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(p. 150) Chapter 6 Human Rights and International Investment Arbitration

6.1 Introduction

THE treatment of human rights issues by investment tribunals has received increased attention in recent years, especially from the academic world.¹ This is particularly so (p. 151) because tribunals have adopted varying approaches when confronted with human rights-based arguments. Some have responded in a negative way, declining to exercise jurisdiction when human rights were concerned.² Others declined to discuss human (p. 152) rights arguments, noting that investment protection provisions were more favourable to investors than human rights law.³ Some, although willing to apply human rights norms in principle, did not pronounce upon them after finding that their violation or incompatibility with investors' rights had not been sufficiently substantiated.⁴ Others applied human rights law where it composed part of the applicable law by virtue of the host state being a party to a human rights treaty.⁵ And some, when interpreting investment protection treaties, drew inspiration from approaches used by human rights courts, despite the decisive human rights treaty not being in force in the host state in the case at hand.⁶

This chapter briefly reflects upon the requirements for the application of human rights law in investment disputes. It then explores ten different ways that tribunals have dealt with situations where human rights have been invoked or could have been invoked in investment arbitrations.

As we will see, human rights have played a role in various contexts of investment proceedings. One context in which human rights often arise is in respect of purely procedural questions. Yet another, more common context is substantive, where parties invoke human rights to demonstrate the existence or absence of violations of investment protection standards. Human rights have also been relevant to such matters as the assessment of damages or the binding nature of interim measures. In annulment proceedings, one ad hoc committee relied upon human rights considerations to decide whether a fundamental rule of procedure had been violated. Sometimes, it is third parties that introduce such considerations. *Amici* often rely on human rights considerations in order to stress why particular state measures were necessary to protect human rights and should therefore not be deemed to breach investment protection standards.

(p. 153) 6.2 Requirements for the application of human rights law in an investment dispute

Whether an investment tribunal may apply human rights law depends both on the relevant jurisdiction clause and on the applicable law. The wording of compromissory clauses vary across investment protection treaties. In some cases, jurisdiction is restricted to violations of the treaty (most often a Bilateral Investment Treaty (BIT)) containing the applicable jurisdiction clause. Other treaties, however contain broad clauses that provide tribunals with significantly wider jurisdiction. Consider, for example, the Norway-Lithuania BIT which provides for jurisdiction in respect of '[a]ny dispute which may arise between an Investor of one Contracting Party and the other Contracting Party in connection with an investment'.⁷ Such a clause would also include disputes involving human rights violations, if and to the extent that they were connected to an investment. It follows that tribunals must decide on a case-by-case basis whether and how far they may look into a particular human rights problem.

It is not only the relevant jurisdictional clause, but also the applicable law which determines if and to what extent an investment tribunal may take human rights law into account. Choice of law clauses typically refer to 'international law', which includes both treaties and customary international law as well as national law.⁸ Human rights law may be applicable as a component of international law.⁹ This will particularly apply to human rights treaties in force in the investor's host state. Otherwise it must be established that a (p. 154) particular human rights norm is customary international law. Finally, human rights obligations may also be applicable as an element of local law.¹⁰

Furthermore, principles of treaty interpretation as provided for in the Vienna Convention on the Law of Treaties (VCLT) offer the possibility of taking human rights into consideration when deciding whether a violation of investment law has occurred.¹¹ Art. 31(3)(c) of the VCLT requires that in the interpretation of a treaty there 'shall be taken into account, together with the context: ... any relevant rules of international law applicable in the relations between the parties'.¹²

It is disputed whether human rights norms are relevant rules in the context of interpreting investment treaties. Further, it is not entirely clear what the phrase 'applicable in the relations between the parties' means in an investor-state arbitration context.¹³ Human rights norms will obviously be relevant to the interpretation of an investment protection treaty if the preamble of the treaty refers to such rules. Furthermore, if both states party to a BIT conferring jurisdiction on the tribunal are also parties to a particular human rights treaty, this requirement will also be satisfied.¹⁴ The situation is more problematic with regard to regional investment protection treaties such as NAFTA or the ECT. In such a context, the additional question arises whether all the parties to the regional treaty must be parties to the human rights treaty relied upon as well. There is, however, no uniform answer to this question.¹⁵

In any event, human rights norms may influence the meaning of the terms and provisions of an investment treaty through treaty interpretation. They may be of importance, for instance, in determining the meaning of the fair and equitable treatment standard,¹⁶ (p. 155) or of full protection and security clauses,¹⁷ with regard to decisions on direct or indirect expropriation,¹⁸ or when identifying the international minimum standard.¹⁹ Similarly, human rights considerations can find their way into investment law through the concept of 'legitimate expectations' which plays a role in several protection standards.

For tribunals to be able to make use of human rights law, human rights considerations must be invoked by either the investor or the host state. So far, no state has sued an investor for human rights violations. One reason for this may be that human rights violations often occur in complicity with the host state.²⁰ The main reason, then, is lack of consent to arbitrate human rights issues. In the case of an investment contract, it depends on the text of the contract whether a state can sue an investor if its actions require an intervention from the state to prevent human rights violations. Where consent is based on a national investment statute or BIT, it will often not be perfected so as to allow arbitration against an investor.²¹ States desiring such an effect will thus have to adapt their BITs accordingly. States dispose of their own legal orders to prevent investors from committing acts that would amount to human rights violations, and thus investment arbitration is not necessary for such purposes.

(p. 156) As a result, cases where investors have sued states which in turn have responded by invoking human rights as a defence are more common. A further familiar avenue of informing tribunals of human rights implications raised by investment arbitration are *amicus curiae* petitions by civil rights groups and human rights NGOs.²²

6.3 Ten different ways of dealing with potential human rights issues in investment disputes

It is possible to identify ten ways in which tribunals have reacted to human rights issues. Sections 6.3.1–6.3.4 deal with cases where tribunals did not apply human rights to a particular case, or chose not to employ them for the purpose of interpreting substantive investment protection standards, although one of the parties requested it.

Section 6.3.5 addresses instances where tribunals applied human rights law to an investment dispute in the context of the fair and equitable treatment standard. Sections 6.3.6 and 6.3.7 concern cases where tribunals relied on human rights law to interpret diverse provisions of investment protection treaties. In these cases, the state party to the investment protection treaty was often, but not always, a party to the human rights treaty the tribunal relied upon.

Section 6.3.8 deals with the approach of investment tribunals to human rights abuses committed by investors. Section 6.3.9 reviews cases where human rights issues were at stake but neither the state nor the tribunal relied upon human rights law. Section 6.3.10 considers instances where states invoked human rights as a defence and tribunals took such norms into account, finding them ‘not to be inconsistent’ with investment treaty obligations.

(p. 157) It is not suggested that all cases that concern issues of human rights can be neatly categorized within these ten categories. In fact, some cases reflect several of the features described below.

6.3.1 Lack of jurisdiction over human rights issues

In some cases in which investors relied on human rights arguments, tribunals held that they lacked jurisdiction over such issues. Interestingly, tribunals have not used this approach in cases in which states have invoked human rights arguments as a defence.

An early instance of a tribunal adopting such a restrictive approach was *Biloune v Ghana*.²³ In that case, the claimant alleged that his investment had been expropriated and that he had been subjected to a denial of justice and his human rights had been violated by arbitrary detention and deportation.²⁴ Ghana is obviously not a party to the European Convention on Human Rights (ECHR). At the time it was not yet a party to the African Charter on Human and Peoples’ Rights or to the UN Covenant on Civil and Political Rights either. As a result, Mr Biloune did not enjoy access to a separate international forum for the purpose of asserting his human rights.

In an effort to pursue his human rights claims, Mr Biloune turned to arbitration. The jurisdictional clause in Art. 15 of the GIC Agreement (an investment contract) covered ‘[a]ny dispute between the foreign investor and the Government in respect of an approved enterprise’.²⁵ The applicable law comprised the investment contract and the national law of Ghana.²⁶ The investment tribunal, however, held that it lacked jurisdiction to examine the human rights violations allegedly suffered by the investor in the context of an investment dispute. It found that, although international law recognizes that all individuals have human rights, its jurisdiction was limited to commercial disputes arising out of the contract. Specifically, the tribunal held that it had not been authorized to deal with allegations of human rights violations as an independent cause of action:

[C]ontemporary international law recognizes that all individuals ... are entitled to fundamental human rights ... which no government may violate. Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this

Tribunal is authorized to deal with allegations of violations of fundamental human rights.

This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes "in respect of" foreign investment. Thus, other matters ... are outside this Tribunal's jurisdiction ... [W]hile the acts alleged (p. 158) to violate the international human rights of Mr. Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.²⁷

Therefore, the tribunal declined to exercise jurisdiction over the alleged human rights violations as an independent cause of action, but did not exclude possible relevance of human rights violations when considering violations of the investment contract.

In *Rompetrol v Romania*²⁸ the investor alleged that the manner in which investigations had been conducted by Romanian authorities had breached due process rights, among them Art. 6(3)(a)²⁹ of the ECHR.³⁰ One point of controversy between the parties was the relevance of the ECHR for the interpretation of the BIT's standards. The claimant took the position that even if the ECHR had been respected, the BIT could nevertheless have been violated.³¹ Pursuant to the argument of the respondent, the ECHR constituted a benchmark for BIT violations, meaning that if the ECHR had been complied with, the requirements of the BIT would also have been satisfied.³²

The tribunal adopted a restrictive approach towards the relevance of human rights law in the investment context. Despite both parties submitting ECHR-based arguments, the tribunal expressed a general refusal to decide 'any issue under the ECHR whether the issue in question lies in the past or is still open'. In terms of defining the task of the tribunal, it concluded that:

Its function is solely to decide, as between TRG and Romania, "legal dispute[s] arising directly out of an investment" and to do so in accordance with "such rules of law as may be agreed by the parties", which in the present case means essentially the BIT, in application of the appropriate rules for its interpretation.³³

The tribunal took this approach although both the home state of the investor (The Netherlands) and the host state (Romania) were parties to the ECHR. The jurisdiction clause in the Netherlands-Romania BIT does not limit the tribunal's jurisdiction to breaches of its standards, but refers to 'solving disputes with respect to investments' in general.³⁴ This would, arguably, also include disputes arising out of ECHR violations targeting investors.

Art. 42(1) of the ICSID Convention, which governs applicable law, refers to 'such rules of international law as may be applicable', and therefore includes the ECHR if its violation is directly related to a legal dispute arising out of an investment. The mere fact that (p. 159) the European Court of Human Rights (ECtHR) is competent to interpret the ECHR does not exclude other organs from identifying ECHR breaches. Despite the tribunal's refusal to issue an opinion on a violation of the ECHR in the context of the investment dispute, it did not rule out the possibility of resorting to the ECHR for interpretative purposes.³⁵

A slightly different constellation of facts was prevalent in *Pezold v Zimbabwe*.³⁶ In that case, a non-disputing party petitioned for leave to submit an *amicus curiae* brief referring in particular to the UN Declaration on the Rights of Indigenous Peoples. The tribunal found

that the question of indigenous peoples' rights was not within the scope of the dispute before it.³⁷ It also held, in this regard, that the BIT:

does not incorporate the universe of international law into the BITs or into disputes arising under BITs ... [and that] [t]he Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete.³⁸

Therefore, the tribunal was of the opinion that issues of human rights were genuinely beyond its competence despite both applicable BITs containing broad jurisdiction clauses. The Zimbabwe–Germany BIT covers 'disputes between a contracting party and a national or company of the other contracting party concerning an investment of such national or company'³⁹; and the Switzerland–Zimbabwe BIT provides for jurisdiction with regard to 'solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party'.⁴⁰

6.3.2 No interpretation of BITs in light of human rights principles since the legal situation is different under investment protection treaties

At least two cases can be found in which tribunals stated that the legal situation under a human rights treaty was different from that under investment protection treaties, and therefore they did not apply principles established in human rights law to investment law cases. The ECHR was not part of the applicable law in any of these cases where states sought to rely on concepts developed by the ECtHR to justify interferences with investors' rights.

(p. 160) *Siemens v Argentina* is an example of such an approach. In this case, Argentina relied on the ECtHR's judgment in *James v United Kingdom* to argue that expropriations do not necessarily require compensation in the amount of full market value.⁴¹ The tribunal observed that the legal situation under the BIT was not comparable to that under human rights law, since 'Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty'.⁴² The tribunal did not specify a particular difference between treaty texts. While the ECHR text does not specify the amount of compensation required, the BIT clearly sets out that compensation shall correspond to the value of the investment expropriated.⁴³

The tribunal in *Pezold v Zimbabwe* also followed this approach. The case concerned expropriations without compensation of three estates owned by the claimants, including forestry and agricultural businesses. The expropriation occurred in the context of Zimbabwe's land reform programme. The respondent relied on jurisprudence of the ECtHR, arguing that the proportionality doctrine and the doctrine of margin of appreciation would be equally applicable to the case at hand. It submitted that the tribunal should permit a wide margin of appreciation in terms of allowing states to determine whether land reforms were necessary and how they should be achieved.⁴⁴ The tribunal, however, rejected this approach. Noting that concepts from other fields of public international law should only be transplanted into investment law with caution, it held:

As to 'margin of appreciation' and the Respondent's argument that it should be given a wide margin when determining what is in the Zimbabwean public interest, the Tribunal is of the opinion that due caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing

decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law. The Respondent has only referred the Tribunal to European human rights cases in its arguments.

This is a very different situation from that in which margin of appreciation is usually used. Here, the Government has agreed to specific international obligations and there is no 'margin of appreciation' qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine.⁴⁵

(p. 161) Similar to the Germany-Argentina BIT, the Germany-Zimbabwe BIT spells out that compensation 'shall be equivalent to the value of the expropriated investment'. It therefore uses different wording from the ECHR. Additionally, *James v United Kingdom*, which was referred to by Zimbabwe, involved claims of a national rather than a foreign citizen. The ECtHR has specifically emphasized the need to treat foreign citizens differently with respect to compensation.⁴⁶

6.3.3 Investor rights offer a higher and more specific level of protection compared to human rights instruments

Other tribunals have found that investor rights offer a higher and more specific level of protection compared to human rights instruments, and have therefore refused to apply the latter. An example of this approach can be found in *Roussalis v Romania*.⁴⁷ There, the claimant relied on the right to a fair trial in the ECHR and on the protection of property in its First Addition Protocol. For this purpose it invoked Art. 10 of the BIT⁴⁸ that provided that any more favourable international law obligation for investors existing between the parties to the BIT shall prevail over the provision of the BIT.⁴⁹ Jurisdiction under the BIT is limited to 'disputes ... concerning an obligation ... under this Agreement'.⁵⁰ Given that Art. 10 of the BIT permits importing more favourable substantive protection standards, the tribunal's jurisdiction also extends to them.

However, this was not discussed in the award. Instead, the tribunal found the protection offered by the BIT to be more specific and favourable than that of the ECHR, thus refusing to apply the latter.⁵¹ However, the tribunal did not exclude the application of (p. 162) human rights obligations under Art. 10 of the BIT if they are more favourable than obligations under the BIT.⁵²

6.3.4 Human rights were not fully argued

In some cases, tribunals appeared willing, in principle, to apply human rights, but refrained from doing so for lack of sufficient substantiation by the parties. In these cases tribunals abstained from in-depth analyses of the compatibility between investor protection and human rights standards.

One such example is the case of *Azurix v Argentina*.⁵³ The case concerned a concession for the distribution of drinking water and the treatment of sewage in Argentina. Blaming the foreign investor for an algae bloom in a reservoir and water contamination, the government encouraged consumers not to pay their water bills. It also prevented the investor from increasing its rates. As a result, Azurix sought to terminate the concession, but the government of the province where the investment was located initially rejected the request. Finally, the province terminated the concession itself, alleging a failure to provide the agreed services under the concession.

The investor argued that Argentina's measures constituted an indirect expropriation, as well as a violation of the fair and equitable treatment, non-discrimination, and full protection and security standards. In response, Argentina explicitly invoked human rights-based arguments to justify its actions, stating that a hierarchy exists between human rights provisions and investment protection standards. How this argument had been developed by Argentina's expert is unknown, given that neither the legal briefs nor the expert opinions of the case are publicly available.

What has been revealed by the award is Argentina's argument that there was a conflict between its investment obligations and human rights obligations, namely consumers' rights, in which case, it argued, the latter must prevail:

The Respondent also raises the issue of a conflict between the BIT and human rights treaties that protect consumers' rights. According to Argentina's expert, a conflict between a BIT and human rights treaties must be resolved in favor of human rights because the consumers' public interest must prevail over the private interest of service provider. On this point, the Claimant argues that the user's rights were duly protected by the provisions made in the Concession Agreement and the Province fails to prove how said rights were affected by the termination.⁵⁴

(p. 163) The tribunal did not enter into an abstract discussion about a possible hierarchy of norms in international law. Instead, it noted that a conflict between human rights and investment protection norms had not been sufficiently advanced and therefore any incompatibility between human rights and the standards of the applicable BIT could not be assessed:

The Respondent has also raised the issue of the compatibility of the BIT with human rights treaties. The matter has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case. The services to consumers continued to be provided without interruption by ABA during five months after the termination notice and through the new provincial utility after the transfer of service.⁵⁵

The tribunal subsequently found that the actions of the province were arbitrary, and constituted a violation of the fair and equitable treatment and full protection and security standards.⁵⁶

The tribunal in *Frontier Petroleum v Czech Republic* adopted a similar approach. In that case, the claimant had referred to Art. 6 of the ECHR. However, neither party had pleaded the case law of the ECtHR or explained why a relevant violation should (or should not) have occurred. The tribunal therefore declined to delve into the issue of applicability and violation of the ECHR:

With respect to Claimant's argument that by operation of Articles III(3) and III(4) of the BIT, Claimant was entitled to the same right to expeditious proceedings before a court in the Czech Republic as are persons entitled to such treatment under the ECHR, the Tribunal notes that rights under the ECHR accrue to everyone, regardless of nationality. This obviates Claimant's need to rely on the BIT to invoke such rights. The Parties have not pleaded the jurisprudence of the ECHR in these proceedings, therefore this Tribunal makes no finding as to whether any standard set by the ECHR is applicable here and has been breached.⁵⁷

In the cases discussed in this section, human rights were invoked by investors and states alike to influence the application and interpretation of investment protection standards by tribunals. The tribunals did not reject the human rights arguments for reasons of jurisdiction or applicable law, nor did they find it inappropriate in principle to take human rights law into consideration when interpreting investment provision standards in accordance with Art. 31(3)(c) of the VCLT. However, the tribunals did clarify that for a human rights argument to merit consideration in an investment arbitration case, it would have to be fully argued.

(p. 164) 6.3.5 To the extent that human rights are part of the applicable law they will be applied

In another group of cases, tribunals considered human rights norms to be part of the applicable law and applied them side by side with the applicable investment provisions. The result of the human rights analysis was then used as a factor in determining whether obligations under investment law had been violated.

In *Toto Costruzioni Generali S.p.A. v Lebanon*⁵⁸ the tribunal pointed out that it was not restricted to applying the treaty's standards, but was authorized to rule on any breach of international law in general.⁵⁹ For this purpose it referred to the clause on applicable law. Art. 7 of the Italy-Lebanon BIT contains the following provision on applicable law:

The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law.⁶⁰

The jurisdictional clause in Art. 7 of the BIT is also broad and provides jurisdiction, namely, 'in case of a dispute regarding investments'.

The tribunal carefully distinguished between the ECHR and the UN Covenant on Civil and Political Rights (ICCPR). It declined to rely upon the ECHR, given that it did not constitute part of the applicable law, but found the ICCPR to be applicable. The dispute concerned a highway construction contract. The claimant argued that the long duration of legal proceedings before the Lebanese *Conseil d'État* violated the FET provision in the BIT between Italy and Lebanon. In this context the claimant invoked several judgments of the ECtHR concerning violations of the right to a fair trial (Art. 6 ECHR) as well as the corresponding guarantee in Art. 14 ICCPR.

The ICCPR was part of the applicable law since Lebanon was a party to it, but the ECHR was not. Without explicitly mentioning Art. 7 of the BIT but applying the normative content of Art. 7, the tribunal rejected the submitted references to the judgments of the ECtHR.⁶¹ However, it upheld the invocation of Art. 14 of the ICCPR and took the decisions of the Human Rights Committee into consideration.⁶² In the end, the tribunal rejected the claims of the investor for lack of sufficient proof of having had recourse to internal remedies that would have allowed acceleration of the procedure before the *Conseil d'État*.⁶³

*Al Warraq v Indonesia*⁶⁴ is a further example of a tribunal applying human rights law in an investment case. That case concerned the bailout of a bank. Indonesian courts (p. 165) found the investor guilty of contributing to the bank's collapse. They convicted him *in absentia* of corruption and money laundering without providing him with a possibility of participating in the criminal proceedings. In the ensuing investment arbitration, the award was rendered on the basis of an investment protection treaty of the Organisation of the Islamic Conference. Its Art. 13 provides:

The investor shall be entitled to damages for any injury incurred by him resulting from any of the following acts committed by a Contracting Party ...

B) failure to comply with the international obligations and undertakings incumbent on the Contracting Party in favor of the investor pursuant to this Agreement or voluntary or negligent assent to taking the measures necessary for their implementation ...⁶⁵

The tribunal applied Art. 14 of the ICCPR, which guarantees a fair trial in criminal proceedings, finding that a denial of justice and a violation of the fair and equitable treatment standard had occurred. It held that Art. 14 was binding upon Indonesia and contains rules that allow deciding whether a denial of justice has occurred through a trial *in absentia*. The tribunal held that:

all persons charged with a criminal offence have a primary, unrestricted right to be present at the trial to defend themselves ... Trials in absentia are not prohibited under Article 14(3) only when the accused person, although informed of the proceeding sufficiently in advance, voluntarily declines to exercise his right to be present.⁶⁶

The tribunal found that Al Warraq had neither been informed correctly of the accusation nor of his conviction, and that he had not been interrogated as a suspect. Furthermore, it found that he had been deprived of the opportunity to nominate a representative for his trial as well as for the appeals proceedings. Therefore, Indonesia had violated the guarantees contained in the ICCPR. This amounted to a denial of justice and hence constituted a violation of the FET standard.⁶⁷ The tribunal used the provisions of the ICCPR to decide on the conformity of court proceedings with the FET standard under the BIT.

Both the *Toto* and the *Al Warraq* tribunals used human rights norms as a basis for their legal findings concerning the FET standard under the relevant BITs. They incorporated elements of human rights-based fair trial standards into the FET standard. To be able to do so, both tribunals first found the relevant human rights treaty to be part of the (p. 166) applicable law in the case under consideration. In both cases there was no situation of a potential conflict between investment law standards and human rights standards. Rather, the normative relationship between the two was complementary.

The situation was different in *Urbaser v Argentina*.⁶⁸ In that case, the host state relied on human rights norms to defend its interference with investor rights. The dispute arose in the context of Argentina's financial crisis in 2001-2. The claimant was a shareholder in a concessionaire that provided water and sewage services in the province of Buenos Aires, Argentina. The investor never invested, to the extent provided for in the concession contract, in the expansion of services to achieve a broader coverage. Urbaser argued that a number of measures adopted by the province of Buenos Aires had made a profitable operation of its concession impossible. Furthermore, it claimed that the province had conducted renegotiations of the concession in a manner that led to its termination in 2006 because of the political desire to return utility concessions to the state. Argentina argued that the investment failed not due to its measures to cope with the financial crises (which included 'pesification' and tariff freezes) but because of the shareholders' deficient management and its failure to fulfil its obligations under the concession agreement.

The tribunal took Argentina's human rights obligations into account when interpreting the FET provision of the Argentina-Spain BIT. With regard to the human right to water, it made several important findings. Concerning the compatibility of human rights and investment law obligations, the tribunal decided that the state has to fulfil both sets of obligations simultaneously:

its obligations regarding the population's right to water, and its obligations towards international investors. The Argentine Republic can and should fulfil both kinds of obligations simultaneously. In so doing, the obligations resulting from the human right to water do not operate as an obstacle to the fulfilment of its obligations towards the Claimants.⁶⁹

The tribunal held that the province had to guarantee the continuation of basic water supply, and that this universal basic human right was a component of the framework of the claimant's legitimate expectations.⁷⁰

Respondent rightly recalls that the Province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this universal basic human right constitutes the framework within which Claimants should frame their expectations.⁷¹

Given the major impact of the emergency measures on the investment, the tribunal considered the measures viewed in isolation as a breach of the FET standard.⁷² However, since the investment had already been struggling, the tribunal found the emergency (p. 167) measures were not the cause of the failure to meet the concession's obligations. Therefore, it decided that the emergency measures per se did not cause a violation of the FET standard.⁷³ Furthermore, it found that the state of necessity defence was available to Argentina. The authorities only breached the FET provision of the BIT by engaging the investor in doomed renegotiations of the concession contract.⁷⁴ But since the concession was already deprived of any future due to the failure of the claimants to make the necessary investments, the tribunal did not award any damages.⁷⁵

Argentina also brought a counterclaim, arguing that the concessionaire's failure to provide the necessary investment for the expansion of the network violated the investor's commitments and its obligations under international law based on the human right to water.⁷⁶ The tribunal accepted jurisdiction for the counterclaim. With regard to the counterclaim, the Tribunal said *obiter* that investors can violate the human right to water by destroying access to water. Therefore, they have an obligation to abstain from such acts.⁷⁷ However, the tribunal held that the claimants' obligation to comply with the negative obligation (to refrain from destroying access to water) was 'not a matter for concern in the instant case'.⁷⁸

The tribunal based this finding of an 'obligation to abstain' contained in Art. 30 of the Universal Declaration of Human Rights⁷⁹ and Art. 5 of the Covenant on Economic, Social and Cultural Rights,⁸⁰ as well as on Principle 8 of the International Labor Office's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (1977 as amended 2006).^{81,82}

Art. 30 of the Universal Declaration of Human Rights as well as Art. 5 of the Covenant on Economic, Social and Cultural Rights prevents reliance on rights contained in the Universal Declaration of Human Rights or the Covenant respectively to destroy other rights contained in the respective instrument.⁸³ Thereby, they do not (p. 168) forestall reliance on another treaty. Specifically, they do not prevent an investor from relying on a BIT. The International Labor Office's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy is a soft law document that does not create binding obligations for corporations under international law. Therefore, it is doubtful whether these provisions can be used as a basis to establish a human rights obligation for investors to abstain from interfering with a population's right to water.

With regard to the issue at stake, namely a potential obligation under international law to create water connections and expand the network, the tribunal found that under current international law there was no positive obligation on investors to provide access to water based on international human rights law. The acceptance of the bid and the concession contract could not create such an obligation under international law.⁸⁴ Therefore, the counterclaim failed on the merits.

In this case, the tribunal resolved a perceived conflict between investment law and human rights law obligations. It did so by applying international human rights norms to frame the interpretation of what legitimate expectations are under the FET standard of the BIT. In some of the above cases it was investors who invoked human rights, whilst in others it was the state. Nevertheless, in both situations tribunals used the technique of bringing human rights and investment law in line with one another.

6.3.6 Inspiration from the approach of human rights bodies if the host state is a party to the corresponding human rights treaty

In another group of cases, tribunals did not directly base their findings on human rights norms but used them as a means of interpreting investment law standards in accordance with Art. 31(3)(c) of the VCLT. This group of cases distinguishes itself from the former only by the extent to which human rights were used to interpret investment law standards. In the previous subsection, tribunals fully applied human rights standards to the facts of the case to reach a decision on the violation of an investment protection provision, whereas in this subsection, tribunals merely used them as inspiration for the interpretation of the investment protection standard.

An example of such an approach is the *Micula v Romania*⁸⁵ case. In that case, the tribunal used a human rights-based argument in its decision on jurisdiction as one of several reasons for upholding the Swedish nationality of the investor. The tribunal had (p. 169) to answer the question whether nationality that was properly obtained can fade away because of the disappearance of an effective link.

The parties disagreed in this context on the role of international law in the interpretation of Art. 1(a) of the Sweden-Romania BIT.⁸⁶ The BIT does not contain a provision on applicable law. Therefore, according to Art. 42 of the ICSID Convention, the tribunal was required to apply 'the law of the Contracting State party to the dispute and such rules of international law as may be applicable'. The tribunal mentioned that it would take into account, as provided for by Art. 31(3)(c) of the VCLT, any relevant rules of international law. In this context it held that it would take into consideration the 'right to a nationality' under Art. 15 of the Universal Declaration of Human Rights⁸⁷ when deciding on the investor's nationality.⁸⁸

A similar approach was taken in the case of *Rompetrol v Romania*. In that case, the tribunal declined to decide on a violation of human rights norms in its decision on the merits. However, in the context of a challenge to counsel whose participation allegedly created a bias of the tribunal, it referred to the right to a fair trial enshrined in Art. 6 of the ECHR. The tribunal rejected the challenge with reference to Art. 6 of the ECHR, and explained that challenging counsel should not become an alternative to raising a challenge against the tribunal itself.⁸⁹ In doing so it relied on the ECHR for interpretative assistance.

The tribunal took the same approach in *obiter* in the merits phase concerning the FET standard. There, it stated that under particular circumstances human rights considerations may be relevant for the interpretation of the FET standard:

The category of materials for the assessment in particular of fair and equitable treatment is not a closed one, and may include, in appropriate circumstances, the consideration of common standards under other international regimes (including those in the area of human rights), if and to the extent that they throw useful light on the content of fair and equitable treatment in particular sets of factual circumstances; the examination is however very specific to the particular circumstances, and defies definition by any general rule.⁹⁰

In *Lauder v Czech Republic*, the BIT did not contain a definition of expropriation or nationalization. The tribunal in that case held that it is generally accepted that a wide variety of measures can lead to an indirect expropriation, and referred to a description of indirect expropriation by the ECtHR.⁹¹ Unlike the tribunal in *Toto v Lebanon*, the (p. 170) *Lauder v Czech Republic* tribunal did not discuss whether the ECHR constituted part of the applicable law. It mentioned the ECtHR's jurisprudence alongside literature and then explained why no indirect expropriation occurred. Yet, importantly, it did not rely specifically on the criteria developed in the ECtHR jurisprudence. In this sense, the tribunal took inspiration from ECHR jurisprudence rather than applying it *stricto sensu*.

In *ADC v Hungary*⁹² the tribunal referred to the judgments of a number of courts and tribunals, among them the ECtHR,⁹³ concerning the applicable standard for the assessment of damages to support the application of the *Chorzów Factory* standard for this purpose.⁹⁴

In *Frontier Petroleum v Czech Republic* the tribunal considered that the criteria applied by the tribunal in *Toto v Lebanon* was useful in deciding whether the duration of a procedure before a domestic court amounted to a violation of the fair and equitable treatment standard. The tribunal in *Toto* had relied on the judgments of the Human Rights Committee. Both Lebanon and the Czech Republic are party to the UN Covenant on Civil and Political Rights. The tribunal in *Frontier Petroleum* held:

In assessing whether the delays at the regional court were such that they constituted a breach of the fair and equitable treatment standard, the tribunal finds the criteria set forth in *Toto* useful:

To assess whether court delays are in breach of the requirement of a fair hearing, the ICCPR Commission takes into account the complexity of the matter, whether the Claimants availed themselves of the possibilities of accelerating the proceedings, and whether the Claimants suffered from the delay.⁹⁵

The tribunal in *Frontier Petroleum* was not willing to decide on the applicability and potential violation of Art. 6 ECHR. Nevertheless, it used the criteria developed by the Human Rights Committee on the right to a fair trial that had been applied by the tribunal in *Toto v Lebanon*, to decide whether a violation of the fair and equitable treatment standard had occurred. It inquired whether the case was complex, whether the claimant had availed itself of possibilities of acceleration, and whether it had suffered from the delay, finally denying a violation of the FET standard.⁹⁶

The ad hoc Committee in *Tulip v Turkey* referred to the case law of the ECtHR as a means of interpreting Art. 52 of the ICSID Convention. In that case, the tribunal held that provisions in human rights instruments dealing with fair trial are relevant to the (p. 171) interpretation of the concept of a violation of a fundamental rule of procedure in Art. 52 of the ICSID Convention:⁹⁷

Provisions in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention. This is not to add obligations extraneous to the ICSID Convention. Rather, resort to

authorities stemming from the field of human rights for this purpose is a legitimate method of treaty interpretation.⁹⁸

The ad hoc committee proceeded to apply the criteria established by the ECtHR in the context of equality of arms and the obligation to state reasons.⁹⁹

The obligation for tribunals to give reasons for their decisions arises out of the overriding duty to afford the parties a fair hearing, guaranteed in Article 48(3) of the ICSID Convention and ICSID Arbitration Rule 47(1)(i), and reiterated in numerous decisions of ICSID ad hoc committees. In *Ruiz Torija v Spain*, the ECtHR stated:

The Court reiterates that Article 6(1) [of the ECHR] obliges the Courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the Courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a Court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.¹⁰⁰

It is the opinion of the Committee that these broad parameters apply equally to international tribunals constituted under the ICSID Convention. The depth and extent of the duty to give reasons will inevitably vary from one case to another. The duty is contextually sensitive and a tribunal's reasons need not be extensive as long as its decision makes sense and enables the parties to know the strengths and weaknesses of their respective cases.¹⁰¹

The ad hoc committee did not discuss whether, in the particular case, the ECHR was part of the applicable law, despite Turkey being a party to the ECHR. However, it made a general statement to the effect that the parameters concerning the obligation to state reasons within the right to a fair trial, as protected by the ECHR, were equally applicable to tribunals constituted under the ICSID Convention.

(p. 172) In contrast to the tribunals in section 6.3.5, which directly applied human rights norms to the facts under consideration, for the purpose of deciding upon violations of investment treaty standards, tribunals in this section used human rights norms in a more general way. They did not intend to directly apply a human rights instrument to the case under consideration. This is in line with the fact that they did not deal with the issue of whether a particular treaty was part of the applicable law. Rather, the tribunals in this subsection drew inspiration for their interpretation of various investment treaty provisions from the judgments of human rights organs. They employed it in the context of procedural questions (challenges to counsel), questions of jurisdiction (nationality), and interpretation of treaty standards (FET, indirect expropriation), as well as the interpretation of Art. 52 of the ICSID Convention.

6.3.7 Inspiration from the approach of human rights bodies even if the corresponding human rights treaty is not applicable

In a number of cases, investment tribunals drew inspiration from the analyses of human rights bodies, even though the host state was not a party to the relevant human rights treaty. This was the case, for example, in *Perenco v Ecuador*. The tribunal relied upon,

among other sources of inspiration, the ECtHR judgments on the binding nature of interim measures.¹⁰²

Similarly, in *El Paso v Argentina* the tribunal relied upon, among other sources of inspiration, the judgments of the ECtHR regarding Art. 15 of the ECHR to decide whether the phrase ‘essential security interest’ in Art. XI of the Argentina-US BIT is a self-judging clause. Art. 15 of the ECHR provides for the possibility to derogate from certain rights of the convention under specific circumstances, and has always been interpreted as ‘not self-judging’ by the ECtHR.¹⁰³

In *Saipem v Bangladesh*, the tribunal also relied on judgments of the ECtHR on Art. 1 of the Additional Protocol on property protection to confirm its finding that immaterial rights, in the particular case an ICC award, can be the object of an expropriation.¹⁰⁴ Furthermore, it referred to ECtHR judgments when it decided that a court decision can amount to expropriation.¹⁰⁵

The tribunal in *Tecmed v Mexico*¹⁰⁶ also relied extensively on concepts developed by the ECtHR in the context of the right to property to decide on the occurrence of an (p. 173) indirect expropriation. The case concerned the revocation of a licence for the operation of a landfill site. As a first step, the tribunal established, in accordance with the sole effects doctrine, whether the host state’s interference had been severe enough to amount to expropriation. It found that the claimant had been radically deprived of the economic use and enjoyment of its investment, and concluded, ‘as far as the effects of such Resolution are concerned, the decision can be treated as an expropriation under Article 5(1) of the Agreement.’¹⁰⁷

As a second step, it applied the proportionality test developed by the ECtHR to confirm its finding. It balanced the public interest, presumably pursued by the interference, against the burden imposed upon an investor,¹⁰⁸ holding:

There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.¹⁰⁹

The tribunal used the proportionality test as an additional element to decide whether an expropriation had occurred at all. It did not mention that the ECtHR used the proportionality test for a different purpose—namely to examine whether an expropriation is justified or leads to a violation of the convention.¹¹⁰ Therefore, the investment tribunal applied the concept of proportionality taken from human rights law to a different context in investment law.¹¹¹

(p. 174) Like the tribunals in the previous section, tribunals here drew inspiration for their interpretation of various investment treaty provisions (binding nature of interim measures, essential security interest, rights that can be expropriated, etc.) from the case law of human rights organs without any intention of applying human rights norms directly. Direct application would not have been possible since, in contrast to section 6.3.6, in the cases discussed here the respective human rights treaties were not applicable. In such a situation great care must be taken to make sure that the principles developed in human rights law are equally valid in investment law.

6.3.8 A serious human rights violation on the part of the investor will lead to the loss of investment protection

In some cases, tribunals applying a BIT containing a clause that investments must be made ‘in accordance with host state law’¹¹² found that an investment made in serious violation of host state law did not enjoy the protection of the BIT.¹¹³ In other words, they held that human rights abuses by investors that are at the same time in breach of host state law may lead to a loss of investment protection. But it appears that even without a treaty provision

of this kind, tribunals will generally refuse to afford protection to investments that are made contrary to host state law.¹¹⁴

(p. 175) Take, for example, the case of *Phoenix Action v Czech Republic*.¹¹⁵ The tribunal held:

To take an extreme example, 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 in pursuance of torture or genocide or in support of slavery or trafficking of human organs.¹¹⁶

However, an investment that was made legally but is subsequently conducted in violation of human rights would not be covered by this sanction. To ensure that investments must not only be made but also remain in accordance with human rights throughout their lifetime in order to enjoy investment protection, states could use formulations like the one included in Art. 2(2) of the China–Malta BIT (2009), which provides:

Investments of either Contracting Party shall be made, and shall, for their whole duration, continuously be in line with the respective domestic laws.

The inclusion of a reference to human rights would further strengthen a provision of this kind.

6.3.9 The tribunal decided in conformity with human rights without mentioning them

There are cases in which a state could have justified interference with an investment with human rights arguments, but the relevant governments did not do so, or referred to human rights only indirectly. Therefore, the tribunals also did not include human rights arguments in their reasoning.

The award in *Biwater Gauff v Tanzania*¹¹⁷ is an example of such a case. In that case, the investor had failed to take certain promised actions designed to protect indigent consumers. As a reaction, Tanzania terminated the investment contract because of the poor performance of the investor.¹¹⁸ The investor responded by filing a claim under the auspices of the ICSID. The tribunal held that terminating the investment agreement because of the investor's poor performance was not a breach of contract and did not amount to a violation of the FET standard.¹¹⁹ *Amici* submitted that the respondent's measure was in line with Tanzania's duty under human rights law to ensure access to water for its citizens.¹²⁰

(p. 176) In the *Biwater Gauff* case, the very purpose of the investment contract was to give effect to the right to water, ensuring the state's compliance with its international human rights obligations by enabling the delivery of water to the public. The respondent's measure, to terminate the lease contract, was in line with Tanzania's duty under human rights law to ensure access to water for its citizens. Therefore, human rights could have served as justification for its interference with the investor's rights.

However, only the *amicus curiae* brief explicitly invoked human rights arguments. Tanzania argued that water and sanitation services are of vital importance, and that it had a right or perhaps even a duty to protect the functioning of these services.¹²¹ But neither the respondent nor the tribunal made any explicit reference to the human right to water. The tribunal considered the termination of the contract not to be a violation of the BIT.¹²² Therefore, the tribunal ultimately decided the case in a way that respected the human rights obligations of the state, albeit without mentioning these obligations. However, one

cannot reproach the tribunal for not basing its reasoning on the right to water of the population, since the state did not rely on its human rights obligations in the first place.

A similar situation occurred in *Methanex v United States*.¹²³ The case concerned a Canadian producer and distributor of methanol, the main ingredient in the gasoline additive MTBE. The dispute arose out of a Californian ban of MTBE. While MTBE has a positive effect on air quality, the Californian legislator considered MTBE to pose an environmental and public health risk due to its possible seepage into groundwater, including sources of drinking water, that outweighed its clean air benefits.¹²⁴ The investor argued that the ban was tantamount to an expropriation of the company's investment and thus violated Art. 1110 of the NAFTA; that it was enacted in breach of the national treatment obligation in Art. 1102 of the NAFTA; and that it was also in breach of the international minimum standard of treatment under Art. 1105 of NAFTA.¹²⁵

The tribunal found that no violation of the national treatment standard had occurred,¹²⁶ and that Art. 1105 of the NAFTA had not been violated by the MTBE ban.¹²⁷ With regard to its expropriation claim, the *Methanex* tribunal applied the police powers doctrine, and found that a non-discriminatory measure in the public interest taken in accordance with due process requirements that targets, among others, foreign investors is not an expropriation. Therefore, the United States prevailed with its defence that it legislated to protect its ground and drinking water resources, and the tribunal denied (p. 177) both the occurrence of an expropriation and a violation of FET. A human right to water might have been relevant but was not mentioned.

The same is true for the case of *Glamis Gold Ltd v United States*,¹²⁸ where the Quechan Indian Nations' rights in California were at stake. In that case, human rights considerations were addressed only in the *amicus curiae* briefs.¹²⁹ Rather than relying on human rights norms, the state relied on federal and state laws that accord protection to sacred tribal sites and other tribal resources.¹³⁰ The tribunal ultimately did not find a violation of the NAFTA.

What all these cases have in common is that the states did not invoke human rights as a justification for adverse measures. In all of them, only the *amici* invoked human rights arguments to justify the measures, but the tribunals did not use human rights arguments in their reasoning. In arbitration it is neither common nor necessary to deal with arguments not presented by one of the parties, especially if they do not change the outcome of a case. From this perspective it was perfectly appropriate not to discuss the human rights concerns of the *amici*. From a public international law perspective, it does not create problems if a tribunal decides a case in line with human rights law, even if not explicitly dealing with it. Yet, for the critical observer it is of great interest whether tribunals refer to human rights concerns explicitly.

6.3.10 No inconsistency between human rights and investment treaty obligations

Several tribunals that had to decide cases in the context of public services (e.g. the supply of water or electricity) have pointed out that they had taken human rights considerations into account, and that human rights obligations and investment treaty obligations were not inconsistent.

In *CMS Gas Transmission Company v Argentina*¹³¹ and *Suez v Argentina*,¹³² Argentina tried to invoke human rights as a defence in a situation of economic crisis which resulted in widespread unemployment and poverty. It contended that since the economic and social crisis affected human rights, the protections afforded under the respective investment treaties should not prevail.¹³³ One line of argument by Argentina was that human (p. 178) rights norms were hierarchically superior to guarantees contained in investment protection

treaties. Another argument was that a state of necessity would allow for derogation from investment protection provisions.

In *CMS*,¹³⁴ Argentina argued that the economic and social crisis affecting the country compromised basic human rights, and that in such a situation an investment treaty could not prevail since that would constitute a violation of constitutionally recognized rights.¹³⁵ The tribunal did not enter into a discussion on the hierarchy of norms, but denied a conflict between human rights and investor rights on the facts of the particular case. It found no question affecting fundamental human rights when considering the issues in dispute:

In this case, the Tribunal does not find any such collision. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties.¹³⁶

The *Suez*¹³⁷ cases concerned foreign shareholders in water and sewage concessions. Argentina prohibited a price increase that was designed to compensate for the precipitous decline in the value of the Argentine peso due to the economic crisis. The tribunal found Argentina liable for breaching the FET obligations of the BIT. In the context of the state of necessity discussion, the tribunal mentioned Argentina's argument that its human rights obligations would trump obligations emanating from the BIT. The tribunal rejected this argument, holding the correct position to be that Argentina must respect both sets of obligations simultaneously:

Argentina has suggested that its human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligations, and must respect both of them. Under the circumstances of this case, Argentina's human rights (p. 179) obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as was discussed above, Argentina could have respected both types of obligations.¹³⁸

The *amici* on the other hand suggested to the tribunal that '[h]uman rights law could displace investment law in two situations examined in this section, namely a situation of conflict of norms and a situation of necessity'.¹³⁹ They based their argument on the *jus cogens* status of certain human rights norms such as the right to life. As Diane Desierto has convincingly shown, the hierarchy of norms approach causes more problems than it solves. Not only is it impossible to prove that all human rights invoked would qualify as *jus cogens*, but the results of such a qualification would not be helpful to the state invoking the argument. To fulfil the requirements of Art. 53 of the VCLT, one would have to argue that the investment protection treaty was contrary to *jus cogens* at the time of its conclusion. The consequence of this argument would be that the investment protection treaty would be void *ab initio*. This would lead to an obligation of the host state to eliminate the consequences of any act performed in reliance on the treaty.¹⁴⁰

The tribunal held that ensuring a right to water to the population and fair and equitable treatment to investors were not mutually exclusive, and could have been achieved by Argentina at the same time.¹⁴¹ It followed that Argentina was obligated to observe both its human rights and BIT obligations. Argentina could not simply assert human rights obligations to justify setting aside investment obligations altogether. Furthermore, like the *CMS* tribunal, the *Suez* tribunal held that Argentina had contributed to the emergency

situation it was facing from 2001 to 2003, and therefore did not fulfil the requirement of Art.25 (2) (b) of the ILC Articles on State Responsibility.¹⁴²

The dispute in *SAUR v Argentina*¹⁴³ also arose in the context of the 2002 financial crisis, and the facts resemble, to a certain extent, those of the *Suez* cases. SAUR had invested (p. 180) in a provincially owned water company that held a concession for drinking water, sanitation, and sewage in the Argentinean province of Mendoza. In the context of the 2002 financial crisis, Argentina froze all water prices charged to consumers and a dispute concerning tariff renegotiations arose. The project ran into financial difficulties and, as a consequence, into problems with the quality and quantity of sewage services, consumer services, and drinking water quality.

In 2003 SAUR turned to arbitration. Argentina argued that it had to terminate and renationalize the concession to ensure service and to protect the public interest in health and the right to water.¹⁴⁴ Further, it invoked the state of necessity defence,¹⁴⁵ claiming that the measures were a legitimate exercise of 'police powers',¹⁴⁶ and asserted that the province had only made use of its contractual rights to terminate the contract due to breaches by the concessionaire.

Before the tribunal entered into the details of the various investment protection standards, it dealt with Argentina's human rights defence. The tribunal recognized that human rights in general and the human right to water in particular had to be taken into consideration. It justified this by the fact that they are represented in the Argentinian constitution and are part of the general principles of international law which are part of the applicable law according to Art.8.4 of the BIT. In this vein, the tribunal held:

In fact, human rights in general, and the right to water in particular, constitute one of the various sources that the Tribunal will have to take into account in resolving the dispute, since these rights are of great importance within the Argentine legal system as constitutional rights, and, moreover, they form part of the general principles of international law. 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.¹⁴⁷

For this reason, concerning this matter, the legal order can and must reserve for the Public Authority legitimate functions of planning, supervision, police, sanction, intervention and even termination, in order to protect the general interest.¹⁴⁸

Having emphasized the significance of human rights in principle, the tribunal proceeded to state that the obligations under human rights law were compatible with those under investment law:

(p. 181)

But these prerogatives are compatible with the rights of investors to receive the protection offered by the BIT. The fundamental right to water and the right of the investor to benefit from the protection offered by the BIT operate on different levels: the concessionary company of a basic public service is in a situation of dependency on the public administration, which has special powers to guarantee its enjoyment by virtue of the priority of the fundamental right to water; but the exercise of these powers is not absolute and must be combined with respect for the rights and guarantees granted to the foreign investor under the BIT. If the government decides to expropriate the investment, treat the investor unfairly or

inequitably, or deny the promised protection or full security, all this by violating the BIT, the investor will be entitled to be compensated under the terms of the Treaty.

Counterbalancing these two principles will be the task that the Tribunal will have to perform in its analysis of the substantive claims presented by Sauri.¹⁴⁹

Furthermore, the tribunal denied that there was a sufficient causal link between the declaration of the state of necessity and the measures imposed by the provincial authorities that led to the expropriation.¹⁵⁰ Therefore, the tribunal decided that it did not have to enter into a discussion on the issue of which circumstances might give rise to a genuine conflict between the right of access to water and investment protection norms.

After the general discussion of its approach to Argentina's human rights arguments, the tribunal made no further references to a right to water in its subsequent analyses of substantive treaty violations. In response to the 'police powers' defence invoked by Argentina, it stated that the measures could not be considered a legitimate use of the province's police powers in view of the gravity and deliberateness of the province's failure to abide by a previous settlement.¹⁵¹

Ultimately, the tribunal found that an expropriation had occurred. It also held that Argentina had violated the FET standard by a 'financial strangulation' of the concessionaire in order to justify the termination and renationalization of the concession. This conduct was incompatible with the demands of a public administration that is conscientious, impartial, and respectful of the rights of its subjects.¹⁵²

In contrast to the approach of the tribunals mentioned in sections 6.3.5 and 6.3.6, the tribunal in *SAUR* was only prepared to take human rights considerations into account in (p. 182) a very abstract manner. It merely stated that human rights norms were applicable and compatible with the investment protection provisions of the BIT. It did not explicitly deal with human rights considerations when interpreting the expropriation provision in assessing the police powers of the government, nor discuss human rights arguments when interpreting the FET provision.

In a similar manner, and as already set out above, the *Urbaser* tribunal applied human rights law to frame the FET standard, in particular its legitimate expectations element. Like the tribunals just mentioned, it also set out that human rights and investment law obligations are compatible and that states have to fulfil both sets of obligations simultaneously.

6.4 Conclusion

There are multiple ways in which investment tribunals may take international human rights law into account. How much weight a tribunal may give to human rights considerations depends on the jurisdiction clause, the applicable law, and the possibility of considering them via treaty interpretation.

In section 6.3.1, tribunals were asked to apply human rights norms to the facts before them. The tribunals denied to apply human rights norms for lack of jurisdiction. Human rights had been either invoked by claimants or raised by a non-disputing party that petitioned for leave to submit an *amicus curiae* brief. The jurisdictional clauses covered either 'any dispute with respect of an approved enterprise' (*Biloune*) or 'disputes with respect to investments' (*Romp petrol*, *Pezold*). The applicable law was host state law and the contract in *Biloune*, and host state law and international law as provided for in Art. 42 of the ICSID Convention in the other cases. The tribunals declined jurisdiction despite a broad

jurisdictional norm that had not limited jurisdiction to disputes arising out of the contract or the BIT.

In section 6.3.2, host states wanted to import concepts developed by the ECtHR into expropriation provisions of BITs. The tribunals declined to do this based on the argument that the legal situation prevailing under the applicable legal instruments was different—i.e. that the legal concepts contained in the property protection clause of the ECHR, that was not part of the applicable law, were not comparable to the expropriation provisions of the applicable BITs.

In section 6.3.3, the claimant had relied on a provision of the BIT that provided for importing more favourable protection provisions from other treaties. The tribunal would have been prepared to apply human rights standards of applicable human rights treaties if only these had offered a higher degree of protection than the applicable investment protection treaty, which the tribunal found not to be the case.

In section 6.3.4, tribunals were confronted with issues of alleged incompatibilities of human rights law and investment law in one case and an alleged human rights violation through state measures in the other. Both cases were similar to the extent that human (p. 183) rights arguments had not been sufficiently substantiated by the party invoking them. This caused both tribunals to declare that they were willing, in principle, to apply human rights law. Yet, they declined to do so in practice because the parties had not sufficiently argued those points. These cases demonstrate that it is essential that human rights are fully argued to receive consideration in investment arbitration cases.

In section 6.3.5, tribunals applied human rights norms to the facts of the cases to determine whether investment law obligations had been violated. They did so after having found that human rights constituted part of the applicable law in the case under consideration. One tribunal even distinguished between the ECHR, which it found not to be applicable, and the UN Covenant on Civil and Political Rights. They applied human rights law independent of whether the investor had relied on human rights or whether the state had relied on them to justify its measures.

In section 6.3.6, tribunals did not deal with the issue whether the particular human rights treaty used for inspiration was part of the applicable law. Tribunals imported concepts from the ECHR where the state parties to these cases were also parties to the ECHR or, in one case, to the Covenant on Civil and Political Rights. But the tribunals in their awards did not mention this. They took inspiration from human rights provisions when interpreting investment treaty provisions in the context of various issues of investment treaty law.

In section 6.3.7, tribunals took inspiration from the jurisprudence of the ECtHR even though the ECHR was not part of the applicable law, since the respondent states were not party to the Convention. In section 6.3.8, a tribunal stated in *obiter* that human rights abuses by investors would lead to a loss of investment protection. In section 6.3.9, tribunals decided cases that raised human rights issues where only the *amici curiae* had mentioned them in their submissions. The respondent states did not rely on possible human rights arguments to defend their causes, and tribunals in these cases decided them in line with human rights law without explicitly basing their decision on human rights norms.

Lastly, section 6.3.10 dealt with cases where human rights had been invoked as a defence by host states to justify measures interfering with investors' rights. The tribunals pointed out that they had taken human rights considerations into account. At the same time they found them not to be inconsistent with investment treaty obligations. Therefore, they came to the conclusion that the state had an obligation to respect both investor rights and human rights simultaneously.

A number of variables determine these diverse groups of cases. For example, human rights issues may be invoked by the investor, the host state, or *amicus curiae*. The applicable treaty may provide the tribunal with jurisdiction over all disputes arising out of an investment, or just over disputes on the alleged violation of the treaty's substantive standards. The law applicable to the dispute may extend to international law in general or may be circumscribed more narrowly. Human rights may have been pleaded as a separate cause of action or merely in support of a particular interpretation of an investment treaty. Human rights may have been pleaded in some detail or may merely have been referred to in passing. Further, the host state may or may not be party to a human rights treaty that is relied upon.

(p. 184) Despite this variety of circumstances, it is possible to draw some general conclusions. The cases show that tribunals are hesitant to get involved in 'stand-alone human rights issues'—i.e. to be transformed into human rights tribunals even if a human rights violation arises directly out of an investment, and human rights obligations were part of the applicable law. So far, no tribunal has found a violation of a stand-alone human rights norm—not even in cases where human rights were part of the applicable law and the tribunal had jurisdiction with regard to any legal dispute arising out of an investment.

With regard to the possibility of transferring ideas and principles from human rights law to investment law, we find a variety of different approaches. A number of tribunals were willing to import concepts developed in the context of human rights law to investment arbitration. Some of them did so even *ex officio*. In other cases, the parties had invoked and discussed those concepts in some detail. This holds true for several principles, including, for example:

- expropriation and the principle of proportionality;
- issues relating to the calculation of damages;
- the fact that immaterial rights can be expropriated; and
- the fact that expropriations can also be performed by courts.

Other matters where tribunals referred to the jurisprudence of human rights courts were the binding nature of interim measures and the issue of the 'non-self-judging nature' of emergency provisions. A third set of cases concerned fair trial issues. Here some tribunals drew inspiration from the ECtHR or the UN Human Rights Committee; others even directly applied human rights provisions, since they were part of the applicable law.

However, we also find tribunals that refuse to import principles found in human rights law. In these cases, the tribunals found that the human rights rules in question were conceptually incompatible with the relevant investment protection principles. Where human rights arguments had not been fully argued, tribunals declined to decide on violations of human rights norms or incompatibilities of human rights obligations with investment law obligations. This occurred independently of whether or not the claimant or respondent had raised the human rights issue. Tribunals also made it clear that investors responsible for human rights abuses would not enjoy investment protection.

It remains an open question how human rights should influence investment protection during periods of economic crises. Tribunals have consistently found there to be no hierarchy of norms between human rights and investment law obligations. None of the tribunals analysed above came to the conclusion that there would be a conflict of norms between investment law and human rights law, and a conclusion as to which set of obligations ought ultimately to prevail. Rather, they chose to systemically integrate human rights law into investment provisions, either by applying human rights provisions directly to reach a decision on the violation of an investment protection standard or by taking inspiration from applicable human rights norms. This approach (p. 185) is in line with the

International Law Commission's report on Fragmentation that argues that international law ought to be conceived as one integrated system.¹⁵³

In view of the various critiques that investment tribunals ignore human rights or environmental concerns, it seems to be of importance that international investment tribunals view international law as a coherent system of norms and not as fragmented into various branches. So far, we can see no genuine friction between human rights and investment law in the investment context. Where tribunals have refused to apply human rights concepts in investment law cases, this has never been in a situation of norm conflict between investment law and human rights law. Rather, tribunals that declined to import concepts from human rights treaties into investment protection treaties held that the investment treaty they had to apply contained norms explicitly regulating the problem under consideration but in a different way from human right treaties.

Footnotes:

¹ See e.g. Pierre-Marie Dupuy and Jorge Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress', in Marc Bungenberg et al. (eds), *International Investment Law* (Hart, 2015), 1739; Ursula Kriebaum (ed.), 'Aligning Human Rights and Investment Protection', TDS 1 (2013); Patrick Dumberry and Gabrielle Dumas-Aubin, 'When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration', 13 *Journal of World Investment & Trade* 349 (2012); Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox', 37 *North Carolina Journal of International Law and Commercial Regulation* 1107 (2012); Megan Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights?' 39 *Denver Journal of International Law and Policy* 483 (2011); Abdullah Faruque, 'Mapping the Relationship Between Investment Protection and Human Rights', 11 *Journal of World Investment & Trade* 539 (2010); Olivier De Schutter, 'Foreign Direct Investment, Human Development and Human Rights: Framing the Issues', 3(2) *Human Rights & International Legal Discourse* 137 (2009); Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009); Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology', in Christina Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), 678; Ursula Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration', 10 *Journal of World Investment and Trade* 653 (2009); Ursula Kriebaum, *Eigentumsschutz im Völkerrecht: Eine vergleichende Untersuchung zum Internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (Duncker & Humblot, 2008); James Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity', 18 *Duke Journal of Comparative & International Law* 77 (2007); Lahra Liberti, 'Investissement et droits de l'homme', in Philippe Kahn and Thomas Wälde (eds), *Les aspects nouveaux du droit des investissements internationaux* (Brill, 2007), 791; Ursula Kriebaum, 'Privatizing Human Rights: The Interface between International Investment Protection and Human Rights', in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (Eleven International, 2007), 165.

² See e.g. *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, UNCITRAL (1989), (1994) 95 ILR 184, at 203: 'contemporary international law recognizes that all individuals ... are entitled to fundamental human rights ... which no government may violate. Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights. This

Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes "in respect of" foreign investment. Thus, other matters ... are outside this Tribunal's jurisdiction ... [W]hile the acts alleged to violate the international human rights of Mr. Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.' Also see *Rompetrol Group N.V. v Romania*, Award, ICSID Case No. ARB/06/3 (2013), paras. 170–72: 'The Tribunal starts from the elementary proposition that it is not called upon to decide any issue under the ECHR, whether the issue in question lies in the past or is still open. Its function is solely to decide, as between TRG and Romania, "legal dispute[s] arising directly out of an investment" and to do so in accordance with "such rules of law as may be agreed by the parties," which in the present case means essentially the BIT, in application of the appropriate rules for its interpretation. The ECHR has its own system and functioning institutional structure for complaints of breach against States Parties ...

- (i) The Tribunal is not competent to decide issues as to the application of the ECHR within Romania, either to natural persons or to corporate entities;
- (ii) The governing law for the issues which do fall to the Tribunal to decide is the BIT, and notably its requirements for fair and equitable treatment and non-impairment of, and full protection and security for, the investments of investors of one Party in the territory of the other Party;
- (iii) The category of materials for the assessment in particular of fair and equitable treatment is not a closed one, and may include, in appropriate circumstances, the consideration of common standards under other international regimes (including those in the area of human rights), if and to the extent that they throw useful light on the content of fair and equitable treatment in particular sets of factual circumstances; the examination is however very specific to the particular circumstances, and defies definition by any general rule.'

For further details, see Ursula Kriebaum, 'The Rompetrol Group N.V. v Romania', 15 JWIT 1020 (2014). Also see *Bernhard von Pezold and Others v Republic of Zimbabwe*, Procedural Order No. 2, ICSID Case No. ARB/10/15 (2012), paras. 57, 58, 60: 'The Arbitral Tribunals agree in this regard with the Claimants that the reference to "such rules of general international law as may be applicable" in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs. Moreover, neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings. The Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete.'

³ *Spyridon Roussalis v Romania*, Award, ICSID Case No. ARB/06/1 (2011), paras. 310–12.

⁴ *Azurix Corp. v Argentina*, Award, ICSID Case No. ARB/01/12 (2006), para. 261; *Frontier Petroleum v Czech Republic*, Award, UNCITRAL (2010), para. 338.

⁵ See e.g. *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, Award, ICSID Case No. ARB/03/16 (2006), para. 497; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, Decision on Jurisdiction, ICSID Case No. ARB/05/20 (2008), para. 88; *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, Decision on Jurisdiction, ICSID Case No. ARB/07/12 (2009), paras. 157–160, 167–8; *Hesham T. M. Al Warraq v Republic of Indonesia*, Award, UNCITRAL (2014), paras. 564–5, 621; *Tulip Real Estate and Development Netherlands B.V.*

v Republic of Turkey, Decision on Annulment, ICSID Case No. ARB/11/28 (2015), paras. 86–92, 145–53.

⁶ See e.g. *Perenco v Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/08/6 (2009), para. 70; *Total S.A. v The Argentine Republic*, Decision on Liability, ICSID Case No. ARB/04/01 (2010), para. 129; *El Paso v Argentina*, Award, ICSID Case No. ARB/03/15 (2011), para. 598; *Saipem S.p.A. v The People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07 (2007), para. 130; *Técnicas Medioambientales Tecmed S.A. v Mexico*, Award, ICSID Case No. ARB (AF)/00/2 (2003), paras. 115–17, 122.

⁷ Norway–Lithuania BIT (1992), Art. IX.

⁸ See e.g. Netherlands–Argentina BIT (1992), Art. 10(7): ‘The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.’ See also Tadia Begic, *Applicable Law in International Investment Disputes* (Eleven Publishing, 2005); Christoph Schreuer et al., *The ICSID Convention: A Commentary*, 2nd edn (Cambridge University Press, 2009), Art. 42.

⁹ The Report of the Executive Directors on the ICSID Convention, para. 40: ‘The term “international law” shall be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice.’ This reference to Art. 38 of the Statute of the ICJ shows that ICSID tribunals are to apply the full range of sources of international law. See Schreuer et al. (n. 8), Art. 42, 169–203; Pierre-Marie Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’, in Dupuy et al. (n. 1), 56ff.; Emmanuel Gaillard and Yas Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in ICSID Choice of Law Process’, 18 ICSID Review Foreign Investment Law Journal 348 (2003), 397. See e.g. *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, Decision on Jurisdiction, ICSID Case No. ARB/07/12 (2009), paras. 158–60; *Hesham T. M. Al Warraq v Republic of Indonesia*, Award, UNCITRAL (2014), paras. 564–5, 621; *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, Decision on Annulment, ICSID Case No. ARB/11/28 (2015), paras. 86–92, 145–53.

¹⁰ Dupuy (n. 9), 59ff.

¹¹ See e.g. Simma and Kill (n. 1).

¹² Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969), Art. 31(3)(c).

¹³ See e.g. Simma and Kill (n. 1); Thomas Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’, in Binder et al. (n. 1), 772; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), 260–75; Campbell McLachlan, ‘Investment Treaties and General International Law’, 57 ICLQ 361 (2008); UN International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, UN Doc A/CN.4/L.682 (2006), paras. 410–80; Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, 54 ICLQ 279 (2005). Also see *Oil Platforms Case (Iran v United States of America)*, I.C.J. Reports (2003), para. 41, but also see Separate Opinion of Judge Buergenthal (paras. 22–3) and Separate Opinion of Judge Higgins (paras. 45–6).

¹⁴ UN International Law Commission (n. 13), para. 472. Simma and Kill refer furthermore to the concept of *erga omnes* obligations. See Simma and Kill, (n. 1), 701; Bruno Simma,

'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* 293 (1994).

¹⁵ See e.g. UN International Law Commission (n. 13), paras. 471-2; Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003), 257-63; McLachlan, 'The Principle of Systemic Integration' (n. 13), 313-15; Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009), 433.

¹⁶ See e.g. Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice', 70 *BYIL* 99 (1999); Patrick Dumberry, 'The Quest to Define "Fair and Equitable Treatment" for Investors under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards', 3 *Journal of World Investment & Trade* 657 (2002), 657-91; Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', 6 *Journal of World Investment and Trade* 357 (2005); Barnali Choudhury, 'Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law', 6 *Journal of World Investment & Trade* 297 (2005); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (Oxford University Press, 2012), 130-60; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press, 2008).

¹⁷ Dolzer and Schreuer (n. 16), 160-65.

¹⁸ *Ibid.* 98-129; Campbell McLachlan, Laurence Shore, and Matthew Weininger, *International Investment Arbitration* (Oxford University Press, 2007), 290-97. On indirect expropriation, see e.g. Vaughan Lowe, 'Regulation or Expropriation?', 55 *Current Legal Problems* 447 (2002); Rudolf Dolzer, 'Indirect Expropriations: New Developments?', 11 *NYU Environmental Law Journal* 64 (2003); W. Michael Reisman and Robert Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation', 74 *British Year Book of International Law* 115 (2003); Gary Sampliner, 'Arbitration of Expropriation Cases Under U.S. Investment Treaties: A Threat to Democracy or the Dog That Didn't Bark?' 18 *ICSID Review Foreign Investment Law Journal* 1 (2003); Jan Paulsson and Zachary Douglas, 'Indirect Expropriation in Investment Treaty Arbitration', in Norbert Horn and Stefan Kröll, *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International, 2004), 145; L. Yves Fortier and Stephan Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor', 19 *ICSID Review Foreign Investment Law Journal* 293 (2004); Daniel Clough, 'Regulatory Expropriations and Compensation under NAFTA', 6 *Journal of World Investment & Trade* 553 (2005); Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', 20 *ICSID Review Foreign Investment Law Journal* 1 (2005); Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State', 8 *Journal of World Investment & Trade* 717 (2007); Kriebaum, *Eigentumsschutz im Völkerrecht* (n. 1); Kriebaum, 'Expropriation', in Bungenberg et al. (n. 1), 959.

¹⁹ Alireza Falsafi, 'The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard', 30 *Suffolk Transnational Law Review* 317 (2007).

²⁰ See e.g. African Commission on Human and Peoples' Rights, 'The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria': <http://www.cohre.org/store/attachments/SERACper cent20andper cent20CE SRper cent20v.per cent20Nigeria.doc>.

²¹ Often, the BIT clause even restricts jurisdiction to claims by investors and excludes the possibility for the host state to sue the investor. See e.g. Canada-Uruguay BIT (1997), Art. 12: 'Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former

Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach ... '.

²² See e.g. *Aguas del Tunari S.A. v Republic of Bolivia*, NGO Petition to Participate as Amici Curiae, ICSID Case No. ARB/02/3 (2002), paras. 47–8; *Aguas del Tunari S.A. v Republic of Bolivia*, Letter from President of Tribunal Responding to Petition, ICSID Case No. ARB/02/3 (2002); *United Parcel Service of America v Canada*, Decision on Petitions for Intervention and Participation as Amici Curiae, ICSID Case No. UNCT/02/1 (2001), para. 40; *Methanex v United States*, Decision on Amici Curiae, UNCITRAL (2001), paras. 47–9; *Glamis Gold v United States*, Decision on Application and Submission by Quechan Indian Nation, UNCITRAL (2005), para. 10; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (2006), paras. 14–19; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Petition for Amicus Curiae Status, ICSID Case No. ARB/05/22 (2006), paras. 7–8; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Procedural Order No. 5, ICSID Case No. ARB/05/22 (2006), para. 50; *Pietro Foresti, Laura De Carli, and Others v Republic of South Africa*, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39 and 35 of the Additional Facility Rules, ICSID Case No. ARB(AF)/07/01 (2009), paras. 2.1, 3–4.1. Also see Statement of the North American Free Trade Commission on Non-Disputing Party Participation (USTR 2003): <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Nondisputing-en.pdf>.

²³ *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, UNCITRAL (1989), (1994) 95 ILR 184.

²⁴ Ibid. para. 202.

²⁵ Ibid.

²⁶ Ibid. para. 207.

²⁷ Ibid. para. 203.

²⁸ *Rompetrol Group N.V. v Romania*, Award, ICSID Case No. ARB/06/3 (2013). For more on the award, see Kriebaum (n. 2).

²⁹ ECHR, Art. 6(3)(a): 'Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.'

³⁰ *Rompetrol Group N.V. v Romania*, Award, ICSID Case No. ARB/06/3 (2013), para. 54.

³¹ Ibid. para. 60.

³² Ibid. para. 169.

³³ Ibid. para. 170.

³⁴ The Netherlands–Romania BIT (1983).

³⁵ *Rompetrol Group N.V. v Romania*, Award, ICSID Case No. ARB/06/3 (2013), para. 172.

³⁶ *Bernhard von Pezold and Others v Republic of Zimbabwe*, Procedural Order No. 2, ICSID Case No. ARB/10/15 (2012).

³⁷ Ibid. paras. 57–60.

³⁸ Ibid. paras. 57–8.

³⁹ Zimbabwe–Germany BIT (1995), Art. 11.

- ⁴⁰ Swiss–Zimbabwe BIT (1996), Art. 10.
- ⁴¹ *Siemens A.G. v The Argentine Republic*, Award, ICSID Case No. ARB/02/8 (2007), para. 346.
- ⁴² *Ibid.* para. 354.
- ⁴³ Argentina–Germany BIT (1991), Art. 4(2): ‘Die Entschädigung muß dem Wert der enteigneten Kapitalanlage unmittelbar vor dem Zeitpunkt entsprechen ... La indemnización deberá corresponder al valor de la inversión expropiada ...’
- ⁴⁴ *Bernhard von Pezold and Others v Republic of Zimbabwe*, Award, ICSID Case No. ARB/10/15 (2012), paras. 453–4.
- ⁴⁵ *Ibid.* paras. 465–6.
- ⁴⁶ *James and Others v United Kingdom*, (1986) ECHR 2, para. 63: ‘[T]here may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned.’ On this issue, see Ursula Kriebaum, ‘Nationality and the Protection of Property under the European Convention on Human Rights’, in Isabelle Buffard et al. (eds), *International Law Between Universalism and Fragmentation* (Brill, 2008), 649.
- ⁴⁷ *Spyridon Roussalis v Romania*, Award, ICSID Case No. ARB/06/1 (2011).
- ⁴⁸ Greece–Romania BIT (1997), Art. 10 provides that: ‘If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable, prevail over this Agreement.’ Also see *Spyridon Roussalis v Romania*, Award, ICSID Case No. ARB/06/1 (2011) paras. 117 and 310.
- ⁴⁹ *Spyridon Roussalis v Romania*, Award, ICSID Case No. ARB/06/1 (2011), paras. 117 and 309.
- ⁵⁰ Greece–Romania BIT (1997), Art. 9.
- ⁵¹ *Spyridon Roussalis v Romania*, Award, ICSID Case No. ARB/06/1 (2011), para. 312: ‘The Tribunal does not exclude the possibility that the international obligations of the Contracting States mentioned at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No. 1. But the issue is moot in the present case and does not require decision by the Tribunal, given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above. Consequently Article 10 of the BIT cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT.’
- ⁵² *Ibid.*
- ⁵³ *Azurix Corp. v Argentina*, Award, ICSID Case No. ARB/01/12 (2006).
- ⁵⁴ *Ibid.* para. 254.
- ⁵⁵ *Ibid.* para. 261.
- ⁵⁶ *Ibid.* paras. 377, 393, 408.

- ⁵⁷ *Frontier Petroleum v Czech Republic*, Award, UNCITRAL (2010), para. 338.
- ⁵⁸ *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, Decision on Jurisdiction, ICSID Case No. ARB/07/12 (2009).
- ⁵⁹ *Ibid.* para. 154.
- ⁶⁰ Italy-Lebanon BIT (1997), Art. 7(3).
- ⁶¹ *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, Decision on Jurisdiction, ICSID Case No. ARB/07/12 (2009), para. 157.
- ⁶² *Ibid.* paras. 158-60.
- ⁶³ *Ibid.* paras. 167-8.
- ⁶⁴ *Hesham T. M. Al Warraq v Republic of Indonesia*, Award, UNCITRAL (2014), paras. 556-605.
- ⁶⁵ Author's translation from the original French: 'L'investisseur aura droit à des dommages-intérêts pour tout préjudice subi par lui et résultant de l'un de ces actes suivants commis par une Partie Contractante: ... B) non respect des obligations et des engagements internationaux incombant à la Partie Contractante en faveur de l'investisseur conformément au présent Accord ou [a]bstention volontaire ou par négligence de prendre des mesures nécessaires pour leurs exécution ... '
- ⁶⁶ *Hesham T. M. Al Warraq v Republic of Indonesia*, Award, UNCITRAL (2014), paras. 564 and 565.
- ⁶⁷ *Ibid.* para. 621.
- ⁶⁸ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, Award, ICSID Case No. ARB/07/26 (2016).
- ⁶⁹ *Ibid.* para. 720.
- ⁷⁰ *Ibid.* paras. 623-4.
- ⁷¹ *Ibid.* para. 624.
- ⁷² *Ibid.* para. 680.
- ⁷³ *Ibid.* paras. 680-83.
- ⁷⁴ *Ibid.* paras. 843-7.
- ⁷⁵ *Ibid.* paras. 846-7.
- ⁷⁶ *Ibid.* para. 36.
- ⁷⁷ *Ibid.* para. 1210.
- ⁷⁸ *Ibid.*
- ⁷⁹ Universal Declaration of Human Rights, Art. 30: 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.' See UN General Assembly Resolution 217A (1948).
- ⁸⁰ Covenant on Economic, Social and Cultural Rights, Art. 5: '1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant. 2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize

such rights or that it recognizes them to a lesser extent.’ See UN General Assembly Resolution 2200A (XXI) (1966).

81 Governing Body of the International Labour Office, ‘Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy’ (adopted 204th session (1977), as amended 279th session (2000), 295th session (2006), and 329th session (2017)).

82 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, Award, ICSID Case No. ARB/07/26 (2016), paras. 1196–9.

83 Edward Guntrip, ‘Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?’ (EJIL Talk, 2017), <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>. On the Covenant on Economic, Social and Cultural Rights, Art. 5(1), see Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, 2014), 263ff.

84 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, Award, ICSID Case No. ARB/07/26 (2016), para. 1212.

85 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, Decision on Jurisdiction, ICSID Case No. ARB/05/20 (2008).

86 *Ibid.* para. 87.

87 Universal Declaration of Human Rights, Art. 15: ‘everyone has a right to a nationality and no one shall be arbitrarily deprived of his nationality ...’

88 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, Decision on Jurisdiction, ICSID Case No. ARB/05/20 (2008), para. 88.

89 *Rompetrol Group N.V. v Romania*, Decision of the Tribunal on the Participation of a Counsel, ICSID Case No. ARB/06/3 (2013), para. 20.

90 *Rompetrol Group N.V. v Romania*, Award, ICSID Case No. ARB/06/3 (2013), para. 172.

91 *Ronald S. Lauder v The Czech Republic*, Award, UNCITRAL (2001), para. 200: ‘It is generally accepted that a wide variety of measure are susceptible to lead to indirect expropriation, and each case is therefore to be decided on the basis of its attending circumstances ... The European Court of Human Rights in *Mellacher and Others v. Austria* (1989 Eur.Ct.H.R. (ser. A, No. 169)), held that a “formal” expropriation is a measure aimed at a “Transfer of property”, while a “de facto” expropriation occurs when a State deprives the owner of his “right to use, let or sell (his) property”.’

92 *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, Award, ICSID Case No. ARB/03/16 (2006).

93 *Ibid.* para. 497.

94 *Ibid.* para. 499.

95 *Frontier Petroleum v Czech Republic*, Award, UNCITRAL (2010), para. 328.

96 *Ibid.* paras. 329–34.

97 *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, Decision on Annulment, ICSID Case No. ARB/11/28 (2015), paras. 86–92, 145–53.

98 *Ibid.* para. 92.

99 *Ibid.* paras. 145–53.

- 100** *Ruiz Torija v Spain* (1994) ECHR (18,390/91), Series A/303-A, para. 29.
- 101** *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, Decision on Annulment, ICSID Case No. ARB/11/28 (2015), paras. 152–3.
- 102** *Perenco v Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/08/6 (2009), para. 70.
- 103** *El Paso v Argentina*, Award, ICSID Case No. ARB/03/15 (2011), para. 598.
- 104** *Saipem S.p.A. v The People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07 (2007), para. 130.
- 105** *Ibid.* para. 132. The Tribunal made reference to *Allard v Sweden*, (2003) ECHR (35,179/97), paras. 50–53, 61.
- 106** *Técnicas Medioambientales Tecmed S.A. v Mexico*, Award, ICSID Case No. ARB (AF)/00/2 (2003).
- 107** *Ibid.* paras. 115–17.
- 108** The tribunal based its award on the ECtHR's decision in *Matos and Silva*, (1996) ECHR, para. 92. In doing so, it applied a proportionality test and established a relationship between the two criteria 'effect' and 'purpose' of the interference. See *Técnicas Medioambientales Tecmed S.A. v Mexico*, Award, ICSID Case No. ARB (AF)/00/2 (2003), para. 122: '[T]he Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.' In applying this proportionality test the *Tecmed* Tribunal relied on judgments of the ECtHR—namely, *Mellacher v Austria*, (1989) ECHR 25, *Pressos Compania Naviera v Belgium*, (1995) ECHR 471, and *James and Others v United Kingdom*, (1986) ECHR 2—and balanced the public interest of the host state and the investor's interest in having its investment protected.
- 109** *Técnicas Medioambientales Tecmed S.A. v Mexico*, Award, ICSID Case No. ARB (AF)/00/2 (2003), para. 122. In the omitted footnote the tribunal referred to *Mellacher v Austria*, (1989) ECHR 25 and *Pressos Compania Naviera v Belgium*, (1995) ECHR 471.
- 110** The ECtHR takes the decision that an expropriation has occurred based on a sole effects test. Under the ECHR, any interference with the peaceful enjoyment of property triggers a proportionality test. This test comprises an overall examination of the various interests at stake—one element of the test is the amount of compensation obtained for the expropriated property, if any. If an expropriation had occurred, compensation would, in principle, be full compensation. But there are exceptional circumstances that would allow a lesser amount to be paid. If the interference is of lesser severity than an expropriation, the ECtHR will also apply a proportionality test where, in principle, less than fair market value or no compensation will be required except in exceptional circumstances. The test is whether, taking into consideration all the facts, the state interference with property rights had created an excessive burden for the individual.
- 111** For a critical analysis of the use of the proportionality test in investment arbitration, see N. Jansen Calamita, 'The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties', in Andrea Bjorklund (ed.), *Yearbook of International Investment Law and Policy, 2013–2014* (Oxford University Press, 2015), 157–200.
- 112** See e.g. Germany–Philippines BIT (1997), Art. 1; Bulgaria–China BIT (1989), Art. 1(1); Bangladesh–Italy BIT (1990), Art. 1(1); Spain–Ecuador BIT (1996), Arts. 2 and 3; Netherlands–Bolivia BIT (1992), Art. 2. On these clauses see e.g. Andrea Carlevaris, 'The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals', 9 *Journal of World Investment & Trade* 25 (2008); Christina Knahr,

'Investments in Accordance with Host State Law', 4 TDM 5; Ursula Kriebaum, 'Illegal Investments', in Christian Klausegger et al., *Austrian Arbitration Yearbook 2010* (AAY, 2010), 307; Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law', 34 *Fordham International Law Journal* 1473 (2011).

113 See e.g. *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, Award, ICSID Case No. ARB/03/25 (2007), para. 401; *Alasdair Ross Anderson et al. v Republic of Costa Rica*, Award, ICSID Case No. ARB(AF)/07/3 (2010), paras. 50, 53, 58, 59; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, Award, ICSID Case No. ARB/07/2 (2010), paras. 123-6, 138; *Saba Fakes v Republic of Turkey*, Award, ICSID Case No. ARB/07/20 (2010), para. 115; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, Decision on Jurisdiction, ICSID Case No. ARB/06/2 (2012), paras. 255, 282; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (No. 2)*, Award, ICSID Case No. ARB/11/12 (2014), para. 328; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24 (2015).

114 See e.g. *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24 (2008), para. 138; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, Award, ICSID Case No. ARB/07/2 (2010), para. 124; *SAUR International SA v Republic of Argentina*, Award, ICSID Case No. ARB/04/4 (2012), para. 308; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, Award, UNCITRAL, PCA Case No. AA 228 (2014), paras. 1349-52.

115 *Phoenix Action Ltd v The Czech Republic*, Award, ICSID Case No. ARB/06/5 (2009).

116 *Ibid.* para. 78.

117 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (2008).

118 *Ibid.* para. 789.

119 *Ibid.* paras. 491-2, 605, 814(b).

120 Amicus Curiae Submission of The Lawyers' Environmental Action Team (LEAT), The Legal and Human Rights Centre (LHRC), The Tanzania Gender Networking Programme (TGNP), The Center for International Environmental Law (CIEL), The International Institute for Sustainable Development (IISD) in Case No. ARB/05/22 before the International Centre for Settlement of Investment Disputes between *Biwater Gauff (Tanzania) Limited and United Republic of Tanzania* (2007), paras. 7, 11, 68, 69, 95, 96.

121 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (2008), para. 434.

122 *Ibid.* paras. 488, 791.

123 *Methanex v United States*, Award, UNCITRAL (2005).

124 MTBE Public Health and Environment Protection Act of 1997, California Senate Bill No. 521, Ch. 816: http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0501-0550/sb_521_bill_19971009_chaptered.html.

125 *Methanex v United States*, Award, UNCITRAL (2005), Part IV, Ch. A, para. 1.

126 *Ibid.* Part IV, Ch. B, para. 38.

127 *Ibid.* Part IV, Ch. C, para. 27.

128 *Glamis Gold v United States*, Award, UNCITRAL (2009).

- 129** *Glamis Gold v United States*, Decision on Application and Submission by Quechan Indian Nation, UNCITRAL (2005), paras. 7, 9–13; *Glamis Gold v United States*, Decision on Application and Submission by Quechan Indian Nation, UNCITRAL (2005) (Supplemental Submission), paras. 1–7, 9.
- 130** See e.g. *Glamis Gold v United States*, Statement of Defense of Respondent United States of America, UNCITRAL (2005), paras. 14, 28.
- 131** *CMS Gas Transmission Company v The Republic of Argentina*, Award, ICSID Case No. ARB/01/8 (2005).
- 132** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Award, ICSID Case No. ARB/03/19 (2010).
- 133** *CMS Gas Transmission Company v The Republic of Argentina*, Award, ICSID Case No. ARB/01/8 (2005), para. 114.
- 134** *Ibid.* paras. 114, 121.
- 135** *Ibid.* para. 114: ‘In respect of the legal regime of treaties in Argentina, the Respondent argues that while treaties override the law they are not above the Constitution and must accord with constitutional public law. Only some basic treaties on human rights have been recognized by a 1994 constitutional amendment as having constitutional standing and, therefore, in the Respondent’s view, stand above ordinary treaties such as investment treaties. It is further argued that, as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights.’
- 136** *Ibid.* para. 121.
- 137** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Award, ICSID Case No. ARB/03/19 (2010); *AWG Group Ltd v The Argentine Republic*, Decision on Liability, UNCITRAL (2010); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Decision on Liability, ICSID Case No. ARB/03/19 (2010).
- 138** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Award, ICSID Case No. ARB/03/19 (2010), para. 240. Also see *AWG Group Ltd v The Argentine Republic*, Decision on Liability, UNCITRAL (2010), para. 240; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Decision on Liability, ICSID Case No. ARB/03/19 (2010), para. 250.
- 139** Centro de Estudios Legales y Sociales (CELS), Asociación Civil por la Igualdad y la Justicia (ACIJ), Consumidores Libres Cooperativa Ltda: De Provisión de Servicios de Acción Comunitaria, Unión de Usuarios y Consumidores, Center for International Environmental law (CIEL), 26: http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf.
- 140** Diane Desierto, ‘Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises’, TDM (2013), 37ff.
- 141** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Award, ICSID Case No. ARB/03/19 (2010), para. 240; *AWG Group Ltd v The Argentine Republic*, Decision on Liability, UNCITRAL (2010), para. 262.
- 142** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Award, ICSID Case No. ARB/03/19 (2010), paras. 241–3; *AWG Group Ltd v The Argentine Republic*, Decision on Liability, UNCITRAL (2010), paras. 263–5; *Suez*,

Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic, Decision on Liability, ICSID Case No. ARB/03/19 (2010), paras. 263–5.

143 *SAUR International SA v Republic of Argentina*, Award, ICSID Case No. ARB/04/4 (2012).

144 Ibid. para. 32.

145 Ibid. paras. 451–4.

146 Ibid. paras. 328, 394–5.

147 Ibid. para. 330: ‘En réalité, les droits de l’homme en général, et le droit à l’eau en particulier, constituent l’une des diverses sources que le Tribunal devra prendre en compte pour résoudre le différend car ces droits sont élevés au sein du système juridique argentin au rang de droits constitutionnels, et, de plus, ils font partie des principes généraux du droit international. L’accès à l’eau potable constitue, du point de vue de l’État, un service public de première nécessité et, du point de vue du citoyen, un droit fondamental.’

148 Ibid. para. 330: ‘Pour ce motif, en cette matière, l’ordre juridique peut et doit réserver à l’Autorité publique des fonctions légitimes de planification, de supervision, de police, de sanction, d’intervention et même de résiliation, afin de protéger l’intérêt général.’

149 Ibid. paras. 331–2: ‘Mais ces prérogatives sont compatibles avec les droits des investisseurs à recevoir la protection offerte par l’APRI. Le 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: l’entreprise concessionnaire d’un service public de première nécessité se trouve dans une situation de dépendance face à l’administration publique, qui dispose de pouvoirs spéciaux pour en garantir la jouissance en raison de la souveraineté du droit fondamental à l’eau; mais l’exercice de ces pouvoirs ne se fait pas de façon absolue et doit, au contraire, être conjugué avec le respect des droits et des garanties octroyés à l’investisseur étranger en vertu de l’APRI. Si les pouvoirs publics décident d’exproprier l’investissement, de traiter l’investisseur injustement ou de façon non équitable ou de lui refuser la protection ou la pleine sécurité promises, tout ceci en violant l’APRI, l’investisseur aura le droit d’être indemnisé dans les termes que le Traité lui accorde. Contrebalancer ces deux principes sera la tâche que le Tribunal devra effectuer lors de son analyse des prétentions substantives présentées par Sauri.’

150 Ibid. paras. 461, 463.

151 Ibid. para. 405.

152 Ibid. paras. 505–6.

153 International Law Commission (n. 13), para. 420, Fifty-Fifth Session of the General Assembly, ‘Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law’, UN Doc. A/CN.4/L.702 (2006). See also Christoph Schreuer and Ursula Kriebaum, ‘From Individual to Community Interest in International Investment Law’, in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011), 1079; Moshe Hirsch, ‘Interactions between Investment and Non-Investment Obligations’, in Peter Muchlinski, Federico Ortino, and Christoph Schreuer, *Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 154.