

# GLOBALIZATION OF WATER PRIVATIZATION: RAMIFICATIONS OF INVESTOR-STATE DISPUTES IN THE “BLUE GOLD” ECONOMY

JULIEN CHAISSE\*  
MARINE POLO\*\*

**Abstract:** The world of water services changed significantly over the last two decades, opening it to new business possibilities as promoted by different international financial institutions. Such prospects arose in the face of extraordinary population growth and dire water expansion needs. Accordingly, a vast increase of water-services privatization contracts between foreign investors and states ensued. Today, 10 percent of global consumers receive water from private companies. Inevitably, disputes have emerged regarding these privatization contracts, with little indication of subsiding anytime soon. In the absence of a specialized international regime to regulate these fast-growing activities, both investors and host states filed twenty-one investment claims to investment tribunals in less than two decades. These filings have invited tribunals to interpret foreign investments in the water industry. The tribunal interpretations have generated the embryonic international regulatory and jurisprudential regime on water services analysed in this Article. Governments must design water related policies that comply with investment treaties because failure to do so results in higher water costs and deters foreign investors from providing much needed high quality services to local populations and industries. Although the investment jurisprudence may be seen as progress towards the regulation of an important service, it also emphasizes the lack of a true global holistic approach to regulate water services.

## INTRODUCTION

Water is often perceived as an infinite natural resource. Unfortunately, the tragic reality is it maintains a fixed invariable volume with less than three percent consisting of fresh water.<sup>1</sup> Never before has the inherent ten-

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\* Julien Chaisse is an Associate Professor at the Chinese University of Hong Kong and the Director of the Centre for Financial Regulation and Economic Development.

\*\* Marine Polo is Counsel to International Trade Law Advisory Services Unit, World Trade Advisors Group, Sydney.

<sup>1</sup> Amy K. Miller, Note, *Blue Rush: Is an International Privatization Agreement a Viable Solution for Developing Countries in the Face of an Impending World Water Crisis?*, 16 IND. INT'L & COMP. L. REV. 217, 223 (2005).

sion of scarcity versus overconsumption in the relationship between man and water reached such a critical point.<sup>2</sup> Accordingly, Earth's water supply faces many newfound demands and challenges in the years ahead.<sup>3</sup>

Water, Earth's "blue gold," is its most precious and essential commodity. It is fundamental to all aspects of drinking, eating, maintaining hygiene, and promoting population health. Water is basic to the preservation of most ecosystems and crucial to a safe and long lasting environment. Moreover, it is critical to several types of businesses and industries.<sup>4</sup> It not only maintains social stability and environmental sustainability, but also fosters economic development across civilizations.<sup>5</sup> Consequently, access to clean water has been recognized by the United Nations (UN) as a basic human right that every government is obligated to provide.<sup>6</sup>

The world of water services changed significantly in the late 1990s due to an extraordinary boom in global population growth.<sup>7</sup> The sustained population increase sparked a need for water services expansion.<sup>8</sup> Opportunities for investment in water services and sanitation infrastructure attracted tremendous support from a myriad of international financial institutions.<sup>9</sup> These institutions unlocked a host of new business opportunities for the water services and sanitation industry to address traditional problems ranging from fresh water scarcity to inadequate investment in sanitation infrastructure to the inability of many public authorities to meet coverage needs.<sup>10</sup>

<sup>2</sup> See *id.* at 223–24.

<sup>3</sup> See Edith Brown Weiss & Lydia Slobodian, *Virtual Water, Water Scarcity, and International Trade Law*, 17 J. INT'L ECON. L. 717, 717 (2014).

<sup>4</sup> Miller, *supra* note 1, at 217.

<sup>5</sup> *Id.* at 221.

<sup>6</sup> Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization*, 31 BERKELEY J. INT'L L. 89, 89, 109 (2013).

<sup>7</sup> See generally *World Population Prospect: The 2006 Revision, Highlights* (U.N. Dep't of Econ. & Soc. Affairs, Population Division Working Paper No. ESA/WP.2002, 2007), available at [http://www.un.org/esa/population/publications/wpp2006/WPP2006\\_Highlights\\_rev.pdf](http://www.un.org/esa/population/publications/wpp2006/WPP2006_Highlights_rev.pdf), archived at <https://perma.cc/KH78-BNT9?type=pdf> (explaining how in just over the past 50 years, the population on the planet has grown from 2.5 billion to over 6.5 billion and that it is expected to reach 9.2 billion people by 2050); Miller, *supra* note 1, at 218; Diego J. Rodriguez et al., *Investing in Water Infrastructure: Capital, Operation and Maintenance*, WATER PAPERS 11 (Nov. 2012), available at <http://water.worldbank.org/sites/water.worldbank.org/files/publication/water-investing-water-infrastructure-capital-operations-maintenance.pdf>, archived at <http://perma.cc/5YFT-AHV2> (depicting the increased investment in water projects in developing countries starting in 1990).

<sup>8</sup> Miller, *supra* note 1, at 217.

<sup>9</sup> E.g., *Water Projects & Programs*, WORLD BANK, <http://www.worldbank.org/en/topic/water/projects> (last visited Feb. 11, 2015), archived at [perma.cc/8PPK-9BWF](https://perma.cc/8PPK-9BWF) (providing examples of water projects and programs from the World Bank).

<sup>10</sup> E.g., *All Projects*, WORLD BANK, <http://www.worldbank.org/en/topic/water/projects/all> (last visited Feb. 11, 2015), archived at [http://perma.cc/8PPK-9BWF](https://perma.cc/8PPK-9BWF).

Coverage and accessibility, even at the most elementary level, necessitate functional water services and sanitation facilities.<sup>11</sup>

The inability of public authorities to provide coverage to their citizens prompted a rise in water-services privatization contracts between foreign investors and states, such that 10 percent of global consumers now receive their water from private companies.<sup>12</sup> Today, a growing number of businesses are engaging with the water services industry.<sup>13</sup> It is estimated that by 2025, annual spending on water infrastructure in OECD countries will exceed \$1 trillion.<sup>14</sup> New technologies and the need for additional infrastructure investment will certainly increase demand in the market, potentially spawning billion dollar valuations. Such economic promise and opportunity largely explains why water has earned the moniker of Earth's "blue gold."

No international regime or regulatory body responsible for sanitation and water services exists. The growing execution of international investment treaties in the water sector, however, has resulted in the slow emergence of an international economic form of governance for cross-border sanitation and water services. This Article explores the increased role of investment treaties in the context of disputes and investment arbitration and provides the first exhaustive analysis of this burgeoning water regime.

Part I of this Article provides an introduction to the cross-border sanitation and water-services regime. Part II analyzes the typology of water services in international water disputes. Part III outlines a number of multi-million dollar water investment disputes as held by the World Bank International Center for Settlement of Investment Disputes (ICSID). Part IV affords an exhaustive review of the entire case law related to water service disputes and identifies recurring issues and scenarios present in classic "blue gold" disputes. Part V examines the three key investment principles that currently form the backbone of the emerging international economic governance of sanitation and water services. Finally, this Article concludes with outstanding issues and foreshadows potential concerns facing the "blue gold" regime in the years ahead.

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<sup>11</sup> Jose Esteban Castro & Leo Heller, *Introduction to WATER AND SANITATION SERVICES: PUBLIC POLICY AND MANAGEMENT* 1, 1 (Jose Esteban Castro & Leo Heller eds., 2009).

<sup>12</sup> Murthy, *supra* note 6, at 122–23, 125. Ninety percent of the world's 400 largest cities are served by the public sector. *Id.* at 125; *see also* Miller, *supra* note 1, at 219.

<sup>13</sup> *See* Miller, *supra* note 1, at 219.

<sup>14</sup> Rodriguez et al., *supra* note 7, at 7–8. For developing countries alone, \$103 billion per year was estimated to finance water, sanitation, and wastewater treatment. *Id.* at 8.

## I. WATER SERVICES AS A FORM OF FOREIGN INVESTMENT

In Section A, we provide the current international legal framework for foreign direct investment and how its wide variety of national and international rules and principles have inadvertently formed an emerging system of regulatory governance over the international water services sector. In Section B, we provide a definition for the term “investment” as it pertains to international investment treaties. In Section C, we discuss the ever-evolving character of international investment treaties and how the expansion of cross-border investment in the sanitation and water services sector has amounted to a proliferation of “blue gold” disputes. In Section D, we discuss the privatization and concession contract related arbitration. In Section E, we delve further into the clean water distribution system, while Section F further clarifies the wastewater and sewerage services regime.

### *A. A Recalibration of Customary International Law to International Investment Treaties*

Targeted investment host countries develop a tier one level of international investment regulation by promulgating national rules to ensure the realization of benefits of Foreign Direct Investment (FDI) and avoid costs.<sup>15</sup> Due to pressure from competing countries, host states must generally combine economic openness with incentives for investors to attract FDIs.<sup>16</sup> Such incentives are comparable to “free zones,” in which duty-free imports and exports are permitted along with direct subsidies and other financial incentives and foreign investment guarantees such as, promises to stabilize domestic laws, provide tax relief, allow currency conversion, and the repatriation of sale proceeds and profits.<sup>17</sup>

On a secondary yet complementary tier, international investment law provides rules to ensure access for foreign investment to host country markets and to protect investments against risks, particularly political risks.<sup>18</sup> It creates a specific set of investment protection obligations on host countries, including protection against expropriation without compensation.<sup>19</sup> Internation-

<sup>15</sup> See Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 155 (2007).

<sup>16</sup> UNCTAD, *THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES* 110 (2009), [http://unctad.org/en/docs/diaeia20095\\_en.pdf](http://unctad.org/en/docs/diaeia20095_en.pdf), archived at <http://perma.cc/662Y-96PZ>.

<sup>17</sup> See Dorsati Madani, *A Review of the Role and Impact of Export Processing Zones*, WORLD BANK 5 (Aug. 1999), <http://siteresources.worldbank.org/INTRANET/TRADE/Resources/MadaniEPZ.pdf>, archived at <http://perma.cc/GXD3-LETC>.

<sup>18</sup> See Salacuse, *supra* note 15, at 163.

<sup>19</sup> See SANTIAGO MONTT, *STATE LIABILITY IN INVESTMENT TREATY ARBITRATION—GLOBAL CONSTITUTIONAL LAW IN THE BIT GENERATION* 83 (2009).

al investment law also provides access to financial compensation through investor-state arbitration if the host country breaches a protection obligation.<sup>20</sup>

International investment agreements (IIAs) serve as a source of international investment law.<sup>21</sup> IIAs include preferential trade and investment agreements (PTIAs) and bilateral investment treaties (BITs), both of which provide more comprehensive rules on investment.<sup>22</sup> Additionally, IIAs provide for investor-state dispute settlement.<sup>23</sup> IIAs strive to ensure a stable and predictable environment for investment through investor protection and arbitration mechanisms in cases of breach.<sup>24</sup> This “treatification” shows the significant recalibration of international investment law over the last few years.<sup>25</sup>

### *B. The Meaning of Investment: When Are Sanitation and Water Services Subject to Investment Treaties?*

The most fundamental question in determining whether investment treaties are applicable to water services is whether a given sanitation or water service constitutes a “foreign investment” under international law. Indeed, this definition constantly changes as entrepreneurs, financiers and multinational companies develop innovative investment tools. IIAs tend to adopt a broad definition of “investment” that refers to “every kind of asset” of a foreign investor in a host country, suggesting the agreement covers anything of economic value.<sup>26</sup> Recent interpretations by the ICSID have determined that “investment” has an intrinsic meaning of contribution.<sup>27</sup> If it creates or generates “fruits and value,” it deserves protection as an “investment.”<sup>28</sup> In many IIAs, the oft-used asset-based definition typically includes

<sup>20</sup> See *id.* at 125–26.

<sup>21</sup> See Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT’L ECON. L. 507, 510–11 (2009).

<sup>22</sup> *Id.* at 511–14; see UNCTAD, *Intellectual Property Provisions in International Investment Arrangements* (2007), [http://unctad.org/en/docs/webiteia20071\\_en.pdf](http://unctad.org/en/docs/webiteia20071_en.pdf), archived at <http://perma.cc/KZ8M-ZD65>.

<sup>23</sup> See Aaken, *supra* note 21, at 513.

<sup>24</sup> See MONTT, *supra* note 19, at 1; Aaken, *supra* note 21, at 513–14.

<sup>25</sup> See Salacuse, *supra* note 15, at 155.

<sup>26</sup> See, e.g., Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, U.K.-Arg., art. 1, Dec. 11, 1990, 1765 U.N.T.S. 33 [hereinafter *U.K.-Arg. BIT*]; Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, U.K.-Tanz., art. 1, Jan. 7, 1994, U.K.T.S. 90 (1996).

<sup>27</sup> Céline Lévesque, Abaclat and Others v. Argentine Republic: *The Definition of Investment*, 27 ICSID REV. 247, 253 (2012).

<sup>28</sup> *Id.*

an illustrative list of assets covered.<sup>29</sup> The categories of investments covered by most BITs remain substantially identical, namely: (a) movable and immovable property and other property rights; (b) interests in the property of companies; (c) claims to money and claims to a performance; (d) intellectual property rights; and (e) concession rights conferred by law or contract.<sup>30</sup>

Alternatively, some IIAs focus on foreign investment as an “enterprise” rather than as a variety of assets.<sup>31</sup> Those following the enterprise-based definition pay particular attention to the investor’s objectives for establishing a long-term relationship with the economy of the host country—for example, the acquisition of a lasting interest in the ownership or management of an enterprise.<sup>32</sup>

Water sanitation is the process of cleaning water to make it safe for drinking, bathing, cooking, and other uses. Common methods of treating water include flocculation, filtration, absorption, ion-exchange, and disinfection.<sup>33</sup> Any and all of these methods require an individual in the host state to own and operate facilities (physical assets) with adequate technical expertise and proper technology to sufficiently purify the water. Therefore, “investment,” for purposes of water sanitation and water services in international law, typically encompasses both the facilities invested in by foreigners (tangible assets) as well as the research and development used to create new technologies (intangible assets).

<sup>29</sup> See, e.g., *U.K.-Arg. BIT*, *supra* note 26.

<sup>30</sup> See, e.g., *U.K.-Arg. BIT*, *supra* note 26.

<sup>31</sup> See Julien Chaisse & Puneeth Nagaraj, *Changing Lanes: Intellectual Property Rights, Trade and Investment*, 37 HASTINGS INT’L & COMP. L. REV. 223, 251 (2014).

<sup>32</sup> See Omar E. García-Bolívar, *G3 Agreement: A Comparison of Its Investment Chapter with the Emerging International Law of Foreign Investment*, 10 L. & BUS. REV. AM. 779, 785 (2004). For instance, the G3, the free trade agreement between Colombia, Mexico and Venezuela, takes an enterprise-based approach to define investment. *Id.*

The G3’s use of an enterprise-based definition is a positive one. By defining investment in terms of enterprise, the G3 grants protection to non-incorporated forms of FI as well as incorporated forms. The term “enterprise” is more general than the term “corporation,” but the former comprises the latter. The drafters of the G3 differentiated between constituting an enterprise and organizing an enterprise. The agreement states that an enterprise will be any entity constituted, organized or protected under domestic laws. Such a provision opens the door for protection of non-incorporated forms of business organizations.

*Id.*

<sup>33</sup> See OFFICE OF WATER, EPA, DRINKING WATER TREATMENT 2 (2004), available at [http://water.epa.gov/lawsregs/guidance/sdwa/upload/2009\\_08\\_28\\_sdwa\\_fs\\_30ann\\_treatment\\_web.pdf](http://water.epa.gov/lawsregs/guidance/sdwa/upload/2009_08_28_sdwa_fs_30ann_treatment_web.pdf), archived at <http://perma.cc/FVE4-ZKYM>.

### C. The Proliferation of “Blue Gold” Disputes

Investors have increasingly exercised their arbitration rights under the IIAs in recent years. To date, twenty-one claims dealing with foreign investments in the water industry have been filed internationally. The proliferation of sanitation and water-related disputes before international investment tribunals serves as an important phenomenon.

The key feature of investment protection under BITs is that it allows foreign investors to challenge host governments’ actions before an international arbitral tribunal.<sup>34</sup> This is imperative because domestic judicial systems may be biased against foreign interests. Moreover, national courts may be more likely to fall under pressures from other branches of government. The ability of foreign investors to bring their disputes to independent arbitrators provides assurances to the investors that domestic authorities will live up to their international obligations, thus ensuring a favorable and stable investment climate in the host country.<sup>35</sup>

This proliferation of water-services disputes must be further analysed by considering the type of services currently provided by foreign investors and the details of the claims and breaches of treaties, which often result in heavy compensation for the winning party.

### D. Privatization and Concession Contract Related Arbitration

Privatization refers to a variety of partnerships between host states and private, foreign or local, investors or companies with different degrees of ownership in management and operating services.<sup>36</sup> These partnerships have given the entire water sector management a brand new framework of policies.

Privatization is attractive as a means of improving, developing, and expanding the water service infrastructure by increasing its efficiency, distribution and technical expertise.<sup>37</sup> From 1990 to 1997, more than ninety projects in thirty-five different countries concerning water services had been undertaken by the private sector.<sup>38</sup>

Privatization of public services can be formalized in various agreement configurations. A common and recurring practice can be clearly identified upon examination of the twenty-one water services disputes discussed later

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<sup>34</sup> See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L. J. 67, 88 (2005).

<sup>35</sup> See *id.*

<sup>36</sup> See Miller, *supra* note 1, at 228.

<sup>37</sup> See *id.*; George Mergos, *Private Participation in the Water Sector: Recent Trends and Issues*, EUROPEAN WATER, Jan.-June 2005, at 59, 63.

<sup>38</sup> Mergos, *supra* note 37, at 65.

in this Article. Indeed, in nearly every case, the same form of privatization and foreign investment was disputed: the concession agreement.

The most important foreign investments of the past twenty years were formalized with this special kind of privatization contract called a concession.<sup>39</sup> In ninety-seven contracts with foreign investors, forty-eight of them were concessions, which accounts for almost 80 percent of total private investment in developing countries.<sup>40</sup> Concession contracts are popular with governments for several reasons. The different types of concession contracts allow governments to allocate risks and responsibility according to their needs.<sup>41</sup> For instance, in a concession contract, all associated risks, financial and commercial, are transferred to the investor.<sup>42</sup> Traditionally, a full concession agreement transfers the full operational and management responsibility of the entire water supply and sewerage system to the private contractor.<sup>43</sup> In other cases, a partial concession agreement option can stand, which defines the conditions and obligations transferred to the private contractor.<sup>44</sup> In these kinds of concessions, usually the assets remain controlled by the government through monitoring and regulations and the water services are still public property.<sup>45</sup> The private company, however, has the complete responsibility for operation systems, maintenance and new investments, without actually owning the assets.<sup>46</sup> At the end of the contract, the assets are returned in good condition to the public authorities who had always retained title to the infrastructure.<sup>47</sup> All of these subtleties are actively negotiated between the two parties and differ on a case-by-case basis.

In any event, under a concession contract, the private company is generally responsible for everything including: the setting of customer and tariff rates, labor, expanding infrastructure, and new technologies.<sup>48</sup> These contracts are commonly made with a long duration, often over twenty-five years, to allow for more continuity and sustainability.<sup>49</sup> The specific conditions of the contract depend on the long-term and short-term goals of each party, such as the capacity of the government, how much private investors want to invest, and how much infrastructure construction is required.<sup>50</sup>

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<sup>39</sup> See Mergos, *supra* note 37, at 67.

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> See Miller, *supra* note 1, at 217, 230.

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> Judith A. Rees, *Regulation and Private Participation in the Water and Sanitation Sector*, 22 NAT. RES. F. 95, 99 (1998).

<sup>50</sup> *See id.* at 99–100; Miller, *supra* note 1, at 230.



Furthermore, the contract can be well negotiated and regulated legally, constitutionally, and politically even before its application. If negotiated effectively, such contracts can ensure that water prices do not reach outrageous levels. Authorities can also reduce public outcry by arguing that they are actually not selling public assets nor placing them in the hands of foreign investors. It also reduces the regulatory burden on the government by using the concession contract itself as the regulatory mechanism.

Although every concession contracts is unique, there is a classic pattern in the formation of such contracts.<sup>51</sup> The process begins with the launch of a public bid tender in order to find the best company to manage the water system.<sup>52</sup> Bidders compete to provide the best services at the lowest price, including the largest discounts to the public tariff among other considerations.<sup>53</sup> Generally, bids are awarded to companies with strong financial and technological capabilities.<sup>54</sup> The winner of the bid tender, called the concessionaire, will then be responsible for operating and maintaining the fixed assets, expanding coverage, and guaranteeing the water quality and developing the sewage system. Afterwards, negotiations begin, where the government describes what it expects from the investment such as goals, expansion plans, new technologies, coverage, overall efficiency, price and duration. The concessionaire identifies its investment priorities and responds to the government's requests by detailing the investor's methodology, costs, and expected duration. The government is usually responsible for paying a compensable monthly fee, set by a mathematical formula, to the concessionaire. The government is also responsible for setting the procedure of the collection of the bills from the customers. In addition, the government must assume the role of the regulator in the concession agreement.<sup>55</sup> In order to ensure that the customer is protected during the privatization process, different regulatory tasks must be observed by the state.<sup>56</sup> The regulatory tasks include, but are not limited to, control over unfair trading practice, safety net regulations, promoting water use efficiency, ensuring responsiveness to final customer needs.<sup>57</sup> In return, the concessionaire is responsible for providing services and guarantees of performance while

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<sup>51</sup> Kevin Sansom & Richard Franceys, CONTRACTING OUT WATER AND SANITATION SERVICES: CASE STUDIES AND ANALYSIS OF SERVICE AND MANAGEMENT CONTRACTS IN DEVELOPING COUNTRIES 5–6 (Sansom et al. eds. 2003).

<sup>52</sup> See Claude Crampes & Antonio Estache, *Regulating Water Concession: Lessons from the Buenos Aires Concession*, WORLD BANK GROUP, Sept. 1996, at 2.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 2–3.

<sup>56</sup> See Rees, *supra* note 49, at 100.

<sup>57</sup> See *id.*

meeting the standards set out in the concession contract.<sup>58</sup> Generally, water and tariff prices are the first and most important points fixed in the agreement as these costs often involve several million of dollars.

The parties agree to not only a fixed general price at the outset of the concession, but also its maximum percentage augmentation for subsequent years. This enables the parties to identify their interests early on in the process. The investor knows that it will be possible to make some profits and returns on investment in the following years, and the government is certain that only a maximum augmentation will be possible, maintaining an efficient access to water to its citizens. In this way, the concession is the key to expanding access to water and services rehabilitation, while minimizing the impact on tariffs. As it is impossible to predict the economic, environmental, social or even technological changes for such a long period of time, the tariff formula must be reviewed and renegotiated from time to time.<sup>59</sup> Annual adjustments can be made, for example, to accommodate for an increase or decrease of water consumption or wastewater treated, but every change must maintain the profit percentage initially fixed in favor of the investor.<sup>60</sup> This delicate point is often a key factor in the water investment arbitration cases.<sup>61</sup>

### *E. Clean Water Distribution Systems*

Pure water, directly from rivers or oceans is rarely clean enough for direct human consumption. Therefore, water purification systems must be used to remove all possible bacteria and contaminants before it reaches consumers. This process commonly involves physical and chemical methods such as clarification and disinfection.<sup>62</sup>

Water quality refers to the biological, radiological, chemical and physical characteristics of the water.<sup>63</sup> In order to reach sufficient quality, every water supply system must follow and reach certain national standards depending on the intended use of the water whether it be for industrial, agricultural, cleaning, or drinking use.<sup>64</sup> Certain considerations such as turbidity, color, taste, hardness, odor, and corrosiveness are considered when ana-

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<sup>58</sup> See Jennifer Baumert & Laura Bloodgood, *Private Sector Participation in the Water and Wastewater Services Industry* 22–23 (U.S. Int'l Trade Comm'n Working Paper ID-08, 2004), available at <http://ageconsearch.umn.edu/bitstream/15876/1/id040008.pdf>, archived at <https://perma.cc/XJ5U-FCC6?type=pdf>.

<sup>59</sup> Rees, *supra* note 49, at 100.

<sup>60</sup> See Crampes & Estache, *supra* note 52, at 3.

<sup>61</sup> See *id.*

<sup>62</sup> See WORLD HEALTH ORG., GUIDELINES FOR DRINKING-WATER QUALITY 4–7 (4th ed. 2011).

<sup>63</sup> See *id.*

<sup>64</sup> *Id.* at 2.

lyzing water quality in order to avoid serious human health concerns resulting from procedural oversight.<sup>65</sup>

Access to water requires both a readily available water supply and a well-constructed distribution system.<sup>66</sup> Water distribution systems consist of a series of interconnected storage tanks, valves, pumps, hydrants and pipes that transport and provide water to consumers, both individuals and industries.<sup>67</sup> In other words, a water distribution system is the mechanism that carries water from the source to the consumer and is ultimately responsible for providing an uninterrupted supply of well-pressurized and safe drinking water.<sup>68</sup>

High quality distribution systems are critical components in delivering safe drinking water in developing countries where too many people still receive poor water distribution services.<sup>69</sup> Water supply quality has three chief dimensions. First, it is necessary to have a certain continuity of supply and afford a sufficient quantity of water.<sup>70</sup> Second, the water must be provided with adequate pressure, sufficient for operating plumbing fixtures and firefighting equipment but at the same time not so high as to cause leaks or pipeline breaks that could result in waste of water.<sup>71</sup> It also allows the customer to have a sufficient amount of drinkable water available on a normal flow.<sup>72</sup> Third, and most important, high quality service must provide high quality, safe drinking water where needed.<sup>73</sup>

#### F. Wastewater and Sewerage Services

Yet another category of water related cases concerns wastewater and sewerage services. Sewerage services are the second phase in managing water resources. Once the water is used, either for domestic or industrial purposes, it is necessary to collect the wastewater and remove its impurities before it reaches its final destination for settlement or reuse.<sup>74</sup> Sewerage services consist of a network of pipes and pumps for the collection of wastewater.<sup>75</sup>

<sup>65</sup> See *id.* at 6, 7, 28, 174, 225.

<sup>66</sup> See HARRY E. HICKEY, WATER SUPPLY SYSTEMS AND EVALUATION METHODS 2 (U.S. Fire Admin., Oct. 2008).

<sup>67</sup> See *id.* at 1–4.

<sup>68</sup> See *id.* at 5.

<sup>69</sup> See WORLD HEALTH ORG., THE RIGHT TO WATER 6, 15 (2003).

<sup>70</sup> See HICKEY, *supra* note 66, at 1–4.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *Sewage Treatment*, FOUNDATION FOR WATER RESEARCH, [http://www.euwfd.com/html/sewage\\_treatment.html](http://www.euwfd.com/html/sewage_treatment.html) (last visited Feb. 14, 2015), archived at <http://perma.cc/8Z6A-KCGK>.

<sup>75</sup> *Wastewater Disposal and Transport Options—Sewerage*, WORLD BANK GROUP, <http://water.worldbank.org/shw-resource-guide/infrastructure/menu-technical-options/sewerage> (last visited Feb. 14, 2015), archived at <http://perma.cc/5HM6-W399>.

Sewerage is a complex and technical procedure. An understanding of three fundamental characteristics of sewerage services is essential to mastering wastewater service goals.

The first fundamental characteristic is the collection and disposal of wastewater. It consists of a system of pipes, which transports the wastewater for treatment and ultimately for disposal.<sup>76</sup> There are many types of wastewater collection systems. Maintenance of these systems is an integral component of the proper management of sewerage services and is critical for preventing illegal wastewater releases.<sup>77</sup> Moreover, disposal of the treated wastewater is a delicate procedure and difficult to achieve. The final destination of treated sewage water is largely earth's soil, oceans, and rivers.<sup>78</sup> Thus, many environmental and technical precautions must be made when discharging the treated water out of sewage systems including anaerobic digestion (bacterial process), composting, or sometimes, incineration.<sup>79</sup>

The second characteristic is disease potential. The sewage process is critical because it stops water-borne diseases such as cholera and typhoid. However, during the collection method, small amounts of chemicals or organic compounds from cleaning and disinfection operations are often discharged into sewers and into the air.<sup>80</sup> Sewage may also contain assorted chemicals and specialized disposables such as medical waste, microbiological pathogens, nitrates and oils. Therefore, without proper treatment, there is a significant risk of water-borne diseases such as infections, intestinal and lung problems, and fever that pose a danger to the public.<sup>81</sup>

The third characteristic of wastewater services is sewage treatment. In order to protect public health, sewage water must be purified to remove organics, destroy bacteria, and neutralize toxic and chemicals waste.<sup>82</sup> There are varying methods and processes to treat the wastewater, depending on the degree of contamination, local conditions, governmental regulations, and general industry standards.<sup>83</sup>

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<sup>76</sup> See *Sewage Treatment*, *supra* note 74.

<sup>77</sup> *Wastewater Collection System Toolbox*, EPA, <http://www.epa.gov/region1/sso/toolbox.html> (last visited Feb. 14, 2015), archived at <http://perma.cc/2Y5Q-UNHW>.

<sup>78</sup> See *Final Disposal of Wastewater*, WORLD BANK GROUP, <http://water.worldbank.org/shw-resource-guide/infrastructure/menu-technical-options/final-disposal> (last visited Feb. 14, 2015), archived at <http://perma.cc/P36S-4MBH>.

<sup>79</sup> See *Sewage Treatment*, *supra* note 74.

<sup>80</sup> WORLD HEALTH ORG., COLLECTION AND DISPOSAL OF WASTEWATER, [http://www.who.int/water\\_sanitation\\_health/medicalwaste/130to134.pdf](http://www.who.int/water_sanitation_health/medicalwaste/130to134.pdf) 130 (last visited Feb. 14, 2015), archived at <http://perma.cc/DQ2B-H8XN>.

<sup>81</sup> *Id.*

<sup>82</sup> See *Introduction to Wastewater Treatment Processes*, WORLD BANK GROUP, <http://water.worldbank.org/shw-resource-guide/infrastructure/menu-technical-options/wastewater-treatment> (last visited Feb. 14, 2015), archived at <http://perma.cc/84FU-KFZE>.

<sup>83</sup> See *Sewage Treatment*, *supra* note 74.

Although the wastewater treatment process is very technical, it can be summarized as follows. The primary treatment consists of physical operations to remove floating solids and sedimentation by gravity.<sup>84</sup> This removes approximately 60 percent of impurities.<sup>85</sup> The wastewater is passed through a screen to trap solid objects and sedimentation.<sup>86</sup> The rest of the liquid is then subject to the secondary treatment, which consists of a biological process that removes organic matter and approximately 85 percent of impurities.<sup>87</sup> After the biological methods, tertiary treatments are conducted to eliminate every other constituent left after the first and second treatment stages, removing approximately 99 percent of impurities.<sup>88</sup> The aim of the tertiary treatment is to significantly improve the quality of wastewater before discharging it into the environment and is often the most expensive stage for water companies.<sup>89</sup> Finally, the wastewater undergoes disinfection before it is discharged.<sup>90</sup> Chlorine is typically used to remove and destroy any remaining pathogens.<sup>91</sup> At this point, wastewater is ready for public use.

## II. TYPOLOGY OF WATER SERVICES IN INTERNATIONAL INVESTMENT DISPUTES

Countries have begun to increasingly rely on private sector participation in the water supply sector and the provision of sanitation services. This is due to budget pressures, a drive for greater efficiency in service delivery, and because of the promotion by agency donors for greater private sector participation. A range of options for private sector participation in water supply and sanitation exists, ranging from service contracts for functions such as billing and collection to concessions for complete operations to maintenance and network expansion.<sup>92</sup>

Investing in water services can be a very delicate, laborious and unsteady task. While the definition of investment involves some risks, water services appear to be a singular type of investment. Indeed, it simultaneously involves technological means and knowledge, financial funding, and a panoply of laws including investment law, international law, human rights

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<sup>84</sup> See *Introduction to Wastewater Treatment Processes*, *supra* note 82.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> Miller, *supra* note 1, at 227 n.121.

standards, contractual rights and obligations, national laws, and more.<sup>93</sup> This may be one of the reasons why water investment disputes have surged in recent years.<sup>94</sup>

Between 2006 and 2014, at least twenty-one water services related cases were brought to international arbitration. This number, however, may only be the tip of the iceberg because many arbitration cases have yet to be released to the public or continue to remain in private negotiation. Before further discussion, it is imperative that we review the typology of the “blue gold” investments and briefly define the types of water services detailed in the twenty-one arbitration disputes to date. A brief look at the diversity of services mentioned will provide a more holistic perspective and a better understanding of the current state of water services as well as the delicate stakes present in these water disputes.

### *A. Water Utilities Construction Projects*

A survey of major international water cases has uncovered four general categories of water-services disputes. The first category consists of water utilities constructions projects. This type of service has resulted in four major disputes.

In *ATA Construction, Indus. and Trading Co. v. Jordan* (2010), a Turkish company, ATA, was hired by a local, Jordanian state owned company, APC, which operated the water services for the construction of a dike at a site in the Dead Sea.<sup>95</sup> The construction contract was signed on May 2, 1998 and was governed by the laws of Jordan per the Turkey-Jordan BIT of 1993.<sup>96</sup> During the filling process by the local company, a section of the dike collapsed.<sup>97</sup> Originally, the dispute began in front of local courts but ultimately ended up in front of the ICSID arbitral tribunal, where investors alleged several denials of justice by the Jordanian courts in breach of their BIT.<sup>98</sup>

In *LESI S.p.A. v. Algeria* (2008), an Italian company was hired by Algeria for the construction of a dam.<sup>99</sup> The dam was meant to supply drinka-

<sup>93</sup> See generally Rebecca Bates, *The Trade in Water Services: How Does GATS Apply to the Water and Sanitation Service Sector*, 31 SYDNEY L. REV. 121 (2009) (exploring the stakes and impact of general investment agreement on water and sanitation services sector).

<sup>94</sup> See Jorge E. Vinuales, *Access to Water in Foreign Investment Disputes*, 21 GEO. INT'L ENVTL. L. REV. 733, 733 (2009).

<sup>95</sup> *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, ¶¶ 30–31 (May 18, 2010).

<sup>96</sup> *Id.* ¶¶ 31, 37.

<sup>97</sup> *Id.* ¶ 32.

<sup>98</sup> *Id.* ¶¶ 35–37.

<sup>99</sup> *LESI S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, ¶¶ 3–4, 7 (Nov. 12, 2008).

ble water to the city of Algiers.<sup>100</sup> On December 20, 1993, LESI was awarded the bid for approximately a five-month deadline and a fixed global market price in local currency.<sup>101</sup> The Algeria-Italy BIT was signed in 1991.<sup>102</sup> Algeria eventually terminated the construction contract after difficulties in executing the project in light of the unstable security situation.<sup>103</sup> The investor subsequently alleged a breach of the BIT as a result of Algeria's actions.<sup>104</sup>

In *Salini Costruttori, S.p.A. v. Jordan* (2006), an Italian company was awarded a contract in 1993 for the construction of a dam in Jordan, entitled the "Karameh Dam Project."<sup>105</sup> The 1996 Italy-Jordan BIT governed the contract.<sup>106</sup> The dispute arose due to disagreement on the payment amount to the contractor.<sup>107</sup> Investors brought the suit before an arbitral tribunal for an alleged breach of the BIT by the state.<sup>108</sup>

In another, lesser known, Jordanian case, *JacobsGibb, Ltd. v. Jordan* (2004), an English company was hired to construct a waterway in Jordan. The project was governed by the 1979 Jordan-United Kingdom BIT.<sup>109</sup> Unfortunately, further information regarding this case has not been released to the public.

### B. Clean Water Distribution and Sewage Services Facilities

The second category of water services often involved in arbitration involves clean water distribution and sewage services facilities.<sup>110</sup> These disputes have been far more significant. This category includes a wide vari-

<sup>100</sup> *Id.* ¶¶ 3–4.

<sup>101</sup> *Id.* ¶ 7.

<sup>102</sup> *Id.* ¶ 89.

<sup>103</sup> *Id.* ¶¶ 11–13, 19, 22, 23, 35, 56.

<sup>104</sup> *Id.* ¶¶ 119, 140, 165.

<sup>105</sup> *Salini Costruttori S.p.A and Italstrade S.p.A v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, ¶ 52 (Jan. 31, 2006).

<sup>106</sup> *Id.* ¶ 14.

<sup>107</sup> *Id.* ¶ 53.

<sup>108</sup> *Id.* ¶ 69.

<sup>109</sup> See *Case Details: JacobsGibb Ltd. v. Hashemite Kingdom of Jordan*, (ICSID Case No. ARB/02/12), ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?caseno=ARB/02/12> (last visited Feb. 22, 2015), archived at <https://perma.cc/XEE5-ZXZF?type=source>.

<sup>110</sup> See, e.g., *AWG Group Ltd. v. Argentine Republic*, UNCITRAL Case No. ARB/03/19, Decision on Liability, (July 30, 2010), joint with *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, (July 30, 2010, award on damages pending); *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, (Aug. 20, 2007); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, (July 14, 2006).

ety of services and amounts to 85 percent of water disputes. This type of service has resulted in six international disputes.<sup>111</sup>

In *Azurix Corp. v. Argentina* (2006), an American corporation won the tender for a thirty-year concession to provide drinkable water (distribution, supply, utilities and treatment) in conjunction with wastewater utilities (collection and disposal).<sup>112</sup> The contract was signed in 1999 and included varied water infrastructure repairs in a Buenos Aires province.<sup>113</sup> The tariff regime and diverse infrastructure repairs were also initially fixed in the agreement.<sup>114</sup> At that time, the foreign investor, Azurix, paid 438.5 million pesos (local currency) for the concession.<sup>115</sup> The Argentina-United States BIT was signed in 1991.<sup>116</sup> Also noteworthy is that this case took place when Argentina was suffering from a serious and devastating economic crisis.<sup>117</sup>

In *Compania de Aguas del Aconquija S.A. v. Argentina* (2007), a French-based company and a local company entered into a thirty-year concession agreement in 1995 to operate the clean water supply and sewage services in the province of Tucuman.<sup>118</sup> The concession consisted of providing drinkable water and improving overall quality of service by refurbishing the chlorination system, purchasing new equipment, and improving the clean water treatment bulk.<sup>119</sup> The Argentina-France BIT was signed in 1991.<sup>120</sup> As in *Azurix*, the concession was part of the broader privatization campaign of the state owned water services during Argentina's economic and financial crisis.<sup>121</sup>

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<sup>111</sup> See, e.g., *AWG Group*, UNCITRAL Case No. ARB/03/19, Decision on Liability; *Suez Sociedad General de Aguas de Barcelona S.A and Interagua Servicios Integrales de Agua S.A v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, (July 30, 2010) (award on damages pending); *Vivendi*, ICSID Case No. ARB/97/3, Decision on Liability; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (Oct. 21, 2006) (settlement agreed by the parties and proceedings discontinued on the March 28, 2006); *Azurix*, ICSID Case No. ARB/01/12, Award; *Gelsenwasser Complain After Algeria Contract Ended*, GLOBAL WATER INTELLIGENCE (May 19, 2011), <http://www.globalwaterintel.com/news/2011/20/gelsenwasser-complain-after-algeria-contract-ended.html>, archived at <https://perma.cc/84KD-ZCJ4?type=image>.

<sup>112</sup> *Azurix*, ICSID Case No. ARB/01/12, ¶¶ 1, 41.

<sup>113</sup> *Id.* ¶¶ 41, 120–121.

<sup>114</sup> *Id.* ¶¶ 77–160.

<sup>115</sup> *Id.* ¶¶ 41.

<sup>116</sup> *Id.* ¶¶ 3.

<sup>117</sup> *Id.* ¶ 57.

<sup>118</sup> *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶¶ 1.1.1, 4.5.5 (Aug. 20, 2007).

<sup>119</sup> *Id.* ¶¶ 4.5.5, 4.9.2–4.9.3.

<sup>120</sup> *Id.* ¶¶ 1.1.2.

<sup>121</sup> *Id.* ¶¶ 4.2.1, 6.9.13; *Azurix*, ICSID Case No. ARB/01/12, ¶¶ 38, 57.



One more prominent dispute regarding clean water supply services involved the *AWG Group v. Argentina* case joint with *Suez Sociedad General de Aguas de Barcelona and Vivendi Universal v. Argentine Republic* (2010).<sup>122</sup> In 1992, Argentina granted a thirty-year concession with French, Spanish and English investors to operate the water distribution and wastewater services for the city of Buenos Aires and the surrounding municipalities.<sup>123</sup> Suez, Vivendi and AWG formed a consortium and won the public bid.<sup>124</sup> The consortium was viewed as the most economically efficient solution for providing high quality water services to the city and surrounding areas.<sup>125</sup> Soon after, Aguas Argentina, a local company, formed to handle and operate the concession made between the state and the investors.<sup>126</sup> At the same time, they were designated as the general operator and signed a management contract aside from the concession contract.<sup>127</sup> The services to be provided through the concession included a continuous supply of drinkable and quality water and major investments to improve the overall system.<sup>128</sup> The initial capitalization of the concession amounted to \$120 million.<sup>129</sup> The different BITs between France, Spain and United Kingdom and Argentina were signed between 1990 and 1992.<sup>130</sup> This dispute also took place during the financial crisis in Argentina.<sup>131</sup>

In *Suez Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic* (2010), Argentina granted a thirty-year concession to operate a specified water supply, distribution service and wastewater service to the province of Santa Fe to a local company (Aguas Provinciales de Santa Fe S.A.) managed and created by a foreign and French based investor (Suez).<sup>132</sup> The concession aimed to improve and expand the water distribution system and sewage services among other goals.<sup>133</sup> As with nearly every other water dis-

<sup>122</sup> See generally *AWG Group Ltd. v. Argentine Republic*, UNCITRAL Case No. ARB/03/19, Decision on Liability, (July 30, 2010), joint with *Suez Sociedad General de Aguas de Barcelona S.A and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, (July 30, 2010) (arising from one of the world's largest water distribution and waste water treatment privatizations in Buenos Aires).

<sup>123</sup> *Id.* ¶¶ 32–34.

<sup>124</sup> *Id.* ¶¶ 32–33.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* ¶ 33.

<sup>127</sup> *Id.* ¶ 34.

<sup>128</sup> *Id.* ¶¶ 34–35.

<sup>129</sup> *Id.* ¶ 35.

<sup>130</sup> *Id.* ¶ 29.

<sup>131</sup> *Id.* ¶¶ 41–43.

<sup>132</sup> *Suez Sociedad General de Aguas de Barcelona S.A and Interagua Servicios Integrales de Agua S.A v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 1 (July 30, 2010) (award on damages pending).

<sup>133</sup> *Id.* ¶ 37.

pute from Argentina, the concession contract took place in a national privatization movement and during a serious and disastrous financial crisis.<sup>134</sup>

Similar services were involved in *Aguas del Tunari S.A. v. Bolivia* (2006), where Bolivia awarded a forty-year concession to a local company managed by a Dutch company for the exclusive provision of potable water and sewages services in the city of Cochabama.<sup>135</sup> The main goals of the concession agreement were to provide a regular volume and certain quality of drinkable water in exchange of return on the consequent investment.<sup>136</sup> The Bolivia-Netherlands BIT was signed in 1992.<sup>137</sup>

In *Gelsenwasser AG v. Algeria* (2012), the foreign, German based, investor was awarded a five and a half-year concession management contract, to improve the water and sewage services in the city of Anaba.<sup>138</sup> Algeria terminated the contract three years early.<sup>139</sup>

Finally, in a more recent case, Dutch investors bought controlling rights in a utilities company that provides water services for the city of Tallin in Estonia and its surrounding areas.<sup>140</sup> The investors subsequently gave a notice of arbitration against the state in May 2014.<sup>141</sup> This case evidences the still increasing and immediate issues regarding water services and foreign investment at the present time.<sup>142</sup> In this case, the water services, including safe water distribution and sewage services, aimed to achieve the quality service standards required by national and European regulations within a fifteen-year license period.<sup>143</sup> The Estonia-Netherlands BIT was signed in 1992.<sup>144</sup>

<sup>134</sup> *Id.* ¶¶ 40–42; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 57 (July 14, 2006).

<sup>135</sup> *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID, Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶¶ 2, 52, 57, 81 (Oct. 21, 2005) (settlement agreed by the parties and proceedings discontinued on March 28, 2006).

<sup>136</sup> *Id.* ¶ 57.

<sup>137</sup> *Id.* ¶ 49.

<sup>138</sup> *Gelsenwasser Complains After Algeria Contract Ended*, *supra* note 111.

<sup>139</sup> *See id.*

<sup>140</sup> *AS Tallinna Vesi Gave Notice to the Republic of Estonia of a Potential Legal Claim for Breach of International Treaty*, AS TALLINNA VESI, <http://www.tallinnavesi.ee/en/Investor/663-AS-Tallinna-Vesi-teavitas-Eesti-Vabariiki-rahvusvahelise-lepingu-rikkumisest-tulenevast-voimalikust-noudest> (last visited Feb. 18, 2015), archived at <https://perma.cc/8SPJ-EAP3?type=image> [hereinafter *AS Tallinna Vesi*].

<sup>141</sup> *Id.*

<sup>142</sup> *See generally* Vinuales, *supra* note 94 (observing increasing water disputes from 2009).

<sup>143</sup> *See AS Tallinna Vesi*, *supra* note 140.

<sup>144</sup> *See* Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Estonia, Neth.-Est., Oct. 27, 1992, 1774 U.N.T.S. 383.

### C. Wastewater and Sewerage Services

The third category of water services often involved a number of leading foreign investment water related cases involving delicate and highly technical wastewater and sewerage services.<sup>145</sup>

In *Impregilo v. Argentine Republic* (2011), a consortium of international companies was awarded a thirty-year concession to manage and operate the wastewater sewerage services—collection, treatment, disposal, potential reuse of sewage, maintenance and more—in a province of Buenos Aires that covered seven municipalities.<sup>146</sup> The contract included overall system improvements, such as maintenance, an expansion project design, and construction and rehabilitation.<sup>147</sup> The foreign investor made an initial payment of \$1.26 million along with the foundation of a local company to operate the services.<sup>148</sup> A five-year plan was presented explaining and adjusting the updates and improvements needed to fulfill the agreement's aims.<sup>149</sup> In addition, the investor took part in a national “service expansion and optimization program” (POES).<sup>150</sup> The Argentina-Italy BIT was signed in 1990.<sup>151</sup> As with every Argentinian dispute, it took place during troubled times and national financial crisis.<sup>152</sup>

In another wastewater services investment case, *SAUR International v. Argentine Republic* (2014), a French based foreign investor was awarded a concession to provide water and sewerage services.<sup>153</sup> SAUR constituted a local company to operate the concession and conjointly concluded a tech-

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<sup>145</sup> See, e.g., *SAUR Int'l v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, (May 22, 2014); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, (Dec. 19, 2012); *Impregilo S.p.A. v. Argentine Republic*, ICSID, Case No. ARB/07/17, Award, (June 21, 2011); *Bi-water Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, (July 24, 2008); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, (July 14, 2006); *Case Details: Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic (ICSID Case No. ARB/03/18)*, ICSID <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/03/18&tab=PRO> (last visited Feb. 20, 2015), archived at <https://perma.cc/3577-KP2S>, [hereinafter *Case Details: Aguas Cordobesas*] (settlement agreed by the parties and proceedings discontinued on Jan. 24, 2007).

<sup>146</sup> *Impregilo*, ICSID Case No. ARB/07/17, ¶¶ 14–15.

<sup>147</sup> *Id.* ¶ 15.

<sup>148</sup> *Id.* ¶¶ 14, 15.

<sup>149</sup> *Id.* ¶ 15.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* ¶ 12.

<sup>152</sup> *Id.* ¶ 23; *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 6.9.13 (Aug. 20, 2007); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 57 (July 14, 2006).

<sup>153</sup> *SAUR Int'l v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, ¶¶ 55–57 (May 22, 2014).

nical assistance contract.<sup>154</sup> The previous local company operating the water services signed another concession contract with the new local company and a management contract with the investor.<sup>155</sup> SAUR invested more than \$72.4 million to hold participating shares in the company.<sup>156</sup> These contractual processes once again took place during the Argentinian crisis.<sup>157</sup>

In *Urbaser S.A. v. Argentine Republic* (2012), once again, the operation of sewage services covering seven districts in the province of Buenos Aires were involved in a concession granted to a Spanish based investor.<sup>158</sup> The investor acquired an interest of 47.4 percent of the local and operating company.<sup>159</sup> The Argentina-Spain BIT was signed in 1991.<sup>160</sup>

In a similar case, *Aguas Cordobesas S.A. v. Argentine Republic* (2007), the wastewater services were involved in a thirty-year concession contract following a public tender to provide potable water and sewages services in Argentina.<sup>161</sup> The Argentina-Spain and the Argentina-France BIT were both signed in 1991.<sup>162</sup> Unfortunately, however, the case remains unreleased to the public.

In another leading case, *Biwater Gauff Ltd. v. Tanzania* (2008), there was a dispute involving a ten-year concession contract with German and English based investors to manage, operate, and improve the water and sewerage services in Dar El Saalam, Tanzania.<sup>163</sup> The concession was part of a national investment program supported by the World Bank, the African Development Bank and the European Investment Bank.<sup>164</sup> Under the terms of the bid, the investors signed three different contracts with a local company to incorporate it with the City-Water project.<sup>165</sup> The United Kingdom-Tanzania BIT was signed in 1994.<sup>166</sup>

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* ¶ 56.

<sup>156</sup> *Id.* ¶ 55.

<sup>157</sup> *Id.* ¶ 60.

<sup>158</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, ¶¶ 28, 31 (Dec. 19, 2012).

<sup>159</sup> *Id.* ¶ 31.

<sup>160</sup> *Id.* ¶ 69.

<sup>161</sup> See *Case Details: Aguas Cordobesas*, *supra* note 145.

<sup>162</sup> *International Investment Agreements Navigator—Argentina*, INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/8> (last visited Feb. 19, 2015), archived at <http://perma.cc/JYE9-QE54>.

<sup>163</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶¶ 3–6, 9 (July 24, 2008).

<sup>164</sup> *Id.* ¶ 3.

<sup>165</sup> *Id.* ¶ 6.

<sup>166</sup> *Id.* ¶ 17.

Finally, in *Azurix Corp v. Argentine Republic* (2012), a foreign company was awarded a water and sewerage services concession agreement in Argentina.<sup>167</sup> The Argentina-United Kingdom BIT was signed in 1990.<sup>168</sup>

#### D. Diverse Water Related Services

The few other cases known to date fall within a fourth category of diverse water related services.<sup>169</sup>

*Bayview Irrigation District et al. v. United Mexican States* (2007), involved questions about alleged water rights to seize water from part of the Rio Grande, as well as distribution and irrigation services.<sup>170</sup> The NAFTA agreement was signed in 1994.<sup>171</sup>

In another case, *Nepolsky v. Czech Republic* (2010), the dispute concerned a water extraction and project between Czech Republic and a German based investor and contractor.<sup>172</sup> The Czech Republic-Germany BIT was signed in 1990.<sup>173</sup>

Furthermore, in *Branimir Mensik v. Slovak Republic* (2008), the dispute concerned a mineral water spring project between the Slovak Republic and a Swiss based investor and contractor.<sup>174</sup>

Finally, in *Sun Belt Water v. Canada*, the dispute would have encompassed water management and bulk water exports.<sup>175</sup> Sun Belt, an American based investor, invested in Canada in the new industry to export surplus water by marine transport systems.<sup>176</sup> The investment was aimed at additional supplies of fresh water in South Carolina, Nevada, Arizona, and Mex-

<sup>167</sup> *Case Details: Azurix Corp v. Argentine Republic (ICSID Case No. ARB/03/30)*, ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/03/30&tab=PRO> (last visited Feb. 22, 2015), archived at <https://perma.cc/7LR9-3DEX>.

<sup>168</sup> Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, U.K.-Arg., Dec. 11, 1990, 1765 U.N.T.S. 33.

<sup>169</sup> See e.g. *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Award, (June 19, 2007); *Case Details: Branimir Mensik v. Slovak Republic (ICSID Case No. ARB/06/9)*, ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?caseno=ARB/06/9&tab> (last visited Feb. 22, 2015), archived at <https://perma.cc/XDN9-JQLX> [hereinafter *Case Details: Branimir Mensik*].

<sup>170</sup> *Bayview Irrigation*, ICSID Case No. ARB(AF)/05/01, ¶¶ 113, 116–119.

<sup>171</sup> *Id.* ¶ 34.

<sup>172</sup> JORGE VINALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 170 (2012).

<sup>173</sup> See Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Czech, Oct. 2, 1990, 1909 U.N.T.S. 391.

<sup>174</sup> *Case Details: Branimir Mensik*, *supra* note 169.

<sup>175</sup> *Sun Belt Water v. Canada*, UNCITRAL, Notice of Intent to Submit a Claim to Arbitration, ¶ 2 (Nov. 27, 1998), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disposition/sunbelt-01.pdf>, archived at <https://perma.cc/FW5B-PE23?type=pdf>.

<sup>176</sup> *Id.* ¶¶ 2, 10, 35.

ico and included diverse infrastructure meant to deliver water via tankers as well as the acquisition of licenses to export the water surplus by maritime transport.<sup>177</sup>

In sum, after reviewing the diverse typology of water services involved in the twenty-one aforementioned cases, it appears that the water privatization business has already covered many areas in the water market. Water distribution and sewage services remain the most lucrative aspects of the water service sector. With this in mind, we now turn to the outcomes of each dispute.

### III. MAPPING THE “BLUE GOLD” DISPUTE RESOLUTION PROCESS

At least three main categories of outcomes are immediately evident upon examination of the twenty-one aforementioned water dispute cases. A concise map of these water dispute outcomes is necessary to illustrate a clearer perspective of this new breed of arbitration.

#### A. *Wrongful Acts of the State*

The most significant category of outcomes are in favor of the investor. Indeed, the majority of these water disputes ended in the same way, awarding outstanding compensation amounts to the foreign investor for an assortment of BIT breaches and wrongful actions by the state.

#### 1. The Six Disputes That Resulted in Awards Against the State

To begin, the water dispute in *ATA Construction, Indus. and Trading Co. v. Jordan* (2010) resulted in favor of the Turkish investor.<sup>178</sup> After serious disagreements on the liability for the dike collapse in front of the Jordanian courts, the Court of Appeal decided in 2006 to annul ATA’s first arbitration award in favor of the investor under the Jordanian Arbitration Law. Jordan’s Court of Cassation confirmed the decision in 2007. In the same course, the court extinguished the right to arbitrate the dispute contained in the initial contract. In 2010, the Turkish investor brought the case to ICSID arbitration.<sup>179</sup> The arbitral tribunal upheld ATA’s claim against Jordan and found that the retroactive extinguishment of the arbitration agreement by Jordanian courts after the dike collapse litigation constituted a clear breach of the BIT, confirming ATA’s basic contractual right as well as its violation

<sup>177</sup> *Id.* ¶¶ 10, 35.

<sup>178</sup> *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, ¶¶ 71–73, 121–129 (May 18, 2010).

<sup>179</sup> *Id.* ¶¶ 31–32, 35–37.

by Jordan.<sup>180</sup> The state action resulted in an “unlawful expropriation” of ATA’s investment and a violation of both “the letter and the spirit of the Turkey-Jordan BIT”.<sup>181</sup> The state was ordered to immediately cease these interferences with the investor’s right and awarded its restitution.<sup>182</sup>

In *Azurix Corp. v. Argentine Republic* (2006), once again the investor won the case, though only partially.<sup>183</sup> The tribunal found that several actions by Argentina constituted clear breaches of the BIT it had entered into with investors.<sup>184</sup> Provincial authorities allowed political interests to interfere with the tariff regime applied by the company and initially fixed by the concession agreement, thus precluding the company from increasing its revenue.<sup>185</sup> Moreover, the province’s failure to repair infrastructure resulted in an algae outbreak and incessant calls from the provincial governor directing the public to not pay the company bills.<sup>186</sup> The state was therefore found liable for breach of the BIT on the basis of a lack of “fair and equitable treatment,” “full protection and security,” and “arbitrary or discriminatory measures” towards Azurix’s investment.<sup>187</sup> Ultimately, Argentina had to pay a large sum in damages to its investor.<sup>188</sup>

In *Compania de Aguas del Aconquija S.A. v. Argentine Republic* (2007), the award also ended in favor of the investor.<sup>189</sup> Soon after the beginning of the concession, strong oppositions to the privatization agreement arose from the new local government.<sup>190</sup> Pressures to impose a tariff reduction, water turbidity episodes leading local authorities to proclaim health risks without any proof, and further negotiation failures resulted in the abrupt termination of the contract by the state in 1997.<sup>191</sup> Various actions by Argentina were found by the arbitral tribunal to be clear breaches of the BIT signed by both parties in various ways.<sup>192</sup> First, Argentina violated the “fair and equitable treatment” of Vivendi’s investment by acting illegitimately to end the concession or forcing its renegotiation.<sup>193</sup> The state likewise violat-

<sup>180</sup> *Id.* ¶¶ 121–126.

<sup>181</sup> *Id.* ¶¶ 71–73, 121–129.

<sup>182</sup> *Id.* ¶¶ 132–133.

<sup>183</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 442 (July 14, 2006).

<sup>184</sup> *Id.* ¶ 408.

<sup>185</sup> *Id.* ¶ 375.

<sup>186</sup> *Id.* ¶¶ 126, 143–144, 376.

<sup>187</sup> *Id.* ¶ 442.

<sup>188</sup> *Id.*

<sup>189</sup> *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 11.1 (Aug. 20, 2007).

<sup>190</sup> *Id.* ¶¶ 4.11.1–4.11.4.

<sup>191</sup> *Id.* ¶¶ 4.10.1–4.19.4, 4.10.3, 4.11.1–4.11.7, 4.13.13.

<sup>192</sup> *Id.* ¶ 11.1.

<sup>193</sup> *Id.* ¶¶ 7.4.18–7.4.19, 11.1.

ed the “protection and full security” provision by means of illegitimate national sovereign acts.<sup>194</sup> Moreover, in the tribunal’s view, despite the physical and managerial control of the concession, the devastating economic effect on its viability was equal to an indirect “expropriation without compensation” and therefore also constituted a breach of the BIT.<sup>195</sup> Losing the dispute, the liable state was finally ordered to compensate the investor.<sup>196</sup>

*Impregilo S.p.A. v. Argentine Republic* (2011) also stands as another significant case awarded in favor of the investor.<sup>197</sup> Achievement of the concession’s aims and the POES program were perceived as in danger after experiencing difficulties in collecting bills from customers.<sup>198</sup> In 2002, Argentina’s authorities enacted a law freezing all utility contracts.<sup>199</sup> In addition, the investor’s right to stop water supply for non-payment was suspended.<sup>200</sup> In these troubled times, the state argued that it was in fact the company who was breaching its obligations under the concession agreement and put a definitive end to it.<sup>201</sup> Argentina then transferred the water services to a local state owned supplier.<sup>202</sup> The arbitral tribunal found that Argentina violated the fair and equitable treatment of Impreglio’s investment by failing to restore a reasonable equilibrium to the concession.<sup>203</sup> The tribunal also found that Argentina breached the “arbitrary and discriminatory measures” obligations of the BIT.<sup>204</sup> These violations led to the award of costly damages in favor of the investor.<sup>205</sup>

In yet another Argentinian case, *SAUR International v. Argentine Republic* (2014), the tribunal awarded in favor of the investor. After severe financial difficulties suffered by the local company followed by collapse risks of the overall sewage system, diverse emergency measures were taken by the state, which proved highly detrimental to the investor. After two failed negotiations and agreements between the parties, local authorities terminated the concession contract, as well as the technical assistance contract attached to the concession, and transferred it to a local and state owned

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<sup>194</sup> *Id.* ¶¶ 7.4.13–7.4.19, 11.1.

<sup>195</sup> *Id.* ¶¶ 7.5.1–7.5.4, 11.1.

<sup>196</sup> *Id.* ¶ 11.1.

<sup>197</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 86 (June 21, 2011).

<sup>198</sup> *Id.* ¶¶ 21, 28.

<sup>199</sup> *Id.* ¶ 28.

<sup>200</sup> *Id.* ¶ 39.

<sup>201</sup> *Id.* ¶¶ 34, 48.

<sup>202</sup> *Id.* ¶ 48.

<sup>203</sup> *Id.* ¶ 370.

<sup>204</sup> *Id.* ¶¶ 333–334.

<sup>205</sup> *Id.* ¶ 86.



company.<sup>206</sup> In the tribunal's view, Argentina breached the "fair and equitable treatment" as well as the expropriation without compensation provisions of the BIT.<sup>207</sup> This subsequently led to a high final compensation in favor of the foreign investor.<sup>208</sup>

Finally, in the case of *Biwater Gauff Ltd. v. Tanzania* (2008), the concession presented some serious financial difficulties and was even in danger of shutting down.<sup>209</sup> The major overestimation of projected tariff revenue at the bidding stage and the poor condition of the overall system that led to numerous unexpected challenges were only some of the reasons why the concession was in jeopardy.<sup>210</sup> After a failed salvation agreement attempt between both parties, the state took drastic and damaging measures, including the usurpation of management control, deportation of the company manager, takeover of the water facilities and business, and finally, in 2005, the abrupt termination and repudiation of the concession contract.<sup>211</sup> The assets were later reposed by the previous state owned water supplier.<sup>212</sup> In this case, the tribunal found that Tanzania's actions amounted to an unlawful expropriation even if the termination of the concession was inevitable.<sup>213</sup> The tribunal also found that some of Tanzania's actions were unnecessary and abusive and therefore amounted to violations of both its obligation to ensure "full protection and security" and provide "fair and equitable treatment" to its English investors.<sup>214</sup> Additionally, the state was found liable for "unreasonable and discriminatory conduct."<sup>215</sup> In this case, however, even if Tanzania was liable, these acts did not cause quantifiable financial or commercial losses and therefore, no financial compensation was awarded.<sup>216</sup>

## 2. The Cost of Non-Compliance: Compensation Awarded in Water Disputes

When host states are found liable for BIT breaches against a foreign investor, they have to pay the price. In most of these water disputes won by the investor, the compensation amounts are tremendous.<sup>217</sup> Such economic

<sup>206</sup> SAUR Int'l v. Argentine Republic, ICSID Case No. ARB/04/4, Award, ¶¶ 76–78 (May 22, 2014).

<sup>207</sup> *Id.* ¶ 511.

<sup>208</sup> *Id.* ¶¶ 393, 408, 433, 511.

<sup>209</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶¶ 149–152 (July 24, 2008).

<sup>210</sup> *Id.* ¶¶ 149, 164.

<sup>211</sup> *Id.* ¶¶ 193–200, 219, 223–225.

<sup>212</sup> *Id.* ¶ 224.

<sup>213</sup> *Id.* ¶¶ 791, 814.

<sup>214</sup> *Id.* ¶¶ 729–731.

<sup>215</sup> *Id.* ¶ 814.

<sup>216</sup> *Id.* ¶¶ 798–801, 807.

<sup>217</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, at 86 (June 21, 2011); *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Re-*

consequences are not soon forgotten. From 2006 to 2014, six leading water services disputes were decided in favor of the investor.<sup>218</sup> In total, approximately \$300 million in compensation was awarded to investors.<sup>219</sup> This, without adding the interest amounts which generally hovered at a rate of six percent.<sup>220</sup>

*Azurix* probably represents the most expensive loss and highest compensation amount due in a water services dispute to date. Argentina was found liable for three serious BIT breaches and ordered by the arbitral tribunal to pay over \$165 million in compensation to the American investor; an amount calculated on account of the fair market value of the concession.<sup>221</sup> A semi-annually compounded interest at a rate of 2.44 percent was added to this amount.<sup>222</sup> In addition to that, Argentina had to pay \$34,496.00 in costs and tribunal fees. Each party was responsible for their own costs and attorney fees.<sup>223</sup>

In the second most expensive water case, *Vivendi*, Argentina was found liable for three BIT breaches and ordered to pay a \$105 million in compensation for damages to investors.<sup>224</sup> To this amount, an annually compounded interest was added at a rate of six percent. Moreover, the host state had to pay over \$700,000 for legal and other costs, plus interest at a rate of six percent starting from the award date until the final payment.<sup>225</sup> The fees and expenses, however, were equally divided between both parties.<sup>226</sup>

The *SAUR* case is a further example of the bitter taste of states' non-compliance cost. In this dispute, Argentina was liable for two main BIT breaches, was ordered to pay over \$39 million in damages, plus interest at an annual rate of six percent.<sup>227</sup> In addition, Argentina had to pay over \$2

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public, ICSID Case No. ARB/97/3, ¶ 11.1, (Aug. 20, 2007); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, ¶ 442, (July 14, 2006).

<sup>218</sup> *SAUR Int'l v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, at 86 (May 22, 2014); *Impregilo* ICSID, Case No. ARB/07/17, at 86; *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID, Case No. ARB/08/2, Award, ¶ 133 (May 18, 2010); *Bi-water Gauff*, ICSID Case No. ARB/05/22, ¶ 814; *Vivendi*, ICSID Case No. ARB/97/3, ¶ 11.1; *Azurix*, ICSID, Case No. ARB/01/12, ¶ 442.

<sup>219</sup> *SAUR*, ICSID Case No. ARB/04/4, at 86; *Impregilo*, ICSID Case No. ARB/07/17, at 86; *Vivendi*, ICSID Case No. ARB/97/3, ¶¶ 11.1; *Azurix*, ICSID Case No. ARB/01/12, ¶ 442.

<sup>220</sup> *See SAUR*, ICSID Case No. ARB/04/4, at 86; *Impregilo*, ICSID Case No. ARB/07/17, at 86; *Vivendi*, ICSID Case No. ARB/97/3, ¶ 11.1; *Azurix*, ICSID Case No. ARB/01/12, ¶ 442.

<sup>221</sup> *Azurix*, ICSID Case No. ARB/01/12, ¶ 442.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Vivendi*, ICSID Case No. ARB/97/3, ¶ 11.1.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *SAUR Int'l v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, ¶ 433 (May 22, 2014).

million in arbitral costs and attorney fees, with interest at an annual rate of six percent.<sup>228</sup>

In *Impregilo*, Argentina was found liable for BIT breaches.<sup>229</sup> The tribunal awarded over \$21 million in compensation, plus an annually compounded interest at a rate of six percent starting from July 2006 until the final payment to the Italian investor.<sup>230</sup> The fees and expenses, however, were equally divided between both parties.<sup>231</sup>

The award in *Biwater* is probably one of the most unique. Here, the tribunal found the host state liable for four different BIT breaches, which is more than in similarly situated water disputed cases.<sup>232</sup> The tribunal, however, awarded no compensation.<sup>233</sup> According to the tribunal, the investors were unable to prove any quantifiable or commercial loss nor any causal link between the violations and the economic diminution of its investment.<sup>234</sup> Therefore, every claim for damages was dismissed and the investor was not entitled to compensation.<sup>235</sup> Arbitration costs were equally divided and each party had to pay its own expenses and attorneys fees.<sup>236</sup> Despite the outcome, this case remains consequential; the result of its final award is still extremely relevant in terms of legal implications in water-services investment law and should continue to be carefully considered.

Finally, the *ATA* case represents the lowest compensation awarded in favor of the investor until now, apart from *Biwater*. The arbitral tribunal ordered a termination of Jordanian court proceedings on the subject, and found that the claimant was “entitled to proceed with litigation.”<sup>237</sup> The fees and expenses were equally divided.<sup>238</sup> Although no financial damages were awarded, the message was clear and the investor’s win over the Jordanian state still remains relevant.<sup>239</sup>

<sup>228</sup> *Id.* ¶ 434.

<sup>229</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶¶ 331–334 (June 21, 2011).

<sup>230</sup> *Id.* at 86.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*; see *SAUR*, ICSID Case No. ARB/04/4, Award, at 86 (May 22, 2014); *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, ¶ 133 (May 18, 2010); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 814 (July 24, 2008); *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 11.1 (Aug. 20 2007); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 442 (July 14, 2006).

<sup>233</sup> *Biwater Gauff*, ICSID Case No. ARB/05/22, ¶¶ 798–801, 805.

<sup>234</sup> *Id.* ¶ 807.

<sup>235</sup> *Id.* ¶ 813.

<sup>236</sup> *Id.* ¶ 814.

<sup>237</sup> *ATA*, ICSID Case No. ARB/08/2, ¶¶ 132–133.

<sup>238</sup> *Id.* ¶ 133.

<sup>239</sup> See *id.* ¶¶ 132–133.

From multi-million compensation awards and costly interest rates, fees, and expenses to legal order and implications, every one of these six water related disputes demonstrates that there are high financial stakes involved in international arbitration cases. The cost of non-compliance will undoubtedly not be forgotten by states or future direct foreign investors, as they continue to enter into international investment treaties.

### *B. State Compliance with International Law*

In the second category of outcomes, only three water dispute cases rejected the investor's claims and awarded in favor of the state.<sup>240</sup>

In *LESI S.p.A. v. Algeria* (2007), only after many difficulties involving the execution of the work and delays due to security reasons did the host state terminate the contract with the private company and launch another public bid tender, to which LESI refused to participate.<sup>241</sup> The tribunal found that the termination of the construction contract by Algeria did not constitute a direct or indirect "expropriation" as alleged by the investor nor a violation of the "fair and equitable treatment" provision of the BIT.<sup>242</sup> Indeed, negotiations and compensations were proposed by the state before the termination.<sup>243</sup> Therefore, all damage claims were rejected and both parties had to pay their own costs and expenses.<sup>244</sup> The tribunal costs were equally divided.<sup>245</sup>

In *Salini Costruttori S.p.A v. Jordan* (2006), the tribunal found that, due to a failure to prove the existence of an agreement to arbitration, it was not necessary to consider whether Jordan breached the BIT.<sup>246</sup> All claims were unanimously rejected. Therefore, the case was awarded in favor of the state.<sup>247</sup> The arbitral costs and fees were reserved for subsequent determination.<sup>248</sup>

Finally, in *Bayview Irrigation District et al. v. United Mexican States* (2007), the tribunal found that the forty-six Texas claimants had no property

<sup>240</sup> *LESI S.p.A. & ASTALDI S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, ¶ 188 (Nov. 12, 2008); *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Award, (June 19, 2007); *Salini Costruttori S.p.A and Italstrade S.p.A v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB 02/13, Award, ¶ 179 (Jan. 31, 2006).

<sup>241</sup> *LESI*, ICSID Case No. ARB/05/3, ¶¶ 11, 13, 19, 22, 26, 32–33.

<sup>242</sup> *Id.* ¶¶ 139, 164.

<sup>243</sup> *Id.* ¶¶ 157, 162–164.

<sup>244</sup> *Id.* ¶ 188.

<sup>245</sup> *Id.*

<sup>246</sup> *Salini Costruttori S.p.A and Italstrade S.p.A v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB 02/13, Award, ¶ 100 (Jan. 31, 2006).

<sup>247</sup> *Id.* ¶¶ 100, 105

<sup>248</sup> *Id.* ¶¶ 104, 179

rights in the waters in the Mexican portion of the Rio Grande arising out of the 1994 NAFTA Treaty, despite the Mexican government's purposeful and systematic capture, seizure and diversion of Rio Grande waters for use by local Mexican farmers, which was detrimental to the American investors' water use.<sup>249</sup> According to the tribunal, NAFTA's chapter eleven does not concern "domestic investment" such as in *Bayview*.<sup>250</sup> Therefore, the investor's claims did not fall within NAFTA's scope and the tribunal had no jurisdiction on the alleged breach claims, making the host state the winner in this particular case.<sup>251</sup> The tribunal costs were divided equally between both parties and each one had to bear its own costs.<sup>252</sup>

These three outcomes in favor of the state prove to be the exception rather than the norm. Moreover, the last state-won cases followed a construction contract pattern and did not fall within the classic concession contract background found in almost every investor-won dispute.

### C. Pending Cases

Finally, there are still other water dispute cases that can be listed in a third outcomes category. The majority of these cases are still pending, settled, or have been discontinued by both parties themselves.

#### 1. Decision on Liability

In two major cases, the tribunal only dispatched a "decision on liability," rendering the dispute as "still pending" in regards to the final damages award amount. In *AWG Group Ltd. v. Argentine Republic*, joint with *Suez Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic* (2010), the tribunal found the host state, Argentina, liable for breach of the BIT.<sup>253</sup> After many concession difficulties arising during the Argentinian economic crisis, such as the inadequate tariff regime, inflation rates, refusal of some sectors to pay the system charge, higher amounts of water consumption, severe measures by local authorities, and new additional taxes, the state abruptly terminated the concession alleging breaches of the contract by the investor.<sup>254</sup> Although the "unlawful expropriation" as well as the "full pro-

<sup>249</sup> *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Award, ¶¶ 115–120 (June 19, 2007).

<sup>250</sup> *Id.* ¶¶ 96–98, 104, 112–113.

<sup>251</sup> *Id.* ¶¶ 116–120, 122.

<sup>252</sup> *Id.* ¶ 125.

<sup>253</sup> *AWG Group Ltd. v. Argentine Republic*, UNCITRAL Case No. ARB/03/19, Decision on Liability ¶ 276 (July 30, 2010) (award on damages pending), joint with *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19.

<sup>254</sup> *Id.* ¶¶ 39, 43, 56.

tection and security” claims were rejected by the tribunal, Argentina was still found liable for breaching the “fair and equitable treatment” provision of the BIT.<sup>255</sup> Various state actions frustrated the legitimate expectations of the investor and therefore constituted breaches of the BITs signed between the parties.<sup>256</sup> It should also be noted that Argentina’s defense of “state of necessity” was rejected.<sup>257</sup> The tribunal deferred the “decision on costs and expenses until the completion of the damages phase” of the proceedings.<sup>258</sup>

In *Suez Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic* (2010), the concession contract was definitively terminated by local authorities after major investments to improve the overall facilities costing more than \$250 million and severe measures were taken by the authorities such as the refusal to apply adjustments on tariff previously agreed to.<sup>259</sup> Subsequently, a new state-owned local company was created to operate the water and wastewater services in the province in lieu of the investor’s company.<sup>260</sup> The state was found liable for BIT breaches due to these actions, much in the same way as the *AWG* and *Vivendi* cases.<sup>261</sup> In its decision on liability, the tribunal found that Argentina’s actions violated the “fair and equitable treatment” provision of the BIT by frustrating the legitimate expectations of the company’s investment.<sup>262</sup> However, the “expropriation without compensation” and “full protection and security” claims were rejected.<sup>263</sup> The state defense of “state of necessity” was also dismissed.<sup>264</sup> The fees, costs and damages amount were deferred, along with the final award.<sup>265</sup>

## 2. Decision on Jurisdiction

In the *Urbaser S.A. v. Argentine Republic* (2012), case, the host state first prohibited the concession holder from “charging tariffs in conformance with its own internal decision-making” and then terminated the conces-

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<sup>255</sup> *Id.* ¶ 276. According to the arbitral tribunal, Argentina’s obligations do not encompass the maintenance of a stable legal and commercial environment. *Id.*

<sup>256</sup> *Id.* ¶ 247.

<sup>257</sup> *Id.* ¶ 276.

<sup>258</sup> *Id.* ¶¶ 272–275.

<sup>259</sup> *Suez Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 37–38, 42, 48, 52 (July 30, 2010) (award on damages pending).

<sup>260</sup> *Id.* ¶ 52.

<sup>261</sup> *See id.* ¶ 228; *AWG*, UNCITRAL Case No. ARB/03/19, ¶¶ 237–238, 276.

<sup>262</sup> *Suez Sociedad*, ICSID Case No. ARB/03/17, ¶¶ 228, 248.

<sup>263</sup> *Id.* ¶¶ 173, 248.

<sup>264</sup> *Id.* ¶ 248.

<sup>265</sup> *Id.* ¶ 247.

sion.<sup>266</sup> Several categories of breaches of the Argentina-Spain BIT were alleged by the foreign investor, such as fair and equitable treatment and unlawful expropriation.<sup>267</sup> The investor further claimed more than \$100 million for damages and compensation, plus interest.<sup>268</sup> As of today, the tribunal only dispatched a “decision on jurisdiction” in favor of the investor on December 19, 2012, giving it competence to arbitrate the ongoing dispute.<sup>269</sup>

#### D. Settled Cases

##### 1. Settlement by the Parties

Three other known water disputes concluded through settlement agreements resulting in no further proceedings and no final award or public outcome.

In *Aguas del Tunari S.A. v. Bolivia* (2005), the dispute arose during the privatization movement in Bolivia.<sup>270</sup> Foreign investors transferred corporate ownership of privatized assets from the Cayman Islands to the Netherlands in order to have access to the Netherlands-Bolivia BIT without the permission of Bolivia.<sup>271</sup> After strong public opposition to the concession contracts in Cochabamba, this caused fear of higher rates and prohibitions on private wells.<sup>272</sup> Finally in April 2000, Bolivian authorities terminated the concession. Despite the BIT breaches of “expropriation” claimed by the investor, the case was settled and the proceedings were discontinued on March 28, 2006.<sup>273</sup>

In *Aguas Cordobesas S.A. v. Argentine Republic* (2010), both parties similarly signed a settlement agreement in this thirty-year concession dis-

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<sup>266</sup> Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction, ¶ 32 (Dec. 19, 2012).

<sup>267</sup> *Id.* ¶¶ 238, 252.

<sup>268</sup> *Id.* ¶ 38.

<sup>269</sup> *Id.* ¶ 111.

<sup>270</sup> *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID, Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, ¶ 52 (Oct. 21, 2005) (settlement agreed by the parties and proceedings discontinued on March 28, 2006).

<sup>271</sup> *Id.* ¶¶ 67–72, 156–158.

<sup>272</sup> *Id.* ¶¶ 2–3, 64.

<sup>273</sup> *Id.* ¶ 8; see Jonathan C. Hamilton, *A Decade of Latin American Investment*, in *LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS* 81 (Mary H. Moura & Thomas E. Carbonneau, eds. 2008); Damon Vis-Dunbar & Luke Eric Peterson, *Bolivian Water Dispute Settled; Bechtel Forgoes Compensation*, INT’L INST. FOR SUSTAINABLE DEV. (Jan. 20, 2006), [http://www.iisd.org/pdf/2006/itn\\_jan20\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_jan20_2006.pdf), archived at <https://perma.cc/MU8Y-5E9J?type=pdf>.

pute.<sup>274</sup> On January 24, 2007, the proceedings were discontinued.<sup>275</sup> Unfortunately no more public information is available regarding this case.<sup>276</sup>

Finally, the waterway construction dispute in *JacobsGibb* was also settled by the parties.<sup>277</sup> No more public information is available for this case as well.

## 2. Discontinued Cases

The outcomes of still two more unfinished water dispute cases may never be known. The disputes were discontinued for not paying advances to the tribunal. In *Branimir v. Slovak Republic*, involving a mineral water spring project, the tribunal issued an order in 2008 for discontinuance of the proceedings for lack of payment.<sup>278</sup> Four years later, in 2012, the exact same situation occurred in *Azurix Corp v. Argentine Republic* involving a water and sewerage services concession agreement.<sup>279</sup>

Finally, in *Neplosky v. Czech Republic*, the investor, who bought a part of the land for water extraction but failed to obtain the permit from local authorities, alleged discrimination by the state and a breach of the BIT for which he claimed CZK970 million for damages.<sup>280</sup> In 2010, however, the investor withdrew his claim and effectively ended the dispute.<sup>281</sup>

### E. Recent Developments

In *AS Tallinna Vesi v. Estonia*, the most recent case concerning a water and wastewater services concession, Dutch investors gave notice of arbitration to Estonia on May 13, 2014 alleging several breaches of the BIT, such as fair and equitable treatment and discrimination.<sup>282</sup> By refusing to permit tariff increases from the regulators for two years despite the fact that Estonian courts have deemed the tariffs part of the services agreement to be an

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<sup>274</sup> See Hamilton, *supra* note 273, at 82; *Case Details: Aguas Cordobesas*, *supra* note 145; *Individual Project Information—Aguas Cordobesas*, WORLD BANK (Aug. 2014) <http://ppi.worldbank.org/explore/PPIReport.aspx?ProjectID=607>, archived at <http://perma.cc/7Y6P-L9N3>.

<sup>275</sup> Hamilton, *supra* note 273, at 82.

<sup>276</sup> See *Case Details: Aguas Cordobesas*, *supra* note 145.

<sup>277</sup> *Case Details: JacobsGibb Ltd. v. Hashemite Kingdom of Jordan (ICSID, Case No. ARB/02/12)*, *supra* note 109.

<sup>278</sup> *Case Details: Branimir Mensik*, *supra* note 169.

<sup>279</sup> *Case Details: Azurix Corp v. Argentine Republic (ICSID Case No. ARB/03/30)*, *supra* note 167.

<sup>280</sup> Tomáš Fecák, *Czech Experience with Bilateral Investment Treaties: Somewhat Bitter Taste of Investment*, 2 CZECH Y.B. INT'L L. 233, 266 (2011).

<sup>281</sup> See *id.*

<sup>282</sup> See *AS Tallinna Vesi*, *supra* note 140; *AS Tallinna Vesi v. Estonia, ICSID, INVESTMENT TREATY ARBITRATION*, <http://www.italaw.com/cases/2540> (last visited Feb. 21, 2015), archived at <http://perma.cc/H4M5-KCV6>.



administrative contract, the foreign investor is claiming more than 90 million euros of potential damages.<sup>283</sup> The case is still pending but further illustrates the continued reality of such water disputes.<sup>284</sup> The battle between water services investors and state contractors continues to roar on with no end in sight. As water becomes more scarce and difficult to manage, and international investment agreements regarding water services continue to increase, the result is a greater need for international investment arbitration.

This overview of the typology of the diverse water services currently and generally involved in the water investment disputes and their particular outcomes provide a better general understanding of what constitutes the recent wave of water disputes in international investment law. Such disputes have amounted to a slow but steady creation of a common regulatory scheme surrounding the international water services regime.

#### IV. IDENTIFYING THE CLASSIC SCENARIO OF “BLUE GOLD” DISPUTES: RECURRING ISSUES AND A COMMON THREAD

There is a common thread of recurring issues in the majority of the water disputes examined in the previous section.

##### *A. Developing Countries' Water Policy Under International Review*

Based on the geographic location of the parties presented in each of the twenty-one water disputes, it is not difficult to conclude that in almost every case, the same group of developing countries tend to be involved. Indeed, the majority of the leading water services disputes took place in either Argentina, Bolivia or Jordan and in the African countries of Algeria and Tanzania.<sup>285</sup> All of these states are still considered developing countries.<sup>286</sup>

The World Bank and the International Monetary Fund (IMF) are among the world's largest and primary source of loans and development assis-

<sup>283</sup> *AS Talinna Vesi Has Commenced International Arbitration Proceedings Against the Republic of Estonia*, NASDAQ GLOBAL NEWSWIRE (Oct. 14, 2014), <http://globenewswire.com/news-release/2014/10/14/672807/0/en/AS-Tallinna-Vesi-has-commenced-international-arbitration-proceedings-against-the-Republic-of-Estonia.html>, archived at <http://perma.cc/QG8E-3WX2>.

<sup>284</sup> *See id.*

<sup>285</sup> *E.g.*, SAUR Int'l v. Argentine Republic, ICSID Case No. ARB/04/4, Award, at 86 (May 22, 2014); Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (Oct. 21, 2006) (settlement agreed by the parties and proceedings discontinued on the March 28, 2006); Salini Costruttori S.p.A and Italstrade S.p.A v. Hashemite Kingdom of Jordan, ICSID Case No. ARB 02/13, Award, ¶ 179 (Jan. 31, 2006).

<sup>286</sup> *Developing Countries*, INT'L STATISICAL INST., <http://www.isi-web.org/component/content/article/5-root/root/81-developing> (last visited Mar. 13, 2015), archived at <http://perma.cc/YV9P-NAUH>.

tance.<sup>287</sup> In the early 1990s, many programs and recommendations involving principles of deregulation, market liberalization and privatization of states' assets and services were made, which strongly encouraged developing nations to permit foreign investor companies to manage and run previously state-owned water facilities.<sup>288</sup> It is clear that these international agencies in particular are the forefront to water privatization and continue to wield leverage in the developing world.<sup>289</sup>

The past twenty years have been plagued by an escalating global water crisis.<sup>290</sup> Although it is a worldwide phenomenon, certain countries have traditionally experienced disproportional negative effects.<sup>291</sup> Since 1990, many governments and international communities have tried to find novel approaches toward managing water and optimizing resources.<sup>292</sup> Indeed, countries with the weakest public sectors have the greatest need for water services.<sup>293</sup> The new movement in water management toward privatization is now seen as an attractive option and solution for public authorities to save face and provide their populations with basic water needs.<sup>294</sup> Until privatization, water as a public resource was systematically provided and managed by provincial or municipal government entities around the world.<sup>295</sup> Governments had a moral obligation to ensure access to safe water and access to effective water services.<sup>296</sup> Beginning in the early 1990s, developing countries were faced with a global push towards formal private sector participation in water services.<sup>297</sup> Between 1991 and 2000, the number of countries with private participators grew from four to thirty-eight, increasing the population served by private companies from 6 million to 96 million

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<sup>287</sup> See, e.g., *Water*, WORLD BANK, <http://www.worldbank.org/en/topic/water/projects> (last visited Mar. 13, 2015), archived at [perma.cc/8PPK-9BWF](http://perma.cc/8PPK-9BWF) (providing examples of water projects and programs from the World Bank); *History*, INT'L MONETARY FUND, <http://www.imf.org/external/about/history.htm> (last visited Mar. 13, 2015), archived at <http://perma.cc/7FAV-JRU2>.

<sup>288</sup> See, e.g., *Water*, WORLD BANK, <http://www.worldbank.org/en/topic/water/projects> (last visited Mar. 13, 2015), archived at [perma.cc/8PPK-9BWF](http://perma.cc/8PPK-9BWF) (providing examples of water projects and programs from the World Bank).

<sup>289</sup> John Tagliabue, *As Multinational Run the Taps, Anger Rises Over Water for Profit*, N.Y. TIMES (Aug. 26, 2002), <http://www.nytimes.com/2002/08/26/international/americas/26WATE.html?pagewanted=2&pagewanted=all>, archived at <http://perma.cc/A5B7-M83T>.

<sup>290</sup> See A. Dan Tarlock, *Four Challenges for International Water Law*, 23 TUL. ENVTL. L.J. 369, 370 (2009).

<sup>291</sup> See Miller, *supra* note 1, at 219, 235.

<sup>292</sup> *Id.* at 228–32.

<sup>293</sup> *Id.* at 236.

<sup>294</sup> See *id.* at 260.

<sup>295</sup> See INT'L LABOUR ORG., THE IMPACT OF DECENTRALIZATION AND PRIVATIZATION ON MUNICIPAL SERVICES 34 (2001), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb283/pdf/jmmsr.pdf>, archived at <https://perma.cc/49DT-Z2PS?type=pdf>.

<sup>296</sup> See G.A. Res. 54/175, art. 12, U.N. Doc. A/RES/54/175 (Dec. 1999).

<sup>297</sup> See INT'L LABOUR ORG., *supra* note 295, at 34.

in 2000.<sup>298</sup> In 2012, some researches showed that in all, more than 205 million people in developing countries have been served by a private participation project at some point since 1990.<sup>299</sup>

This trend can be explained by two main reasons. First, as previously cited, it was mostly driven by two major international agencies: the World Bank and the IMF. They are indeed the source of powerful recommendations to developing countries to participate in a privatization movement. From their point of view, privatization is a promising means of improving the weak performance of the water services and utilities, expanding coverage, raising the quality and efficiency of services, providing alternative ways of infrastructure investment, and reducing the burden on public budgets.

### *B. The Nature of Foreign Investment in Water Services Involves Much Technology Transfer*

There is yet another reason as to why almost all of the twenty-one known water related cases took place in developing countries. Such countries represent the perfect targets for foreign investment. The developing world is made of struggling nations whose capital, financial, and technical needs, among others, often make it difficult and sometimes near impossible for them to construct adequate infrastructure capable of providing fresh water to their citizens. In response to the population demands and moral obligations, developing nations opened their water services market to leading international and foreign investment companies.<sup>300</sup>

Developing countries are not armed with the resources, whether in the form of knowledge, technology or financing, to face such overwhelming demand from their growing populations.<sup>301</sup> The World Bank estimated that water services costs would reach \$60 billion annually.<sup>302</sup> This is no easy task when such countries frequently find themselves in debt and lacking sufficient capital.<sup>303</sup> Deficient funding leads to difficulties in managing water supply and an inability to finance and operate existing facilities.<sup>304</sup>

As demand grows, the technological sophistication level for water services must increase as well. Advanced technologies and novel infrastruc-

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<sup>298</sup> P. Marin, *PPPs for Urban Water Utilities in Developing Countries: Review of Their Performance Over the Past 15 Years*, in *WATER SERVICES AND THE PRIVATE SECTOR IN DEVELOPING COUNTRIES* 97 (Aymeric Blanc & Sarah Botton eds., 2012).

<sup>299</sup> *Id.* at 114.

<sup>300</sup> See Mergos, *supra* note 38, at 59, 71.

<sup>301</sup> See *id.* at 62–63.

<sup>302</sup> See *id.* at 60.

<sup>303</sup> See *id.*

<sup>304</sup> See *id.* at 63.

al concepts are needed to meet demand by handling higher volumes of drinkable water. Not every water company, especially those that are state-owned, have the ability, the capacity or the knowledge to handle these responsibilities. Additionally, since the UN recognition of a “right to water,” the expected standards have increased in terms of access, quality, continuous supply, efficient reuse, diminution of pollution, diminution of water losses, overall quality of service, operational efficiency, coverage expansion, tariff levels, water price, treatment processes, infrastructure expansion, technological improvements, new management strategies and more. Immediately, it is clear that investing in water facilities is a delicate and subtle mission to achieve. Many parameters must be taken into account, which results in a laborious, yet often lucrative, investment market.

Overall, privatization has been viewed as a viable solution for developing countries in order to meet their water obligations by providing efficient water services to their citizens. Privatization simultaneously generates revenue while maximizing efficiencies. For example, Argentina is one of the leading developing countries in water arbitration disputes. Argentina represented one of the largest and most significant global privatization projects even amidst a serious economic crisis.<sup>305</sup> Argentinian authorities had provided such poor and insufficient water services and wastewater treatment that almost half of the city of Buenos Aires had no access to potable water, which raised serious health concerns.<sup>306</sup> Additionally, access to sewerage services was of a poor quality and sometimes even non-existent.<sup>307</sup> Almost every pipe and water service structure needed to be replaced.<sup>308</sup> The technology to dispose wastewater was antiquated and there were no funds available to expand or repair the overall services.<sup>309</sup> Argentina’s particular situation could be framed as the classic privatization scenario. Argentina was therefore inclined, during the initial stages of water service privatization, to enter in a 30-year concession agreement with a French investor for the operation and management of the country’s water and wastewater services in order to be able to finally reach their water obligations owed to its population.<sup>310</sup>

<sup>305</sup> See *AWG Group Ltd. v. Argentine Republic*, UNCITRAL Case No. ARB/03/19, Decision on Liability, ¶ 26 (July 30, 2010) (award on damages pending), joint with *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19.

<sup>306</sup> *Suez Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 28, 29 (July 30, 2010) (award on damages pending).

<sup>307</sup> See *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Liability, ¶¶ 4.2.2, 4.2.3 (Aug. 20, 2007).

<sup>308</sup> See *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶ 15 (June 21, 2011).

<sup>309</sup> *Vivendi*, ICSID Case No. ARB/97/3, ¶¶ 4.7.1–4.7.6.

<sup>310</sup> See *AWG*, UNCITRAL Case No. ARB/03/19, ¶ 26.

## V. RISING TIDE OF A TRIUMVIRATE: THE THREE KEY BREACHES

Investment agreements enshrine a series of obligations on the parties aimed at ensuring a stable and favorable business environment for foreign investors.<sup>311</sup> These obligations pertain to the treatment that investments are afforded in the host country, as well as certain guarantees by foreign investors certifying their ability to perform key operations related to their investment.<sup>312</sup>

The treatment granted to investors encompasses laws, regulations and customs from public entities that apply to, or affect, foreign investors and their investments.<sup>313</sup> All public entities are bound by international obligations, including the federal and sub-federal governments, local authorities, regulatory bodies, and entities that exercise delegated public powers.<sup>314</sup> Measures adopted by private actors can also fall under the scope of international agreements in exceptional circumstances when such private measures can ultimately be attributed to a governmental entity.<sup>315</sup>

The set of obligations is rather consistent amongst the majority of bilateral investment agreements.<sup>316</sup> The core provisions found in such investment agreements typically include a most favored nation treatment obligation, grants of national treatment, obligations to provide fair and equitable treatment, protection and security for foreign investors, and an obligation to allow international transfers of funds.<sup>317</sup> While the substance of these principles remains the same throughout many investment agreements, the precise scope and reach of each obligation depends on the precise wording featured in each case.<sup>318</sup>

While these diverse provisions may be important to reassure foreign investors that they will be able to reap the benefits of their investment, evidence on the extent to which investment treaties actually stimulate investment is mixed.<sup>319</sup>

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<sup>311</sup> See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 20 (2nd ed. 2012); RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 6, 12 (1995).

<sup>312</sup> See SCHREUER ET AL., *supra* note 311, at 20, 90–91, 130.

<sup>313</sup> See *id.* at 198–99; STEVENS ET AL., *supra* note 311, at 58.

<sup>314</sup> SCHREUER ET AL., *supra* note 311, at 216–21.

<sup>315</sup> *Id.* at 226.

<sup>316</sup> See STEVENS ET AL., *supra* note 311, at 14, 49.

<sup>317</sup> *Id.* at 49.

<sup>318</sup> STEVENS ET AL., *supra* note 311, at 14–15; M. SORNAJAH, *INTERNATIONAL LAW ON FOREIGN INVESTMENT* 237 (3rd ed. 2010).

<sup>319</sup> See Salacuse & Sullivan, *supra* note 34, at 105–11; Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* 22 (World Bank Dev. Research Grp., Research Working Paper No. 3121, 2003), available at <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-312>, archived at <http://perma.cc/BUA9-3GEF>.

### A. The Protection of Sanitation and Water Services Against Expropriation

The protection of foreign investors has historically been the main goal of international investment agreements (IIAs). Hence, international agreements include pivotal guarantees against the nationalization or expropriation of foreign investments without compensation.<sup>320</sup>

#### 1. The Regulation of Expropriation

There are significant discrepancies in the way expropriation is defined in investment treaties and in countries' practices. Some IIAs will cover both direct and indirect expropriation, whereas some will not address indirect expropriation.<sup>321</sup>

There is, however, no clear definition of indirect expropriation; despite a number of decisions by international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated.<sup>322</sup> Rather, it depends on the specific facts and circumstances of the case.<sup>323</sup> In recent years, a new generation of US and Canadian investment agreements, including the investment chapters of FTAs, have introduced specific language and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred.<sup>324</sup> Jurisprudence in the last decade has demonstrated that the cases of indirect expropriation fall short of the actual physical taking of property but that they result in the effective loss of management, use, control, or a significant depreciation of the value of the assets of a foreign investor.<sup>325</sup>

Indirect expropriation can be further divided into regulatory takings, which are "those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture, or economy of a host

<sup>320</sup> SORNAJAH, *supra* note 318, at 95, 253–55.

<sup>321</sup> See STEVENS ET AL., *supra* note 311, at 99–104

<sup>322</sup> See *id.* at 99–100.

<sup>323</sup> See *id.* at 100.

<sup>324</sup> See Rachel D. Edsall, *Indirect Expropriation Under NAFTA and DR–CAFTA: Potential Inconsistencies in the Treatment of State Public*, 86 B.U. L. REV. 931, 953–61 (2006).

<sup>325</sup> See *Gemplus, S.A., SLP, S.A. and Gemplus Indus., S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, ¶¶ 2, 23 (June 16, 2010); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 395 (July 24, 2008); *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 7.5.17 (Aug. 20, 2007).

country.”<sup>326</sup> The issue of regulatory takings is a particular point of concern within many sensitive areas of public policy.<sup>327</sup>

There are however, three main criteria that arbitrators are likely to consider in evaluating a measure as recently summarized in *Burlington Resources v. Ecuador* (2012).<sup>328</sup> This decision clarifies the criteria to apply and notes that the following requirements must be met in order to find an indirect expropriation: (i) a substantial deprivation of the value of the whole investment, *i.e.*, the degree of interference with the property right, including interference with the investor’s reasonable investment-backed expectations; (ii) a permanent measure, *i.e.*, the duration of the measure; and (iii) a measure not justified under the police power doctrine, which basically is a review of the measure’s purpose.<sup>329</sup>

## 2. Impact in the Regime of Water Services

Four breaches of the expropriation concept have been found and interpreted in the context of water services over the past twenty or so years. These four different cases involved four different factual backgrounds, four different water management agreements, and four different kinds of conduct or actions that resulted in one and only one decision: undisputed breach of “expropriation” without compensation by the state. By briefly defining how the expropriation standards applied in these four cases were won by the investor, it will be easier to understand what constitutes a decisive protection for the foreign investor against expropriation, as well as the parallel obligation upon the host state.

In *ATA Construction, Indus. and Trading Co. v. Jordan* (2010), the dispute mainly concerned the validity of a final award annulment by the Jordanian courts.<sup>330</sup> The initial case was rendered in favor of the investor, meaning compensation and exoneration from any liability for the dike collapse during the filling process; however, the Jordanian court annulled this award and extinguished the arbitration agreement, after which the investor initiated an ICSID proceeding.<sup>331</sup> In its final award, the ICSID tribunal found that the extinguishment of the investor’s right to have its dispute decided by way

<sup>326</sup> U.N. Conference on Trade & Dev., *Taking of Property: UNCTAD Series on Issues in International Development*, 12, U.N. Doc. UNCTAD/ITE/IIT/15 (2000) [hereinafter UNCTAD].

<sup>327</sup> See Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—General Exceptions Clause as a Forced Perspective*, 39 AM. J. L. & MED. 332, 353 (2013).

<sup>328</sup> *Burlington Res. v. Ecuador*, ICSID Case No. ARB/ 08/5, Decision on Liability, ¶ 471 (Dec. 14, 2012).

<sup>329</sup> *See id.*

<sup>330</sup> *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, ¶¶ 31–37 (May 18, 2010).

<sup>331</sup> *Id.*

of arbitration by local Jordanian courts constituted a clear breach of the BIT.<sup>332</sup> The investor initially alleged two violations of the BIT, particularly the “unlawful expropriation of the [investor’s] claims to money and rights to legitimate performance under the contract and the Final Award, and the failure to accord fair and equitable treatment to its investment inter alia by way of serious and repeated denials of justice by the Jordanian courts.”<sup>333</sup> This case illustrates a specific way of seeking protection against expropriation. Indeed, the facts do not fall into the scope of a classical expropriation, which includes a physical occupation of the company or seizure of title.<sup>334</sup> In this case, the Turkish investor simply sought protection against an alleged expropriation suffered by both annulment of a final award and permanent denial of its contractual right to arbitrate.<sup>335</sup>

The next logical question would be: can serious and repeated denials of justice as well as denial of contractual rights constitute an expropriation provision under a BIT? The investor argued that the state failed to fulfill any conditions for a lawful expropriation provided under the BIT.<sup>336</sup> For example, it argued that no legitimate public interest was served, the conduct of the local courts was discriminatory because it contradicted its consistent practice in similar cases, basic procedural rights were denied, and most of all, no compensation was provided.<sup>337</sup>

In its final decision, the arbitral tribunal had to decide whether the legal actions of the state courts constituted breaches of the BIT.<sup>338</sup> Although the tribunal declined to exercise jurisdiction regarding the annulment award and denial of justice claims for lack of *rationae temporis*, it clearly stated that it had jurisdiction regarding the third claim, the extinguishment of the arbitration agreement under the construction contract, which occurred this time after the entry into force of the BIT.<sup>339</sup> Within this affirmation, the tribunal unanimously found that this extinguishment was undeniably contrary to the Turkey-Jordan BIT.<sup>340</sup> In explaining its decision, the tribunal stated that the denied right to arbitration was an integral part of the contract and therefore constituted an asset of ATA’s investment, as subtly defined in the BIT, which had been fully violated by the Jordanian courts. In this way the investor was deprived of a valuable asset.<sup>341</sup> Without specifically referring

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<sup>332</sup> *Id.* ¶ 125.

<sup>333</sup> *Id.* ¶ 37.

<sup>334</sup> SCHREUER ET AL., *supra* note 311, at 101.

<sup>335</sup> *ATA*, ICSID Case No. ARB/08/2, ¶ 71.

<sup>336</sup> *Id.* ¶ 72.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* ¶ 37.

<sup>339</sup> *See id.* ¶¶ 103–108, 118–121.

<sup>340</sup> *Id.* ¶¶ 118–121.

<sup>341</sup> *See id.* ¶ 125.



to the expropriation provision, the tribunal decided that Jordan violated both the letter and spirit of the treaty, implying that the expropriation claim was valid.<sup>342</sup> The tribunal then ordered Jordanian courts to immediately cease interference with ATA's rights and entitled the investor to further proceed to arbitration on the dike dispute, restoring its right to arbitration.<sup>343</sup>

This decision is relevant for several reasons. First, it clearly states that every right found in the investment contract between the host state and the foreign investor represents an asset of its investment, highly protected by the BIT.<sup>344</sup> Included in these rights is even the right to initiate arbitration proceedings.<sup>345</sup> Furthermore, this case enlarges the classic definition of expropriation by including the "extinguishment of a valid right to arbitrate" by any state court as a form of expropriation precluded under a BIT.<sup>346</sup> The case also showed the significant ability of the arbitral tribunal to adopt and award non-pecuniary compensations when required by the specific circumstances of the dispute.<sup>347</sup>

In *SAUR International v. Argentine Republic* (2014), the tribunal also held that there was a breach of the expropriation clause.<sup>348</sup> After two negotiated agreements trying to salvage the concession from its financial difficulties, national authorities decided to intervene and help the investor in further managing the business.<sup>349</sup> Soon after, the intervention resulted in taking full control of the company.<sup>350</sup> Contrary to previous negotiations that management and administration of the company should return to the investor's hands, the provincial governor made a public speech announcing that the company was returned to provincial control because of its financial difficulties.<sup>351</sup> Later, the concession contract was terminated unilaterally, alleging failures of the investor.<sup>352</sup> In the investor's view, these actions and measures constituted clear and repeated intentions to expropriate SAUR's investment, which would be a blatant breach of the BIT.<sup>353</sup> The investor

<sup>342</sup> See *id.* ¶¶ 125, 129, 37.

<sup>343</sup> See *id.* ¶ 132.

<sup>344</sup> See *id.* ¶¶ 59, 69, 125.

<sup>345</sup> *Id.* ¶ 125.

<sup>346</sup> See *id.* ¶¶ 125–129.

<sup>347</sup> See *id.* ¶¶ 131–132.

<sup>348</sup> SAUR Int'l v. Argentine Republic, ICSID Case No. ARB/04/4, Award, ¶¶ 381–382, 384 (May 22, 2014).

<sup>349</sup> *International Arbitration: Update on Argentine Cases*, PAGBAM (June 2012), [http://www.pagbam.com/newsletters/Arbitration/PAGBAM\\_-\\_Arbitration\\_Newsletter\\_n\\_17\\_June\\_12.pdf](http://www.pagbam.com/newsletters/Arbitration/PAGBAM_-_Arbitration_Newsletter_n_17_June_12.pdf), archived at <http://perma.cc/7JJA-NBF3>.

<sup>350</sup> *Id.*

<sup>351</sup> SAUR, ICSID Case No. ARB/04/4, ¶ 74.

<sup>352</sup> *Id.* ¶ 76.

<sup>353</sup> *Id.* ¶ 80.

argued that this indirect expropriation amounted to more than \$143 million of damages.<sup>354</sup>

In response, the host state rejected every claim.<sup>355</sup> Argentina believed they did nothing more but use its policy power and concession rights to interfere with management in order to save the concession and protect public health.<sup>356</sup> If the investor had not failed at fulfilling the aims and expectations agreed to in the contract, the host state would not have had to interfere and ultimately terminate the contract.<sup>357</sup> Moreover, Argentina argued that the intervention phase was realized in accordance with the concession contract and therefore did not constitute an expropriation contrary to the BIT.<sup>358</sup> Diverse motives such as impairment of the system, failure to achieve the general aims of the contract, financial difficulties, and insufficient maintenance would have justified the state's intervention.<sup>359</sup>

The arbitral tribunal had to decide whether the series of measures taken by the host state constituted an indirect expropriation of SAUR's investment.<sup>360</sup> In its final decision, the tribunal stated that the intervention phase, the unilateral termination of the concession, and its transfer to another company were clear breaches of the BIT and served as an indirect expropriation of the investor's asset.<sup>361</sup> To the tribunal, even if the term "measures" is not properly described, it must be understood as a broad concept including direct and indirect conduct: legal, economic, or even administrative actions committed by an organ of the host state.<sup>362</sup> On June 6, 2012, the tribunal decided in its decision on liability that Argentina had taken measures and actions resulting in the expropriation of SAUR's investment contrary to the BIT signed between both parties.<sup>363</sup> This decision enlarges the scope of forbidden or unsavory measures by host states within the context of fulfilling their BIT obligations and avoiding claims of expropriation.<sup>364</sup>

Moreover, in *Compania de Aguas del Aconquija S.A. v. Argentine Republic* (2007), the French based investor also claimed a violation of "expro-

<sup>354</sup> *Id.* ¶¶ 80, 81.

<sup>355</sup> *Id.* ¶ 340.

<sup>356</sup> *Id.* ¶¶ 340, 394, 443.

<sup>357</sup> *Id.* ¶ 414.

<sup>358</sup> *Id.* ¶ 443.

<sup>359</sup> *Id.* ¶¶ 416, 423, 426, 446.

<sup>360</sup> *Id.* ¶ 359.

<sup>361</sup> *Id.* ¶¶ 381–382, 384.

<sup>362</sup> *Id.* ¶ 364.

<sup>363</sup> *International Arbitration: Update on Argentine Cases*, PAGBAM (June 2012), [http://www.pagbam.com/newsletters/Arbitration/PAGBAM\\_-\\_Arbitration\\_Newsletter\\_n\\_17\\_June\\_12.pdf](http://www.pagbam.com/newsletters/Arbitration/PAGBAM_-_Arbitration_Newsletter_n_17_June_12.pdf), archived at <http://perma.cc/7JJA-NBF3>.

<sup>364</sup> See *SAUR*, ICSID Case No. ARB/04/4, ¶ 364.

priation” without compensation in breach of its BIT.<sup>365</sup> In the claimant’s perspective, this concept must be broadly interpreted, including any interference with an investor’s property depriving him of the use or value of its investment, directly or indirectly.<sup>366</sup> Therefore, they argue that the province’s taking or denial of valuable rights under the concession and the destruction of its economic value constitute an expropriation under the BIT.<sup>367</sup> The claimant argued several specific actions taken by the host state to support its alleged expropriation breach. Such actions included: the denial of a 10 percent tariff increase previously negotiated and entitled at the end of the third year of the concession; the use of its regulatory authority to compel the company to stop invoicing customers for certain taxes contrary to the instructions; and the unilateral change of the legal framework that governed the company and that drastically altered the economic balance of the concession.<sup>368</sup> Moreover, the investor argued that the use of the state’s public authority to encourage the customers not to pay the bills of the company and the state’s continued delivery services after a specific date and ultimate termination of the concession amounted to expropriation.<sup>369</sup>

In response, Argentina argued the investor’s failure to fulfill the contractual obligations and aims led to the termination of the concession.<sup>370</sup> In sum, no actions taken by the state were constitutive of a breach of the international standard of expropriation.<sup>371</sup> In addition, the termination of the concession was valid considering the serious violation of the concession agreement by the investor.<sup>372</sup>

The arbitral tribunal then faced the delicate question of whether the specific actions taken by the host state constituted expropriation as set forth in the BIT between both parties.<sup>373</sup> The tribunal found that, contractual rights, such as pursuing the customer to pay the bills among others, are indeed capable of being expropriated.<sup>374</sup> The tribunal further stated that all of these precise measures taken by the host state were not legitimate regulatory answers to the investor’s failings, but in fact were clear sovereign acts designed to end the concession or force its renegotiation.<sup>375</sup> Such severe

<sup>365</sup> *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶¶ 3.2.1–3.2.3 (Aug. 20, 2007).

<sup>366</sup> *See id.* ¶ 5.3.2.

<sup>367</sup> *Id.* ¶ 5.3.3.

<sup>368</sup> *Id.* ¶ 5.3.5.

<sup>369</sup> *Id.* ¶¶ 5.2.16, 5.3.5, 5.3.7–5.3.8.

<sup>370</sup> *Id.* ¶ 6.5.1.

<sup>371</sup> *See id.* ¶¶ 6.5.2–6.5.3.

<sup>372</sup> *Id.* ¶ 6.5.1.

<sup>373</sup> *See id.* ¶¶ 7.5.1, 7.5.5.

<sup>374</sup> *Id.* ¶¶ 7.5.4, 7.5.19.

<sup>375</sup> *Id.* ¶ 7.5.22.

actions were viewed as a campaign against the investor's business, which led to an expropriation even though there was no dispossession of the company itself.<sup>376</sup>

These actions had a similar effect to an expropriation on the dispossession of the claimant's rights and expectations upon the concession contract. The most devastating effect occurred when the recovery rate dramatically declined causing unsustainable losses.<sup>377</sup> This in turn deprived the investors of economic use and enjoyment of their concessionary rights, thus rendering the effectiveness of the concession and water services useless.<sup>378</sup> The tribunal also alluded that the failure alleged by the state, the turbidity episode, was intermittent and only occurred for a short period of time.<sup>379</sup> Moreover, it was not harmful, not out of the ordinary, and only affected a small number of customers.<sup>380</sup> The constant public pressure of the state to encourage the unpaid bills was, according to the tribunal, the most important breach of the BIT.<sup>381</sup> This decision further broadened the scope of possible actions constitutive of expropriation of a BIT.<sup>382</sup> This time, it included measures that did not lead to a physical dispossession of the concession itself, but had a similar effect by destroying the economic viability of the concession in a way that rendered it useless.<sup>383</sup>

Finally, in *Biwater Gauff Ltd. v. Tanzania* (2008), Tanzania was found liable for expropriation without compensation in breach of the BIT.<sup>384</sup> In this case, the investor claimed that Tanzania's repudiation of the contract, occupation of the company's facilities, and deportation of its senior employees all amounted to a breach of the BIT.<sup>385</sup> The claimant argued that such direct or indirect actions had the same effect of direct dispossession resulting in the effective loss of management, use of control and even depreciation of the asset values.<sup>386</sup> The accumulation of these actions constituted an effective expropriation.<sup>387</sup>

In response to the allegations, Tanzania argued that the investor breached the concession agreement on several occasions. For instance, the

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<sup>376</sup> *Id.* ¶¶ 7.5.23, 7.5.24.

<sup>377</sup> *Id.* ¶ 7.5.26.

<sup>378</sup> *Id.* ¶¶ 6.5.28–6.5.29.

<sup>379</sup> *Id.* ¶ 7.6.2.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* ¶¶ 7.5.24–7.5.26, 7.5.34

<sup>383</sup> *Id.*

<sup>384</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 519 (July 24, 2008).

<sup>385</sup> *Id.* ¶ 393.

<sup>386</sup> *Id.* ¶¶ 395, 397.

<sup>387</sup> *Id.* ¶ 413.

investor failed to provide maintenance or to pay the monthly rental fee.<sup>388</sup> This according to Tanzania, entitled the state to take certain measures, such as the termination of the contract.<sup>389</sup> The state then invoked the ongoing crisis at this time to support its measures and allege that the company had created a real threat to public health and welfare.<sup>390</sup> Finally, the state argued that three weeks of financial loss could not be seen as a fundamental deprivation of the investment asset leading to expropriation.<sup>391</sup>

The tribunal had to evaluate the impact of these actions in stages. The tribunal first turned to the international rule that includes direct and indirect measures in the scope of expropriation under a BIT.<sup>392</sup> Second, the tribunal scrutinized the alleged conduct of the host state.<sup>393</sup> In this case, the cumulative acts of the state could not be characterized as the ordinary behavior of a contractor, which adversely impacted the investor's rights.<sup>394</sup> Indeed, the state aggravated the dispute by announcing the repudiation of the contract itself during a press release.<sup>395</sup> This conduct was an unreasonable disruption of the contract between both parties, exclusively motivated by political reasons, and therefore contrary to the BIT provisions.<sup>396</sup> The tribunal further added that the termination of the concession remained a contractual matter to be resolved between both parties.<sup>397</sup>

As for the occupation of the facilities and the usurpation of the management and control, the tribunal decided that the occupation of the facilities and the usurpation of management, as executed with assistance of the police force, went far beyond normal contractual behavior.<sup>398</sup> Citing various international cases in support, the tribunal concluded that these actions clearly deprived the investor of its investment, in breach of the BIT.<sup>399</sup>

In conclusion, the public termination of the contract, subsequent political rally, seizure of the business, deportation of managers, and the final replacement with a state-owned corporation amounted to an expropriation of Biwater's investment, regardless of the inevitable termination of the contract and the absence of economic damages.<sup>400</sup> This case provides more examples of state actions that can result in an investment's expropriation.

<sup>388</sup> *Id.* ¶¶ 424–425.

<sup>389</sup> *Id.* ¶¶ 428–429.

<sup>390</sup> *Id.* ¶¶ 434–436.

<sup>391</sup> *Id.* ¶ 437.

<sup>392</sup> *Id.* ¶¶ 451–484.

<sup>393</sup> *Id.* ¶¶ 485–518.

<sup>394</sup> *Id.* ¶ 489.

<sup>395</sup> *Id.* ¶¶ 497–498.

<sup>396</sup> *Id.* ¶ 500.

<sup>397</sup> *Id.* ¶ 493.

<sup>398</sup> *Id.* ¶ 503.

<sup>399</sup> *Id.* ¶¶ 504–510.

<sup>400</sup> *Id.* ¶ 519.

Here, the tribunal did not take too many liberties in their interpretation, instead relying on international precedent to support its view and final decision.<sup>401</sup>

### B. The Fair and Equitable Treatment of Foreign Suppliers of Water Services

Comparative standards of treatment, like the Most Favored Nation (MFN) principle, operate through the extension of rights already afforded to some investors.<sup>402</sup> They do not, however, provide an objective guarantee of good treatment toward foreign investors.<sup>403</sup> Therefore, MFN obligations would be of little help in cases where all investors were subject to equally egregious treatment.

Absolute standards of treatment are meant to ensure that foreign investors are granted fair treatment.<sup>404</sup> Several formulations are found in BITs that intend to express the obligation of the host state to provide a certain minimum standard of “good” treatment to foreign investors.<sup>405</sup> Many of these formulations relate to the common requirement of ensuring “fair and equitable treatment” to foreign investors.<sup>406</sup>

#### 1. The Regulation of Fair and Equitable Treatment

Tribunals have avoided grand theories about the meaning of the Fair and Equitable Treatment (FET) standard. Some authors have endorsed such an approach, stating “FET has only one content which is operating at different thresholds, depending on the context.”<sup>407</sup> These different formulations, however, may lead to different interpretative outcomes.<sup>408</sup>

Most commonly, any theoretical discussion is limited to a list of examples of the kinds of behavior that violate the FET standard.<sup>409</sup> Illustrative

<sup>401</sup> *Id.* ¶¶ 485–518.

<sup>402</sup> See SCHREUER ET AL., *supra* note 311, at 206.

<sup>403</sup> *Id.*

<sup>404</sup> See STEVENS ET AL., *supra* note 311, at 58–62.

<sup>405</sup> *Id.*

<sup>406</sup> See SCHREUER ET AL., *supra* note 311, at 130.

<sup>407</sup> See IOANA TUDOR, *THE FET STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 154 (2008).

<sup>408</sup> See *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶ 338 (Oct. 31, 2011) (stating that there is variation in the practice of arbitral tribunals in relation to the fair and equitable standard); *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 296 (Sept. 28, 2007) (noting that fair and equitable treatment is not a clear and precise standard and that it has evolved by case-by-case determinations).

<sup>409</sup> See *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004); *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 95 (Oct. 11, 2002) (observing that “the minimum standard of treatment’ under international law

is the NAFTA award in *Waste Management v. Mexico* (2004). Here, the tribunal held that FET is violated by conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.”<sup>410</sup> In applying this standard, “it is relevant that the treatment which is in breach of representations made by the host State were reasonably relied on by the claimant.”<sup>411</sup>

## 2. Impact on the on the Water Services Regime

The host state was found liable for “fair and equitable treatment” breach in each of the six disputes mentioned above. A brief review of all the cases that involved the FET standard will allow us to better understand how this particular guarantee has gained wider protection after each and every international case dealing with its application and interpretation.

In the *ATA* dispute, there is no express mention of the FET standard in the text of Article II of the BIT.<sup>412</sup> This is particularly striking seeing as the arbitral tribunal found a FET violation<sup>413</sup> In this case, the FET standard was claimed as an MFN breach under Article II(2) of the BIT.<sup>414</sup> The investor argued that the MFN involves a duty of the state to accord FET among others, such as the duty not to impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments.<sup>415</sup> Again, in the eyes of the investor, the serious denials of justice, deprivation of procedural rights given by the contract itself, such as the extinguishment of the arbitration agreement, were constitutive of unfair and unequitable treatment, in violation of its duty.<sup>416</sup>

The arbitral tribunal had to face a simple question: are severe denials of justice and procedural rights allowing arbitration extinguishment constitutive of a FET breach upon the relevant BIT? The tribunal firmly declared that an investment was made of several, mostly inseparable procedural rights.<sup>417</sup> Later, the tribunal recalled that it is impossible for a state to in-

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as applied by arbitral tribunals and in State practice applies to a wide range of factual situations, whether in peace or in civil strife, and to conduct by a wide range of State organs and agencies”).

<sup>410</sup> *Waste Mgmt.*, ICSID Case No. ARB(AF)/00/3, ¶ 98.

<sup>411</sup> *Id.*

<sup>412</sup> *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, ¶ 73 n.1 (May 18, 2010).

<sup>413</sup> *Id.* ¶ 125.

<sup>414</sup> *Id.* ¶ 73.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* ¶ 74.

<sup>417</sup> *Id.* ¶ 96.

voke its national laws to evade BIT obligations.<sup>418</sup> The procedural right constitutes an asset regarding ATA's investment and it should benefit from the FET protection, as it is mentioned in the preamble of the treaty.<sup>419</sup> The contract's termination was found unlawful and therefore constitutive of a BIT breach, particularly of the FET standard, which, not to be forgotten, was only expressly mentioned in the preamble of the treaty.<sup>420</sup> In this case, the essence of the FET standard appears to have been extended to include extinguishment of an arbitration agreement.<sup>421</sup> This case gives a sense that the FET protection under a BIT provision is deeper than initially expected.

Second, in *SAUR*, the FET standard was part of the breach against the host state. Argentina violated the FET standard, according to the claimant, by taking several measures in violation of both the concession contract and the BIT.<sup>422</sup> In response, Argentina claimed that every action undertaken during this troubled time was necessary to keep the public water services available for its citizens and that the host state should not be responsible for the commercial risks assumed by the investor.<sup>423</sup>

The arbitral tribunal had to face different questions. First, it had to decide the specific meaning of the FET treatment, as found in the present BIT between both parties. To begin, the tribunal stated that Article 3 of the BIT was a general definition of the FET and that Article 5, the full protection standard, was its specific application.<sup>424</sup> This point is particularly interesting as it shows two standards, as opposed to the traditional view that combined both the definition of FET and a possible full protection standard, as alluded to in Article 5.1 of the present BIT.<sup>425</sup> At this point, it reveals the latitude of the arbitrators when interpreting the letter of a BIT. Furthermore, the tribunal also incorporated the concepts of discrimination and arbitrary measures as part of the FET and full protection standard.<sup>426</sup> The tribunal only examined the following actions to be relevant when considering the breach: the tariff revisions requested by the company which the host state deliberately delayed approval of as well as the inexorable termination of the concession

<sup>418</sup> *Id.* ¶ 122.

<sup>419</sup> *Id.* ¶ 125.

<sup>420</sup> Reciprocal Promotion and Protection of Investments, Jordan-Turk., Aug. 2, 1993, 2459 U.N.T.S. 175; *ATA*, ICSID Case No. ARB/08/2, ¶¶ 125, 129, 132.

<sup>421</sup> *ATA*, ICSID Case No. ARB/08/2, ¶ 125.

<sup>422</sup> *SAUR Int'l v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, ¶ 475 (May 22, 2014).

<sup>423</sup> *Id.* ¶¶ 32–33.

<sup>424</sup> *Id.* ¶ 480.

<sup>425</sup> See Accord entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur L'encouragement et la Protection Réciproques des Investissements, France-Arg., art. 5.1, July 3, 1991, 1728 U.N.T.S. 281; *SAUR*, ICSID Case No. ARB/04/4, ¶ 480.

<sup>426</sup> *SAUR*, ICSID Case No. ARB/04/4, ¶¶ 485–488.



by the state.<sup>427</sup> These were the decisive actions held by the tribunal in reaching the conclusion that Argentina, by its conduct, breached the FET standard provided for in Article 3 of the BIT.<sup>428</sup> Once again, looking at the outcome of the case, it appears to be a perfect catalogue of conduct constitutive of a FET treatment, and in a way, enlarging the scope of this sometimes-ambiguous international standard.

Moreover, a FET breach was found in the complex *Azurix Corp. v. Argentine Republic* (2006) dispute as well.<sup>429</sup> In this case, the FET standard was not only expressly written down in the text of the BIT but also mentioned in the preamble of the treaty.<sup>430</sup> In the claimant's view, several acts taken by Argentina led to a FET breach; such as, the refusal to provide necessary information, indefinite delays in verifying information, assertions of non-existent policy considerations, requests for unnecessary information, manipulation of contract language while ignoring express representations during the contracting process, changes of position, and even threats of criminal action against the company directors.<sup>431</sup> In response, Argentina rejected the investor's standard FET interpretation and proposed its own.<sup>432</sup> Moreover, the alleged facts were strongly questioned by the state and considered as rash, vague labels.<sup>433</sup> The state argued that the same acts leading to an expropriation breach could not be used once again to prove a breach of the FET.<sup>434</sup>

The arbitral tribunal was then confronted with two primary questions. First, what is the true definition and scope of the FET standard, and second, what conduct constitutes a breach of FET?<sup>435</sup> To answer the first question, the tribunal interpreted the ordinary meaning of the terms along with the text and purpose of the relevant BIT signed by both parties. The FET should be understood, in this case, as treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment at a higher level than required by international law.<sup>436</sup> Second, and more importantly, the tribunal had to consider the alleged actions of the state, and decide whether

<sup>427</sup> *Id.* ¶¶ 450, 475, 506.

<sup>428</sup> *Id.* ¶ 506.

<sup>429</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 408 (July 14, 2006).

<sup>430</sup> Treaty Between the United States and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., Nov. 14, 1991, 31 I.L.M. 124; *Azurix*, ICSID Case No. ARB/01/12, ¶ 324.

<sup>431</sup> *Azurix*, ICSID Case No. ARB/01/12, ¶ 330.

<sup>432</sup> *Id.* ¶ 332.

<sup>433</sup> *Id.* ¶ 337.

<sup>434</sup> *Id.* ¶¶ 338–339.

<sup>435</sup> *Id.* ¶ 358.

<sup>436</sup> *Id.* ¶¶ 360–362.

this type of conduct could constitute a breach of FET.<sup>437</sup> In the tribunal's view, several facts were relevant, including: the refusal by the province to accept the notice of termination, the unilateral termination by the state (on account of abandonment of the concession), the politicized tariff regime, and the repeated calls from the province for customers to not pay their bills.<sup>438</sup> All of these actions were decisive to the tribunal declaring that the actions reflected pervasive conduct of the host state in total breach of the FET standard.<sup>439</sup> Although the conclusion appears to be clear, the FET standard can be tricky to understand because it is so fact-specific. In any event, the *Azurix* case allowed the arbitral tribunal to present its interpretation of FET and contributed some examples of conduct constitutive of a FET breach.

In *Biwater*, once again, the FET standard was involved where the investor claimed a breach of Article 2.2 of the BIT.<sup>440</sup> According to the claimants, the FET standard required an obligation of vigilance and protection from the state, as well as a commitment to due process, and the promise to refrain from conduct which is arbitrary or constitutes a denial of justice.<sup>441</sup> In addition to alleged actions related to the expropriation standard, the investor also brought up several other actions taken by the state, such as: the non-appointment of an independent regulator, the failure to deal with requests to adjust the terms of the contract, the failure to ensure that the government agencies paid their water bills promptly, the failure of the state to manage the expectations of the public regarding the speed of improvements of the overall network system and more.<sup>442</sup> All of these actions were alleged as breaches of the FET standard

Once again, the first issue answered by the arbitral tribunal was whether FET is an autonomous standard or whether it is no more than the customary international law minimum standard.<sup>443</sup> Indeed, as the tribunal noted, the expression itself has different meanings depending on the terms of the individual treaty involved.<sup>444</sup> Interpreting the Tanzania-United Kingdom BIT spirit and letter, the tribunal concluded that the parties intended to adopt an autonomous standard as no reference to the customary law was made.<sup>445</sup> If the parties had wanted to refer to it, it should have been express-

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<sup>437</sup> *Id.* ¶¶ 358, 373–377.

<sup>438</sup> *Id.* ¶¶ 374–377.

<sup>439</sup> *Id.* ¶ 377.

<sup>440</sup> *Id.* ¶ 324.

<sup>441</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 524 (July 24, 2008).

<sup>442</sup> *Id.* ¶ 535.

<sup>443</sup> *Id.* ¶ 587.

<sup>444</sup> *Id.* ¶ 590.

<sup>445</sup> *Id.* ¶ 591.

ly written; without any reference to customary international law, the FET standard becomes autonomous.<sup>446</sup> Having said that, the tribunal admitted that the difference between the two meanings was more than thin, giving the arbitrators much latitude regarding its interpretation in each case.<sup>447</sup> Its ambiguous nature gives the tribunal the possibility to articulate a range of principles, such as protection of legitimate expectations, transparency, consistency non-discrimination, and good faith, in order to reach the required FET protection.<sup>448</sup>

The next question was whether the circumstances alleged were inequitable and thus a breach of the BIT.<sup>449</sup> Several acts were relevant in finding a breach of the FET by the state. Such actions included: the provincial governor's press conference, the seizure of the company offices, the deportation of its senior management, the installation of the provincial authorities in the company, and the failure to manage the expectations of the public, regarding the speed of improvements to the overall network that in effect undermined the public confidence in the company and the concession during various public speeches.<sup>450</sup> After a discussion on the essence of the ambiguous yet versatile concept of FET, giving us more insight as to its meaning in the context of water services concessions, this case exposed conduct that states should avoid in order not to breach their international investment treaty provisions and obligations.<sup>451</sup> This case illustrates one more time how the FET can be applied, interpreted, and understood in the water services context and what conduct can constitute a breach of FET provided in a BIT.

Furthermore, in the *Vivendi* water dispute, the concept of FET was interpreted in a similar context. In this case, the investor was claiming a breach of Articles 3 and 5.1 of the BIT.<sup>452</sup> In the claimant's view, various actions and omissions of the state were constitutive of a FET breach. The investor claimed to have been systematically deprived of its bilateral rights upon the BIT.<sup>453</sup> To support these allegations, the investor provided proof of specific actions and omission of the host state.<sup>454</sup> Such evidence included: the imposition of unilateral tariffs contrary to the terms of the concession; use of media to generate hostility in the citizenry towards the investor's business; incitation of customers to not pay their bills; forcing a concession

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<sup>446</sup> *Id.*

<sup>447</sup> *Id.* ¶¶ 592–593.

<sup>448</sup> *Id.* ¶ 602.

<sup>449</sup> *Id.* ¶ 603.

<sup>450</sup> *Id.* ¶¶ 604–605, 622.

<sup>451</sup> *Id.* ¶¶ 587–593, 604–605.

<sup>452</sup> *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶¶ 5.2.9, 5.2.17 (Aug. 20, 2007).

<sup>453</sup> *Id.* ¶¶ 5.2.4–5.2.6

<sup>454</sup> *Id.* ¶¶ 5.2.15–5.2.16, 5.2.4–5.2.9.

renegotiation and rejecting possible solutions; compelling the provision of services for a time after the first termination of the concession by the investor; and a pattern of harassment to prevent the investor from pursuing lawsuits.<sup>455</sup> All of these acts, according to the tribunal constituted a breach of FET, as well as an expropriation breach as seen in the previous section.<sup>456</sup>

In response, the state argued that this case was entirely contractual and that the tribunal had no jurisdiction.<sup>457</sup> The state alleged that the investor had failed to comply with the terms of their agreement such as increasing tariffs abruptly rather than gradually.<sup>458</sup> Finally, the state maintained that in this situation, to protect the drinkable water and sewage services of the population, the province had a legitimate right to act and therefore, there was no FET breach<sup>459</sup>

In its final award, the tribunal faced several issues. First, it had to interpret the scope, content, and true essence of the FET standard desired under the Argentina-France BIT.<sup>460</sup> The tribunal noted that the principle was already present in both parties' minds during the preamble process of their treaty.<sup>461</sup> The text suggests a broader interpretation of the standard, which invites consideration of a wide range of other international principles, such as good faith and transparency.<sup>462</sup> The tribunal also considered Article 5.1, which concerned the full protection and security standard.<sup>463</sup> It is clear that in this case, both of these principles were intimately linked. Both principles appear to be mixed in the arguments of both of the parties as well as the tribunal's.

Some actions undertaken by the state where specific FET references were made, even where applicable to the full protection and security concept, also pertain to the FET treatment in general.<sup>464</sup> For example, enforced renegotiation of concessions as well as threats of rescission based on various allegations and after depriving the investor's billings of formal legitimacy clearly constitute inequitable conduct amounting to a BIT breach.<sup>465</sup> According to the FET standard, undercutting a concession that has been properly granted constitutes unfair and inequitable treatment.<sup>466</sup> Here, the

<sup>455</sup> *Id.* ¶¶ 5.2.4, 5.2.6, 5.2.12, 5.2.16.

<sup>456</sup> *Id.* ¶¶ 7.4.18–7.4.19.

<sup>457</sup> *Id.* ¶ 6.3.1.

<sup>458</sup> *See id.* ¶¶ 6.4.2, 6.4.7, 6.4.8, 6.4.9–6.4.10.

<sup>459</sup> *Id.* ¶¶ 6.4.7, 6.5.1, 6.6.6.

<sup>460</sup> *Id.* ¶¶ 7.4.1–7.4.5.

<sup>461</sup> *See id.* ¶ 7.4.4.

<sup>462</sup> *Id.* ¶ 7.4.7.

<sup>463</sup> *Id.* ¶ 7.4.13.

<sup>464</sup> *Id.* ¶ 7.4.15.

<sup>465</sup> *Id.* ¶ 7.4.31.

<sup>466</sup> *Id.* ¶¶ 7.4.34–7.4.44.

provincial governor made several public speeches criticizing and undermining the investor's business.<sup>467</sup> Furthermore, the prohibition of the company's ability to pursue its collection lawsuits or enforce its judgments also served as conduct amounting to a breach of FET.<sup>468</sup> This case provides a number of paradigmatic examples of state action constitutive of FET violation.

Finally, in *Impregilo S.p.A. v. Argentine Republic* (2011), the investor claimed that Argentina failed to treat the claimant's investment equitably, and thus breached Article 2.2 of the BIT.<sup>469</sup> The claimant delivered a list of actions and omissions by the host state to support his claim during arbitration. Such examples include: the early repudiation of the state commitments and obligations under the concession contract that prevented the investor from generating expected revenues; delays when delivering to wastewater treatment plants; delays and a refusal to update the categorization of the company's customers; and preventing the use of a more current valuation methodology in order to calculate the water price.<sup>470</sup> Even worse, however, the province enacted emergency legislation in 2002 depriving the investor of all its fundamental and legal concession rights.<sup>471</sup> The most destructive consequence of this legislation was the elimination of the right to calculate the tariff in US dollars. Instead, the peso was devalued at an artificial rate, reducing the revenues by two-thirds.<sup>472</sup> Moreover the province attempted to force renegotiation of the concession right before terminating it, alleging obligation failures from the company, in order to return the water concession back into public hands.<sup>473</sup>

In response to these allegations, Argentina argued that every action it undertook sufficed as an emergency measure in response to the serious financial crisis it faced at the time.<sup>474</sup> The state further argued that the investor knew how fragile and unstable a condition both the state and its water services sector was in prior to its involvement.<sup>475</sup> For this reason, according to Argentina, the state cannot be responsible for the risks assumed by the investor itself.<sup>476</sup>

<sup>467</sup> See *id.* ¶ 6.8.6.

<sup>468</sup> *Id.* ¶ 7.4.45.

<sup>469</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶¶ 284–285 (June 21, 2011).

<sup>470</sup> *Id.* ¶¶ 196–199.

<sup>471</sup> *Id.* ¶ 202.

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* ¶¶ 203–205.

<sup>474</sup> *Id.* ¶ 211.

<sup>475</sup> *Id.* ¶ 212.

<sup>476</sup> *Id.* ¶ 225.

Upon review of the dispute, the tribunal declared, that as it is written in the BIT at issue, the FET standard was meant to give an adequate protection to the investor's reasonable expectations.<sup>477</sup> This protection does not mean, however, that the investor is absolutely assured against any changes in the legal framework of the host state, especially not in a time of crisis.<sup>478</sup> The investor does, however, remain protected against unreasonable modifications.<sup>479</sup> The crucial actions by the state in the tribunal's point of view were those occurring when the emergency legislation was enacted, such as: the requirement that fees and bills be paid in pesos and not in US dollars; that water price calculated in devaluated Argentinian peso was detrimental to the investor's business; the new regulatory framework concerning drinkable water and wastewater services was unfavorable to the company; and finally, the reluctance to renegotiate the concession.<sup>480</sup> All of these actions informed the tribunal's finding that Argentina had failed to restore a reasonable equilibrium to the concession.<sup>481</sup> Additionally, the tribunal held that Argentina had aggravated its situation so much that it constituted a clear breach of FET upon the BIT signed with the investor.<sup>482</sup> This water dispute represented yet another factual scenario of a potential FET breach, thus providing much more substance, with diverse examples of actions, to the FET analysis in the context of water services.

Looking at all the FET breach cases, there is no doubt that this jurisprudence is slowly giving birth to a more precise definition of the FET international economic law standard.

### C. *The Full Protection and Security Guaranteed to Water Services*

One of the key substantive provisions commonly included in investment treaty texts is the obligation to provide "full protection and security." Different variants in phrasing also exist, such as: "protection and security," "protection in accordance with fair and equitable treatment," or "legal security."<sup>483</sup>

#### 1. The Principle of Full Protection and Security

*Saluka Investments B.V. v. Czech Republic* (2006) explains that the "full protection and security" standard applies when the foreign investment

<sup>477</sup> *Id.* ¶ 285.

<sup>478</sup> *Id.* ¶ 299.

<sup>479</sup> *Id.* ¶ 291.

<sup>480</sup> *Id.* ¶¶ 316–318, 325, 328, 329.

<sup>481</sup> *Id.* ¶ 331.

<sup>482</sup> *Id.*

<sup>483</sup> SCHREUER ET AL., *supra* note 311, at 161.

has been affected by civil strife and physical violence.<sup>484</sup> It is clear that tribunals are in agreement that the standard applies at least in situations where actions of third parties involving either physical violence or the disregard of legal rights occurs.<sup>485</sup> It further requires that the state exercise due diligence to prevent harm to the investor.<sup>486</sup> The standard is commonly understood to not grant the investor an “insurance against all and every risk,” as was recently noted in *Vanessa Ventures v. Venezuela* (2008).<sup>487</sup> Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence for purposes of these cases is considered that of a host state in the circumstances and with the resources of the particular state in question.<sup>488</sup> More recently, the scope of the full protection and security concept has been extended to provide “a legal framework that offers legal protection to investors including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights” and which offers a rich canvas against which foreign investors in the water sector may prepare their claims.<sup>489</sup>

## 2. Impact in the Regime of Water Services

Only four water disputes over the past twenty years have resulted in a “full protection and security” BIT breach. A review of the specific facts and tribunal interpretations of each case exposes the contours of the emerging full protection standard and sheds light on the types of attitudes and actions that may be construed as a breach.

First, in *Azurix*, Argentina was found liable for breach of full protection and security provision of the BIT, among others.<sup>490</sup> In its memorial, the claimant, an American investor, argued that the standard of full protection and security imposes an obligation of vigilance and due diligence upon the government.<sup>491</sup> Furthermore, such an obligation goes beyond physical protection or basic police functions, to protections from acts such as adminis-

<sup>484</sup> *Saluka Inv. B.V. (Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, ¶ 483 (Mar. 17, 2006).

<sup>485</sup> SCHREUER ET AL., *supra* note 311, at 163–65.

<sup>486</sup> *Id.* at 161–62.

<sup>487</sup> See *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, ¶ 223 (Jan. 16, 2013); SCHREUER ET AL., *supra* note 311, at 161–62.

<sup>488</sup> FRANCIS NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* 310 (2009).

<sup>489</sup> *Frontier Petroleum Serv. Ltd v. Czech Republic*, UNCITRAL, Final Award, ¶ 263 (Nov. 12, 2010).

<sup>490</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 442 (July 14, 2006).

<sup>491</sup> *Id.* ¶ 394.

trative actions, political actions or again amendment of its law.<sup>492</sup> In the present situation, the investor alleged that the host state breached the standard by failing to apply the regulatory framework of the concession agreement, including failures to revoke concession resolutions and to decide adjustment or valuations.<sup>493</sup> In short, the claimant maintained that the state failed to take any actions to protect the investment, and that such an omission necessarily implied a breach of the full protection and security obligation.<sup>494</sup> In response, the state argued that the investor simply claimed this contractual dispute in arbitral court for the sole purpose of obtaining the BIT protection.<sup>495</sup> The host state further maintained that the dispute was not related to an investment at all.<sup>496</sup> Moreover, according to the state, no specific actions had been rightfully claimed, only omissions, which are ordinarily not included within standard BIT protection, which requires active behavior in the duty of care.<sup>497</sup>

Neither active behavior nor basic police functions were involved in *Azurix*. The only relevant facts were the failures of the state to apply the regulatory framework initially negotiated into their water concession agreement.<sup>498</sup> The tribunal, therefore, faced the delicate question of whether “full protection and security” as written into the relevant BIT is limited to active behavior of the state. To answer this question, the tribunal carefully interpreted Article II(2)(a) of the BIT.<sup>499</sup> First, the tribunal noted that in some treaties, the full protection and fair and equitable treatment appears as a single standard.<sup>500</sup> This, however, was not the case in *Azurix*. The two phrases in the treaty clearly indicate two distinct obligations.<sup>501</sup> Moreover, the tribunal declared that the BIT signed between Argentina and *Azurix* was understood to go beyond physical actions or security and that the stability of the investment was simply another form of full protection, which was just as important to the investors.<sup>502</sup> Though the United States had previously signed other agreements with Uruguay limiting the scope of the full protection standard, these would have no impact on the present dispute because here the phrasing of the Article had no other adjective or explanation.<sup>503</sup>

<sup>492</sup> *Id.* ¶¶ 394–395.

<sup>493</sup> *Id.* ¶ 396.

<sup>494</sup> *Id.*

<sup>495</sup> *Id.* ¶¶ 398, 401.

<sup>496</sup> *Id.* ¶ 398.

<sup>497</sup> *Id.* ¶¶ 398, 400.

<sup>498</sup> *Id.* ¶ 396.

<sup>499</sup> *Id.* ¶¶ 406–408.

<sup>500</sup> *Id.* ¶ 407.

<sup>501</sup> *Id.* ¶¶ 407–408.

<sup>502</sup> *Id.* ¶ 408.

<sup>503</sup> *Id.*



Therefore, the provision reasonably extended the Article's coverage to more than physical actions when applying the concession's regulatory framework, such as to omissions.<sup>504</sup> These omissions thus constituted a failure to assure full protection and security of Azurix's investment.<sup>505</sup>

The tribunal's conclusion is highly relevant for several reasons. The actual text and phrasing of a BIT will be literally interpreted. If the state wants to limit the scope of the full protection standard, it has to specifically include a provision in the BIT.<sup>506</sup> This case confirmed the notion that standard limitations must be clearly expressed in BITs and that omissions may be considered in determining breach of a BIT relating to service concessions.<sup>507</sup>

The full protection standard was again part of Argentina's liability in the *Vivendi* case.<sup>508</sup> The French investors claimed they were systematically attacked and deprived of their rights under their BIT by the host state.<sup>509</sup> The investors pointed to several specific actions undertaken by the host state, such as: the imposition of unilaterally modified tariffs that were contrary to the terms of the concession; the use of media to create hostility within the population towards the investors; inciting the population to not pay their bills; forcing the renegotiation of the concession; rejecting, in bad faith, proposals that could have saved the agreement and the overall water services system.<sup>510</sup> These alleged attacks destroyed the economic value of the concession, thereby forcing the investor to terminate the agreement.<sup>511</sup> The state then forced the investor to continue providing services for ten additional months before the final termination of the concession.<sup>512</sup> The claimant further argued that the harassment from the state continued even after the end of the water services contract.<sup>513</sup> The claimant thus not only argued a breach of full protection standard for passive behavior, but also that the standard extended beyond physical security to encompass security against harassment that damages the functionality of an investor's company.<sup>514</sup>

<sup>504</sup> *Id.* ¶¶ 406–408.

<sup>505</sup> *Id.* ¶¶ 396, 408.

<sup>506</sup> *See id.* ¶¶ 406–408.

<sup>507</sup> *Id.* ¶ 408.

<sup>508</sup> *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICISID Case No. ARB/97/3, Award, ¶¶ 7.4.16–7.4.17 (Aug. 20, 2007).

<sup>509</sup> *Id.* ¶ 3.2.1.

<sup>510</sup> *Id.* ¶¶ 3.2.1–3.2.2.

<sup>511</sup> *Id.* ¶ 3.2.2.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> *Id.* ¶ 5.2.18.

The state viewed these actions and omissions as only involving contractual matters, under which the arbitral tribunal had no jurisdiction.<sup>515</sup> The state likewise argued that the treaty rights and the controlling interest in the local company were acquired unlawfully, therefore precluding the investor to any BIT claim.<sup>516</sup> Additionally, the host state contended that the population was revolting and not paying their bills due to their loss of confidence in the water services system as a result of poor water quality and delivery.<sup>517</sup> The state believed that it had the right and responsibility to take steps to ensure availability of safe affordable and accessible water to its population.<sup>518</sup> Finally, the state rejected the interpretation imposing a general duty to ensure a stable and predictable business or fiscal environment. The state thus supported a limitation to physical interferences or actions.<sup>519</sup>

In its final decision, the tribunal decided that the text of Article 5.1 was not limited to physical actions. If the parties wanted to limit the scope of the provision, they should have included specific language expressing such intent.<sup>520</sup> Without this type of language, any kind of act or measure including those harming the functional business of the investors, as in the present case, may constitute a breach of full protection under the BIT.<sup>521</sup>

Interestingly, the tribunal found there was a breach of the FET standard in addition to the breach of full protection and security.<sup>522</sup> This suggests that the two standards, although expressly written in two separate articles, are in fact intimately linked.<sup>523</sup> The *Vivendi* decision enlarged the scope of what constitutes a full protection and security provision in the singular context of water services.<sup>524</sup> The tribunal's interpretation included any kind of acts, measures or conduct possibly harming in any way, economically, physically or politically the investors' business and the company providing the water services.<sup>525</sup>

In both *Azurix* and *Vivendi*, the full protection and security standard were significantly expanded with the addition of two kinds of actions constitutive of a BIT breach in the water services context: a state's omission of guarantees to fully protect the investment and conduct towards an investor

<sup>515</sup> *Id.* ¶¶ 3.3.1, 6.3.

<sup>516</sup> *Id.* ¶¶ 3.3.1, 6.6.9.

<sup>517</sup> *Id.* ¶ 3.3.2.

<sup>518</sup> *Id.* ¶ 3.3.5.

<sup>519</sup> *Id.* ¶¶ 6.6.8, 7.4.14.

<sup>520</sup> *See id.* ¶¶ 7.4.15.

<sup>521</sup> *Id.* ¶¶ 7.4.15–7.4.17.

<sup>522</sup> *Id.* ¶ 11.1.

<sup>523</sup> *See id.*

<sup>524</sup> *Id.* ¶¶ 7.4.15–7.4.17.

<sup>525</sup> *See id.*

that harms the functionality of the investor's business.<sup>526</sup> These two cases provide examples of actions that host states should avoid when dealing with private investors in the water sector so as to adequately and legally fulfill their provisions under the relevant BIT.

In the third case, *Impregilo*, the final decision on the full protection and security was more complex. Indeed, the international standard does not immediately stand out while reading the different written provision under the Argentina-Italy BIT. The concept of full protection cannot be found separately from the related FET, and not a single line of the provision mentioned full protection and security.<sup>527</sup> As we have seen previously, however, the interpretation and definition of this standard must be closely considered with any analysis of a potential FET breach.<sup>528</sup>

In the claimant's view, the same facts that led to an FET breach also led to a breach of "full protection and security."<sup>529</sup> This case draws a relevant point, clearly stating that under the Argentina-Italy BIT, the concept of FET and full protection were not separate standards, but intimately bound, so much that, a breach of one will almost automatically amount to a violation of the other.<sup>530</sup> In its eighty-eight page award, the tribunal spent only six lines discussing the alleged full protection standard breach.<sup>531</sup> After a long and detailed interpretation of the FET breach, the tribunal simply stated that where a FET breach was already established, it was not necessary to examine whether there was a breach of the full protection standard.<sup>532</sup> Here, according to the tribunal, FET breaches already constitute failures to ensure full protection.<sup>533</sup> These words clearly support the fact that in this specific BIT, both of these international standards were viewed as inexorably linked together.<sup>534</sup>

Finally, in *Biwater*, Tanzania was found liable for full protection and security breach.<sup>535</sup> The investor argued that the state had an obligation of

<sup>526</sup> *Id.* ¶¶ 7.4.13, 7.4.15–17; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 406–408 (July 14, 2006).

<sup>527</sup> Agreement Between the Republic of Argentina and the Italian Republic for the Promotion and Reciprocal Protection of Investments, Fra.-Arg., May 22, 1990, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/99> (It.), archived at <http://perma.cc/4USU-KQ7Y>; *Impregilo S.p.A. v. Argentine Republic*, ICSID, Case No. ARB/07/17, Award, ¶¶ 285, 334 (June 21, 2011).

<sup>528</sup> *Impregilo*, ICSID Case No. ARB/07/17, ¶ 334; *Vivendi*, ICSID Case No. ARB/97/3, ¶¶ 7.4.16, 11.1.

<sup>529</sup> See *Impregilo*, ICSID Case No. ARB/07/17, ¶¶ 192–209.

<sup>530</sup> *Id.* ¶¶ 333–334.

<sup>531</sup> *Id.* ¶ 334.

<sup>532</sup> *Id.*

<sup>533</sup> *Id.* ¶¶ 333–334.

<sup>534</sup> *Id.*

<sup>535</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 814 (July 24, 2008).

due diligence to protect its investment against physical assault, such as civil strife and physical violence under the full protection provision.<sup>536</sup> Similarly, the investor maintained that Tanzania, by its actions, failed to safeguard the physical integrity of its investment against interference by use of force.<sup>537</sup> The alleged actions of the state included: the usurpation of management and control of the investor's water services company; the termination of the concession and the new state owned replacement at a staff meeting; the removal of the company manager under serious threat of deportation; and finally, the occupation and seizure of the entire water services facilities and business.<sup>538</sup> All of these actions were viewed as forcible physical interferences in the investor's company.<sup>539</sup> Additionally, the claimant argued that the full protection and security standard, as negotiated in their BIT, "included a protection from interference with the basic legal framework upon which the investor relied to make its investment."<sup>540</sup> The investor's basic expectation was that the concession contract would be performed in good faith, and this expectation was not met.<sup>541</sup>

In response to these allegations, the host state argued that the investor wrongfully distinguished between the FET provision and the full protection standard by enlarging their scope by including the obligation of legal protection and full security in addition to physical actions.<sup>542</sup> The state also contended that the purported termination of the concession during the staff speech did not constitute a breach of the BIT, since it was not intended to be a termination.<sup>543</sup> In addition, the state attempted to limit the scope of the diligence standard by claiming that the standard only applied to the use of force from outside actors, such as civil war, riots, or natural disasters.<sup>544</sup> The state also refused to characterize the scheduling of the staff meeting as using force, thus denying any effects on physical integrity on the claimant's investment by stating that no quantifiable damages could be found.<sup>545</sup> The state further argued that the investor did not possess the assets and by refusing to give them up, the state had no choice but to seize the services.<sup>546</sup> Despite that, no physical force was used and the deportation threats were made

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<sup>536</sup> *Id.* ¶ 712.

<sup>537</sup> *Id.* ¶ 714.

<sup>538</sup> *Id.* ¶¶ 714–715.

<sup>539</sup> *Id.* ¶ 714.

<sup>540</sup> *Id.* ¶ 715.

<sup>541</sup> *Id.*

<sup>542</sup> *Id.* ¶¶ 716–719.

<sup>543</sup> *Id.* ¶ 716.

<sup>544</sup> *Id.* ¶¶ 717–719.

<sup>545</sup> *Id.* ¶ 720.

<sup>546</sup> *Id.* ¶ 722.

to protect the water supply and sewage system.<sup>547</sup> Finally, according to Tanzania, the scope of the full protection standard should not be seen as a strict liability.<sup>548</sup> Rather, the state viewed the standard as more of a duty of diligence expected from a civilized nation that may be limited when authorities act to protect water services and distribution to their people, particularly in times of crisis.<sup>549</sup>

In its decision, the tribunal expressed the meaning of full protection and security and affirmed both the “duty of diligence” and protection of the “physical integrity of an investment against the use of force” concepts.<sup>550</sup> The tribunal cited to and adopted the view of the *Azurix* case, concluding that full protection standard protects beyond strict physical force.<sup>551</sup> The tribunal enlarged the scope of the protection beyond physical force by adding commercial, financial and legal guarantees of stability.<sup>552</sup> It would be “unduly artificial,” according to the tribunal, to confine the essence and scope of this international standard.<sup>553</sup> Moreover, the tribunal refused to limit the protection to the state’s duty to protect against interference by third parties.<sup>554</sup> Rather they extended an obligation to organs of the host state itself, as the word “full” clearly intended.<sup>555</sup>

In conclusion, unnecessary and abusive acts by the state, even without the use of force, represent a clear breach of the full protection and security standard under the related BIT, even if no quantifiable damages are found or proven.<sup>556</sup> The *Biwater* case added a third kind of action to the full protection breach called the “unreasonable or discriminatory measures” standard, which includes threats.<sup>557</sup> These cases provide important guidelines and types of actions for states to avoid in an effort to faithfully adhere to both current and future BITs and state water service concession contracts.

#### CONCLUSION: THE EMERGENCE OF AN INTERNATIONAL REGIME FOR SANITATION AND WATER SERVICES

The last decade has witnessed a dramatic surge of investment disputes between foreign investors and host country governments. Arbitral panels have been charged with the task of applying the rules of international in-

<sup>547</sup> *Id.* ¶¶ 721–722.

<sup>548</sup> *Id.* ¶ 723.

<sup>549</sup> *Id.*

<sup>550</sup> *Id.* ¶¶ 727–730.

<sup>551</sup> *Id.* ¶¶ 728–729.

<sup>552</sup> *Id.* ¶ 729.

<sup>553</sup> *Id.*

<sup>554</sup> *Id.* ¶ 730.

<sup>555</sup> *Id.*

<sup>556</sup> *See id.* ¶¶ 730–731.

<sup>557</sup> *Id.* ¶ 714.

vestment agreements in specific cases, a task that is not often straightforward given the broad and ambiguous terms of these agreements. This new phenomenon of investment litigation has resulted in a number of decisions from arbitral tribunals in the water service sector. Such decisions have contributed to the formation of an embryonic water service jurisprudence and the elucidation of key provisions, concepts, and definitions embedded in BITs and water service-related concession contracts. All of this has led to the emergence of a nascent framework for global economic regulation of the sanitation and water services industry.

The definition of investment is currently absorbing sanitation and water services, a rather new form of investment in the transnational scenario. Furthermore, international investment law is growing flexible enough to attract these specific types of highly sensitive disputes. International investment treaties and the tribunal in charge of applying these rules have contributed significantly in shaping the contours and substance of an international water service jurisprudence and the emerging international economic water services regime. The investment world fills a gap that no other organization has been able to address.

While an investment tribunal's main task is to apply treaties, which protect foreign investors, the same tribunals may not be well equipped to consider non-economic issues, such as those essential to the water regulation industry.<sup>558</sup> Although the investment jurisprudence may be seen as progress towards the regulation of an important service, it also emphasizes the lack of a more global holistic approach to regulating water services and access to water. Future research will have to find a means of reconciling the great advances made in the area of investment with the urgent need of ensuring that the more nascent human right to water receives equal consideration in the coming years.

On a more practical level, water services are no longer solely under the purview of domestic regulation. International investment agreements apply by default, particularly in the absence of World Health Organization standards. The international investment regime further contributes to the internationalization of the water services regime. Conversely, governments must design water related policies that comply with fair and equitable treatment, expropriation regulation, and full protection and security, since not doing so can be costly and deter foreign investors from providing high quality services. Or, if policy makers do not agree with such a reality, they must re-design and re-engineer the applicable international law.

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<sup>558</sup> See Bradley J. Condon, *Treaty Structure and Public Interest Regulation in International Economic Law*, 17 J. INT'L ECON. L. 333, 351-53 (2014).

Both the theoretical and practical conclusions drawn by this Article anticipate future developments and assist in exposing the horizon of forthcoming research and debate in the global governance of sanitation and water services. The increasing need for water due, inter alia, to global warming and climate change and new technologies means that foreign investments in water will increase and will create more proactive approaches in thinking and designing the international principles that regulate water.

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