that policy—international and domestic—is shaped. With social and environmental concerns front and centre, policymakers now seek to strike a middle ground that balances human rights objectives and inclusive development goals with economic and investment concerns.

8.1 New transparency regime under the UNCITRAL Transparency Rules

Transparency in investment treaty arbitration implies a patchwork of differing standards, depending largely on the investment agreement, national laws, the administering institution, and any other agreements between the parties.

Under the widely used ICSID Rules, transparency in cases is decided on an ad-hoc basis—there is no general duty of confidentiality nor of transparency70—and absent an express waiver to the right to confidentiality, as a matter of practice, ICSID proceedings almost always take place in secret.71

NAFTA, on the contrary, reflects the US staunchly pro-transparency position and provides for public access to documents, submissions, awards, and for third-party submissions.72 Equally, the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA-DR) provides for public access to treaty arbitration documents and hearings, and amicus curiae submissions from the public are expressly allowed.73

A different approach again is provided for parties who have chosen arbitration under the auspices of, for example, the International Chamber of Commerce—parties remain anonymous although a general and unspecified award synopsis may be published.74

According to the UN Conference on Trade and Development (UNCTAD), the best estimate of current and past investor–state arbitration filings sits at more than

70 art 44 of the ICSID Convention provides ‘[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.’ See also Biwater Gauff (Tanzania) Ltd vs Tanzania (ICSID Case No ARB/05/22)—Procedural Order No 3 of 29 September 2006.
71 Ileana M Smeureanu, Confidentiality in International Commercial Arbitration (The Netherlands: Wolters Kluwer 2011) 107. Note, however, that in some cases provision is made for the publication of excerpts.
72 See NAFTA, arts 1128, 1129 and 1137.4 and Ch 11 generally.
73 See CAFTA-DR, ch 10, art 10.20.3.
74 Publication of awards may be possible where the parties agree and in accordance with any applicable confidentiality requirements.
This number is almost certainly inaccurate, however, due to the confidentiality of many of the arbitrations. It is, therefore, practically difficult to have an up-to-date understanding of the types of investment claims brought before tribunals, the decisions issued by the tribunals and their reasons for doing so. And it is even more difficult to ascertain with any degree of certainty the existence and extent that human rights are implicated in such investment treaty proceedings.

Unsurprisingly, a strong public interest argument has long been advanced to promote the uniform transparency of investment proceedings, particularly since they involve, by definition, alleged government wrong doing, possible liability for state treasuries, legislative decision-making and, importantly, issues of fundamental public interest including and especially environmental concerns, exploitation of natural resources and the right to water.

The United Nation Commission on International Trade Law (UNCITRAL) has recently sought to remedy this asymmetry by adopting the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration (Transparency Rules). Having come into effect on 1 April 2014, the Transparency Rules allow (where, and to the extent that, the parties have agreed to the rules’ application) public access to documents, public hearings, third-party amicus curiae submissions and the wide dissemination of awards. While the extent to which tribunals will adjudicate in favour of fuller transparency, especially when balancing competing interests of efficiency and fairness of process, remains to be seen, it seems clear that transparency—an essential pre-condition to any fuller appreciation of the human rights implications of investment treaty arbitration—under the new UNCITRAL regime will have a noticeable effect on both the substance and process of the applicability of human rights considerations in investment arbitration.

In practical terms, a more transparent regime means promoting access to essential information relating to the allocation of resources (including and especially water). This access to information is essential for effective public action, scrutiny and monitoring of both the private and public sectors.


79 Peterson and Gray (n 9) 32.

8.2 UN guiding principles on business and human rights
A second recent and important development attempting to strike a balance between investment protections and human rights objectives can be seen in Professor John Ruggie’s widely esteemed ‘UN Guiding Principles on Business and Human Rights’ (Guiding Principles). Appointed Special Representative to the UN Secretary General for business and human rights in 2005, Professor Ruggie’s mandate encompassed ‘a move beyond what had been a deeply divisive doctrinal debate’ to charter, in broad terms, a separation of state versus corporate human rights responsibilities. Endorsed by the UN Human Rights Council in 2011, the Guiding Principles have implemented the ‘protect, respect and remedy’ framework.

8.2.1 State duty to protect
The first pillar of the Guiding Principles is the state’s duty under public international law to ‘protect against human rights abuse within their territory and/or jurisdiction by third parties including business enterprises’. More specifically, this pillar obliges states to protect against violations by way of progressive ratification of international human rights standards into the domestic law and the implementation of a legitimate system for the enforcement of those standards.

That a state is responsible for safeguarding the human rights of its own citizens is uncontroversial: that a state is further responsible for protecting those same human rights in the context of corporate activity is significantly more contentious. One of the Guiding Principle’s true achievements has been the removal of all doubt that states may breach their human rights obligations where ‘they fail to take appropriate steps to prevent, investigate, punish and redress’ corporations’ abuse.

8.2.2 Corporate obligation to respect
Although the Guiding Principles do not attempt to outsource human rights protection—this remains the bedrock duty of states—it is clear that corporate actors owe, at a minimum, a broad range of human rights obligations indirectly. The advantage of the Guiding Principles over earlier corporate responsibility initiatives, is that rather than delineating the specific types of human rights private investors should respect, the Guiding Principles set about defining corporate responsibilities relative to those human rights.

In this way, the Guiding Principles articulate not just the (negative) obligation to avoid infringing on human rights, but positive business responsibility to carry out human rights due diligence and preventative measures; for ongoing human rights

83 ibid.
84 See eg the UN Global Compact and the OECD Principles.
85 Ruggie (n 82) Principle II(A)(11).
risk analysis; and to position themselves to respond appropriately to abuses that occur in spite of those safeguards.

These obligations represent an encouraging development for the protection of human rights in general and the right to water in particular. Indeed, for high-risk activities such as mining and water services, the obligation to understand any adverse human rights impacts will assist in identifying trends and patterns and highlight repeat problems that may require a systemic approach to resolve. In this respect, corporations are required to:

i. carry out water access and quality impact assessments (especially if no such requirement exists under the host state’s domestic framework); and
ii. engage with local stakeholders—before, during and after investment activity.

8.3 Trends towards a non-compensable ‘right to regulate’ under international law

Although human rights law imposes an over-riding responsibility on states to protect citizens, investment agreements are, with the exception of a notable few treaties, silent on positive human rights obligations (either for the state or the investor).

In the context of investment law, this ‘duty to protect’ finds equivalency in the idea of a state’s ‘right to regulate’—an inherent aspect of state sovereignty. Ordinarily, this regulatory ability is restricted under investment agreements so as to, as far as possible, provide a predictable regulatory environment. Indeed, relinquishing certain regulatory rights through investment agreement is not unlawful, or even objectionable—the difficulty arises when limitations impede the development of a ‘sound human rights policy’. As the Tribunals in both Vivendi and SAURI were required to resolve: when does a regulation, or a state measure, spill over into a form of compensable expropriation or compensable breach of investment rights?

Some commentators contend that states should be able to regulate a range of issues relevant to human rights and that investment treaties should, at the very least, contain carve-outs or reservations creating a ‘window’ to avoid liability for measures that may otherwise be inconsistent with the usual standards of protection. Interestingly, these kinds of ‘exception clauses’ have experienced an increased take-up in recent years, as parties draft (and include) innovative sustainable development provisions to preserve key public policy priorities such as the right to water and sanitation, natural resources, environmental matters, and public health—all areas

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86 Supra, n.3.
87 For example, through the use of stabilization clauses as risk management tools. Stabilization clauses can exist either as a ‘freezing clause’—freezing the host state’s domestic law at the time the contract is executed—or ‘economic equilibrium clauses’. In both cases, the purpose is to provide a predictable regulatory environment by insulating, or indemnifying, the investor from any regulatory regime changes.
88 Mann (n 15) 18.
that have a clear impact on human rights in general, and the right to water specifically.\textsuperscript{90}

These kinds of exception clauses employed in investment agreements may be ‘general’ or ‘specific’. General exceptions are traditionally modelled on General Agreement on Tariffs and Trade (GATT) Article 20,\textsuperscript{91} and can be seen in the Association of Southeast Asian Nations (ASEAN) Framework Agreement on Investment and the Canadian Model Bilateral Investment Treaty (BIT) that permit the host state to adopt measures relating to the protection of ‘human, animal or plant life’ or for the ‘conservation of natural resources’.\textsuperscript{92} Other cross-sectoral general exceptions exist, carving out measures taken in pursuit of public health,\textsuperscript{93} public order,\textsuperscript{94} and the environment.\textsuperscript{95} Specific reservations, on the contrary, are focused on particular industries or regulatory actions or obligations: for example, under the Chile–US Free Trade Agreement, Chile retains the right to control the provision of water services.\textsuperscript{96}

The debate over investment agreement exceptions is not simply a question of state sovereignty versus international law—indeed one of international law’s critical tasks is that it can (and should) regulate to a certain degree government’s decision-making on both international and domestic issues.\textsuperscript{97} It is, instead, an issue of regulatory balance: while investors need to be protected from capricious government actors, so must governments have the ability to enact measures with legitimate and proper public-policy objectives. Professor Ruggie treads a familiar fine line in recognizing the prolific economic opportunities afforded to parties through foreign direct investment while simultaneously urging states to ‘ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such IIAs’.\textsuperscript{98}


\textsuperscript{91} General Agreement on Tariffs and Trade, art XX: ‘[g]eneral exceptions to GATT rules are established for measures necessary for protection of public morals, or for health and safety measures. However, such measures are not to be used as disguised trade restrictions and are not to discriminate arbitrarily between countries.’

\textsuperscript{92} See ASEAN Framework Agreement on Investment, art 13 and Canada Model Bilateral Investment Agreement, art 10. Note, these exception provisions are subject to the general requirement that the state measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination, nor a disguised restriction on investment flows.

\textsuperscript{93} See the Model BITs of Uganda, Canada, and Switzerland.

\textsuperscript{94} See the Model BITs of Germany, Peru, Switzerland, India, and Belgo–Luxembourg Economic Union.

\textsuperscript{95} See Model BITs of USA and Norway.


\textsuperscript{98} Ruggie (n 82) Principle I(B)(9).
8.4 Increasing scrutiny over investor conduct, investor standards and the calculation of damages

A fourth development of interest is the extent that the conduct of an investor which has contributed, or exacerbated, a deterioration of the human rights and security situation in the host state will affect the evaluation of that investor’s right to damages in an investment tribunal, or even the investor’s right to avail itself of substantive investment protection at all.99

Uncontroversially, investors that offend *jus cogens* norms, or violate the domestic laws of the host country (eg through bribery and corruption)100 will not have their rights upheld in subsequent proceedings.101 However, the situation becomes considerably more difficult when dealing with, for example, a ‘less egregious’102 breach of international human rights, or activity deemed to be in violation of social or environmental norms enshrined in treaties and covenants. This vacuum is particularly conspicuous for two reasons: first, the traditional understanding is that conventions spelling out international human rights protections are not directly binding on private actors (non-parties to the treaty) but rather govern relations between its subjects—that is, primarily between states and then between states, their citizens and those within the states’ jurisdiction (including non-citizens). Secondly, investment treaties are typically narrow in their formulation only specifying substantive investor rights without corresponding investor obligations.

In the absence of any duty on investors to observe human rights, and recognizing the changing political and economic context of international investment policies, in 2012 UNCTAD issued its ‘Investment Policy Framework for Sustainable Development’103 recommending that capital—importing countries increase efforts to actively encourage the move towards sustainable development policies, including water provision, access, and supply.104 In doing so, UNCTAD has provided specific guidelines in negotiating and designing sustainable development-friendly investment agreements. For example, UNCTAD recommends countries actively engage in ‘international investment policy-making’ (such as including a reference to the UN Guidelines on Business and Human Rights) as a way to balance the parties’ commitments and promote responsible investment.105 Critically, UNCTAD then recommends that any non-compliance

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99 Recalling that it is not a feasible proposition for affected civilians to bring a direct action in an ICSID investment arbitration against a foreign investor. Public international law requires states to uphold the rights contained in international human rights instruments. In such cases, citizens may be entitled to seek relief through local courts, or through petition to the European or American human rights systems.

100 *Inceysa Vallisoletana SL v Republic of El Salvador* (ICSID Case No ARB/03/26).

101 See *Phoenix Action Ltd v Czech Republic* (ICSID Case No ARB/06/5) para 78: ‘nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs’.

102 Peterson and Gray (n 9) 21.


104 ibid 4, 24, and 55.

105 ibid 39 and 58.
with these standards be specifically considered by a tribunal in an assessment of damages due to the investor under a claim for treaty breach, or in denying treaty protection altogether.  

As a matter of logic, tribunals may already be able to consider investor conduct, or human rights violations, in the quantification of damages. However, including a provision to this effect would put it beyond doubt while simultaneously creating incentives for investors to comply with soft-law instruments.

### 8.5 Host state initiated counterclaims

As a final point is the question of host state counter-claims and their admissibility in investment treaty arbitration—noting that counterclaims seeking affirmative relief should be distinguished from the possibility for states to rely on human rights as a defence, as described above.

Procedurally speaking, investment agreements limit the jurisdiction of tribunals to consider originating claims of investors challenging state acts. As a matter of substance, and as discussed above, investment treaties typically contain only state obligations rather than state and investor obligations. As a result, seldom do investment agreements contain provisions evidencing the parties consent to submit a state’s counterclaim to the Tribunal’s adjudication, and even more seldom do they contain any substantive rights for a state to enforce.  

Broadly speaking, only a handful of cases exist, in published form, to give insight into the mechanics of how a tribunal handles state-initiated counterclaims.

In a recent award confronting these issues, the Tribunal in *Goetz v Burundi* in 2012 affirmed its jurisdiction over the respondent state’s counterclaim. Burundi had sought US$1 million for the claimant’s bank failure to honour the terms of a local operating certificate. From a strictly doctrinal viewpoint, the Tribunal considered that the parties’ consent to ICSID, noting that the ICSID Convention permitted ‘incidental or additional claims or counterclaims’,  

was sufficient to be understood as a consent to arbitrate counterclaims. This was the case even though the Belgium–Burundi investment agreement itself did not explicitly evidence consent to counterclaim arbitration (although it did refer to ‘tout différend relatif aux investissements’).  

In this respect, *Goetz* broadly follows the reasoning in *Saluka Investments BV v Czech Republic*, authority for the proposition that counterclaims may be

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106 ibid ss 7.1.1 and 7.1.2, 58.
109 *Antoine Goetz & Others and SA Affinage des Metaux v Republic of Burundi* (ICSID Case No ARB/01/2), Award, 21 June 2012.
110 Washington Convention on the Settlement of Disputes between States and Nationals of Other States, 1965, art 46
111 ‘All disputes concerning an investment’.
permitted where the arbitration clause is sufficiently broad and the rules/convention governing the arbitration contemplated counterclaims.

These tentative steps towards the admission, rather than rejection, of counterclaims have interesting implications for human rights. Assuming that an investment treaty contained observable standards relating to adequate and clean water supply, or it contained requirements for an investor to observe the domestic laws of the host country relating to adequate and clean water supply, then this could form the basis of a host-state counterclaim to the extent that the investor failed to comply with such standards relating to environmental and water rights. 113

9. CONCLUSION
What can be gleaned from these analyses is that the trend towards privatization in the 1990s, taken up with enthusiasm by developing and developed countries alike, has resulted in an unexpected collision of international legal norms with investment principles on the one side and human rights on the other. In response to increasing global pressures, governments are tending towards a higher level of intervention (particularly in developing countries with relatively frequent instances of regime change) in implementing state measures to regulate and control certain services within certain sectors of the economy—control that they had been happy to cede to private companies in the first place—in furtherance of their human rights obligations.

The exact scope of those human rights obligations continues to fuel animated discourse. The evidence suggests that, at the very least, human rights considerations are in the ascendency generally, and an increasing and vocal global consensus points to the right to water as a fundamental human right specifically, if not already part of customary international law. In short, the scarcity of fresh-water resources—in terms of volume, accessibility, and affordability—demands the world's attention.

Evident in SAURI and Pacific Rim, the latest in a long line of cases, tribunals seem comfortable in drawing upon and giving greater weight to broader human rights dimensions—specifically the right to water—raised by governments in defence of what may otherwise be considered a straight treaty breach. The important caveat to this trend, however, is that no tribunal has yet ruled on a direct conflict between human rights and BIT obligations: thus far, tribunals have been contented with affirming the coexistence of both human rights law and investment obligations without any serious discussion of hierarchical conflict.

Meanwhile, international and domestic policymaking have begun to follow suit. The adoption of global rules and norms like the UN Guiding Principles and the so-called 'new generation' investment policies play an important role in recognizing that human rights considerations, including the right to water, and a sustainable development framework is crucial to foreign investment's success as a key driver of economic growth and job creation.

113 United Nations Conference on Trade and Development (n 103) 39.