THE HUMAN RIGHT TO WATER IN INVESTMENT DISPUTES INVOLVING LATIN-AMERICAN STATES. AN EXPERIENCE OF FRAGMENTATION OF THE INTERNATIONAL LAW

DERECHO HUMANO AL AGUA EN DISPUTAS DE INVERSIÓN QUE INVOLUCRAN ESTADOS LATINO AMERICANOS. UNA EXPERIENCIA DE FRAGMENTACIÓN DEL DERECHO INTERNACIONAL

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Thesis presented as a requirement to opt for the

Master's Degree in Corporate Law

Director

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Master in Corporate Law

Faculty of Jurisprudence

Universidad del Rosario

Bogota D.C.,

Colombia 2022

The human right to water in investment disputes involving Latin-American States. An experience of fragmentation of the international law

Derecho humano al agua en disputas de inversión que involucran Estados Latino Americanos. Una experiencia de fragmentación del derecho internacional

Droit humain à l'eau dans les conflits d'investissement impliquant des États d'Amérique latine. Une expérience de fragmentation du droit international

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Summary

This dissertation's objective is to determinate whether the human right to water and the investment law are in direct collision in Latin America, based on the analysis of decisions rendered by investment Tribunals between 2006 and 2021. This analysis is relevant considering that investment in the region has focused on extractive industries which could deepen the water crisis, and that investment will have a critical role in its solution in the following decades. The conclusion of this analysis is that collision exists due to the fragmentation to international law, meaning that the regimes of human rights and investment do not dialogue sufficiently. Thus, the dissertation offers substantive and institutional strategies to facilitate the harmonization of both regimes.

Key words

Human right to water; investment law; fragmentation of international law; Latin America.

Resumen

El objetivo de esta disertación es determinar si el derecho humano al agua y el derecho de inversiones están en colisión directa en América Latina, con base en el análisis de decisiones proferidas por Tribunales de inversión entre el 2006 y el 2021. Este análisis es relevante considerando que la inversión en la región se ha centrado en industrias extractivas que podrían profundizar la crisis del agua, y que la inversión tendrá un rol clave en su solución en la próximas décadas. La conclusión de este análisis es que existe colisión debido a la fragmentación del derecho internacional, lo que implica que los regímenes de derechos humanos e inversiones no dialogan lo suficiente. Por lo tanto, la disertación ofrece estrategias sustantivas e institucionales para facilitar la armonización de ambos regímenes.

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Palabras Clave

Derecho humano al agua; derecho de inversiones; fragmentación del derecho internacional; América Latina.

Résumé

L'objectif de cette thèse est déterminer si le droit humain à l'eau et le droit d'investissement sont en collision directe en Amérique latine, sur la base de l'analyse des décisions rendues par les Tribunaux d'investissement entre 2006 et 2021. Cette analyse est pertinente étant donné que l'investissement dans la région s'est concentrée sur les industries extractives qui pourraient aggraver la crise de l'eau, et que l'investissement jouera un rôle clé dans sa solution dans les décennies à venir. La conclusion de cette analyse est qu'il y a une collision due à la fragmentation du droit international, ce qui implique que les régimes des droits de l'homme et d'investissement ne dialoguent pas suffisamment. Par conséquent, la thèse propose des stratégies substantielles et institutionnelles pour faciliter l'harmonisation des deux régimes.

Mots clés

Droit à l'eau; Droit des investissement; fragmentation du droit international; Amérique Latine.

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1. Introduction

Water is the most essential element for life on earth, it is required for the subsistence of literally every living organism (Hoffman 2009, 4). However, there is a global crisis derived from water's scarcity and low quality, which represents the major challenge of the human history (Cooley et al 2014, 2-4). While this crisis in Latin America is caused at least in part by the extractive industries in which foreign investment is focused, investment will play a crucial role in resolving the crisis in the following decades. This is why discussing the human right to water in the context of investment law in Latin-America is extremely urgent (see Section 2).

The undisputable relevance of water leaded the Committee on Economic, Social, and Cultural Rights ("CESCR") (2002, para. 10) to recognize the human right to water, which "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use" (CESCR 2002, para. 10). Accordingly, the States are bound to take regulatory measures to advance in the realization of the said right, ensuring access to water and the protection of hydric resources within their territories (see Section 3.1).

Measures implemented with the aim or the effect to ensure the realization of the right to water often have collateral effects on the industries in which investment is focused. Then, these measures become the basis for foreign investors to initiate arbitration proceedings to claim multi-millionaire reparations from the States, alleging violations to their rights under international investment agreements.

The current existence of multiple regimes within the international law, with their own rules and bodies, represent the legal challenge of the globalization era: to avoid the fragmentation of international law, a situation in which the existing regimes do not dialogue, leading to the risk that one regime goes in detriment of the another (see Section 3.2).

Under these circumstances, this dissertation's main objective is to determine whether the right to water and international investment law are in direct collision in Latin America, caused by the fragmentation of international law. This dissertation analyzes eleven arbitral awards relevant to the solution of the said question. No relevant cases were decided before 2006. In all these cases, Latin American States were involved and the right to water was or should have been a part of the discussion (see Section 4).

On the grounds of the said analysis, this dissertation argues that there is not sufficient dialogue between the regimes of international investment law and international human rights law in Latin America (see Section 4). Therefore, several substantive and institutional strategies with a regional emphasis are offered to advance towards the harmonization of these regimes (see Section 5).

2. Why to talk about the human right to water in international investment law in Latin America?

There is an urgent need to discuss the role of the human right to water and its relation with the international investment law regime in Latin-America. On the one hand, we are experiencing the worst crisis of water in the history, the major challenge ever faced by the life on earth: the scarcity and low quality of water is a reality for millions across the globe, especially in less-developed regions (sub-section 2.1). On the another, the present and near-future perspectives of foreign investment in the region, evidence that investment law regulation could be both, a cause of the water's crisis and a potential mean for its solution (sub-section 2.2).

2.1. The world's crisis of water

Water is the most essential element for the life on earth, it is required for the subsistence of literally every living organism (Hoffman 2009, 4). However, the world is currently experiencing a water crisis without any precedent in the history, that could potentially lead the life on earth to disappear (Cooley et al 2014, 2-4).

The amount of available freshwater in the world is simply not enough to suffice human demand (sub-section 2.1.1). In addition, human activates have substantially reduced the quality of available freshwater (sub-section 2.1.2). These issues affect mainly developing countries and consequently, the most vulnerable people on the globe. They are less likely to access to safe, clean and sufficient water, and also are more exposed to get infected with numerous deadly waterborne diseases.

2.1.1. Limited and unequally distributed quantity of water for all

Most of the planet is covered by water, people are used to see pictures showing the earth as an almost completely blue sphere. It is hard to believe that there is not enough water for all around the globe. However, 97% of the world's water is contained in the oceans and is extremely salty for human consumption. Only 3% of the world's water is freshwater, but the major part of it, amounting to a global 2%, is locked up on the earth's poles, glaciers or permanent snow. This leaves only 1% of the world's water available for the consumption of every living organism (Hoffman 2009, 12).

Empirical evidence shows that 1,2 billion people already live in areas of physical water scarcity, where the multi-purpose demand of water exceeds 75% of the river flows. Furthermore, 500 million people habit in regions approaching to physical scarcity (Cooley et al 2014, 2). This is the major challenge the humanity has ever faced, a situation in which the demand for water nears or exceeds the available water supply (Cooley et al 2014, 2).

This water stress results from both, natural and human causes, which urgently must be resolved.

On the one hand, the earth's wide variety of hydro-geographical conditions imply an unequal distribution of the water supply. Only about 0.036% of the world's water is found in lakes and rivers, easily accessible to the people. The remaining part of the 1% of the world's

freshwater is hardly accessible to humans, since it is located in soil moisture, atmospheric water vapor, and within living organisms (Hoffman 2009, 13-14). Differences in water availability between countries are therefore dramatic in many cases. For instance, Colombia, one of the richest countries in freshwater resources worldwide, has 2,140 times more freshwater than Egypt, one of the poorest (FAO s. a.).

In a world scale, Latin America is the richest region in terms of availability of freshwater, representing 32% of the world's resources (FAO s. a.). Yet, the third part of the region's population suffers water scarcity as they do not have a mean providing sustained access to freshwater. Reasons behind water scarcity in the region include inequitable natural distribution, absence of adequate infrastructure, poor water governance, and in the recent decades, global warming and climate change (Sempris, s. a.).

On the another hand, the demand for water, has dramatically increased across the history as a result of the growth of human population, whose water requirements have never been as high as nowadays. Nonetheless, the earth's water does not increase, we have had always the same quantity of available water in the planet. It cannot escape from the atmosphere, and to our fortune, it is subjected to an eternal cycle of purification (Hoffman 2009, 12).

Humans require millions of liters of water for uncountable purposes every day, including personal consumption, sanitation, agriculture, manufacture, energy generation, mining, and oil exploration and exploitation (UN Water 2021, 4). Only the world's annual withdrawal of freshwater for agriculture, industry and domestic consumption and sanitation, amounts to 3.881 billion cubic meters (FAO s. a.). This is alarming considering that it is almost equivalent to the renewable freshwater resources of Russia, the world's second richest country in terms of water, with 4,312 billion cubic meters available (FAO s. a.).

In addition, the existing water management and distribution systems are poorly maintained around the globe, causing the loss of millions of liters of water per day due to leaks and other infrastructural issues that exacerbate water's scarcity, and demonstrate a global tendency of inefficient use of water (Cooley et al 2014, 3).

2.1.2. Poor quality of available water

While water is certainly a condition precedent to the life, it is also a crucial vector for multiple diseases affecting human life to spread. Across the globe, 1,8 million of people die annually due to diarrheal diseases resulting from the ingestion of polluted water, containing bacteria and viruses, such as cholera, typhoid and other diarrheal diseases. Tragically, 90% of those people are children under the age of five, who live mainly in developing countries (Hoffman 2009, 12). Poor quality of water results from demographic growth, expansive industrial, extractive and agricultural activities, and climate change. (Cooley et al 2014, 3).

Statistical evidence demonstrates that, as of 2020, 44% of the global household wastewater is not safely treated, mainly due to the absence of sewer networks connected to effective wastewater treatment plants. Moreover, at least 70% of industrial wastewater does not receive any treatment (UN Water 2021, 17-18). The UN Water (2021, 19) points out that protection of water bodies is easier than restoration, calling upon the States to promote

initiatives to protect water resources, considering that the pollution of water rises relevant challenges to the food security, the health of ecosystems, and the supply of drinking water.

There is no region in the world on track to achieve the Sustainable Development Goal No. 6 target by 2030, which is to ensure availability and sustainable management of water and sanitation for all by 2030 (UN Water 2021, 8). As of 2020, 2 billion people lacked safely managed drinking water services, while 3,6 billons did not have access to safely managed sanitation, and 2,3 billion did not have basic handwashing facilities with soap at home. In all these cases, inhabitants of rural areas, especially in developing countries, are the most excluded people from these services (UN Water 2021, 7-13).

If nothing is done in the following years to address both, water scarcity and low quality, deaths caused by dehydration and waterborne diseases are expected to increase dramatically. Therefore, reducing water pollution and improving the management of wastewater are critical part of the solution of the water's crisis, that require urgent technological, financial, and institutional innovation (Hoffman 2009, 15).

2.2. Foreign investment in Latin America

Foreign investment plays a relevant role in the world's crisis of water, and specially in Latin-America. Nowadays, foreign investment in the region is focused on the extractive sector, which often generates social and environmental concerns regarding its contribution to the water's crisis (sub-section 2.2.1). Furthermore, in the following decades, high levels of investment will be required in the region to advance in the implementation of water use and management systems that will be required to overcome the crisis (sub-section 2.2.2).

2.2.1. Foreign investment as a cause to the water's crisis in Latin America

Most of the foreign investment in the region has focused on the exploitation of natural resources. As of today, the ICSID data base on pending and concluded cases shows that 70 investor-State arbitration proceedings have been initiated against Latin American States in the oil, gas and mining sectors (ICSID s. a.). In addition, 8 proceedings were commenced in the agriculture, fishing and forestry industries (ICSID s. a.).

To the Inter-American Commission on Human Rights ("IACHR") (2015, para. 104), the principal affectations to access to water across the Americas result from the effects of extraction projects, the use of agrochemicals, and the contamination of water resources. The IACHR (2015, para. 104) further comments that the development model in Latin America would be leading to severely overusing of water resources with serious impacts on the human rights, especially of historically discriminated communities (2015, para. 104).

At the hearing “Human Rights and Water in the Americas”, held on October 23, 2015, the IACHR was informed by the civil society that Latin American States are implementing mining exploration and exploitation projects in ecosystems of high relevance for the supply of water to millions of people across their territories, which are subjected to special conservation. The affected ecosystems include Andean *páramos*, glaciers, wetlands, headwaters, and lakes, leading these ecosystems to the risk of disappearing (IACHR 2015, para. 109).

Colombia's situation referred by the civil society in the said hearing illustrates very well this point. National laws forbid the exploration and exploitation of minerals in Andean *páramos*[2], considering that 85% of the population rely on them as their source of drinking water in the country. Yet, in 2007 the Geological Colombian Service entered into a concession contract with Eco Oro Minerals, granting the latter with the exploration and exploitation of the Angostura gold and silver project, located within the *Páramo de Santurbán* (IACHR 2015, para. 110).

This case is of especial relevance for the purposes of this work, since a decision of the Colombia's Constitutional Court banned the exploration and exploitation activities in the *Páramo de Santurbán*, leading Eco Oro to initiate an investor-State arbitration against Colombia, alleging that the said measure constituted a violation to the protection granted to Eco Oro by to the Canada-Colombia BIT. A summary of the award rendered in this case is presented in sub-section 4.2.8 below.

The IACHR (2015, para. 111) has also referred to multiple reports on contamination of both, surface and ground water resources, caused by heavy metals and toxic substances used in extractive activities. This fact imply a risk for human health and food security, considering that the use of polluted water leads to the loss of crops and affects livestock activities. Additional concerns related to right to water have been raised by the civil society from Costa Rica, where 30% of rural population would have been affected by the contamination of drinking water, due to agrochemicals used by the pineapple industry (IACHR 2015, para. 117).

Further, the US Environmental Protection Agency informed the IACHR that the hydraulic fracturing technique (fracking) has potential impacts on the access to safe water in the Americas, resulting from eventual spills or ground irrigations of fluids and gases used in the process, and from the inadequate treatment of the resulting wastewaters (IACHR 2015, para. 125).

Moreover, in certain cases, extractive activities would be generating alterations to the water's cycle, triggering droughts and desertification in several regions of the Americas, affecting the human rights of millions of people (IACHR 2015, para. 111).

2.2.2. Foreign investment as a potential part of solution to the water's crisis in Latin America

Technological, financial and institutional innovation are essential for preventing the worst-case scenario derived from the current crisis of water (Hoffman 2009, 15). Providing access to safely managed water and sanitation services in the midst of the water's crisis will require therefore high levels of investment to be made in the following decades. This makes foreign investment critical to address the crisis of water, especially in developing regions. The funds and experience that foreign investors can bring to the region have great potential.

To achieve universal access to safely managed drinking water and sanitation services, the UN Water estimates that the current investment rates must be increased at least in four times

[2] See: law 685 of 2001, articles 34 and 36 (Congreso de la República, 2001); and law 1382 of 2010, article 34 (Congreso de la República, 2010).

by 2030 (UN Water 2021, 12-13). This substantial increase is needed to improve water-use efficiency, wastewater treatment and reuse, and to strengthen the protection of water ecosystems.

Improving water-use efficiency around the world will require to renew and upgrade the outdated existing infrastructure, which by 2050 would cost an estimate amount of USD 6,7 trillion only for supply and sanitation services (OECD 2015, 2). Further, infrastructure related to a wider range of services, such as water treatment, would triple the referred estimation by 2030 (OECD 2015, 2).

While treatment traditionally refers to both, the process to make water potable for human consumption and to reduce the pollution levels in wastewater, additional treatment methods have arisen in the past decades. Among them, the innovative desalinization technologies will be key in the upcoming decades to facilitate universal access to safely managed water, so reducing its elevated costs will be fundamental (Hoffman 2009, 56).

In parallel, projects to protect, restore and monitor water quality will be needed to improve the health of a wide range of ecosystems, and to reduce the costs associated to water treatment in the upcoming years (UN Water 2021, 19). Achieving the objective of protecting water bodies and improving water quality in developing regions with high demographic growth, such as Latin America, also require to enhance water-management practices in industries with high rates of water use and affectation, and to increase wastewater treatment (UN Water 2021, 20).

3. Understanding the place of the human right to water in international investment law in the region

To understand the role of the human right to water in the investment law regime in Latin America, two theoretical elements are previously required. On the one hand, an overall picture of the concept and extent of the human right to water, based on the relevant international instruments regulating the matter (sub-section 3.1). On the another, an overview of the discussions arising from the co-existence of multiple regimes within the international law, including those whose tensions are addressed throughout this dissertation: the investment law and the human rights (sub-section 3.2).

3.1. The human right to water

3.1.1. The access to sufficient, safe, and acceptable water as a human right

There is not a binding source regulating the definition and content of the human right to water. These features have been construed on the basis of soft-law instruments and case law, both within the universal and the inter-American systems of human rights. In addition, some treaties have referred to water-related obligations of the States in certain specific contexts, in which the human right to water is not the principal matter under regulation[3].

[3] See, for instance: Convention on the Elimination of All Forms of Discrimination Against Women, article 14, para. 2 (h); Convention on the Rights of the Child, article 24, para. 2 (c); Geneva Convention relative to the Treatment of Prisoners of War, articles 20, 26, 29 and 46; Geneva Convention (IV) relative to the Protection of

The United Nations (the "UN") agencies have been crucial to define the right to water within the universal system. In 2002, the Committee on Economic, Social, and Cultural Rights (the "CESCR") rendered the General Comment No. 15, which provides that the human right to water "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use" (CESCR 2002, para. 10).

In absence of a hard-law instrument regulating the right to water, its legal grounds have been found on the articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (the "ICESCR") (1976), which refer to the rights to an adequate standard of living and to the enjoyment of the highest attainable standard of physical health (CESCR 2002, para. 3).

The realization of the human right to water is critical to avoid deaths resulting from dehydration, to reduce water-related diseases, and to satisfy personal and domestic consumption and sanitation needs (CESCR 2002, para. 2). Furthermore, the right to water is crucial to the realization of other rights contained in the ICESCR (1976), including but not limited to: (i) right to life (article 15, a), (ii) right to human dignity (Preamble), and (iii) right to adequate food, clothing and housing (article 11).

To the CESCR (2002, para. 10), the human right to water grants individuals the entitlements (i) to maintain access to existing water supplies; (ii) to be free from interferences, including arbitrary disconnections or contamination of water resources; and (iii) to access to a system of water supply and management in conditions of equality. The States' correlative obligations explained in sub-section 3.1.3 further elaborate this matter.

As water is an essential element towards the realization of multiple human needs, including personal consumption and sanitation, agriculture and industry, the CESCR holds that water must be treated as a social good and not as a mere economic asset. Thus, the "manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations" (CESCR 2002, para. 11).

In 2010, the UN General Assembly reaffirmed the CESCR position, and stated that the "*right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights*" (United Nations General Assembly 2010, 2). Also in 2010, the UN Human Rights Council issued the Resolution A/HRC/15/L.14, in which confirmed that the rights to an adequate standard of living and to the enjoyment of the highest standard of physical health constitute the legal basis for the human right to water (United Nations Human Rights Council 2010, para. 3). Further, the Human Rights Council (2010, para. 5) recognized that States are responsible to guarantee the human right to water to their citizens, even if water supply has been delegated to third parties.

Within the Inter-American system, in 2007 the Organization of American States ("OAS") (2007, 3) recognized that water is essential to the life and health of all human beings, and that access to water and sanitation is essential to live with dignity. In addition, in 2012 the

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Civilian Persons in Time of War, articles 85, 89 and 127, and Additional Protocols I and II thereto; Mar Del Plata Action Plan of the United Nations Water Conference, preamble; and Ramsar Convention on Wetlands of International Importance, articles 1 and 2.

OAS (2012, 1) recognized "*the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights*".

The IACHR (2015, para. 26) has understood that access to water is essential to ensure other human rights derived from binding treaties that refer to other human rights, closely linked rights to the right to water. Under the American Convention on Human Rights, access to water is a condition precedent to ensure the rights of life (article 4), personal integrity (article 7), and health (Protocol of San Salvador, article 10). Moreover, for indigenous peoples, access to water is a relevant element to their rights over their ancestral lands and natural resources[4] (IACHR 2015, para. 109).

To the IACHR, access to drinking water is a condition precedent to right to life, and thus States are bound to guarantee the individuals' access to water for human consumption in adequate conditions of quantity and quality without discrimination. In addition, States must adopt measures to prevent third parties to affect access to water, for instance, by polluting water resources or destroying water supply systems (IACHR 2015, para. 31).

3.1.2. Elements of the human right to water

To the CESCR (2002, para. 11) the right to water "must be adequate for human dignity, life and health". Despite the elements that would fulfill these criteria may vary according to different circumstances, at least three elements must apply in all cases to satisfy the human dignity, life and health (CESCR 2002, para. 12).

First, the availability which means that the supply for each person has to be sufficient and continuous for personal and domestic purposes, in accordance with the World Health Organization's (the "WHO") guidelines on the quantity of available water per individual (CESCR 2002, para. 12, a). The most recent version of the said guidelines state that "a minimum volume of 7.5 liters per capita per day will provide sufficient water for hydration and incorporation into food for most people under most conditions" (WHO 2017, 83).

Second, the quality referred to the water's safety for personal and domestic purposes. Water must be free from elements constituting biological hazards to people, for instance, chemical substances and micro-organisms (CESCR 2002, para. 12, b).

Third, the accessibility, which in turn must be addressed from four (4) different perspectives. **Physical accessibility** implies an acceptable access to water within households, educational institutions and workplaces in conditions of sufficiency and safety. **Economic accessibility** means that the costs associated with water and related facilities and utilities must be affordable for all, and cannot constitute a hazard to the realization of other rights. **Non-discrimination accessibility** entails that water must be accessible to all including the most vulnerable people, without discrimination based on prohibited grounds. Finally, **information**

[4] Neither the American Declaration of the Rights and Duties of Man, nor the American Convention on Human Rights recognize explicitly the rights of indigenous' peoples over their ancestral territories. Nonetheless, the IACHR and the Inter-American Court of Human Rights have stated that the said rights are protected pursuant to the right to property contained in article XXIII of the American Declaration and article 21 of the ACHR (Inter-American Commission on Human Rights 2015, para. 58).

accessibility which includes the faculty to seek, receive and impart information related to water issues (CESCR 2002, para. 12, c).

3.1.3. Obligations of the State towards right to water

The right to water imposes three (3) types of obligations over the States. They must (i) respect, (ii) protect; and (iii) fulfill the human right to water. The extent of these obligations has been developed in both, the universal and the Inter-American system in a consistent manner.

(i) Obligation to respect

States' obligation to respect requires them to *"*refrain from interfering directly or indirectly with the enjoyment of the right to water" (CESCR 2002, para. 21). Therefore, violations to the obligation to respect arise when the State impede the realization of the right to water, for instance, in cases of: (i) arbitrary or unjustified disconnection from water utilities and facilities, (ii) discriminatory prices of water that make it unaffordable for people, (iii) destruction of water infrastructure as a punitive measure, and (iii) limitations to the equal access to adequate water (CESCR 2002, para. 21, 44).

Within the inter-American system, these obligations are also grounded on article 1.1 of the American Convention of Human Rights, which contains a general mandate for the States to respect the rights and entitlements arising out from the said instrument (IACHR 2015, para. 30).

(ii) Obligation to protect

This obligation requires the States "to prevent third parties from interfering in any way with the enjoyment of the right to water" (CESCR 2002, para. 23). Third parties might be corporations, groups or individuals. Accordingly, the States have to adopt measures to prevent third parties from affecting equal access to water or from polluting hydric resources. Furthermore, where water and sanitation services are operated by third parties, States are obliged to adopt an effective regulatory system to prevent affectations to equal, affordable and physical access to water (CESCR 2002, para. 23).

Thus, violations to the obligation to protect take place when the State does not adopt all the necessary measures to protect the enjoyment of water within its territory from the acts of third parties. These violations might include, among others: "(i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; and (iii) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction" (CESCR 2002, para. 44 b).

(iii) Obligation to fulfill

The States must take measures directed at the full realization of the right to water. This implies that the States must (i) recognize and develop this right within their national legal

systems, (ii) ensure that water is affordable for all, and to facilitate sustainable access to water within their territories (CESCR 2002, para. 26).

In addition, the obligation to fulfill means that States have to ensure due attention to the right to water in their international treaties, and thus they should consider how to reduce the negative impact of their international agreements on the right to water. In the international trade arena, this implies that agreements aimed at the liberalization of markets should not affect the State's capacity to guarantee the full realization of the right to water (CESCR 2002, para. 35). It has been also stated that this obligation to fulfill gives rise to a set of three obligations: to facilitate, to promote and to provide the human right to water (CESCR 2002, para. 35).

First, the obligation to facilitate entails that the States must adopt measures to support the enjoyment of the right by individuals and communities, even beyond their territories (CESCR 2002, para. 25). In formulating policies and regulation related to water, the States must observe the principles of participation and inclusion to ensure the involvement of all the relevant stakeholders (UN Habitat 2010, 33).

In consideration of the availability of resources, States are also obliged to facilitate the realization of the right to water in other countries by means of hydric resources, financial assistance and technical support. To the CESCR, this implies that developed Countries have a special responsibility and interest in supporting developing countries in the realization of the right to water (2002, para. 34).

Second, the obligation to promote, which binds the States to ensure appropriate education concerning the use of water, its protection and the methods to minimize water wastage. Finally, the obligation to provide implies that the States must make the right effective in cases where individuals or groups are unable to do it themselves by the available means due to reasons beyond their control (CESCR 2002, para. 25).

Violations to the obligation to fulfill arise where the State does not take all the necessary measures to guarantee the enjoyment of the right to water. Some examples of violations might be (i) the failure to monitor the realization of the right within the State's territory, (ii) the failure to adopt regulatory measures to reduce inequalities in distribution of water, and (iii) the failure to consider the State's international obligations on right to water when negotiating and entering into further international agreements (CESCR 2002, para. 44 c).

The case law of the Inter-American Court of Human Rights ("I/A Court HR") illustrates very well the international extent of the international responsibility of the State under this obligation.

In the cases of the *Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous Communities v. Paraguay*[5], the I/A Court HR found the State internationally responsible, for not taking the necessary measures to ensure the access of water to these peoples, who have been historically discriminated. The I/A Court HR considered that the State did not take the necessary measures to guarantee the life of these peoples in conditions of dignity, which amounted to a violation of the article 4.1 of the American Convention in connection with the article 1.1 of the same instrument (IACHR 2015, para. 32-33).

Besides, in the case of the *Xákmok Kásek people v. Paraguay*, the I/A Court HR stated an objective standard on the basis of access to water. Since the *Xákmok Kásek* people were receiving no more than 2.17 liters per individual each day, the I/A Court HR held that Paraguay had not ensured the basic conditions for a dignified life. The I/A Court HR further considered that individuals require minimum 7.5 liters of water per day to satisfy their basic needs (I/A Court HR 2010, para. 195)[6].

3.1.4. Obligations of actors different to States: international organizations, multilateral banks and companies

To the CESCR (2002, para. 60), incorporating human rights law and principles into the programs and policies of international organizations is of paramount importance to facilitate the implementation and realization of the right to water. Then, organizations and UN agencies tasked with affairs concerning water, such as WHO, FAO, UNICEF, and UN Habitat, among others, as well as organizations working on trade, such as the WTO, must cooperate with the States based on their respective expertise to facilitate right to water in the national level. Additionally, multilateral financial institutions must promote the enjoyment of water by taking it into consideration in their policies, credit agreements and development projects.

Furthermore, the UN Habitat (2010, 30) has recognized the high importance of corporations to the realization of human right to water when they are involved in rendering water supply and sanitation services, and when they are important users of water resources, as it is the case of large-scale agriculture and industry.

On the one hand, water and sanitation services suppliers are crucial to water availability, quality and accessibility due to their direct involvement in the management of the referred services. On the other hand, some economic sectors demand high volumes of water, and therefore could potentially affect the availability of water resources for people. Agriculture, for instance, require thousands of millions of liters of water per year due to the current inefficient irrigation systems. Likewise, water-use inefficiencies in industry will account for most of the increase in demand for water by 2025 (UN Habitat 2010, 30).

It is true that companies can positively influence the realization of the human right to water (see sub-section 2.2.2.). However, they also can negatively impact the said right by overusing

[5] See: Case of the Yakye Axa Indigenous Community v. Paraguay (I/A Court HR 2005, para. 161-168); Case of the Sawhoyamaxa Indigenous Community v. Paraguay (I/A Court HR 2006, para. 168-169); Case of the Xákmok Kásek Indigenous Community v. Paraguay. (I/A Court HR 2010, para. 194-196).
[6] See also: IACHR 2015, para. 37.

or polluting water resources in which the individuals rely upon (see sub-section 2.2.1.). Besides, the political power of corporations involved in large-scale using of water resources, especially in developing countries, generates concerns related to the risk that the interest of vulnerable people might be pushed aside to favor businesses (UN Habitat 2010, 30).

UN Habitat (2010, 31) has also pointed out that companies' obligations with regards to the right to water generally arise from national laws or contracts, since they do not have direct obligations under the international law of human rights, a sphere in which the State has the primary responsibility to ensure that private actors respect the right to water (see sub-section 3.1.3.).

This lack of a binding source imposing positive obligations on the companies has led to the issuance of multiple soft-law instruments, which respond to the people's expectation that companies' actions shall respect human rights and shall not harm their enjoyment.

In that regards, the HR Council Special Representative of the Secretary-General on the issue of human rights and transnational corporations (2008, para. 55) has criticized the distinction between the so-called "primary obligations" in charge of States and "secondary obligations" in charge of companies, arguing that it does not contribute to the realization of human rights, and rather exacerbates the endless discussion on who is responsible for what. That would be an artificial distinction, considering that the corporate duty to respect to human rights exists with independence of the States' obligations.

Moreover, many companies worldwide have acquired voluntary compromises to respect and support of human rights by means of the UN Global Compact (2000, s. p.), a set of ten (10) principles related to human rights, labor, environment and anti-corruption that these signatory corporations committed to respect (UN Habitat 2010, 32). These principles enact a special relevance regarding the right to water: Principle 1 states that businesses should respect human rights, Principle 7 provides that businesses should undertake initiatives to promote environmental responsibility, and Principle 9 encourages companies to develop environmentally friendly technologies.

Other companies have joined the CEO Water Mandate (2011, 3), a collaborative initiative of the UN Global Compact, the Government of Sweden and the private sector, aimed to produce a strategic framework on water management to address the challenges currently faced by the world. Signatory companies acknowledged that multiple regions are experiencing or are expected to experience water stress in the near future. The framework developed in the mandate is based in six areas: direct operations, supply chain and watershed management, collective action, public policy, community engagement, and transparency.

Other companies also develop human rights actions and programs as a part of their corporate responsibility policies or codes of business and conduct. This is the case of *Veolia Eau*, a French company in the industry of water supply with operations in 59 countries, which supplies water to more than 110 million people worldwide. They recognize that the right to water is a basic human right and adopted voluntary commitments in that regard, such as fostering a greater involvement of people in water management, and promoting dialogue between the company and its consumers (UN Habitat 2010, 32).

3.2. The fragmentation of international law: the tensions between the regimes of human rights and investment law

The 20th century was of high relevance to the law of treaties and to international law in general. The States regulated crucial topics by means of these instruments, and agreed to constitute international organisms that nowadays are irrefutably subjects of international law. For instance, the UN Security Council, who have the use of the force; and the International Court of Justice, who is tasked to resolve international controversies, were both born in the past century. Also, most of the codifications of customary law, in matters such as the law of the sea, diplomatic and consular relations, and even the same law of treaties arose in the 20th century (Becerra and Ávalos 2020, 8-9).

That was how the proliferation of treaties leaded the world to a new era, where the international law has several ramifications due the diverse legal matters regulated by means treaties, not few times with a regional focus (Rodiles 2009, 374). In this context, international treaties were crucial sources to gave rise to the human rights and investment law regimes as we know them nowadays, both with their own jurisdictional and substantial rules.

The concept of the fragmentation of international law arose to refer to this diversification resulting from the rise of institutions and legal regimes with a high grade of autonomy worldwide, as well as to the potential conflicts between regimes (Rodiles 2009, 377). The fact that these wide range of instruments and institutions could somehow react upon each other, and their simple coexistence in the international arena have raised concerns in the academic community during the last 70 years (Jenks 1953, 403).

In Greco's view (2015, 445) the desire for specialization leads each regime to function and develop in isolation from others. Given their different values in some cases bodies belonging to one regime are likely to affect others. This would be the case of the WTO settlement body, which Greco considers would underestimate environmental concerns for not being within its specialization.

To Dupuy (2007, 1) the question of the fragmentation constitutes the international law's most critical dogmatic debate in the globalization era. Thus, a variety of positions have been taken in that regards. Rodiles (2009, 391 - 400), refers, among others, to the views of the pluralism and the critical legal studies. Some considerations under the said perspectives might be useful to the understanding of the issue analyzed in this dissertation.

According to the pluralism, the international law is as a polycentric conglomerate of autonomous regimes. Then, it should be aimed to create the necessary conditions for the coordination of the different regimes and their relevant institutions. This would facilitate the rise of a new global public order (*ordre public*), construed over the basis of the fundamental rationale of different regimes, and the dialogue between them. This dialogue not only needs to be substantive, by means of consistent interpretation and application of rules from different regimes, but also requires interactions between their relevant institutions (Rodiles 2009, 394 - 396).

The critical third world approaches to the international law, a ramification of the critical legal studies, consider that the proliferation of a variety of regimes has been motivated by the idea of subordinating developing countries to the world's most powerful interests, at least partially. This would be the reason why the regulation of aspects that would favor less powerful States, such as the international responsibility of transnational companies does not advance (Rodiles 2009, 399).

Further, this dissertation partially agrees with the Koskenniemi's position, contained in the International Law Commission's report titled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". In his view, the proliferation of specialized regimes is only a feature of the social complexity of a globalized world. However, these regimes do not represent any serious challenge or danger to the legal practice (United Nations General Assembly International Law Commission 2006, para. 222).

While the first part is true, as historical evidence shows that these regimes started to spread in parallel with the globalization ideas, this dissertation counters Koskenniemi, arguing that the fragmentation indeed brings challenges to the practice of international law, as pointed out by the interactions between investment law and the human right to water addressed in section 4. Furthermore, Koskenniemi's position contained in the said report is based on a dogmatic view, rather than on a practical approach (Rodiles 2009, 381).

Indeed, the challenges posed by the fragmentation of international law are more evident in the real practice than in the world of the ideas. The existence of tensions between these fragmented regimes can be better observed in practice. Both, international human rights law and international investment law seems to be self-contained regimes as the tribunals of each regime do not fully acknowledge the normative body related to the other regime.

The decision of the I/A Court HR in the case of the *Sawhoyamaxa Indigenous Peoples vs. Paraguay* illustrates very well this assertion, since the I/A Court HR argued that commercial treaties cannot be invoked by the States as the reason to breach the American Convention (I/A Court HR 2006, para.140). Arbitral tribunals have also dealt with the question of what's the place of human rights in investment law, as further discussed below in Section 4. These facts demonstrate that the independence of international regimes is simply formal, because in the reality, the evaluation of the behavior of the subjects of international law might require the review of different sets of specialized rules.

Since the most accepted consequences of the fragmentation of international law imply conflicts of norms from different regimes, certain alternatives to harmonize those apparently non-related norms have been offered by the academia. First, to avoid conflicts of obligations by including compatibility and subordination provisions in the treaties. Second, to apply the general criterion on interpretation derived from the Vienna Convention on the Law of Treaties ("VCLT"). Finally, if none of the interpretation methods contained therein could solve the incompatibility, the general principles on interpretation should be used: *lex posterior derogat legi priori*, *lex specialis derogat legi generali*, and *lex superior derogat legi inferior* (Greco 2015, 446).

4. The right to water in investment disputes involving Latin American States

The investment awards summarized in this section provide evidence to determine whether the human right water and the investment law are in direct collision due to the fragmentation of international law in the region, which is the main objective of this dissertation. This list of cases was based on Marisi´s research (2020), who identified sixty-five proceedings worldwide in which environmental measures taken by the States were contested by investors. Eleven out of these sixty-five cases involved Latin American States and were relevant for the purposes of this dissertation, considering that the human right to water was or should have been a part of the discussion. These eleven cases were decided between 2006 and 2021, and point out that the interactions between the human right to water and the investment law represent a current regional issue.

For methodological reasons, this section is divided in two parts. The three cases in subsection 4.1 are grouped on the basis that the Tribunals made contributions to resolve the collisions by means of the harmonization of the right to water and the investment law. The remaining eight cases in subsection 4.2, are grouped on the grounds that they show the collisions between the right to water and the investment law, and the fragmentation of international law. Both groups are chronologically organized, and each case summary include comments on the Tribunals' positions.

These eleven cases demonstrate that the human right to water and the investment law are in direct collision due to the fragmentation of international law in the region, meaning that there is not sufficient dialogue between those regimes. This statement is based on four facts resulting from the analysis of these awards.

First, in eight of the eleven cases[7] the Tribunals did not address the role of the human right to water when adjudicating water-related disputes, although in all of them the investors contested measures taken by the State to ensure the realization of the right to water. In the remaining three cases[8] the Tribunals took steps towards the harmonization of the right to water and investment law, exploring some points of contact between both regimes. Yet, these cases only addressed shallowly few points of contact between the right to water and the investment law, thus they could not be used to affirm that these regimes are currently harmonized in the region.

Second, in five of the eleven cases[9] the human right to water was not even mentioned by the States, despite they alleged that the contested measures were taken to protect water resources. Further, in five of the six cases[10] in which the right to water was mentioned Argentina was the respondent, and the factual background of the cases arose from the same socio-economic

[7] See sub-section 4.2: Azurix v. Argentina, Impregilo v. Argentina, Pac Rim v. El Salvador, Burlington v. Ecuador, Bear Creek v. Peru, David R. Aven v. Costa Rica, Perenco v. Ecuador, and Eco Oro Minerals v. Colombia.

[8] See sub-section 4.1: Suez v. Argentina, Saur v. Argentina, and Urbaser S.A. v. Argentina.

[9] See Burlington Resources Inc. v. Ecuador, Bear Creek v. Peru, David R. Aven v. Costa Rica, Perenco v. Ecuador and Eco Oro Minerals v. Colombia.

[10] See Suez v. Argentina, Saur v. Argentina, Urbaser S.A. v. Argentina, Azurix v. Argentina and Impregilo v. Argentina.

context. This is an evidence that Latin American States, except for Argentina, are not bringing the right to water to their investment disputes, hence showing that they are not promoting the dialogue between both regimes although they have had the elements to do so.

Third, in three of eleven cases[11] the States filed counterclaims against the investors. In Urbaser v. Argentina, the counterclaim was based on the alleged breach to the investors' obligation under the right to water. In Burlington and David R. Aven, despite the right to water was not expressly mentioned by the States, the counterclaims were based on the environmental damage allegedly caused by the investors to water resources. These facts show that the States are requiring a more equitable investment regime, where they could raise counterclaims to avoid investors from interfering with the realization of the right to water. This is a claim for a dialogue between both regimes, in order to make the investors to take their part on the responsibility for the right to water.

Fourth, in three of eleven cases[12] non-contending parties filed amicus curiae submissions referring to the human right to water or related rights. This demonstrates that the stakeholders are concerned about the impact of the investment in the realization of the right to water in Latin America. The fact that investment Tribunals render decisions with direct or indirect impact on the water resources of individuals and communities without their presence in the proceedings, shows that there is not a dialogue between the interests behind both, the right to water and investment regimes. Therefore, constituting an additional scenario to be explored towards the harmonization.

Strategies to address the fragmentation of the right to water and the investment law are offered in section 5 below.

4.1. Cases where contributions to the harmonization between the right to water and the investment law have been made. Argentina's experience

While the case summarized in this sub-section are certainly a noteworthy effort towards the harmonization, they are insufficient to argue that the right to water and the investment regimes are harmonized.

The fact that Argentina was the respondent in all these cases demonstrates that the attempts to harmonize both regimes are yet far from being a regional trend. Argentina's allegations are an example to be followed by other Latin American States, in order to introduce the human right to water in their investment disputes. However, the absence of relevant considerations on the right to water in proceedings involving other States in the region is alarming.

Further, the developments made by the Tribunals in the cases summarized in this sub-section are focused in the defense of state of necessity. This means that other points of contact are yet to be explored, and consequently additional efforts towards the harmonization are needed. Also, since the Tribunals' considerations in these cases are based on certain investment

[11] See Urbaser S.A. v. Argentina, Burlington Resources Inc. v. Ecuador, and David R. Aven v. Costa Rica.
[12] See Suez v. Argentina, Pac Rim v. El Salvador, and Bear Creek v. Peru.

instruments, these considerations are likely to be inapplicable in cases decided under different investment treaties.

4.1.1. Suez, Vivendi Universal, and AWG v. Argentina (2010)

On July 30, 2010, the Arbitral Tribunal constituted by Jeswald W. Salacuse (President), Gabrielle Kaufmann-Kohler, and Pedro Nikken (Arbitrators) rendered a single decision on liability in two closely related investment cases involving Argentina. The tribunal decided the ICSID Case No. ARB/03/19 initiated by Suez, Sociedad General de Aguas de Barcelona S.A. ("AGBAR"), and Vivendi Universal S.A. ("Vivendi"). It also resolved the arbitration under the UNCITRAL rules initiated by AWG Group Ltd ("AWG"). Given the mutiplicity of natiltalities involved, the Tribunal resolved the dispute under the Argentina-UK, Argentina-Spain, and Argentina-France BIT.

These cases arose from a 30-years concession entered into by Aguas Argentinas S.A., whose shareholders were the abovementioned claimants, and the Argentina's Minister of Economy and Public Works. The concession was granted for the provision of the water and sewage services in Buenos Aires and surrounding municipalities. Under the contract, the claimants had to make multiple investments for the expansion and improvement of the water and sewage services. These investments, required the claimants to seek international loans that were denominated and payable in US dollars (ICSID Case No. ARB/03/19 2015, para. 35).

The contract regulated the procedures to adjust to the users' tariffs, and to increase the claimants' investment commitments in case of unexpected conditions. These procedures were the ground for the claimants to receive two tariff adjustments between 1993 and 2001 (ICSID Case No. ARB/03/19 2015, para. 38). By 2001, Argentina's government issued a series of emergency measures to face the country's financial crisis, including the abolishment of the convertibility regime, which equated 1 Peso to 1 USD. This measure was followed by a deep depreciation of the Argentina's Peso. In addition, Argentina started a process to renegotiate the existent public services contracts, in consideration of the impact that increasing the tariffs would have on the accessibility and quality of the services.

The claimants alleged that the emergency measures affected their investment, and therefore sought to obtain a third adjustment in the tariffs to be charged to the citizens (ICSID Case No. ARB/03/19 2015, para. 44). Therefore, on April 17, 2003 they filed a Request for Arbitration against Argentina. Suez and Vivendi were both incorporated in France, while AGBAR in Spain and AWG in the United Kingdom. Thus, the Tribunal had to apply the three relevant Argentinean BITs in the decision making.

After several unsuccessful attempts to renegotiate the concession and the tariff regime, on 21 March, 2006, the government of Argentina terminated the concession on the grounds of alleged defaults incurred by the claimants, and transferred the water and sewage services to a public entity (ICSID Case No. ARB/03/19 2015, para. 56).

At the proceeding, Argentina raised a state of necessity defense, arguing that the contested measures were adopted to safeguard the human right to water, which involved a social good that could not be treated as an ordinary commodity. It further submitted that the conformity

of Argentina's behavior with investment treaty obligations, should be analyzed by the Tribunal granting Argentina a broader margin of discretion in view of the water's fundamental role for human life and health. Argentina considered that to decide whether a BIT provision had been violated, the Tribunal had to take into account the manner in which the human right to water required Argentina to act in the specific context (ICSID Case No. ARB/03/19 2015, para. 252).

Argentina's position was supported by an *amicus curiae* filed by five non-governmental organizations[13]. This submission argued that the human right to water is essential to the realization of other human rights, such as life, health, housing, and adequate standard of living. In addition, the submission held that human rights law required Argentina to take actions directed to ensure physical and economic access of its population to water. Considering that the human right to water provides a rationale for crisis measures, the submission requested the Tribunal to use the said rationale in interpreting and applying the provisions of the BIT (ICSID Case No. ARB/03/19 2015, para. 256).

The claimants countered both, Argentina's defense and the *amicus curiae*, on the grounds that the right to water had never been questioned by the claimants. Moreover, they considered that Argentina's decision to privatize the Buenos Aires water service was made precisely to reach the effective realization of the human right to water for a larger number of people, as the services expanded due to the claimant’s efforts.

They also submitted that Argentina's actions -rather than claimants'- put the people's right to water in risk, since claimants were denied the economic means promised under the concession's regulatory framework, a fact that compromised the quality of water and sewage services. To the claimants, what was in issue was whether Argentina had violated the BIT, an issue to which human rights law were irrelevant (ICSID Case No. ARB/03/19 2010, para. 255).

The Tribunal considered that there were not grounds in the relevant BITs nor in the international law for concluding that the human right to water prevailed over investment obligations. The Tribunal also stated that the mere existence of the human right to water did not implicitly gave Argentina the authority to take actions in breach of investment obligations. To the Tribunal, Argentina was subjected to human rights and investment obligations, and it had to fulfill both of them equally. Hence, Argentina's human right to water and investment obligations were not inconsistent, contradictory, or mutually exclusive in this case (ICSID Case No. ARB/03/19 2010, para. 262).

Moreover, the Tribunal considered that Argentina might have employed more flexible means that would have protected both, public and private interests. If Argentina had concerns with regards to an increase in tariffs, it might have temporarily relieved the claimants from their commitments to make investments under the concession, that later leaded to the increase of the tariffs. The Tribunal also suggested that Argentina might have allowed the increase in

[13] The five NGOs were Asociación Civil por la Igualdad y la Justicia, Centro de Estudios Legales y Sociales, Center for International Environmental Law, Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores.

tariffs, applying a subsidy for the most vulnerable people (ICSID Case No. ARB/03/19 2010, para. 235).

In view of the foregoing, the Tribunal found that Argentina failed to afford the claimants a fair and equitable treatment (ICSID Case No. ARB/03/19 2010, para. 276). Thereafter, in a decision on damages, dated April 9, 2015, awarded damages to the claimants amounting to USD 404 million, as follows: to Suez USD 223 million, to AGBAR USD 123 million, to Vivendi 37.2 million and to AWG 20.9 million (ICSID Case No. ARB/03/19 2010, para. 116 - 117).

The Tribunal's decision was followed by Argentina's application for annulment of the award, which was decided on May 5, 2017 by a Committee constituted Klaus Sachs (President), Rodrigo Oreamuno, and Trevor Carmichael and (Members of the Committee). Among other reasons to apply for the award's annulment, Argentina alleged that the Tribunal failed to consider Argentina's obligations derived from the human right to water when resolving the state of necessity defense (ICSID Case No. ARB/03/19 2017, para. 42). Further, Argentina submitted that the Tribunal did not provide any reason to support its conclusions that Argentina could have respected both human rights and investment obligations, and that the said obligations were not contradictory or exclusive in this case (ICSID Case No. ARB/03/19 2017, para. 270). The Committee did not accept Argentina's allegations, and the application for annulment was finally denied by the Committee (ICSID Case No. ARB/03/19 2017, para. 435) on the grounds that the Tribunal indeed addressed in sufficiency Argentina's defenses on the human right to water (ICSID Case No. ARB/03/19 2017, para. 308).

The issue of Argentina's alleged state of necessity in this case shows the existing clash between the human right to water and the investment regime. The Tribunal demonstrated that, in order to decide on the existence of a state of necessity, it must verify the availability of alternative measures that the State could have taken to comply with its obligations derived from human rights and investment instruments. Since determining the availability of measures requires a general understanding of the extent of the regulatory obligations of the States under the right to water, this is the first case in which an arbitral Tribunal advanced towards the harmonization of the human right to water and the investment law in Latin America.

4.1.2. Saur v. Argentina (2014)

On May 22, 2014, the Arbitral Tribunal constituted by Juan Fernández-Armesto (President), Bernard Hanotiau, and Christian Tomuschat (Arbitrators) rendered the final decision in the ICSID Case No. ARB/04/4, initiated by Saur International S.A. vs. Argentina. The dispute was resolved under the Argentina-France BIT. The dispute derived from a concession contract for the water and sewage services in the Province of Mendoza, entered into by the Argentinean Saur's affiliate OSM and the provincial authorities on June 9, 1998. Within the Argentina's economic crisis, the national and provincial authorities took several measures, including the end of the convertibility regime, and the freezing of the tariffs to be charged to the users (ICSID Case No. ARB/04/4 2014, para. 70). Furthermore, on July 12, 2010, the

provincial authorities declared the termination of the contract under the grounds of alleged breaches incurred by OSM (ICSID Case No. ARB/04/4 2014, para. 200).

Saur initiated arbitration proceedings arguing that Argentina had expropriated its investment by means of several measures that started to take place in 2000. It included the negative to increase the tariffs to be charged to the users, the breach to Argentina's obligation to pay the user's subsidies, the public intervention of OSM, and the economic emergency measures, among others (ICSID Case No. ARB/04/4 2014, para. 335).

Argentina alleged that the investment protection regime must consider the State's human rights obligations, which in Argentina's domestic system had the same hierarchy as the constitution, having a higher rank than the investment obligations. Thus, Argentina required the Tribunal to interpret and apply Argentina's investment and human rights obligations in a consistent manner (ICSID Case No. ARB/04/4 2014, para. 328).

Argentina also argued that the decisions to intervene OSM and to terminate the contract were adopted in accordance with Argentina's obligation to ensure the access of its population to water supply. A measure of that nature could not be considered as unfair nor amount to an expropriation. Instead, they should be understood as the necessary exercise of the State's regulatory powers (ICSID Case No. ARB/04/4 2014, para. 328). To Saur, on the contrary, Argentina's human rights defenses were opportunistic, and directed to justify Argentina's violations and limit the BIT's guarantees (ICSID Case No. ARB/04/4 2014, para. 329).

The Tribunal found that Argentina had breached the agreements entered into with Saur, hence Argentina could not argue that its behavior was in line with the legitimate use of Argentina's policy powers (ICSID Case No. ARB/04/4 2014, para. 405). Further, in view that Argentina was able re-structure its sovereign debt and was not in default since 2005, the Tribunal concluded that the measures leading to the expropriation of Saur's investment were taken after Argentina's economic situation had normalized and the state of emergency had disappeared (ICSID Case No. ARB/04/4 2014, para. 461).

Nonetheless, the Tribunal made relevant considerations with regards to the harmonization of the human right to water and the investment law in this case. First, it considered that the right to water was derived from the Argentina's constitution and the general principles of international law, and therefore the said right was one of the various sources the Tribunal had to consider to resolve the dispute (ICSID Case No. ARB/04/4 2014, para. 330).

Second, the Tribunal recognized that access to water is both, a public service of paramount importance and a fundamental right. Thus, the domestic legal systems must entitle the State's authorities to exercise legitimate powers of planning, supervision, regulation, punishment, intervention and termination, in order to protect the public interest (ICSID Case No. ARB/04/4 2014, para. 330).

Third, the Tribunal did not contend that the States are entitled to nationalize a public service of high relevance, at any moment on the grounds of public interest. Yet it considered that once the expropriation has been completed, the Sates acquire the obligation to indemnify the affected party for the real value of the expropriated assets (ICSID Case No. ARB/04/4 2014, para. 413).

Fourth, the Tribunal concluded that the human right to water and the invertors' rights must be construed in compatibility. The investor in charge of a public service such as water and sewage depend on public authorities, whose powers are conceived to ensure the fundamental right to water, but the exercise of these powers could not be unlimited and must be consistent with the rights of the said investor (ICSID Case No. ARB/04/4 2014, para. 331).

The Tribunals conclusion that the human right to water is one of the sources to be considered in the decision making in an investment arbitration proceeding is of paramount relevance. Despite it is based on the Argentina-France BIT, which might contain dispositions that are not included in other instruments of the same nature, it is clear that the Tribunal sought to harmonize investment law with human rights, referring to the compatibility of both systems.

While it is clear that arbitral Tribunals do not have jurisdiction to rule on the violation or compliance of human rights, the fact that the Tribunal considered that human rights law is at least as a criterion to interpret the States' behavior in determining their liability for alleged wrongful acts, opens the door for a dialogue between investment law and human rights that would certainly result beneficial to the people.

4.1.3. Urbaser v. Argentina (2016)

On December 8, 2016, the Arbitral Tribunal constituted by Andreas Bucher (President), Pedro J. Martínez and Campbell McLachlan (Arbitrators) rendered the final decision in the ICSID Case No. ARB/07/26, initiated by Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia vs. Argentina. The disputes was resolved under the Argetina-Spain BIT, and arose in the context of a concession granted by the Province of Greater Buenos Aires to Aguas Del Gran Buenos Aires S.A. ("AGBA") in 2000 for the provision of water and sewage services within the Province. The concessionaire was established by the claimants, of Spanish nationality. The dispute was therefore initiated under the BIT executed between the Kingdom of Spain and the Republic of Argentina (ICSID Case No. ARB/07/26 2016, para. 34).

Between 1998 and 2002, Argentina faced a serious economic crisis characterized by the deterioration of people's living conditions. Poverty indicators reached their historical peaks, 54.3% of the population fell below the poverty line, while 24.3% below the indigence line (ICSID Case No. ARB/07/26 2016, para. 71-72). In the midst of the crisis, the State took several emergency measures, including the termination of the 1:1 convertibility between United States Dollar and Argentine Peso, at a time the Peso had depreciated by more than two thirds of its value. Furthermore, Argentina froze the tariffs to be paid by the users of the concession. In July 2006, after failed negotiations between the parties, the Province unilaterally terminated the Contract (ICSID Case No. ARB/07/26 2016, para. 34).

Investors submitted that they were not able to satisfy the needs of the citizens whose service was under concession as a consequence of the measures adopted by the Province. They alleged that the pesification and the freezing of the service tariffs affected the economic-financial equation of the concession contract. Moreover, they expressed that changes in the Regulatory Framework imposed by the Province had the effect to change the commercial parameters of the concession (ICSID Case No. ARB/07/26 2016, para. 75).

In light of those facts, the investors claimed the Tribunal to declare that Argentina had breached its obligation to afford fair and equitable treatment to foreign investments, and the prohibitions to adopt unjustified or discriminatory measures and to expropriate foreign investments without a proper compensation. As a consequence, the investors requested the Tribunal to award USD 152,798,862 to Urbaser S.A. and USD 163,619,810 to the Consortium (ICSID Case No. ARB/07/26 2016, para. 35).

Argentina's defense was based on the necessity of the adopted measures in view of the relevance of water and sanitation services in the socioeconomic conditions of the concession area (ICSID Case No. ARB/07/26 2016, para. 74). It also argued that it was forced to act to prevent affectations to the right to water of the Province's population since the investors interrupted the services consistently (ICSID Case No. ARB/07/26 2016, para. 173). To Argentina, it could not take different measures to guarantee the access to water of an extremely vulnerable population (ICSID Case No. ARB/07/26 2016, para. 698), who had high percentages of unsatisfied needs and lived in conditions of structural poverty. Thus, increasing the price of water in those conditions would have seriously impacted the access to water of these people, resulting in a massive violation of basic human rights (ICSID Case No. ARB/07/26 2016, para. 702).

The investors argued that state of necessity defenses must be analyzed restrictively, and that State raising the defense is bound to provide evidence of any and all of the requirements of state of necessity under international law (ICSID Case No. ARB/07/26 2016, para. 687). However, to the investors, Argentina did not comply with all those requirements. On the one hand, States cannot invoke the state of necessity when they have contributed to necessity situation as Argentina substantially did, as declared by prior arbitral decisions related to the same emergency measures in cases involving Argentina (ICSID Case No. ARB/07/26 2016, para. 688). On the other, the acts of the State must be “the only way for the State to safeguard an essential interest against a grave and imminent peril" (ICSID Case No. ARB/07/26 2016, para. 689), which was not the case since State had other available measures, including the granting of subsidies to lower-income users and the adjustment of tariffs or costs of the concession (ICSID Case No. ARB/07/26 2016, para. 90).

Argentina further argued that its actions did not contribute to the state of necessity, since the main causes of that crisis were the macroeconomic imbalances resulting from debt, fiscal deficits, inflation and foreign exchange volatility, that leaded to a long recession period. Besides, Argentina alleged that it diligently adopted every reform and recommendation formulated by international institutions to address the macroeconomic crisis (ICSID Case No. ARB/07/26 2016, para. 701).

The Tribunal found that it existed a state of necessity at the time the emergency measures were taken (ICSID Case No. ARB/07/26 2016, para. 718), and that Argentina did not contribute to necessity of such relevance to preclude it from raising this defense (ICSID Case No. ARB/07/26 2016, para. 710). In addition, the Tribunal considered that Argentina proved that the emergency measures were its only available alternatives at that time in light of the socioeconomic context (ICSID Case No. ARB/07/26 2016, para. 717). It would have not been possible to provide subsidies when the State's budget was in crisis due to public debts

and fiscal deficits (ICSID Case No. ARB/07/26 2016, para. 725). Likewise, any other measure oriented to relieve the people from the burden of the tariffs and to ensure the Investors' financial equilibrium would have not been possible without public funds (ICSID Case No. ARB/07/26 2016, para. 727). Thus, the emergency measures were not in breach to the fair and equitable treatment according to this analysis.

Nonetheless, the Tribunal considered that it was unfair that the Province invited Investors to submit renegotiation proposals and to have discussions in that regards, and then decided to end such negotiations abruptly in view of federal policies without giving prior formal notice to the investors (ICSID Case No. ARB/07/26 2016, para. 843). Although this violation to the BIT was declared, the Tribunal rejected to award the compensation of damages claimed by the investors on the grounds that the concession was impacted by their failure to comply with their commitments, and not from the State's declared violation to the fair and equitable treatment (ICSID Case No. ARB/07/26 2016, para. 846).

Argentina filed a counterclaim on the grounds that investors assumed the obligation to invest certain funds under the concession contract and the regulatory framework, which gave rise to Argentina's *bona fide* expectations that those investments would be made to guarantee the right to water in the concession area. Since the Investors failed to make these investments, they violated the principles of good faith and *pacta sunt servanda* and affected human rights (ICSID Case No. ARB/07/26 2016, para. 1156). Argentina sought a compensation amounting to USD 404.34 million, equivalent to the investments that Investors failed to make (ICSID Case No. ARB/07/26 2016, para. 1165).

To support this allegation, Argentina held that the BIT must be interpreted in light of all Argentina's relevant rights and obligations under international law, including those related to the human right to water (ICSID Case No. ARB/07/26 2016, para. 1158-1159). Further, Argentina mentioned that the right to water is so essential that the State is not its only guarantor (ICSID Case No. ARB/07/26 2016, para. 1157).

The investors objected the jurisdiction of the Tribunal asserting that IIAs' asymmetric nature prevent States from invoking any right based on such treaties, since their object and purpose is to grant investors "a one-sided right of quasi-judicial review of national regulatory action". In addition, Investors argued that the counterclaim would fall outside of the Tribunal's jurisdiction in that it was based on an alleged violation of human rights which was not a part of the applicable law (ICSID Case No. ARB/07/26 2016, para. 1154). To the Investors, the BIT did not impose obligations to them and consequently Argentina could not rely on the violation of the BIT to file a counterclaim (ICSID Case No. ARB/07/26 2016, para. 1120).

The Tribunal found that the provisions of the BIT allowed either the investors or Argentina to submit a dispute to investment arbitration (ICSID Case No. ARB/07/26 2016, para. 1143). It also considered that Argentina's counterclaim was closely linked to the investors' claim, since both were based on the same obligation to invest in the concession. Besides, the Tribunal considered that even though Argentina's counterclaim related to human rights, it also implied an investment dispute that would be within the scope of competence of the Tribunal (ICSID Case No. ARB/07/26 2016, para. 1154). Thus, the Tribunal decided to

declare it had jurisdiction and competence to decide Argentina's counterclaim (ICSID Case No. ARB/07/26 2016, para. 1151).

With regards to the question of the existence of rights of host-States derived from IIAs in consideration of the alleged asymmetric nature of such instruments, the Tribunal rejected investors' position that these treaties construct investment law in isolation and full independence from other sources of international law (ICSID Case No. ARB/07/26 2016, para. 1182 -1186). To the Tribunal, the BIT allowed it to decide based on the very same agreement, and the general principles of international law where appropriate (ICSID Case No. ARB/07/26 2016, para. 1188).

Pursuant to article 31 of the VCLT, the Tribunal considered that it was bound to consider any relevant rule of international law applicable to the relations between the parties. This supported that the BIT had to be construed in harmony to other rules of international law, including those relating to human rights (ICSID Case No. ARB/07/26 2016, para. 1220). To the Tribunal, assuming the investor's interpretation would deprive the provision of applicable law of its meaning (ICSID Case No. ARB/07/26 2016, para. 1191).

The Tribunal also denied Investors' position that guaranteeing human right to water is only a duty of the State which is never borne by private companies, on the grounds that although in past corporations were not considered subjects of international law and thus were not able to hold obligations, this consideration lost relevance in the field of international commerce. To the Tribunal, it cannot be admitted nowadays that companies are not subjects of international law (ICSID Case No. ARB/07/26 2016, para. 1193-1195).

However, to the Tribunal Argentina had not a cause of action under international law since it was not able to point out any international obligation that could possibly bind the Investor to the right to water, and rather it relied on contractual obligations to argue that the right was incumbent to the Investors since it was their duty under the concession to provide water and sewage services to citizens (ICSID Case No. ARB/07/26 2016, para. 1206). Despite the Tribunal recognized that corporate social responsibility became a standard of paramount importance for companies, which is accepted by international law and includes compromises to comply with human rights, it is not sufficient to oblige corporations with regards to certain human rights at an international level (ICSID Case No. ARB/07/26 2016, para. 1195).

Therefore, it was Argentina's obligation to enforce the human right to water, and Investors had to pursue the same objective but on the basis of the concession contract and not as a result of an international duty (ICSID Case No. ARB/07/26 2016, para. 1210). The situation would be different when referring the obligation to abstain of committing acts violating human right to water, which is of immediate application not only upon the States but also to private parties, whose obligation is not to engage in activities aimed to affect the right (ICSID Case No. ARB/07/26 2016, para. 1199 - 1210). In light of the absence of an international obligation binding the Investors, the Tribunal decided to dismiss Argentina's counterclaim in its entirety and not award any damages.

Without any hesitation, this Tribunal took relevant steps towards the harmonization of the human right to water and the investment law in the region. Besides to using the right to water

to address the first successful state of necessity defense of Argentina, the Tribunal concluded that multinationals also might be subject of international obligations with regards to the said right. However, the absence of a binding instrument to the investors prevented the Tribunal to award an indemnification in favor of Argentina, pointing out the relevance of generating international obligations to new subjects of international law.

4.2. Cases where the fragmentation of the right to water and the investment law is demonstrated

The cases in this sub-section constitute the evidence of the ongoing fragmentation phenomena in the region between international investment law and international human rights, specifically the right to water. Despite in Azurix, Impregilo, and Pac Rim the human right to water was explicitly mentioned in the final awards, the Tribunals' considerations were brief and did not contribute to the harmonization. Further, in the cases of Burlington, Bear Creek, David R. Aven and Eco Oro, the human right to water was not even mentioned, although the facts of the disputes required the right to water to be discussed in these awards.

4.2.1. Azurix v. Argentina (2006)

On July 14, 2006, the Arbitral Tribunal constituted by Andrés Rigo Sureda (President), Marc Lalonde, and Daniel Hugo Martins (Arbitrators) rendered the final decision in the ICSID Case No. ARB/01/12, initiated by Azurix Corp vs. Argentina. The case, decided under the Argentina-USA BIT, was based on a 30-year concession granted by Argentina's authorities to ABA, an affiliate of Azurix.

Under the concession, ABA had to provide the water and sewage services in the Province of Buenos Aires. In the midst of Argentina's economic crisis, between 1999 and 2000, the Provincial and National authorities precluded ABA from billing amounts exceeding those that were billed prior to the privatization, to keep the tariffs affordable to the citizens. Further, the authorities discontinued the methodology for the calculation of tariffs of non-metered costumers, and did never re-establish it. The contract was terminated by the Province in 2022, alleging ABA's failure to provide the service under concession, given the commencement of ABA's bankruptcy proceedings.

To Azurix, Argentina's regulation adopted during the crisis violated several provisions of the Argentina-USA BIT, including those related to expropriation, fair and equitable treatment, non-discrimination and full protection and security. Accordingly, Azurix requested the Tribunal to award an indemnification amounting to approx. US$ 665 million in damages plus interest.

This was Argentina's first unsuccessful attempt to introduce human rights considerations into the investment law. Argentina sought to mitigate its international responsibility for the alleged violations to the BIT, on the grounds of a "conflict between the BIT and human rights treaties that protect consumers’ rights", in which the public interest of the consumers had to prevail over the private interest of service providers (ICSID Case No. ARB/01/12 2006, para. 254).

The Tribunal briefly addressed Argentina's defense, arguing that the alleged incompatibility had not been fully developed by State. Consequently, the Tribunal considered that Argentina failed to prove such incompatibility in the case under analysis, since the water and sewage services were continuously provided to the citizens, by ABA during the contract's period and by the new provincial utility company after the termination (ICSID Case No. ARB/01/12 2006, para. 261). Therefore, the Tribunal found that Argentina breached several provisions of the BIT, and awarded Azurix damages amounting USD $165,2 million.

In this case, Argentina's failure to develop in sufficiency its defense prevented the Tribunal from introducing a dialogue between the human right to water and the investment regime into the award. Further, Argentina did not refer to the human right to water, but to the "rights of consumers" as the basis of the said defense, although the CESCR had rendered the General Comment No. 15 in 2002. These facts provide evidence that Argentina was not fully aware about the definition and content of the human right to water.

Since the Tribunal did not really addressed the possible existence of a direct conflict between the human right to water and the investment regime, this case did not contribute to the resolve the concerns derived from the fragmentation of international law in the region. Nonetheless, it demonstrates that the States are the primary responsible for analyzing in depth the relation between the right to water and the investment law in each case, and for providing the Tribunal with the necessary insights to understand this relation when adjudicating the dispute.

4.2.2. Impregilo v. Argentina (2011)

On June 21, 2011, the Arbitral Tribunal constituted by Hans Danelius (President), Charles N. Brower, and Brigitte Stern (Arbitrators) rendered the final decision in the ICSID Case No. ARB/07/17, initiated by Impregilo S.p.A vs. Agertina, under the Argentina-Italia BIT. The dispute resulted from a concession contract entered into in 1999 for AGBA, an affiliate of Impregilo, to provide water and sewage services within certain areas of the Province of Buenos Aires. From the very beginning of the contract, AGBA faced economic challenges derived from the users' lack of payment to their bills, which affected AGBA's capacity to make the investments required by the contract for the expansion and maintenance of the service-associated infrastructure.

Furthermore, Argentina took several measures to address the economic crises then faced the country. In particular, Argentina prohibited AGBA to increase the tariffs to be paid by the users, and to interrupt the service for those in default. Moreover, as Argentina's convertibility regime came to an end, there were severe affectations to the contract's financial equation, since it was structured based in the 1 to 1 relation between Peso and US dollars (ICSID Case No. ARB/07/17 2011, para. 13-48).

These facts leaded Impregilo to initiate arbitration proceedings against Argentina, alleging violations to the standards of fair and equitable treatment and expropriation, provided by the Argentina-Italy BIT. Argentina argued that its investment obligations, arising out from the BIT, could not prevail over human rights. On the contrary, provisions contained in the BIT should be construed in accordance with the rules on protection of human rights, especially those related to the human right to water (ICSID Case No. ARB/07/17 2011, para. 229).

Argentina also alleged that the exercise of regulatory power in this case was highly relevant to guarantee the human right to water of the citizens.

Furthermore, the contested measures would not have amounted to an expropriation, since they were proportionate and lawful, and did not deprive Impregilos' property (ICSID Case No. ARB/07/17 2011, para. 228). To Argentina, even if the said measures would have leaded to violations to the BIT, their adoption was the only available alternative for Argentina (ICSID Case No. ARB/07/17 2011, para. 230).

The Tribunal's analysis on Impregilo's claims did not even mention Argentina's defenses related to the human right to water, and thus it does not contribute to the harmonization of such right with the investment regime. On the one hand, to resolve the expropriation issue the Tribunal simply held that the effects of the contested measures did not resulted in the loss of Impregilo's property rights (ICSID Case No. ARB/07/17 2011, para. 272). On the other hand, when referring to Argentina's state of necessity defense, the Tribunal recognized that addressing Argentina's economic crisis required the adoption of severe regulatory measures. Yet it did not accept Argentina's defense, on the grounds that Argentina had substantially contributed to the alleged state of necessity by means of its own economic policies (ICSID Case No. ARB/07/17 2011, para. 336-358). The Tribunal found that Argentina did not afford Impregilo a fair and equitable treatment, and consequently awarded an indemnification amounting to USD 21.3 million.

4.2.3. Pac Rim Cayman v. El Salvador (2016)

On October 14, 2016, the Arbitral Tribunal constituted by V. Veeder (President), Guido Tawil, and Brigitte Stern (Arbitrators) rendered the final decision in the ICSID Case No. ARB/09/12, initiated by Pac Rim Cayman LLC vs. El Salvador. Between 2002 and 2008, the Canadian mining company Pac Rim Cayman LLC received several licenses to conduct exploration and pre-mining activities in different concession areas across El Salvador, including the so called "El Dorado" project located in the region of Cabañas. Within the said area, Pac Rim discovered large reserves of gold, and thus decided to apply for the necessary exploitation permits in 2004 through its subsidiary Pac Rim El Salvador (ICSID Case No. ARB/09/12 2016, para. 3.1 – 3.32).

Nonetheless, El Salvador denied the issuance of the permits arguing that Pac Rim failed to fulfill certain requirements contained the State's mining law. Between 2005 and 2008 the State's Parliament discussed amendments to the mining law that would reduce the requirements for obtaining the mining licenses, while in parallel Pac Rim attempted to amend its application with no success (ICSID Case No. ARB/09/12 2016, para. 3.1 – 3.32).

In view of these facts, Pac Rim initiated arbitration proceedings under El Salvador's investment law, which contained an investor-State dispute settlement clause, arguing that the negative to grant the exploitation license amounted to a violation of the said law. Therefore, the Tribunal did not analyze Pac Rim's allegations under the typical standards of investment law, and rather applied national norms such as the mining law.

Within the arbitration proceeding, El Salvador submitted that the planned mining operations could predictably have impacts on the surrounding environment, including water sources

(ICSID Case No. ARB/09/12 2016, para. 3.30). Furthermore, the Center for International Environmental Law filed an *amicus curiae* arguing that measures adopted by El Salvador with regards to El Dorado project were justified in light of the State's international obligations on human rights, including the protection of a healthy environment, and the right to water and food. To the Center, these rights are crucial to the protection of local communities and sustainable development, especially in countries as El Salvador, which suffer water stress and high population density (ICSID Case No. ARB/09/12 2016, para. 3.28 - 3.30).

Yet the Tribunal declined to address the Center's submission, given the negative of the parties to disclose relevant evidence and arguing that these arguments were unnecessary to resolve the case (ICSID Case No. ARB/09/12 2016, para. 3.28 - 3.30). The Tribunal decided to deny Pac Rim's claims, on the grounds that it had not complied with the requirements derived from the mining law, and therefore was not entitled to receive the exploration license. However, the award did not include any consideration with regards to the human right to water or any linked human rights, meaning that the Tribunal did not address the questions brought by El Salvador and the Center's with regards to the right to water as a justification for denying the exploration license. Therefore, this case contributes to the demonstration of a fragmentation of the international law in the region.

4.2.4. Burlington v. Republic of Ecuador (2017)

On February 7, 2017, the Arbitral Tribunal constituted by Gabrielle Kaufmann-Kohler (President), Brigitte Stern, and Stephen Dryme (Arbitrators) rendered the final decision in the ICSID Case No. ARB/08/5, initiated by Burlington Resources Inc. vs. Ecuador.

In 2001, the US investor Burlington was assigned interest in several oil production-sharing contracts by Ecuador, through a consortium it had constituted with Perenco Ecuador Limited. Under the said contracts, Burlington assumed the costs and operation risks for the production activities in areas known as Blocks 7 and 21 in the Ecuadorian amazon. In return, it received a share of the oil produced in such areas. The contracts regulated the tax regime applying to Burlington, and also stated that Ecuador, by means of the State-owned company Petro Ecuador, had to assume any tax increase in the future through a correction factor to be applied in the formula agreed by the parties to determine Burlington's earnings (ICSID Case No. ARB/08/5 2012, para. 5- 66).

Beginning in 2002, the oil prices began to rise across the globe, which increased the incomes derived from the oil extracted from Blocks 7 and 21, and consequently Burlington's earnings. In April, 2006, Ecuador adopted the Law 42 of 2006, imposing a tax of 50% on windfall profits made by oil companies, including Burlington. Later, in October, 2007, Ecuador increased the tax tariff to 99%. Any unforeseen rise of oil prices exceeding the price of oil at the moment in which the contracts were entered into, was to be affected by Law 42 of 2006 (ICSID Case No. ARB/08/5 2012, para. 23 - 51).

While Burlington initially paid the tax, in parallel requested Ecuador to assume this tax appealing to Ecuador's obligations under the contracts. In 2009, after failing in the negotiations with Ecuador, Burlington stopped to pay the tax. This leaded Ecuador to seize Burlington's shares in the contracts. The investor, in turn, threatened to stop the oil production in Blocks 7 and 21. thus, Ecuador terminated the contracts with Burlington by means of an

administrative act, and took possession of the facilities of Blocks 7 and 21 (ICSID Case No. ARB/08/5 2012, para. 52 - 66).

In view of these facts, on April 21, 2008, Burlington filed an arbitration request against Ecuador under the US-Ecuador BIT, arguing that its investment had been expropriated as a result of Ecuador's acts (ICSID Case No. ARB/08/5 2012, para. 67). The Tribunal analyzed each of the measures that allegedly would have entailed Burlington's investment expropriation, and found that the Law 42 of 2006 did not amount to an expropriation, because it did not deprive Burlington of the investment. Nonetheless, the Tribunal considered that Ecuador did expropriate Burlington's investment when it took possession of oil production facilities (ICSID Case No. ARB/08/5 2012, para. 349 - 540). Thus, the Tribunal ordered Ecuador to pay Burlington USD 379,8 million as indemnification (ICSID Case No. ARB/08/5 2017, para. 635).

During the proceedings Ecuador filed a counterclaim, alleging that Burlington's operations caused a relevant environmental damage to the ecosystem, and thus requested the Tribunal to order Burlington to pay the costs associated to the restauration, amounting to USD 2.8 billion. On February 7, 2017, the Tribunal rendered a final decision on the counterclaim, where it found that Burlington did cause an environmental damage by means of the oil production in Blocks 7 and 21. Thus, it ordered Burlington to pay Ecuador USD 41.7 million for the restoration of the affected ecosystems (ICSID Case No. ARB/08/5 2017, para. 1099). This is the first case in which an investor was held liable for environmental damage, and thus it is a landmark decision in terms of environmental protection and investment. Nonetheless, it did not contribute to the harmonization between the right to water and the investment law.

It is noteworthy that the Tribunal analyzed this environmental issue as a matter of investment law, introducing the principles of precaution and *in dubio pro natura* to the latter regime (ICSID Case No. ARB/08/5 2017, para. 343). However, no mention was made to the human right to water neither in the counterclaim nor in the award, despite Ecuador sought Burlington to be declared liable for damages caused to groundwater and other resources, meaning that there was place for discussion on the right to water, especially as to the obligations of private parties under the said right.

4.2.5. Bear Creek v. Peru (2017)

On November 30, 2017, the Arbitral Tribunal constituted by Karl-Heinz Böckstiegel (President), Michael Pryles, and Philippe Sands (Arbitrators) rendered the final decision in the ICSID Case No. ARB/14/21, initiated by Bear Creek Mining Corporation vs. Peru. The arbitration was based on Bear Creek's investment in a silver mining project in the region of Santa Ana, in the Department of Puno, in Peru. Given the location of the project within the territories of Aymara indigenous peoples, the Peruvian Constitution and the International Labor Organization's Convention 169 required the claimant to obtain a "public necessity" decree from the Peruvian Council of Ministers, which was granted in November 2007, by means of Decree 083. However, in June, 2011, the Council of Ministers issued Decree 032 to revoke Decree 083 and the public necessity declaration embedded therein, leading to the extinction of claimant's right to operate the Santa Ana project.

In between these dates, there were protests and social unrests due to the Aymara people's concerns regarding the project's environmental consequences, including water pollution in a region suffering water stress, and the affectations to their sanctuaries and to their spiritual bond with these lands (ICSID Case No. ARB/14/21 2017, para. 1). Under these facts, Bear Creek argued that Peru had expropriated its investment in the project, and failed to afford the investment a fair and equitable treatment, thus incurring in a violation to the Canada-Peru BIT.

In the proceeding, three organizations filed *amicus curiae* submissions referring to the relevance of the indigenous people's rights over their lands to the solution of this case [14]. They argued that Bear Creek failed to comply with international standards of prior consultation, which it knew or should have known that were binding. Further, Bear Creek did not do what was required by international and domestic law to address the Aymara peoples' concerns with regards to the project, which thereafter leaded to the protests and unrest that motivated the issuance of Decree 032 (ICSID Case No. ARB/14/21 2017, para. 218).

Despite as explained in sub-section 3.1 the right to water is closely linked to the indigenous peoples' rights over their ancestral territories, the submissions did not address the human right to water, and neither did the State nor the Tribunal. The claimant requested the Tribunal not to consider the submissions. In particular, the one filed by the Association of Human Rights and Environment of Puno, alleging that it was a non-governmental organization with a "radical anti-mining agenda", and that claimant was worldwide recognized for its commitment with the communities living in the locations of its mining projects (ICSID Case No. ARB/14/21 2017, para. 231-235). On the Contrary, Peru asserted that the submissions represented the voice of the affected Aymara peoples, thus constituting a relevant insight for the Tribunal to evaluate Bear Creek's conducts and contributions to the social unrest and protests (ICSID Case No. ARB/14/21 2017, para. 251).

To resolve the claimant's expropriation claim, the Tribunal referred to whether the unrest justified the derogation of Decree 083, since they were the evidence that the Aymara people clearly and repeatedly opposed to the Project. Further, the Tribunal agreed that international law instruments require the prior and informed consultation of indigenous peoples to advance in projects that might affect their rights over their territories (ICSID Case No. ARB/14/21 2017, para. 400-414).

However, it concluded that Peru failed to prove a causal link between claimants' behavior in the project and the issuance of Decree 032, as required to mitigate or exclude the State's responsibility for alleged wrongful acts. On the contrary, Peru would have leaded claimant to consider that it had complied with the legal requirements as to the prior consultation, and therefore Peru cannot affirm that claimant's conduct contributed to the social unrests nor that it was justified to derogate Decree 083. The Tribunal concluded that Peru expropriated Bear

[14] Amicus curiae were filed by Association of Human Rights and Environment of Puno, Peru; Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists Application; and the Columbia Center on Sustainable Investment.

Creek's investment and awarded damages amounting to USD 18.2 million (ICSID Case No. ARB/14/21 2017, para. 400-414).

Arbitrator Sands dissented with the Tribunal's findings, considering that the claimant's conduct indeed gave rise to the social unrests in Puno, and thus justified at least partially the issuance of Decree 032. He referred to the Urbaser decision to argue that the fact that international instruments on indigenous peoples' rights impose obligation directly on the States does not imply that investors are indifferent to these rights. In fact, private parties also have the obligation to avoid any activity affecting human rights, thus the BIT provisions must be construed consistently with other rules of international law such as those of human rights (ICSID Case No. ARB/14/21 2017, para. 5-10).

The dissenting opinion also mentioned that the Tribunal was entitled to consider the International Labor Organization's Convention 169 to determine whether the claimant gave effect to the Aymara peoples' rights in an appropriate manner. It further submitted that Bear Creek was not prepared to make an investment in the lands of Aymara peoples as it should have been. It was demonstrated that Bear Creek only provided economic benefits -such as employments- to some of the peoples in the project's area, and that those excluded from said benefits were the ones opposing to the project (ICSID Case No. ARB/14/21 2017, para. 12-17). To Sands, while investors have legitimate rights under international law, so do indigenous communities, and these are no lesser rights. Even if the State has the obligation to ensure prior consultation, it is not State's duty to hold investors hand and lead this process (ICSID Case No. ARB/14/21 2017, para. 35-37).

This case displays that, while third parties might rise human rights-related concerns within arbitration proceedings, the arbitrators do not necessarily deepen on them, and on the contrary prefer to pass through the discussion without a proper analysis. Yet Sand's dissent offers evidence that there some arbitrators might be more open than others to harmonize investment law and human rights law.

The case also raises the question of why the human right to water was not a part of the debate, despite its clear connection with the indigenous peoples' rights over their lands and the factual background of the dispute. While no certain response could be given, this fact is an evidence that there is still too much to do to harmonize the investment law and the right to water.

4.2.6. David R. Aven and Others v. Costa Rica (2018)

On September 18, 2018, the Arbitral Tribunal constituted by Eduardo Siqueiros (President), Mark Baker, and Pedro Nikken (Arbitrators) rendered the final decision in the ICSID Case No. UNCT/15/3, initiated by David R. Aven and Other US nationals vs. Costa Rica under the CAFTA. The dispute arose out from the claimant's investments in Costa Rica, comprising property rights over certain lands and a concession site to the development of a tourism project called "Las Olas", which would include a hotel, a beach club and 352 condominiums (ICSID Case No. UNCT/15/3 2014, para. 19). In March, 2006, and June, 2008, the Costa Rican environmental authorities granted the investors the environmental viability permits for the project, by means of Resolutions No. 543-2006 and 1597-2008, which allowed the

investors to apply for construction permits, that were subsequently obtained by them (ICSID Case No. UNCT/15/3 2014, para. 23-26).

In March, 2009, the inhabitants of the areas surrounding the project's location raised concerns before environmental authorities based on the existence of wetlands in the project's relevant area that would be harmed by the investors' activities. This motivated the authorities to conduct three on site visits between April 26, 2009 and May 21, 2010, during which they identified wetlands and forests. Thus, they deployed administrative and judicial actions that caused the termination of the project (ICSID Case No. UNCT/15/3 2018, para. 359-363).

To the investors, these actions were taken by Costa Rica in breach of the Central America Free Trade Agreement ("CAFTA"), because the State did not afford the investor a fair and equitable treatment, and indirectly expropriated the investment with no compensation. Costa Rica alleged that it had acted to prevent further environmental harm to these wetlands given these are protected ecosystems, and that several dispositions in the CAFTA subordinated the investors' rights to the protection of the environment (ICSID Case No. UNCT/15/3 2018, para. 406). Yet, Costa Rica did not refer to the human right to water as an additional source for its duty to protect the environment, specially the water resources that would resulted affected by the investors' project.

The Tribunal found that article 10.11 of the CAFTA[15] subordinated the rights of investors to the right of Costa Rica to ensure that the investments in its territory are carried out “in a matter sensitive to environmental concerns”. Nonetheless, this subordination is not unlimited, and requires the States to take actions in line with the principles of international law, including the good faith. This prevalence results from the explicitly manifested interest of the States parties to the CAFTA in ensuring certain environmental standards (ICSID Case No. UNCT/15/3 2018, para. 412).

The Tribunal considered that legitimate expectations and expropriation claims were dependent on whether there were wetlands and forests in the project's site when Costa Rican actions took place, and whether these ecosystems were adversely impacted (ICSID Case No. UNCT/15/3 2018, para. 412). The Tribunal determined that the wetlands were indeed impacted by the works, and that the actions taken by Costa Rica were well-founded under domestic laws that are consistent with international law. Thus, it concluded that the State's acts were not arbitrary nor constituted a breach to its obligations under the CAFTA ((ICSID Case No. UNCT/15/3 2018, para. 585).

Costa Rica filed a counterclaim against the investors, based on the articles 10.26.1, 10.26.7, and 10.26.8 of the CAFTA[16], and referred to procedural economy as the grounds to bring

[15] The article 10.11 of the CAFTA provides that: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns".

[16] Articles 10.26.1 and 10.26.8 refer to the "respondent" in general, and not to the "State", meaning that the investor could also be the respondent party. Also, article 10.26.7 recognize the Tribunal's competence over issues that a “respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason (ICSID Case No. UNCT/15/3 2018, para. 728).

claims against the investors. Further, Costa Rica mentioned the Urbaser decision on Argentina's counterclaim as a relevant precedent to this case (ICSID Case No. UNCT/15/3 2018, para. 728).

Costa Rica submitted that the investors had violated imperative norms of environmental law, and caused environmental damage due to the works undertaken in the wetlands located within the project's site (ICSID Case No. UNCT/15/3 2018, para. 720-721). To repair such damages, Costa Rica requested the Tribunal to order the investors to present a restoration plan and to assume the derived costs (ICSID Case No. UNCT/15/3 2016, para. 656-658).

The Tribunal declared that it had jurisdiction to hear Costa Rica's counterclaim, and recognized that the CAFTA imposes affirmative obligations over the investors, concerning the compliance with domestic environmental laws (ICSID Case No. UNCT/15/3 2018, para. 735). However, the Tribunal concluded that Costa Rica's counterclaim did not meet the formal requirements derived from the articles 21 and 20 of the UNCITRAL arbitration rules, considering that Costa Rica's memorials did not contain a clear statement of facts, nor a specification of the relief sought (ICSID Case No. UNCT/15/3 2018, para. 45).

Despite this case had enough factual elements for the right to water to be invoked by the State and developed by the Tribunal, this right was absent from the discussion. This is alarming because the Tribunal did not refer to whether the investment must be subordinated to the right to water under the sustainability criterion contained in the CAFTA. Further, this case's insights on the subordination of the investment to a sustainability criterion under the CAFTA, are not enough to ensure neither the realization of the right to water, nor its harmonization with the investment regime. Although this criterion calls upon the investors to use and manage water in a sustainable manner, the full scope of the right to water goes beyond the limits of sustainability.

For instance, where the tariffs of water and sewage services increase, as it occurred in Argentina's cases, the State might decide to take measures to mitigate these barriers to ensure access to water. While these measures would be within the scope of the States right to water derived obligations, they are not actually directed to address a sustainability issue. Without any hesitation, the CAFTA's approach on the subordination of the investment law to sustainability is a noteworthy effort to prevent potential environmental damages to be caused by foreign investment. Yet, the CAFTA fails to determine the relation between the human rights and the investment, something crucial to advance in the harmonization of both regimes.

4.2.7. Perenco v. Ecuador (2019)

On September 27, 2019 the Arbitral Tribunal constituted by Judge Peter Tomka (President), Neil Kaplan, and J. Christopher Thomas (Arbitrators) rendered the final decision in the ICSID Case No. ARB/08/6, initiated by Perenco Ecuador Limited vs. Ecuador, unter the Ecuador-France BIT. As referred above in sub-section 4.2.4, Perenco and Burlington Resources Inc. constituted a consortium and were granted interest in certain oil production-sharing contracts. This fact made Perenco to initiate arbitration proceedings against Ecuador,

on the same grounds as Burlington did. This means that the factual background of both cases is the same previously described.

Nonetheless, the Tribunal in Perenco's case made different findings with regards to the investors' claims. It considered that the tax derived from Law 42 of 2006, rather than Ecuador's intervention to operate Block 7 and 21, entailed the expropriation of Perenco's investment (ICSID Case No. ARB/08/5 2014, para. 713). Then, Ecuador was ordered to pay USD 448,8 million to Perenco as indemnification (ICSID Case No. ARB/08/5 2019, para. 1023).

Ecuador filed a counterclaim against Perenco on the grounds of environmental damage, as alleged by the State in the arbitration against Burlington. As in that case, neither Ecuador nor the Tribunal referred to the right water. Yet, the Tribunal considered that Perenco caused an environmental damage derived from irregularities with the wastewater treatment and chemical management, among other behaviors (ICSID Case No. ARB/08/5 2015, para. 412-446). Ecuador was ultimately awarded an indemnification of USD 54,4 million to remediate the environmental damage found by the Tribunal (ICSID Case No. ARB/08/5 2019, para. 1023).

While this case was a crucial opportunity to advance in the harmonization of the investment law with other international regimes, it demonstrates that the States are not referring to the right to water in their disputes, although they have had the possibility to do so. The case also shows that different Tribunals might come to different conclusions on the very same issues and factual background, which strengthen the existing concerns with regards to the predictability that the parties may expect in investment arbitration.

4.2.8. Eco Oro v. Colombia (2021)

On September 9, 2021 the Arbitral Tribunal constituted by Juliet Blanch (President), Horacio A. Grigera Naón, and Philippe Sands (Arbitrators) rendered the final decision in the ICSID Case No. ARB/16/41, initiated by Eco Oro Minerals Corp. vs. Colombia. In 1994, the Canadian company Eco Oro obtained mining licenses to develop the open-pit Angostura gold and silver project in Colombia. Further, in February 2007, Eco Oro was granted a concession over the said project by the Colombian Geology and Mining Institute Ingeominas, and later in 2009 Eco Oro applied for an environmental license for mining exploitation activities within the projects' area (ICSID Case No. ARB/16/41 2021, para. 48-204).

In 2010, Colombia issued the law 1382 which prohibited mining operations in *páramo* ecosystems, which are crucial to the water cycle and to the water supply of Colombian people. Since the area of Angostura project overlapped with *Páramo de Santurbán*, the Colombian authorities ordered Eco Oro to submit a new environment impact analysis, excluding the overlapped areas from the mining activities (ICSID Case No. ARB/16/41 2021, para. 48-204). This leaded Eco Oro to withdraw its open-pit project, and to apply instead for an underground mine. In the meantime, Ingeominas accepted to extend the exploration stage of the concession several times. Also, in July 2013, Ingeominas granted Eco Oro a suspension of its obligations under the concession, until *Páramo de Santurbán* was completely delimited (ICSID Case No. ARB/16/41 2021, para. 48-204).

In 2014, the delimitation was completed and Colombia issued the Resolution 2090, which indicated that 54.7% of the area of *Páramo de Santurbán* overlapped with the Angostura project. Despite Resolution 2090 contained exceptions to the general prohibition to develop mining activities in *páramo* ecosystems, in February 2016 these exceptions were declared unconstitutional by the Constitutional Court (ICSID Case No. ARB/16/41 2021, para. 48-204).

In view of these facts, Eco Oro filed an arbitration request against Colombia on December 8, 2016. On the same grounds, Galway Gold Inc. and Red Eagle Exploration Limited, both Canadian companies, initiated arbitration proceedings against Colombia. Thus, the Eco Oro's award is a critical insight for the resolution of the other two cases.

To Eco Oro, Colombia's actions amounted to an expropriation, and also constituted a violation to the minimum standard of treatment provided by the Canada-Colombia Free Trade Agreement. Colombia countered Eco Oro's allegations, on the grounds that the FTA contained a general liability exception in cases where measures are necessary either to protect human, animal or plant life or health, of to the conservation of exhaustible natural resources. To Colombia, this provision excluded its liability to pay any compensation to Eco Oro.

The Tribunal rejected the expropriation claims, on the grounds that Colombian's actions constituted a legitimate exercise of its regulatory powers to protect the environment, and were not discriminatory because were directed to all mining concessionaires within the relevant area of *Páramo de Santurbán*. Despite the Tribunal showed concerns with regards to the manner in which the *Páramo* was delimited, they emphasized on Colombia's good faith in taking the contested measures (ICSID Case No. ARB/16/41 2021, para. 643). Further, Colombia's measures were proportionate and reasonable, in light of the precautionary principle of environmental law, given that the extent of the potential environmental damage on *Páramos* as a result of mining activities was uncertain (ICSID Case No. ARB/16/41 2021, para. 654).

Nonetheless, the Tribunal found a violation to the minimum standard of treatment, since Eco Oro was denied a stable and predictable regulatory environment in violation to its legitimate expectations (ICSID Case No. ARB/16/41 2021, para. 748). Considering that Colombia had consistently failed to delimit the area of *Páramo de Santurbán*, the Tribunal held that the Angostura deposit could not be affirmed with certainty to be within the *Páramo* area (ICSID Case No. ARB/16/41 2021, para. 777). Also, the Tribunal stated that Colombia's authorities were inconsistent, contradictory, and uncoordinated, which leaded the State to enter into a concession fully aware that its area overlapped *Páramo de Santurbán*.

With regards to Colombia's defense, the Tribunal held that the FTA allowed the State to implement measures for environmental conservation that are not arbitrary, unjustifiably, nor discriminatory. Nonetheless, that provision did not excluded Colombia's liability for compensation since the parties did not expressly agreed so. On the contrary, the Tribunal asserted that Eco Oro's claimed damaged were not speculative since Colombia had issued a series of permits to allow Eco Oro advance in exploration activities. Thus, Eco Oro could not be considered to have no prospect of obtaining the environmental license for exploitation activities (ICSID Case No. ARB/16/41 2021, para. 848).

This case is the most recent landmark investment decision on the protection of diversity and integrity of the environment, and preservation of the areas of special ecological importance. However, it could not be said that this case contribute to the harmonization of the right to water and the investment law, since neither Colombia nor the Tribunal made any reference to the said right. This fact is alarming considering that the States are bound to protect the right to water from the interference of third parties including multinationals. Thus, the perspectives of the realization of the human right to water in the region, are clearly affected when this of contact is simply omitted from the discussion.

5. Strategies to address the fragmentation of international investment law and international human rights law in Latin America, specifically in the protection of the human right to water

Considering that section 4 provided evidence of clash between the right to water and the investment law in Latin America as result of the phenomena of fragmentation of international law, this section offers strategies to advance towards the harmonization of both regimes. Since the literature recognizes that the fragmentation is the result of both, substantive and institutional issues, this section provides substantive harmonization strategies in sub-section 5.1, whereas institutional strategies are developed in sub-section 5.2.

5.1. Substantive harmonization strategies

While the implementation of one or some of the substantial strategies offered in this section would certainly contribute to the harmonization, their joint implementation would highly increase the chances of success. On the one hand, this dissertation suggests in sub-section 5.1.1. the negotiation of a regional treaty to regulate in depth the human right to water. On the other, the dissertation suggests a series of strategies in sub-sections 5.1.2. to 5.1.4., to be implemented in Latin America's investment treaties, including the regulation of the relations between human rights and investment rights, and to provide the States with possibilities to file counterclaims and stakeholders with realistic opportunities to participate in investment proceedings.

Strategies in sub-sections 5.1.2. to 5.1.4. might be adopted as a part of a single Latin-American investment treaty. would constitute a regional effort to provide confidence that the same rules apply to any foreign investment made in the Latin American territory. The uniformity of the regional investment regime would provide predictability to the investors doing business across the region, thus constituting an alternative to substitute the uncountable investment treaties currently in force in the region. Besides, without any hesitation, the harmonization of a single treaty of investment law with the human rights regime would be easier than the harmonization based on the multiple existing investment treaties.

5.1.1. To adopt an Inter-American treaty on the human right to water

In five of the eleven summarized cases[17] the human right to water was not even mentioned by the States. Despite they alleged that the contested measures were taken to protect water resources, they only based their defenses on binding obligations. For instance, in David R. Aven v. Costa Rica, the State relied upon instruments such as the Rio de Janeiro and the Ramsar Conventions in the case.

Likewise, Peru argued that Bear Creek's investment affected the rights of the Aymara people over their lands under the International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries. The absence of a mention to the right to water in the case of Bear Creek v. Peru is specially alarming. Peru failed to refer to the right to water, which is closely linked to the indigenous peoples' rights over their lands, as recognized by the I/A Court HR in the cases of the *Yakye Axa, Sawhoyamaxa* and *Xákmok Kásek Indigenous Communities v. Paraguay*[18].

The aforementioned five cases demonstrate that States are fully aware that considerations from other international regimes are often necessary in investment disputes. Also, that the States are more likely to bring this type of considerations on the basis of hard-law instruments. This might be explained by the fact that a treaty regulating a human or environmental right provides certainty as to the extent of the States' obligations and entitlements under the said right. Something that is not provided by the existing atomized soft-law regulation of the human right to water.

Thus, the first strategy towards the harmonization of the right to water and the investment law in the region is that the States enter into a treaty to regulate the human right to water in detail. The implementation of this strategy would fall within the States' obligation to fulfill the right to water, under which they must take measures directed at the full realization of the right to water. As explained in sub-section 3.1.3 above this mandate obliges the States to adopt measures to facilitate the enjoyment of the right to water even beyond their territories (CESCR 2002, para. 25). Further, the obligation to adopt measures arguably binds the States to adopt treaties in order to develop the right to water, considering the absence of a hard-law instrument regulating such right.

While the existing soft-law instruments would be a good starting point as to the substantial content of the treaty, it must be complemented with the views of the stakeholders, and with the experiences of the different international law regimes, including the human rights and the investment law. As stated by UN Habitat (2010, 33) the States must observe the principles or participation and inclusion to ensure the involvement of all the relevant stakeholders when formulating policies and regulation related to water. The concerns of the IACHR (2015, para. 26) as to the impact of foreign investment extractive projects on the water resources should be especially reflected in the treaty.

[17] See Burlington Resources Inc. v. Ecuador, Bear Creek v. Peru, David R. Aven v. Costa Rica, Perenco v. Ecuador, and Eco Oro Minerals v. Colombia.

[18] See: Case of the Yakye Axa Indigenous Community v. Paraguay (I/A Court HR 2005, para. 161-168); Case of the Sawhoyamaxa Indigenous Community v. Paraguay (I/A Court HR 2006, para. 168-169); Case of the Xákmok Kásek Indigenous Community v. Paraguay. (I/A Court HR 2010, para. 194-196).

Moreover, this dissertation argues that investors should be more involved in the realization of the human right to water, thus it is suggested that the said treaty includes binding *erga omnes* obligations that could be enforced against the investors. These types of provisions would be consistent with the evolution of the international law, that is requiring the multinationals not only to be subjects of rights but also of obligations.

Considering that the conclusions of this dissertation are focused in Latin America, the strategy offered hereby should be implemented with a regional perspective. Given the solid structure and prior experience of the Inter-American system in dealing with human rights instruments in the region, it is the best scenario for the proposed treaty to be conceived and administered.

5.1.2. To regulate the relation of international investment law and international human rights law in Latin American

In five of the eleven cases[19], the Tribunals discussed whether the State's obligations on human rights and investment could be in conflict. In all these cases, Argentina was the respondent, and raised defenses alleging that the human right to water had to prevail over the investors' rights. In none of these cases, Argentina nor the Tribunals referred to any provision regulating the alleged prevalence of the right to water. In Suez, the Tribunal noted that there were not grounds in the relevant BITs to conclude that the human right to water prevailed over investment obligations. Further, the Tribunals did not find factual support to declare a direct conflict of norms. Thus, in none of these cases Argentina's arguments were accepted.

In two of the eleven analyzed, similar arguments were raised by the States. In David R. Aven v. Costa Rica, and Eco Oro v. Colombia, environmental concerns rather than the right to water were the basis of the States' defenses. In both cases, the States relied upon investment treaty provisions to support the existence of subordination and liability limitations. The Tribunals fully addressed the States' defenses and referred to relevant aspects of environmental law within their investment analysis. This shows that some investment instruments in the region already contain some sort of regulation with regards to the subordination of the States' investment obligations to certain criterion of public interests.

All the referred cases, amounting to seven out of the eleven, are the evidence that discussions on the prevalence of environmental and human rights obligations are likely to raise in investment arbitration. Thus, the second strategy towards the harmonization of the right to water and the investment regime is to regulate their relation in Latin American investment treaties, in order to increase the predictability of the decisions where the public interest of water and the private interest in investment should be balanced.

Two approaches could exist with regards to these relations. The pro-investors approach would suggest to include provisions expressing that both regimes are consistent and never contradictory, thus binding the States to comply both sets of obligations with no exception. The pro-State approach, on the contrary, would suggest that it is possible -not necessarily

[19] See: Suez v. Argentina, Saur, v. Argentina, Urbaser v. Argentina, Azurix v. Argentina, and Impregilo v. Argentina.

probable- that in some cases the State requires to give prevalence to one interest over the another, and therefore these situations must be regulated.

This dissertation follows the pro-State approach since the obligation to fulfill the right to water contains a mandate for the States to reduce the negative impacts of their treaties in the right to water. Following the criteria of the CESCR (2002, para. 35) this implies that the liberalization of markets should not affect the States' capacities to ensure the realization of the right to water. Further, there is no reason to consider that the same considerations do not apply broadly to all the human and environmental rights.

The article 10.11 of the CAFTA[20], analyzed in depth in David R. Aven v. Costa Rica, illustrate well the extent of the suggested provisions. The said norm states that that nothing in the investment chapter of the said instrument can be construed to prevent a State party to implement measures to ensure that investment activity in its territory is undertaken in an environmental sensitive manner. This is a noteworthy effort to prevent investment from causing environmental damages by limiting the Sates regulatory powers.

Based this provision, the Tribunal in the mentioned case considered that the CAFTA subordinated the rights of investors to Costa Rica's regulatory powers to ensure that the investments in its territory are carried out in an environmental sensitive manner (ICSID Case No. UNCT/15/3 2018, para. 412). Therefore, Costa Rica's acts were not arbitrary nor constituted a breach to its obligations under the CAFTA and rather were in line with the principles of international law (ICSID Case No. UNCT/15/3 2018, para. 585). This conclusion is likely to become the justification for future environmental measures to be taken by the parties to the CAFTA: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and United States. Yet, the CAFTA lacks of a provision to regulate the relation between the investment regime and the human rights, including the right water. In lack of such regulation, Costa Rica and the Tribunal focused in the environmental elements, and left behind the fact that this case was critical opportunity to advance in the harmonization of the right to water and the investment law.

Since modern investment treaties around the globe are including regulation on the relation between the States' right to regulate and the investors' rights, these treaties should be also a source of review when determining the regulation that this subsection suggests to be included in Latin American investment treaties. This is the case of the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA)[21], which reaffirms the right of the Parties to regulate in order to protect the environment, and also states that where regulation could interfere with the investors' expectations, it does not necessarily amount to

[20] The article 10.11 of the CAFTA provides that: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns" (CAFTA 2009).

[21] The CETA provides that: "(…) the Parties reaffirm their **right to regulate** within their territories to achieve legitimate policy objectives, **such as the protection of** public health, safety, **the environment** (…) **the mere fact that a Party regulates**, including through a modification to its laws, in a manner **which negatively affects an investment or interferes with an investor's expectations**, including its expectations of profits, **does not amount to a breach of an obligation under this Section**" (CETA 2017).

a violation of the treaty. The Netherlands Model BIT[22] also provides important insights, in that it brings human rights obligations into the investment regime, and imposes the investors the obligations to develop due diligence to avoid their investment to affect human and environmental rights.

5.1.3. To provide the States with procedural and substantial regulation to file counterclaims

In three of ten analyzed cases[23] the States filed counterclaims against the investors, based on the right water, and on environmental damages caused to water resources. However, this is not an available possibility to the States in all the cases. The investment law is conceived as an asymmetrical regime to protect the investors, then the investment treaties rarely entitle the States to file counterclaims in the course of arbitration proceedings, and do not impose obligations to the investors that could be enforced by means of arbitration.

In Urbaser, the counterclaim allowed the Tribunal to state that obligations arising out from the right to water and the investment law had to be interpreted consistently, and were part of the applicable law to resolve the dispute. This is therefore a landmark decision on the harmonization of the right to water and the investment law. While the counterclaims filed by Ecuador and Costa Rica in the cases of Burlington and David R. Aven did not contribute to the harmonization of the right water and the investment law, these cases certainly demonstrate the potential of the counterclaims to make the investors to take their part on the responsibility for the protection of natural resources. In both cases, the Tribunals declared that the investors caused environmental damages. Yet, in none of them indemnifications were awarded to the States.

These contributions to the protection of water resources by means of international law were only possible due to the exceptional possibility these States had to file their counterclaims. This demonstrates that allowing the States to raise their claims would generate further scenarios to develop the harmonization of the right to water and the investment law in the region. Moreover, counterclaims are procedural means that arguably fall into the State's obligation "to prevent third parties from interfering in any way with the enjoyment of the right to water" (CESCR 2002, para. 23). Thus, the States are urged to exercise their powers to ensure that they have international means to prevent investors from affecting the right to water.

These facts show that the States are requiring a more equitable investment regime, where they could raise counterclaims to avoid investors from interfering with the realization of environmental and human rights, such as the right to water. To advance in this direction, hereinafter the Latin American investment treaties must include procedural provisions

[22] The Netherlands' Model BIT states that: "the Contracting Parties **reaffirm their obligations under the multilateral agreements in the field of environmental protection, labour standards and the protection of human rights** to which they are party, such as the Paris Agreement (…) the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment" (Netherlands Model Investment Treaty 2019)

[23] See Urbaser S.A. v. Argentina, Burlington Resources Inc. v. Ecuador, and David R. Aven v. Costa Rica.

regulating the States' right to file counterclaims against the investors, and the substantial obligations the latter have with regards to the realization of the said environmental and human rights.

5.1.4. To establish realistic opportunities for the participation of non-contending parties in investment disputes

In three of the eleven cases[24] amicus curiae were filed by non-contending parties. While it is not the majority of the cases, the mere existence of these submissions demonstrates that communities and other stakeholders are claiming an investment system in which they can point out their interests. The relevance of the intervention of non-contending parties is evident in the said cases. In Bear Creek v. Peru, the amicus curiae elaborated on the rights of indigenous peoples over their ancestral lands, and also argued that Bear Creek failed to comply with international standards on prior consultation of indigenous peoples (ICSID Case No. ARB/14/21 2017, para. 218).

Further, in Suez v. Argentina, the amicus curiae was directed to point out the extent of protection of the right to water and its links with other human rights, in order to show the State's obligation to take the contested measures, and the absence of other alternatives (ICSID Case No. ARB/03/19 2015, para. 256).

Yet, in the case of Pac Rim v. El Salvador, the Tribunal declined to address the amicus curiae submission given the negative of both parties to disclose relevant evidence. Further, the Tribunal argued that the arguments contained in the said submission were not relevant to decide the case (ICSID Case No. ARB/09/12 2016, para. 3.28 - 3.30).

These cases demonstrate how the intervention of non-contending parties is essential to nourish investment discussions, thus representing relevant tools to bring considerations on human rights that would contribute towards the harmonization.

When it comes to human rights, even in the sphere of investment law, there is a need for participation of the potentially affected communities. In these cases, investment goes beyond investor and the State, and thus attention must be paid to individuals and groups. It is alarming that international Tribunals are deciding on issues related to the natural resources of communities that do not have a place within the relevant proceeding.

Therefore, the fourth strategy is to include provisions on Latin American investment treaties to regulate the participation of these third parties. The idea is to provide realistic opportunities for affected communities and virtually for any stakeholder to present their concerns in relation to the right to water -and the human rights in general- within the context of investment disputes.

This regulatory strategy falls within the State's obligation to fulfill the right to water, which imposes the States the mandate to regulate in order to ensure the realization of the said right. Further, this strategy is in line with UN Habitat's recommendation to the States, consisting in the formulation of policies and regulation ensure the due participation and inclusion of all

[24] See: Suez v. Argentina, Bear Creek v. Peru and Pac Rim v. El Salvador.

the relevant stakeholders, especially those pertaining to historically discriminated communities (UN Habitat 2010, 33).

5.2. Institutional harmonization strategies

The strategies of institutional harmonization offered in this section should be implemented both, in short and long-term. On the one hand, given the current structure of the relevant institutions of both regimes, dialogues between the Inter-American Human Rights system and the arbitrators affiliated to the main investment arbitration institutions are suggested in sub-section 5.2.1. On the another, the establishment of a Permanent Court of Investment Law in the Americas is analyzed in sub-section 5.2.2., considering the relevance of this type of initiatives around the globe.

5.2.1. Dialogues between the Inter-American Human Rights system and the investment arbitration institutions

While the IACHR (2015, para. 104) has stated that main affectations to water in the Americas derive from extraction projects, and that the development model in Latin America is leading to severe impacts to the water resources, none of the investment cases analyzed in this dissertation referred to the case law of the I/A Court HR nor to the considerations of the IACHR, despite their positions would be a relevant interpretation criterion to adjudicate the said disputes.

These facts are the evidence that human rights institutions in the region have been raising water-related concerns related with the foreign investment, with no response from the institutions of the investment regimes. Rather than a dialogue that would constitute harmonization, this is a monologue where the human rights concerns are simply not addressed by the investment law, in a clear example of what fragmentation means. While it is usual to see academic initiatives leaded by the investment institutions, there are no evidence of these institutions promoting joint initiates with the Inter-American system organisms.

The identification of potential tensions between those regimes, as well as the determination of their solution, are needed to advance towards the harmonization. To that purpose, a short-term institutional strategy to be implemented consists in the promotion of the dialogues between the said regimes.

Given that this dissertation is focused in Latin America, it is suggested that the Inter-American system organisms, and the arbitrators affiliated to the main investment arbitration institutions with presence in the region, should include the discussions regarding the fragmentation of both regimes as a relevant part of their working agendas. This dialogue must involve, at least, the IACHR, the I/A Court HR, the ICSID, the PCA, and UNCITRAL. These bodies can contribute to the harmonization by means of academic colloquiums and debates, that might lead to the issuance of observations and recommendations for adjudicating disputes where the right to water and investment rights might be in tension.

5.2.2. The establishment of a Permanent Court of Investment Law in the Americas

While the short-term strategy offered above might be beneficial for the harmonization of international law in the region, the investment regime as it is currently conceived has been widely criticized on the grounds of some issues that are evident in the analyzed cases. Some of the alternatives being explored around the globe include the establishment of Courts of investment law.

To contribute to this discussion in the region, this dissertation argues that the establishment of a Permanent Court of Investment Law, under the auspices of the OAS, is an strategy that will contribute to the harmonization of the investment law and the right to water -and more broadly the human rights-. To support this affirmation, two issues as to the harmonization of these regimes are pointed out below, and the benefits of the suggested Court are then explained.

First, there is not predictability in the investment dispute settlement as a result of the absence of a binding case law. This fact does not only affect the investors' interests, in light of the conclusions of this dissertation, it also has implications on the interests of the States and communities in the right to water. For instance, in Suez v. Argentina the Tribunal considered the State had more flexible means that those adopted in the economic crisis to ensure the right to water. However, in Urbaser v. Argentina the Tribunal analyzed the same Argentina's measures and concluded that there were no further available alternatives to the State.

To resolve this lack of predictability, the Permanent Court will require rules on precedent, in order to allow the parties to rely upon previous decisions to predict the likely outcome of their disputes. Precedent should not be restrictive. Thus, the adequate argumentation should be enough for the Court to apart from previous decisions. Having consistent positions in the investment law, without any hesitation, will facilitate the realization of the right to water in scenarios where both of them might be in tension.

Second, as stated above, there is not a dialogue between the institutions of the investment law with those of other regimes. Establishing the Permanent Court as an organism of the OAS, will generate a clear link between the investment law and the human rights in the region given the existence of the Inter-American system of human rights. This would very much facilitate the said dialogue.

The Argentina's cases demonstrate that state of necessity defense very often require the Tribunals to determine whether alternative measures were available to the States. Nonetheless, any available measure must be in line with the right to water. In these cases, therefore, it could be reasonable to allow the Investment Judges to request non-binding concepts on human rights to the relevant Inter-American institutions, which would be of paramount relevance to adjudicate investment disputes and to the harmonization of both regimes.

Additional benefits derived from the establishment of the Permanent Court might include rules and guarantees for the intervention of non-contending parties in investment proceedings, which are very limited under the current status of the investment regime. Also, the Permanent Court might help to address current issues on the arbitrators' conflicts of interests, derived from the current case-by-case appointment of arbitrators.

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