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Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations

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ABSTRACT

An increasing number of international investment arbitrations concern the ability of states to terminate concession contracts or impose regulations onto poorly performing foreign investors. This article attempts to address the way in which international human rights legal obligations interact with international investment agreements when states take regulatory measures to fulfill the right to water. The author examines the development of the right to water as an independent international human right in order to establish the framework of the approach, and subsequently critiques the way in which investment agreement clauses interact with the steps necessary within the human rights regime to further human rights. Expropriation, fair and equitable treatment, and "umbrella" clauses can each play a role, individually or collectively, in creating barriers to development aimed at the realization of the right to water. Such problems have already manifested within recent investment arbitration, and the reluctance of tribunals to discuss the human rights aims of states has resulted in a significant gap in which states cannot be certain that, if they follow the interpretation of state obligations under international human rights law, they then will not be in breach of their other obligations under investment treaties. Finally, the author takes an integrative approach to examine the way in which states can realize the right to water, while complying with existing investment treaties, and seeks to demonstrate that the inclusion of human rights provisions within international agreements will aid in the realization of the universal right to water.

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Water may be a human right, but someone has to pay the capital investments and cover the operating costs – either users or taxpayers and government.[1]

I. INTRODUCTION

Water is a fundamental aspect of human development, dignity, and health.[2] In just over the past 50 years, the population on the planet has grown from 2.5 billion to over 6.5 billion,[3] but the per capita renewable water supply has fallen by 58 percent[4] and over one billion people currently lack access to water.[5] With the population expected to grow to over 9.2 billion in the coming decades,[6] a global water crisis is all but imminent.[7] The effects of water resource challenges are already evident in Sudan[8] and Ethiopia,[9] and the continued absence of sustainable management policies perpetuates many of the conflicts consuming these areas.[10] With international peace and security at the foundational heart of the United

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1. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006, BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS 78 (2006) [hereinafter HUMAN DEVELOPMENT REPORT 2006], *available at* http://hdr.undp.org/en/media/HDR06-complete.pdf.

2. *Id.* at 43.

3. U.N. Dep't of Econ. & Soc. Affairs, Population Div., World Population Prospects: The 2006 Revision, Highlights (Working Paper No. ESA/P/WP.202, 2006), [hereinafter *World Population Prospects*], *available at* http://www.un.org/esa/population/publications/wpp2006/WPP2006_Highlights_rev.pdf.

4. JOHN SCANLON ET AL., WATER AS A HUMAN RIGHT? 16 (2004), *available at* http://data.iucn.org/dbtw-wpd/edocs/EPLP-051.pdf.

5. WORLD HEALTH ORG., THE RIGHT TO WATER 12–13 (2003) [hereinafter WHO], *available at* http://www.who.int/water_sanitation_health/rtwrev.pdf (based on the definition of "no access" as being "more than 1 kilometre/more than 30 minutes round trip" away from a water source).

6. *World Population Prospects*, *supra* note 3, at 9.

7. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 8–11 (2007) [hereinafter IPCC], http://www.ipcc.ch/ipccreports/ar4-wg2.htm (last visited Oct. 25, 2008).

8. BBC News, *Ancient Darfur Lake 'Is Dried Up,'* July 20, 2007, http://news.bbc.co.uk/2/hi/africa/6908224.stm (last visited Sept. 21, 2008).

9. BBC News, *Somalis Clash over Scarce Water*, Feb. 17, 2006, http://news.bbc.co.uk/2/hi/africa/4723008.stm (last visited Sept. 1, 2008).

10. Stanslous Tombe Bonda, *Darfur Conflict and Water Management Issues*, NETWAS NEWSL., Sept. 2005, http://www.netwas.org/newsletter/articles/2005/09/2 (last visited Oct. 7, 2008); Lydia Polgreen, *A Godsend for Darfur, or a Curse?*, N.Y. TIMES, July 22, 2007, http://www.nytimes.com/2007/07/22/weekinreview/22polgreen.html?em&ex=1185336000&en=4fce29635fc3285c&ei=5087%0A (last visited Oct. 7, 2008).

Nations,[11] the Millennium Development Goals have set a target of 2015 to halve the proportion of the world's population unable to access a sustainable source of safe drinking water.[12] Now that there is an increasing focus on sustainable development in international law,[13] it is recognized that there is a need "to reconcile economic development with protection of the environment."[14] Sustainable development requires trade-offs between the economic advancement of a state and the safeguarding of natural resources for the promotion of human well-being. As water is now recognized as a human right, the issue of sustainable development and water use should be at the forefront of the international agenda.[15] This article examines the interaction of human rights and sustainable development of water use and what the impact of this interaction has been on the realization of human rights, and discusses ways in which the synthesis of economic development and the human rights obligation to ensure access to potable water has caused a conflict within competing international treaty obligations.

The recognition of a human right to water imposes obligations upon states to maximize the sustainable use of water resources for the global population. Although the way in which states can achieve this goal is

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11. The Charter of the United Nations (entered into force Oct. 24, 1945), 59 Stat. 1031, art. 1, ¶ 1 [hereinafter U.N. Charter].

12. United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 8, 2000); *see* Larry Elliott, *Anti-poverty Targets in Africa Will Not Be Met, UN Warns*, THE GUARDIAN, July 2, 2007, http://www.guardian.co.uk/business/2007/jul/02/debt.development (last visited Oct. 7, 2008). The United Nations now believes that it will be unable to meet this target.

13. United Nations Conference on the Human Environment, Rio de Janerio, June 3-14, 1992, *The Rio Declaration on Environment and Development*, princ. 1, U.N. Doc. A/CONF.151/26 (vol. I) (June 14, 1992), *available at* http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163.

14. Gabcíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, at 140 (Sept.).

15. This is particularly so because of its prominence as one of the earliest issues of international contention in the Permanent Court of International Justice (PCIJ) in the Jurisdiction of the European Commission of the Danube Between Galatz and Braila (Fr., Gr. Brit. and Italy v. Rom.), 1927 P.C.I.J. (ser. B) No. 14 (Advisory Opinion). Indeed, this importance remains and the International Court of Justice (ICJ) is currently in the process of settling a dispute over the economic development of a water course in *Pulp Mills on the River Uruguay*, (Arg. v. Uru.) 2006 I.C.J. (no opinion), and the International Centre for Settlement of Investment Disputes (ICSID) is in the process of the *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22 (W. Bank 2007) [hereinafter *Biwater Gauff*], arbitration concerning the expansion of water services under the protection of an international investment agreement (IIA).

largely left open to their individual circumstances,[16] the World Bank[17] and International Monetary Fund (IMF)[18] have encouraged privatization of state-owned utilities on the assumption that water is an economic good.[19] While not detracting from the basic human need for water,[20] this economic emphasis, by commodifying water as a resource, detracts from water's role as a necessary part of social and cultural goods.[21] This is one of the core tensions in the state provision of water, that it is also a resource with a financial value that is of interest to private companies.[22] States must provide water, but this is coupled with business concerns over financial viability and planning in running a state utility. As a result, we have seen a vast increase in the amount of water privatization contracts between states and investors[23] resulting in roughly 10 percent of global water consumers today receiving their water from private enterprise.[24]

Generally, the privatization of water is publicly opposed[25] due to the belief that water is such a valuable resource that it should not be the responsibility of profit-making enterprises to ensure its provision to

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16. HUMAN DEVELOPMENT REPORT 2006, *supra* note 1, tbl. 2.3.

17. WORLD BANK, Report No. 19232-BO, BOLIVIA PUBLIC EXPENDITURE REVIEW, 7 (1999), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/01/19/000094946_9906190530222/Rendered/PDF/multi_page.pdf.

18. Press Release, International Monetary Fund, IMF Approves Three-year Arrangement Under the ESAF for Bolivia (Sept. 18, 1998) (IMF Press Release No. 98/41).

19. INTERNATIONAL CONFERENCE ON WATER AND THE ENVIRONMENT, THE DUBLIN STATEMENT ON WATER AND SUSTAINABLE DEVELOPMENT, princ. 4 (June 14, 1992) [hereinafter DUBLIN STATEMENT ON WATER AND SUSTAINABLE DEVELOPMENT]. This is actually different from the ways in which Western water systems developed in that although water utilities were private services at the beginning of the nineteenth century, it was quickly recognized that the expansion of the utility could only take place in the public sphere. By the turn of the twentieth century nearly all water utilities were publicly run and operated. It has been only recently that developed states have reverted back to privatized water utilities, but this has been after the full development of the system has taken place and has not been without its objectors, as noted in HUMAN DEVELOPMENT REPORT 2006, *supra* note 1, at 89; KAREN J. BAKKER, AN UNCOOPERATIVE COMMODITY: PRIVATIZING WATER IN ENGLAND AND WALES (2003).

20. DUBLIN STATEMENT ON WATER AND SUSTAINABLE DEVELOPMENT, *supra* note 19, princ. 1.

21. Comm. on Econ., Soc. & Cultural Rights [CESCR], *The Right to Water: General Comment No. 15*, ¶ 11, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2002) [hereinafter *General Comment 15*].

22. Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L.Q. 957, 963 (2004).

23. *See* Naren Prasad, *Privatisation Results: Private Sector Participation in Water Services After 15 Years*, 24 DEV. POL'Y REV. 669 (2006).

24. Charles C. Mann, *The Rise of Big Water*, VANITY FAIR, May 2007, at 122, *available at* http://www.charlesmann.org/articles/Water-Vanity-Fair-05-07-a.pdf.

25. *See* World Dev. Movement, *UK Water Company Takes One of World's Poorest Countries to Court* (2007) [hereinafter World Dev. Movement], *available at* http://www.wdm.org.uk/news/archive/2007/UKwatercompany16042007.htm.

citizens.[26] For instance, in April 2000, the residents of Cochabamba, Bolivia, rebelled against the privatization of its water supply.[27] There, the private water utility, Aguas del Tunari, increased the water tariff from 25 percent to 200 percent just a few months after signing the privatization agreement with the Bolivian government, resulting in civil unrest.[28] The causes of the rebellion included the fact that Aguas del Tunari was primarily internationally backed[29] and the timing of price rises[30] occurred before any improvements in service quality or operations had been made.[31] The Cochabamba community organized quickly within the four-month period of privatization and held several demonstrations throughout the months leading up to the "water wars" in April 2000.[32] Once the public discovered that the government would not take action against Aguas del Tunari, they began public demonstrations in which they demanded that the Bolivian government immediately rescind the contract and re-nationalize the water industry.[33] After four days of martial law within Cochabamba, where several thousand people took to the streets, the government cancelled the water contract with Aguas del Tunari and re-nationalized the water industry.[34]

Following the nationalization of the water industry, Aguas del Tunari filed a claim of expropriation demanding U.S.$50 million in compensation for the loss of their investment and future profits in Bolivia[35] in *Aguas del Tunari v. Bolivia*.[36] A settlement was reached before the Tribunal could

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26. *See* ALAN SNITOW ET AL., THIRST: FIGHTING THE CORPORATE THEFT OF OUR WATER (John Wiley & Sons 2007).

27. *See* OSCAR OLIVERA, ¡COCHABAMBA!: WATER WAR IN BOLIVIA (Tom Lewis trans., 2004).

28. Democracy Ctr., *Bechtel vs. Bolivia: Cochabamba's Water Bills from Bechtel* (2003) [hereinafter *Bechtel vs. Bolivia*], http://democracyctr.org/bolivia/investigations/water/waterbills_index.htm (last visited Nov. 12, 2008).

29. Aguas del Tunari was primarily controlled by the Bechtel Corp. (USA) as seen in the ownership structure presented in *Aguas del Tunari SA v. Rep. of Bol.*, ICSID Case No. ARB/02/3, para. 61 (W. Bank 2005) (Decision on Respondent's Objections to Jurisdiction of Oct. 21, 2005) [hereinafter *Aguas del Tunari*].

30. *See* PBS, *Bolivia – Leasing the Rain – Timeline: Cochabamba Water Revolt* (2002), http://www.pbs.org/frontlineworld/stories/bolivia/timeline.html (last visited Oct. 25, 2008) (a detailed timeline of the Cochabamba events).

31. World Bank Operations Evaluation Dep't, *Bolivia Water Management: A Tale of Three Cities*, Précis No. 222, at 3 (2002).

32. OLIVERA, *supra* note 27, at 36.

33. See *id.* for an account of the events from the viewpoint of Oscar Olivera, the leader of the community resistance.

34. *See* BENJAMIN DANGL, THE PRICE OF FIRE: RESOURCE WARS AND SOCIAL MOVEMENTS IN BOLIVIA 65–67 (A.K. Press 2007).

35. *Bechtel vs. Bolivia*, *supra* note 28.

36. *Aguas del Tunari*, *supra* note 29.

discuss the merits of the case.[37] Legal scholars thus have yet to assess the ability of corporations to bring a claim against a government attempting to take legislative or regulatory actions that aim towards the full realization of the human right to water when international investment agreements contain provisions restricting the level of interference these same governments may have on the operations of private enterprise.[38] This continued oversight has allowed for questions of this nature to remain unresolved and we have recently seen yet another submission in an ad hoc investment tribunal over the nationalization of water services due to poor performance by an operator[39] in *Biwater v. Tanzania*.[40] Both of these cases illustrate the current difficulties of realizing the right to water within international investment law and will be discussed further throughout this article.

In light of these disputes, it is necessary to assess the way in which international investment law is capable of addressing the need to protect foreign investment alongside the human rights obligations of states to provide equitable and affordable access to water. To address this question, this article aims to analyze the interaction between the relevant international investment agreement clauses and the steps required of states

37. Press Release, Bechtel Corp., Cochabamba Water Dispute Settled (Jan. 19, 2006), http://www.bechtel.com/2006-01-19.html (last visited Dec. 1, 2008).

38. It should be noted that the NGO response in the petition for amicus curiae in the *Aguas del Tunari* case, as well as subsequent cases, did indeed focus on the importance of protecting water. The argument, however, has largely been based on sustainable development and the "public purpose" components rather than on the human rights aspect as seen in the Petition of La Coordinadora para la Defensa del Agua y Vida, La Federación Departamental Cochabambina de Organizaciones Regantes, Semapa Sur, Friends of the Earth – Netherlands, Oscar Olivera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado, where water is discussed as a resource "essential to the lives of all" without expressly discussing Bolivia's human rights obligations. *See* La Coordinadora para la Defensa del Agua y Vida, Int'l Centre for Settlement of Investment Disputes, Case No. ARB/02/02, ¶ 21 (Aug. 29, 2002). The principle scholarly research conducted in this area has also been focused on the privatization aspects of corporate responsibility for fulfilling the right. *See* A. Kok, *Privatisation and the Right to Access to Water, in* PRIVATISATION AND HUMAN RIGHTS (K. De Feyter & F.G. Isa eds., 2005); E. Gutierrez & Y. Musaazi, *The Changing Meaning of Reforms in Uganda: Grappling with Privatisation as Public Water Services Improve* (2003) (WaterAid Discussion Paper); Reynaud Daniels, Thesis, *Implementation of the Right of Access to Sufficient Water Through Privatization in South Africa*, 15 PENN ST. ENVTL. L. REV. 61 (2006). Beyond these human rights and privatization characterizations, the interaction with investment law has only recently been discussed on the basis of access to water as a goal, rather than a human right, and as such looks at some of the international investment implications of extending access to water, but does not address the situation through the legal framework provided under the CESCR, as will be done in this article. *See* Francesco Costamagna & Francesco Sindico, Int'l Envtl. L. Research Centre, *The Linkage Between International Economic Law and Access to Water and Water Scarcity*, Apr. 20–21, 2007, *available at* http://www.ielrc.org/activities/workshop_0704/content/ d0710.pdf.

39. *See* World Dev. Movement, *supra* note 25.

40. *Biwater Gauff*, *supra* note 15.

under international human rights law. While the analysis of international investment law in relation to human rights law in general is relatively new,[41] the steps incumbent upon states in the realization of the right to water warrant a much deeper analysis than the general approach that has been taken so far. In particular, the impact of business investment, the high levels of state involvement in the operation of water utilities, and the way that the interaction between them is managed have been largely absent from legal analysis. As these interactions are central to the realization of the right to water, their assessment will take place throughout this article.

The first section of this article will assess the legal status of the right to water in international human rights law. In examining the development of the recognition and establishment of water as an independent human right, it is submitted that all states have recognized water as being an integral part of their international regime and are legally obligated to fulfill the right to water. What this specifically entails in state responsibility is then examined in light of the obligations articulated by the Committee on Economic, Social and Cultural Rights (CESCR) and state jurisprudence addressing access to water as a human right. The section concludes that these obligations are both negative and positive and necessitate substantial state responsibility for the fulfillment of the right to water regardless of whether or not a water industry has been privatized.

The second section of the article discusses the responsibilities of states in their interaction with foreign investors under the provisions included in International Investment Agreements (IIA). The investment clauses of these treaties that are likely to affect the way in which a state can fulfill its obligations under international human rights law include expropriation, fair and equitable treatment, and the use of the "umbrella clause." Each of these clauses is described in reference to their development and use in investment arbitration before exploring their interaction with the fulfillment of the right to water.

Having established the framework for assessing the obligations incumbent upon states in international human rights and investment law, the final section addresses their interaction based upon the integration of provisions and their prior human rights applications in investment tribunals. This leads to a discussion of whether or not a state is responsible for an international wrongful act in taking positive actions to fulfill the right to water that may restrict full investor control over the utility.

The concluding section submits that investment treaties must include explicit human rights provisions in order to protect the ability of

41. *See* Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization, in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Olivier de Schutter ed., 2006).

states to take appropriate measures in assuring the affordable and equitable distribution of water. While the existing jurisprudence on states exercising their authority for public purpose allows for the adoption of some regulatory measures, the absence of human rights provisions within treaties has resulted in polar interpretations of the permissibility of such actions under IIA clauses. The inclusion of human rights provisions within investment agreements allows for investors to maintain investment security from arbitrary intrusion and inequitable treatment in the operation of water utilities while at the same time allowing states to exercise their sovereign right to implement public measures in accordance with their human rights treaty obligations.

II. WATER AS A HUMAN RIGHT

General Comment 15 from the CESCR allows water to be considered as an independent international human right.[42] While the Cochabamba events described above took place prior to the General Comment being released, the basis and extent to which the provisions detailed within the Comment have highlighted the various existing state obligations under the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[43] in Article 11 (adequate standard of living) and Article 12 (highest attainable standard of physical and mental health). This section will examine the development and legal status of the right to water and its present recognition in international human rights law. It is submitted that the right to water is a fundamental human right implicitly recognized within the International Bill of Rights and that, while it has only recently been explicitly recognized as having independent status, the right to water is a prerequisite for all other human rights.

A. International Human Rights Law

The first international document to state the full body of universal rights was the Universal Declaration of Human Rights (UDHR), adopted by

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42. *General Comment 15*, *supra* note 21, ¶ 2. General Comments are authoritative interpretations of State Party obligations under the ICESCR where the comments are the main source of interpretation of treaty provisions. General Comments do not create "new" obligations, but rather explain the existing obligations of State Parties in reference to a specific recurring theme that has come up within state reports. For further information on General Comments, see MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME, ch. 4.3 (2003); OFF. OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, COMM. ON ECON., SOC. & CULTURAL RIGHTS: GENERAL COMMENTS, *http://www2.ohchr.org/english/bodies/cescr/comments.htm* (last visited July 28, 2008).

43. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

the U.N. General Assembly (UNGA) in 1948[44] in an effort to address the broad human rights protections referred to in the U.N. Charter.[45]

The UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the ICESCR together comprise what is commonly referred to as the International Bill of Rights (IBR) and collectively contain the primary rights protected by international human rights law. Each right is considered "universal, indivisible and interdependent and interrelated"[46] in relation to other human rights. The right to water is not explicitly listed, but because water is a "prerequisite for the realization of other human rights,"[47] if not for *all* other human rights,[48] its explicit absence should be recognized as being due to water being absent from international concern during the time of drafting the IBR documents.[49] Its absence should be viewed in light of a lack of global environmental awareness that would not take place until the Stockholm Declaration was made in 1972, signifying the beginning of a global environmental movement. The Declaration, adopted six years after the ICCPR and ICESCR were adopted by the UNGA, signified the first international conference to recognize the international concern that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself."[50] Subsequent major human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[51] and the Convention on the Rights of the Child (CRC),[52] have recognized the growth of environmental concern following the Stockholm Declaration and have explicitly recognized the right to water within their substantive list of state obligations.

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44. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc A/810, (Dec. 10, 1948) [hereinafter UDHR].

45. U.N. Charter art. 55(a) obliges states to promote "higher standards of living, full employment, and conditions of economic and social progress and development." U.N. Charter, *supra* note 11, art. 55(a).

46. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23, ¶ 5 (July 12, 1993).

47. *General Comment 15*, *supra* note 21, ¶ 1.

48. *See* Ramin Pejan, *The Right to Water: The Road to Justiciability*, 36 GEO. WASH. INT'L L. REV. 1181, 1190–91 (2004).

49. United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf.48/14/Rev.1 (June 16, 1972) [hereinafter *Stockholm Declaration*].

50. *Id.* ¶ 1.

51. U.N. Dep't of Econ. & Soc. Affairs, Div. for the Advancement of Women, U.N. Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h) (Dec. 18, 1979), 1249 U.N.T.S. 13 [hereinafter CEDAW].

52. Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child, art. 24(2)(c) (Nov. 20, 1989), 1577 U.N.T.S. 3 [hereinafter CRC].

Neither CEDAW nor the CRC is meant to convey universal human rights per se, as they target specific groups in society, but they do oblige states to respect, protect, and fulfill the human rights identified within the treaties, which includes the right to water.[53] The significance of these treaties in progressing the right to water rests not just in their inclusion of water provisions, but also in that they have been extremely successful instruments with 185 state ratifications of CEDAW[54] and 193 States Parties to the CRC.[55] Particular attention should also be drawn to the lack of state reservations in regard to the "highest attainable standard of health" through the provision of "clean drinking water" in Article 24(1) and Article 24(2)(c) of the CRC.[56] Similarly, Article 14(2)(h) of CEDAW obligates States Parties to realize the right for women to "enjoy adequate living conditions, particularly in relation to...water supply,"[57] in which the only reservation to the Article rests not in the issue of water itself being a right, but instead on the state obligation to provide the service "free of charge."[58] The lack of reservations in these two recent human rights treaties in relation to the right to water[59] draws significant attention to the willingness of states to accept that there is a human right to water. Beyond the explicit recognition and growth that has been present in recent human rights[60] and sustainable development treaties,[61] the CESCR found that to officially establish water as an

53. CEDAW, *supra* note 51, at art. 14(2)(h); CRC, *supra* note 52, at art. 24(2)(c).

54. CEDAW, *supra* note 51, at *States Parties*, http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited July 29, 2008). There are 185 States Parties as of July 29, 2008. *Id.*

55. CRC, *supra* note 52. There are 193 States Parties as of July 29, 2008, with only two states that have not ratified the document. *Id.*

56. *Id.* at art. 24(1), (2)(c) (noting that the small island state of Kiribati entered a reservation on art. 24 but does not specify a reason or what particular provisions it considers itself bound to by the article).

57. CEDAW, *supra* note 51, at art. 14(2)(h).

58. *Id.*, at *Declarations, Reservations and Objections to CEDAW, France*, http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm (last visited Dec. 1, 2008).

59. Most states ratified CEDAW with reservations; however, it was only France that did so in relation to art. 14(2)(h). *Id.*

60. *See* African Charter on the Rights and Welfare of the Child, art. 14(2)(c), July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 15(a), Sept. 13, 2000, CAB/LEG/66.6; League of Arab States, Revised Arab Charter on Human Rights, art. 39(2)(e), (May 22, 2004), *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005). Article 39(2)(e) calls upon states to provide "safe drinking water." *Id.*

61. Notably, art. 5(l) of *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, pays particular regard to "equitable access to water, adequate in terms both of quantity and quality," and art. 6(1)(a) requires everyone to have access to drinking water. *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, art. 5(l), 6(1)(a), U.N. Doc. MP.WAT/2000/1 (June 17, 1999).

independent human right, it must explicitly draw attention to state obligations under the IBR.

B. Implicit Recognition in the International Bill of Rights

The strongest argument for the inclusion of water in the IBR comes from interpreting ICESCR state obligations to ensure that individuals enjoy an adequate standard of living[62] and achieve the highest attainable standard of mental and physical health.[63] Further arguments may also be extended to the ICCPR,[64] since water is a necessary element for fulfilling the right to life,[65] thus facilitating water's implicit presence in both of the binding human rights treaties. However, as the Human Rights Committee, the ICCPR treaty monitoring body,[66] has yet to comment on the inclusion of water in state obligations to fulfill the right to life, an analysis based upon this element is not as authoritative as the one provided by the CESCR.[67]

The CESCR was established by the Economic and Social Council (ECOSOC) as a permanent expert body to monitor the implementation of state obligations under the ICESCR.[68] While the CESCR is incapable of creating *new* treaty obligations, the development and release of General Comments allows for the expert body to examine recurring issues identified in state reports[69] and produce authoritative statements on the legal obligations that states must observe under the treaty.[70] The CESCR has

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62. ICESCR, *supra* note 43, at art. 11.

63. *Id.* at art. 12.

64. International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

65. *See* WHO, *supra* note 5; Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations It Creates*, 4 NW. U. J. INT'L HUM. RTS. 331 (2005).

66. ICCPR, *supra* note 64, at art. 28(1).

67. This is not a new concept in state practice, and the right to life has been interpreted as being an acceptable argument in India's promotion of the right to water. Article 21 of the 1949 Constitution of India provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law," which is also modified by article 48(A), which requires the State "to endeavour to protect and improve the environment." An argument for the inclusion of water as satisfying the right to life under these sections was accepted in *Attakoya Thangal v. Union of India*. INDIA CONST. arts. 21, 48(A); Thangal v. Union of India, 1 K.L.T. 580 (1990).

68. U.N. Econ. Soc. Council [ECOSOC], Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Res. 1985/17 (May 28, 1985) [hereinafter ECOSOC Resolution], *available at* http://ap.ohchr.org/documents/E/ECOSOC/resolutions/E-RES-1985-17.doc.

69. ICESCR, *supra* note 43, at pt. IV.

70. ECOSOC Resolution, *supra* note 68, at (f).

clarified that obligations under the Covenant must be fulfilled as "expeditiously and effectively as possible."[71] Thus, while states may be allowed to pursue the fulfillment of the recognized rights in a variety of ways,[72] states are still continually obligated to take concrete steps toward the full realization of all the rights within the Covenant.[73]

The first time the CESCR drew attention to the right to water within the ICESCR came in General Comment 14 on state obligations to promote the highest attainable standard of physical and mental health in 2000.[74] Within this comment, Article 12 of the ICESCR was recognized as containing a state obligation to ensure that individuals have "access to safe and potable water" since it is a necessary component of health[75] and well-being.[76] Two years later, the CESCR released General Comment 15 providing a comprehensive examination of the right to water within the ICESCR and established water as an independent international human right.[77] In coming to this conclusion, the Committee collectively interpreted articles 11 (adequate standard of living) and 12 (highest attainable standard of physical and mental health) of the ICESCR to say that water is a basic human right that "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use."[78] While the Covenant does not explicitly recognize the right to water within these two Articles, the Committee found that the use of the word "including" in the substantive list of rights protected under the Article demonstrates that the list is not exhaustive and thus allows for the recognition of further rights.[79] As with other ICESCR rights,[80] States Parties must now take "deliberate, concrete and targeted" steps toward the full realization of the right to water.[81] In contrast to the U.N. Conference on Environment and Development's Dublin Statement calling for water to be recognized as an

71. ECOSOC, Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 3, The Nature of States Parties Obligations* art. 2, ¶ 1, at 9, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter *General Comment 3*].

72. *Id.* ¶¶ 1-12.

73. *Id.* ¶ 3.

74. ECOSOC, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health*, U.N. Doc E/C.12/2000/4 (Aug. 11, 2000) (art. 12 of the International Covenant on Economic, Social and Cultural Rights) [hereinafter *General Comment 14*].

75. WHO, *supra* note 5, at ch. 1.

76. *General Comment 14*, *supra* note 74, ¶ 4.

77. Bluemel, *supra* note 22, at 971.

78. *General Comment 15*, *supra* note 21, at 2.

79. *Id.* at 3.

80. ICESCR, *supra* note 43, at art. 2(1).

81. *General Comment 15*, *supra* note 21, at 17; Note, *What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 120 HARV. L. REV. 1067, 1085 (2007).

economic good,[82] recognizing water as a human right means that all water "should be treated as a social and cultural good, and *not* primarily as an economic good."[83]

One of the principle criticisms that can be directed toward the CESCR in its deduction of the right to water is its failure to go beyond what it views as the basic needs of human development. As such, the CESCR has limited its application and description of the right to water as being directly related to drinking water and sanitation[84] while ignoring the wider uses of water that may be necessary for human development. Agriculture, for example, is a necessary practice for any food crop development, and water scarcity is clearly playing a role in local famines where water is unavailable or of poor quality.[85] While the use of the word "sufficient" by the CESCR could include agriculture, the lack of further analysis or description within General Comment 15 or, more importantly, its absence in General Comment 12 on the right to food[86] offers little support for such reasoning.[87] It is therefore submitted that the right to water, as implicitly recognized by the CESCR in the ICESCR, is limited to the minimum necessary amount[88] for direct human use.[89] While explicit characterization of this right may be incomplete and not explicit within the treaty, the authoritative comment from the ICESCR treaty-monitoring body effectively states that the right to water is a fundamental human right guaranteed in the IBR.

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82. DUBLIN STATEMENT ON WATER AND SUSTAINABLE DEVELOPMENT, *supra* note 19, princ. 4.

83. *General Comment 15*, *supra* note 21, at 11 (emphasis added).

84. *Id.* at 37.

85. *See* STOCKHOLM INT'L WATER INST., LET IT REIGN: THE NEW WATER PARADIGM FOR GLOBAL FOOD SECURITY (2005), *available at* www.siwi.org/documents/Resources/Policy_Briefs/CSD_Let_it_Reign_2005.pdf.

86. ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights [ICESCR]: General Comment 12 to art. 11 Right to Adequate Food*, E/C.12/1999/5 (Dec. 5, 1999) [hereinafter *General Comment 12*], *available at* http://www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9?Opendocument.

87. It should be noted that the extension of a right to water to agriculture could potentially be dangerous if corporate actors begin to assume the role of appropriated water rights based on their own agricultural practices. Care should be taken when discussing this particular element; its use in this analysis is simply illustrative of a lack of complete protection of water allocation for the full realization of human health that in some circumstances may require water for irrigation or agriculture.

88. The minimum necessary amount is still a disputed matter. The WHO recommends that the minimum be in the range of 20 to 50 litres per day. *See* WHO, *supra* note 5. The U.N. Development Programme recommends a 20-litre minimum. *See* HUMAN DEVELOPMENT REPORT 2006, *supra* note 1.

89. *General Comment 15*, *supra* note 21, at 6.

C. Fulfilling the Right to Water

Once a state ratifies a human rights treaty, the state is immediately obligated to adopt legislative measures that progressively realize the treaty's provisions.[90] The best example[91] of this practice in the fulfillment of the right to water comes from South Africa since it has the only constitution[92] to specify that citizens are entitled to "sufficient" water to satisfy basic human needs.[93] Other states, including Belgium,[94] the Gambia,[95] Ethiopia,[96] and, most recently, France,[97] are just beginning to adopt explicit municipal legislation concerning access to water for their population. However, in the fulfillment of the right to water, all organs of society must take positive steps to promote the right to water in their respective spheres of influence.[98] The CESCR addresses this concern by calling upon all states to "adopt effective measures" in order to protect the right to water[99] and to take further measures to ensure that companies based within their jurisdiction do not violate "the right to water of individuals and communities in

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90. ICCPR, *supra* note 64, at art. 2(2) (ICESCR, *supra* note 43, at art. 2(1) has been interpreted in *General Comment 3*, as including such steps); American Convention on Human Rights [ACHR], adopted Nov. 22, 1969, entered into force July 18, 1978, O.A.S.T.S. No. 36 art. 2; CRC, *supra* note 52, at art. 4.

91. *See* Note, *What Price for the Priceless?*, *supra* note 81, at 1088.

92. Pejan, *supra* note 48, at 1194, 1209.

93. S. AFR. CONST. 1996 § 27. Inclusion of the clause in South Africa's constitution has allowed for a justiciable right to water that has been upheld within the courts and has resulted in the development of a monitoring body specifically charged with promoting equitable access and community participation in water system development. Residents in Bon Vista Mansions v. Southern Metropolitan Local Council, 2002 (6) BCLR 625 (W) (S. Afr.); [645]L South Africa National Water Act, Nos. 36, 79, 80 (1998).

94. *See* Belgium Arrêt n 36/98 du 1 Avril 1998, Commune de Wemmel, Moniteur Belge, 24/4/98 (the Belgium courts recognized that art. 23 of the Constitution concerning the right to the protection of a healthy environment included the right to a minimum supply of drinking water).

95. GAM. CONST. 1996, art. 216(4) states that "the State shall endeavour to facilitate equal access to clean and safe water."

96. ETH. CONST. 1998, art. 90(1) states that "[e]very Ethiopian is entitled, within the limits of the country's resources, to...clean water."

97. France Loi sur l'eau et les Milieux Aquatiques n 2006-1772 du 30 Décembre 2006, art. 1 states, "Dans le cadre des lois et règlements ainsi que des droits antérieurement établis, l'usage de l'eau appartient à tous et chaque personne physique, pour son alimentation et son hygiène, a le droit d'accéder à l'eau potable dans des conditions économiquement acceptables par tous." This means that water belongs to every natural person and they have a right of affordable access to drinking water. *See also* Henri Smets, *Implementing the Right to Water in France* (2007), *available at* http://www.ielrc.org/activities/workshop_0704/content/d0723.pdf.

98. *General Comment 15*, *supra* note 21, at 33, 60.

99. *Id.* at 1.

other countries."[100] Achieving this objective is meant to require states not only to address the concerns within their own respective jurisdictions, but also to consider the right to water in light of the international agreements they enter into with other states,[101] while using their power as members of international organizations to adjust lending policies to conform with the full realization of the right to water.[102] States, therefore, are regarded as the bodies ultimately responsible for the fulfillment of the right to water.[103] Three tenets of responsibility therefore fall upon states, that of *respecting*, *protecting*, and *fulfilling* this human right.

Respecting the right to water requires that states refrain from limiting peoples' enjoyment of that right.[104] States must abstain from any action, direct or indirect, that may lead to the infringement of an individual's access to water. States must also take action to *protect* the right to water by regulating third parties that operate or control water services "to prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water."[105] Finally, states must take positive steps to *fulfill* the right to water by taking new domestic legislative measures, including the establishment of new oversight committees,[106] the creation of appropriate pricing policies,[107] and the adoption of sustainable water management strategies,[108] to oversee the development and further realization of the right to water.

Thus, the actions required by states should ensure the full realization of the right to water. After all, if a state is responsible for any contracts that it enters into, then the obligation to take due consideration of the right to water in all such agreements should eradicate the current inequity and disproportionate access to water that individuals currently face. For instance, a host state could not accept a municipal water contract with a private investor[109] that would favor one group of society over another,[110] increase rates beyond what is affordable for the entire population,[111] or take unjustified retrogressive measures[112] in the furtherance of water access.[113]

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100. *Id.* at 33.
101. *Id.* at 35.
102. *Id.* at 36.
103. HUMAN DEVELOPMENT REPORT 2006, *supra* note 1, at 79.
104. *General Comment 15*, *supra* note 21, at 21.
105. *Id.* at 24.
106. *Id.* at 26.
107. *Id.* at 27.
108. *Id.* at 28.
109. *See id.* at 23.
110. *General Comment 15*, *supra* note 21, at 15.
111. *Id.* at 12(c)(ii).
112. *Id.* at 19.
113. *Id.* at 21.

That home states are also given an extraterritorial duty to prevent actors within their jurisdiction from violating the right to water in other states[114] only further supports the logic behind the right to water being an issue of ultimate state responsibility. However, this has not occurred and the obligation has not been realized due to the failure of states to consider the right to water when entering into concession contracts with non-state actors in the management of water resources.

The creation, expansion, operation, and maintenance of water utilities "requires investment on a scale beyond what the poorest countries can begin to afford."[115] However, the desire of states to acquire the foreign investment necessary for the realization of the right to water risks affording rights to private investors through international investment treaties that may prevent any future measures a state may take to progressively realize the right. While it is certainly recognized that states maintain their human rights responsibilities even if they are not directly in control of their water utilities,[116] the contracts that are entered into with investors must be carefully drafted to ensure that the steps required within the human rights framework of the right to water can be realized.[117]

In summary, surveying international legal instruments and state practice demonstrates that an international human right to water is well-recognized today.[118] The method of coming to such a conclusion was not based upon the development of *new* human rights norms, but merely the gradual development, recognition, and interpretation of the interdependence of all human rights, particularly in their relationship to sustainable development. While the CESCR has made considerable progress in identifying the various obligations incumbent upon States Parties to the ICESCR, that they have limited the primary responsibility of the enforcement of the right to water to states alone is not representative of current trends of privatization and non-state control over water resources. The increasing reliance on these non-state actors for the investment needed to advance state development goals risks compromising the ability of states to

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114. *Id.* at 33.

115. Gordon Brown, Special Contribution, *Frontloading Financing for Meeting the Millenium Development Goal for Water and Sanitation*, *in* HUMAN DEVELOPMENT REPORT 2006, *supra* note 1, at 72.

116. *See* Amy K. Miller, *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, 236-39 (2005).

117. *General Comment 15*, *supra* note 21, ¶ 35.

118. SCANLON ET AL., *supra* note 4, at app. 1; WaterAid, *UK Government Recognises Right to Water* (2006), http://www.righttowater.org.uk/code/UKGovnews.asp (last visited Oct. 9, 2008); President of Brazil, Special Contribution, *in* HUMAN DEVELOPMENT REPORT 2006, *supra* note 1, at 72.

carry out their obligations to fulfill the right to water through the international protection that is afforded to the non-state actors under investment treaties.

III. INTERNATIONAL INVESTMENT AGREEMENT OBLIGATIONS

Following General Comment 15's clear outline of state responsibility for the realization of the right to water, states have a framework for implementation that emphasizes regulation. However, questions still remain as to the ability of states to implement any pertinent regulations in light of the binding nature of IIA clauses under international investment law that they may enter into with other states. Every international treaty operates on the foundational principle of *pacta sunt servanda*—states are required to fulfill the obligations set forth within them in good faith.[119] In the absence of an investment treaty between two states, few obstacles prevent states from regulating foreign water investors beyond what is permissible under customary international law on the treatment of aliens.

If, however, there is an investment treaty between states, then it is necessary for States Parties to observe the development of the treaty to "ensure that the right to water is given due attention."[120] States that are signatories to both human rights and investment treaties must duly observe the obligations in both treaties. Regardless if such a treaty is related to human rights or international investment, the principle of *pacta sunt servanda* is equally applicable. It is therefore necessary that the specific obligations that are currently present within investment agreements be assessed to observe the extent to which states are able to implement effective regulations without breaching IIA provisions.

The basic premise of an IIA is that foreign investment will be given adequate protection under international law.[121] Like all treaties,[122] every IIA specifies the explicit Articles that states agree to be legally bound to upon their ratification.[123] While the exact content and title of the clauses may vary, the substantial obligation remains virtually the same in order to protect the

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119. Vienna Convention on the Law of Treaties, art. 26, May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT], *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf; *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 264 (advisory opinion), *available at* http://www.icj-cij.org/docket/files/95/7495.pdf; MALCOLM N. SHAW, INTERNATIONAL LAW 811-14 (5th ed. 2003).

120. *General Comment 15*, *supra* note 21, ¶ 35.

121. See Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW 655 (1990), for a further discussion on the development and adoption of BITs by states.

122. SHAW, *supra* note 119, at 812-13.

123. VCLT, *supra* note 119, at art. 9.

interests of both contracting states.[124] This section assesses the clauses in which protection is given to foreign investors under IIAs by analyzing expropriation, fair and equitable treatment standards, and "umbrella" clauses within IIAs, as well as the recent jurisprudence with regard to the legal effect of said clauses in light of the protection of human health and welfare policies of states.

A. Expropriation

States hold the sovereign right to expropriate, or take, the property of foreign investors if it is done for a public purpose.[125] Expropriation in a IIA addresses the exigency and conditions under which a state may lawfully interfere with a foreign investment to the extent that an investor is unable to benefit from or control the investment.[126] Determining the proper application of the clause for the purposes of this discussion has necessitated that this particular analysis be divided into two parts: Part 1 describes the expansive definition and threshold of applicability of the clause, and Part 2 determines situations in which it is possible to invoke regulatory measures that may have de facto results of expropriation, although no expropriation has taken place. *Metalclad v. Mexico*[127] and *Methanex v. United States of America*[128] will be used as illustrative examples of these various properties of expropriation while demonstrating two competing tribunal analyses of the permissible actions of states in their regulatory capacity.

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124. SHAW, *supra* note 119, at 747.

125. F.V. GARCIA AMADOR, INT'L LAW COMM., SPECIAL RAPPORTEUR'S REPORT 41–42 (1959); SHAW, *supra* note 119, at 738. Not only has it been one of the few investment law principles to be argued in the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), but it is also one of the most fundamental investment security provisions within IIAs. *Certain German Interests in Polish Upper Silesia* (F.R.G. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 22 (Merits May 25), *available at* http://www.icj-cij.org/pcij/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf; Factory at Chorzów Case (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 46–47 (Merits July 26), *available at* http://www.icj-cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf; Elettronica Sicula S.p.A. (ELSI) Case (U.S. v. Italy) 1989 I.C.J. 15, 118–19 (July 20), *available at* http://www.icj-cij.org/docket/files/76/6707.pdf; R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 837 (2005).

126. Starratt Hous. Corp. v. Gov't of the Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 122 (1983) (Interlocutory Award), *available at* http://tldb.uni-koeln.de/php/pub_show_content.php?page=pub_show_document.php&pubdocid=232100&pubwithtoc=ja&pubwithmeta=ja&pubmarkid=965000#mark965000.

127. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, ¶ 107 (W. Bank 2001) (NAFTA Award of Aug. 30, 2000) [hereinafter *Metalclad*], 40 I.L.M. 36, 50 (2001).

128. Methanex Corp. v. United States, NAFTA/UNCITRAL (Final Award of the Tribunal on Jurisdiction and Merits of Aug. 3, 2005) [hereinafter Methanex Final Award], *available at* http://www.state.gov/documents/organization/51052.pdf.

1. Expansive Definitional Capacity

Expropriation may be direct or indirect. Direct expropriation occurs when a state takes control of an enterprise, either in a physical or regulatory capacity. This occurs when a state takes concrete demonstrable action, resulting in an investor's loss "of the normal control of [their] property."[129] Indirect expropriation occurs when a government takes measures that have the effect of limiting the ability of an investor to fully realize the economic benefits of their investment. Under the auspices of indirect expropriation, a state may have limited the rights and ability of investors to operate their business effectively through several different measures that individually would not amount to expropriation,[130] but have had the cumulative effect of being tantamount to expropriation.[131] Such issues arise when states implement regulations that affect the ongoing operations of a foreign investor with or without the intentions of such regulations specifically targeting the investor.

Direct and indirect expropriations are permissable "for a public purpose and against the prompt payment of adequate and effective compensation...."[132] Notably, "an expropriation or taking for environmental reasons may be classified as a taking for public purpose, and thus may be legitimate."[133] The *Metalclad*[134] arbitration presents a particularly strong example of the variable interpretation aspect of a public purpose due to its broad definitional application and analysis of indirect expropriation.

Metalclad Corporation is a United States-owned waste disposal organization.[135] Under the investment protection of the North American Free Trade Agreement (NAFTA), Metalclad established a waste operation facility within Mexico.[136] After several years of operation, the government of Mexico found that the operation of the facility was a health hazard to the surrounding residents and passed an Ecological Decree to create an ecological preservation zone that effectively limited the operation of the

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129. Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, ¶ 76, (W. Bank 2000) (Award of Feb. 17, 2000), 39 I.L.M. 1317, 1330 (2000) [hereinafter *Santa Elena*].

130. Waste Mgmt., Inc. v. United Mexican States I, ICSID Case No. ARB(AF)/98/2, ¶ 17 (Award of June 2, 2000) [hereinafter Waste Mgmt. I], *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded.

131. Waste Mgmt., Inc. v. United Mexican States II, ICSID Case No. ARB(AF)/00/3, ¶ 143 (W. Bank 2004) (Final Award of April 30, 2004), 43 I.L.M. 967 (2004) [hereinafter Waste Mgmt. II].

132. *Santa Elena, supra* note 129, ¶ 71.

133. *Id.*

134. *Metalclad, supra* note 127, ¶ 107.

135. *Id.* ¶ 2.

136. *Id.*

landfill.[137] While the Decree did not nationalize the facility, the international tribunal found that the implementation of the Ecological Decree was "an act tantamount to expropriation."[138]

In assessing the extent to which the regulatory power of Mexico interfered with Metalclad's investor rights, the NAFTA tribunal found that "expropriation under NAFTA includes...incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or *reasonably-to-be-expected economic benefit of property*."[139] In adopting such an interpretation, the tribunal has taken a broad application of the expropriation clause by viewing the clause as providing an absolute high level of protection to investors. Thus, the tribunal found that the implementation of the Ecological Decree was "an act tantamount to expropriation,"[140] and thus required compensation to Metalclad.

According to the CESCR, states must "adopt effective measures" to fulfill the right to water.[141] Based upon the interpretation of expropriation provided in *Metalclad*, it would appear that any such measures that may be required for the realization of the right to water may be expropriation, either directly, through the nationalization of utilities, or indirectly, through the creation of tariff standards that alter the "reasonably-to-be-expected economic benefit" or management of the utility. Although a public purpose defense is applicable to the adoption of any action taken by a state to realize their human rights obligations,[142] the inherent complexity and involvement of foreign investment or control of water utilities should be given considerable attention since the privatized industry is likely to be the *target* of new regulations. The important aspect of *Metalclad* that must be considered in relation to a transferable argument to the right to water is that it focuses on the perceived economic benefits of investment and extends a claim of expropriation based on that element. In doing so, *Metalclad* adopts an expansive interpretation of the expropriation clause that adds an additional element to what would otherwise be a lawful regulation by the host state.

2. Regulatory Capacity

The framework of expropriation provided by *Metalclad* is not beneficial to the human rights regulatory capacity of states. A state may expropriate a water industry for legitimate purposes, and the fulfillment of

137. *Id.* ¶ 109.
138. *Id.* ¶ 111.
139. *Metalclad*, *supra* note 127, ¶ 103 (emphasis added).
140. *Id.* ¶ 111.
141. *General Comment 15*, *supra* note 21, at 1.
142. Suda, *supra* note 41, at 98.

human rights would likely be considered a legitimate purpose. The states' right to expropriate is inherent and exists regardless of the presence of an expropriation clause within an IIA, but if an expropriation clause is present, then the conditions of expropriation are often stronger than those in pure international law. However, this analysis pays particular attention to the ability of states to take measures that may be construed as acts tantamount to expropriation once they receive the necessary foreign investment to expand their water utilities. If a state is incapable of financing its own municipal utilities, it is unlikely that it would be able to expropriate water systems in accordance with an IIA provision for "prompt, adequate and effective compensation."[143] As such, it is necessary for the state to ensure that it maintains the regulatory capacity to continue the expansion and control of water utilities, while ensuring that its actions remain within the legitimate regulatory power of the state.

Tribunals also face challenges in that the inherent longevity of water-concession contracts[144] effectively prevents states from taking *any* action to promote the equitable expansion of water services for periods of up to 40 years from the present.[145] This is quite a significant aspect in asserting investor rights over expropriation cases as the very recognition of water as a human right itself is less than 40 years old. Further, any actions taken by states in the current interpretation of fulfillment would likely interfere with the "reasonably-to-be-expected"[146] investment returns often regarded within utility contracts,[147] let alone the unknown aspects of water development and access that will present themselves in the future due to climate variations and environmental change.[148] Nevertheless, since states have yet to adopt a human-rights defense in arbitration tribunals,[149] it is

143. CME Czech Republic BV v. Czech Republic, UNCITRAL, ¶ 497 (Final Award of March 14, 2003), *available at* http://tldb.uni-koeln.de/php/pub_show_content.php?page=pub_show_document.php&pubdocid=290021&pubwithtoc=ja&pubwithmeta=ja&pubmarkid=965000#mark965000.

144. The reason for the length of contract is typically due to the immense capital investment required by the expansion of services that necessitates the operating assurance that the company will recoup any investment and make a profit.

145. Bolivia Ley de Agua Potable y Alcantarillado Sanitario (Oct. 29, 1999) Ley 2029, art. 29 [hereinafter Law 2029], http://www.congreso.gov.bo/leyes/2029.htm (last visited Oct. 26, 2008).

146. *Metalclad*, *supra* note 127, ¶ 103.

147. *See* Contrato de Concesion de Aprovechamiento de Aguas y de Servicio Publico de Agua Potable y Alcantarillado en la Ciudad de Cochabamba, ann. 4, art. 15, (adopted Sept. 3, 1999) [hereinafter Concession Contract].

148. *See* IPCC, *supra* note 7, at 8–11.

149. Even though states may take measures for human rights purposes, they have yet to declare the steps that were taken for part of a human rights framework but rather are argued on the basis of such measures being taken for a public purpose.

unclear whether new regulations concerning the specific realization of human rights would amount to direct or indirect expropriation.[150] The recent arbitration in *Methanex*, however, indicates that the far-reaching interpretation of expropriation in *Metalclad* should not be applied as an absolute threshold in determining acts tantamount to expropriation.

The *Methanex* arbitration concerned the legality of a California environmental regulation that banned the use of methyl tertiary-butyl ether (MTBE) as a gasoline additive[151] and that was enacted after an extensive government-funded University of California report found that MTBE was contaminating groundwater[152] and posed a potential risk to human health in the U.S. state.[153] Methanex, the largest producer of methanol, the base of MTBE, claimed that the measures taken by the California government were tantamount to expropriation[154] and claimed over U.S. $1 billion in compensation[155] based upon the interpretation of expropriation provided in the *Metalclad* arbitration.[156] The tribunal came to a significantly different interpretation to the expropriation clause within NAFTA from *Metalclad* by finding that

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable *unless specific commitments* [have] been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[157]

In applying this test, the tribunal found that no expropriation had taken place because the ban was a lawful regulation that was "for a public purpose, was non-discriminatory and was accomplished with due process."[158] According to *Methanex*, measures taken by the government of California were appropriate to the potential threat to human health,[159] and expropriation does not take place if the response satisfies these three

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150. Vaughan Lowe, *Changing Dimensions of International Investment Law* 76 (Oxford Legal Studies Research Paper No. 4/2007), *available at* http://ssrncom/paper=970727; Suda, *supra* note 41, at 127.

151. Methanex Final Award, *supra* note 128, at pt. 1, preface.

152. *Id.* at pt. III, ch. A, ¶ 9.

153. *Id.* at pt. III, ch. A, ¶ 11.

154. *Id.* at pt. IV, ch. D, ¶ 2.

155. *Id.* at pt. IV, ch. A, ¶ 2.

156. Methanex Final Award, *supra* note 128, at pt. IV, ch. D, ¶ 4.

157. *Id.* at pt. IV, ch. D, ¶ 7 (emphasis added).

158. *Id.* at pt. IV, ch. D, ¶ 15.

159. *Id.* at pt. III, ch. A, ¶ 101.

actions. If this is indeed the case, then no compensation to the investor is required.[160]

The decision in *Methanex* is much more conducive to the realization of human rights than *Metalclad*. In particular, *Methanex* recognized the political process, where regulations come from public demands, and found that states have the inherent right to apply environmental regulations for a public purpose. Politics undoubtedly plays a role in the enactment of environmental regulations, as these regulations are often propagated on the basis of the public will. For instance, the Ecological Decree adopted in Mexico in *Metalclad* was in response to public opposition to the renewal of a waste license,[161] while in *Methanex* it was the result of public inquiries into the environmental benefits of an alternative fuel source.[162] The issue before tribunals is not then whether or not the state has the ability to regulate the environment in the public interest, but whether or not the measures taken by the state are proportional to the scientific necessity that promotes them. Through this framework, the ability of governments to respond to the public interest through legislation remains with the state, rather than the economic operator. This inherent ability of states allows for the possibility for the enactment of similar public purpose regulations without fear of paying compensation because no expropriation may be determined to have taken place.

Methanex, however, did not discuss human-rights obligations incumbent upon the government in implementing any of the California regulations, nor did it discuss the human rights component of expropriation. Instead of focusing on the human rights aspects of the case, *Methanex* limited its discussion to the scientific assessment of the validity of the regulation to determine the public purpose element and then discussed what said element would entail. The environmental regulation did not directly affect the operation of Methanex and it did not impose taxes or subsidies, or limit the profitability of the investment by anything other than limiting the sale of *one* of its products' uses. This was a fact that the tribunal felt important to emphasize in determining the non-discriminatory element of the regulation.[163] The measure initially[164] did not and was not directly aimed at the investor[165] who produces methanol, but rather one of the products that uses methanol, MTBE.[166]

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160. *Id.* at pt. IV, ch. D, ¶ 18.

161. *Metalclad*, *supra* note 127, ¶¶ 46–59.

162. Methanex Final Award, *supra* note 128, at pt. III, ch. A.

163. *Id.* at pt. IV, ch. B, ¶ 28, ch. E, ¶ 19.

164. During the course of arbitration, California did in fact amend the regulation to "*expressly* [ban] the use of methanol as an oxygenate." *Id.* at pt. II, ch. D, ¶ 22.

165. *Id.* at pt. IV, ch. E, ¶ 19.

166. *Id.* at pt. II, ch. D, ¶ 3.

In failing to discuss the human rights component of the right to water specifically, *Methanex* provides few answers for developing states as to the level of interference in investor control that is permissible in states' protection of human rights. For example, it is unclear whether the subsidization and taxation measures discussed in General Comment 15[167] are tantamount to expropriation, as this level of interference extends far beyond the non-interference regulation that took place in *Methanex*. California did not specifically target Methanex Corp., stabilize the trading rates of the methanol product, or establish production levels based upon the needs of the community – all things that the right to water may necessitate. The most significant characterization of non-expropriatory regulations, as highlighted above, does allow some room for a certain level of regulatory involvement by the state, but the scope of application of regulations that would fulfill that particular point is not discussed further in *Methanex*. The particular inclusion of "specific commitments" as grounds for overriding this principle can be particularly problematic with water privatization contracts that may stipulate tariff regulations, as was the case in Cochabamba.[168]

Metalclad and *Methanex* demonstrate the variability of arbitration tribunals in assessing the basis of expropriation, and each touches upon the relationship of the clause to international law. Given the variety of measures that states may rely on in order to fully realize the right to water, it is difficult to claim that *Methanex* allows for any clear path. While the decision provided in *Methanex* has advanced various aspects of sustainable development within investor-state arbitration,[169] the case-by-case assessment that typically follows investor claims leaves little room for a definitive expropriation interpretation. Furthermore, the legitimacy of state actions being construed as non-expropriatory in nature, and thus not requiring compensation, is limited to cases where no further agreements stipulate financial regulation or actions of the state. The unique nature of water privatization effectively makes this definition difficult to adapt to disputes over water utilities as concession contracts will likely qualify as the "special commitment" referred to by *Methanex* as replacing the non-expropriation formula applied in this case.

The right to expropriate the property of foreign nationals for a public purpose is a sovereign right of states. The inclusion of an expropriation clause within BITs is not meant to limit this inherent right, but rather

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167. *General Comment 15, supra* note 21, ¶¶ 26-28, 44(b).

168. Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT'L L.J. 1663, 1778 (2003).

169. HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., THE FINAL DECISION IN METHANEX V. UNITED STATES: SOME NEW WINE IN SOME NEW BOTTLES 6-11 (2005), *available at* http://www.iisd.org/pdf/2005/commentary_methanex.pdf.

to provide explicit conditions on what must take place once an expropriation occurs, primarily the method of compensation. Jurisprudence around the expropriation clause has been quite varied and the expansive definition provided within *Metalclad* has been recently countered with the one provided in *Methanex*. While both of these tribunals have failed to address the human rights considerations of the dispute, they have shed considerable light on the circumstances in which investors may seek compensation for the regulatory actions of states. Without the express discussion of human rights within tribunals, there remains a significant gap in which the regulatory and direct actions that are required of states in their fulfillment of the right to water may be considered expropriation and whether or not any compensation is required based upon that determination.

B. Fair and Equitable Treatment

The fair and equitable treatment (FET) clause stipulates that investments "shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."[170] The FET clause is found in almost all recent IIAs even though the exact meaning or application remains a contentious issue.[171] Like expropriation, two divergent interpretations have evolved regarding the legal effect of this clause: one addresses a positivist framework of the clause necessitating a "plain meaning" approach where tribunals may set their own standards of FET,[172] while the other says that investments are to be given treatment at the established international minimum standard.[173]

The plain-meaning framework is often viewed as being highly subjective, open to interpretation on a case-by-case basis, and is likely to be applied by both states and investors due to its flexibility.[174] For instance, if a tribunal adopts a flexible approach to the use of the FET clause, then claimants and respondents have the ability to argue that the case is unique and that an ad hoc interpretation of the measurable standard of "fair and

170. Pope & Talbot, Inc. v. Gov't of Canada, NAFTA/UNCITRAL, ¶ 111 (Award on the Merits of Phase 2, Apr. 10, 2001), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Award_Merits-e.pdf.

171. RUDOLF DOLZER & MARGRETE STEVENS, INT'L CENTRE FOR INV. DISPUTES, BILATERAL INVESTMENT TREATIES 58 (1995).

172. MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 333 (2d ed. 2004).

173. Genin, E. Credit Ltd., Inc. & A.S. Baltoil v. The Republic of Est., ICSID Case No. ARB/99/2, ¶ 367 (W. Bank 2001). *See also* United Nations Conference on Trade and Development [UNCTAD], Geneva, Switz., and N.Y., N.Y., May 1999, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements* [hereinafter UNCTAD].

174. BISHOP ET AL., *supra* note 125, at 1011-12 (citing UNCTAD, *supra* note 173).

equitable" treatment is warranted. For example, *Waste Management v. Mexico*, a case concerning the non-payment for waste services rendered by the Claimant, applied plain meaning and stated that a state would be in breach of its obligations if its conduct 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 property."[175] As such, the tribunal found that Mexico's actions had been legitimate and that the FET clause in NAFTA had not been breached.[176]

In contrast, the minimum standard approach favors investors by providing them with an international standard of treatment that is consistent with international law and is backed by significant jurisprudence on the issue of minimum standards on the treatment of foreigners.[177] Under this interpretation, the clause must be read in light of prevailing customary international law[178] "based on State practice and judicial or arbitral case law or other sources of customary or general international law."[179] Within this framework, FET requires that states provide "both stability and predictability of the governing legal framework."[180] If a state changes direction or imposes a new set of regulations or standards upon an investor, it is in breach of its obligation to provide fair and equitable treatment within the understanding of the international minimum standard interpretation.

Técnicas Medioambientales Tecmed SA v. United Mexican States (Tecmed)[181] applied a "plain meaning" approach and provided a comprehensive assessment of the FET clause. There, a dispute arose between the Tecnicas Medioambientales de Mexico SA (Tecmed) and Mexico about the ability of the government of Mexico to issue operational permits for a landfill to Cytrar, a company owned 99 percent by Tecmed,[182] in Las Viboras (the Landfill) outside the nearby Municipality of Hermosillo.[183] The facility was the subject of great concern to the local population in

175. *Waste Mgmt. II*, *supra* note 131, ¶ 98.

176. *Id.* ¶¶ 137–40.

177. BISHOP ET AL., *supra* note 125, at 1012 (citing UNCTAD, *supra* note 173).

178. Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, ¶ 125 (W. Bank 2002), *available at* http://www.state.gov/documents/organization/14442.pdf.

179. ADF Group Inc v. United States, ICSID Case No. ARB(AF)/00/1, ¶ 184 (W. Bank 2003) (interpreting Mondev Int'l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2).

180. Occidental Exploration & Prod. Co. v. Rep. of Ecuador, Case No.UN 3467, ¶ 192 (W. Bank 2004) (July 1, 2004).

181. Técnicas Medioambientales Tecmed v. United Mexican States, ICSID Case No. ARB(AF)/00/2 (W. Bank 2003) (May 29, 2003) [hereinafter *Tecmed*], *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186.

182. *Id.* ¶ 4.

183. *Id.* ¶ 36.

Hermosillo[184] because the prior state-owned operator had a history of misleading and violating operational guidelines.[185] Approximately two years after the concession contract was granted to Cytrar to operate the Landfill "until the end of its useful life,"[186] the political situation in Hemosillo had changed to the point that at the time Cytrar needed to renew its operational permit for the Landfill it was denied by the local government for reasons of environment, health, and public concern.[187] The parent company of Tecmed is a Spanish-owned-and-operated corporation,[188] so the investment in Tecmed was afforded protection under the Spain-Mexico BIT.[189] The tribunal was therefore to determine whether or not the BIT was violated by the state in treating the investor unfairly in denying their operational permit when Cytrar itself was not directly responsible for the poor management of the waste operation prior to the concession contract.

In addressing the FET clause, *Tecmed* applied a plain-meaning approach and found that the FET clause "require[d] the Contracting Parties to provide international investments with treatment that *does not affect the basic expectations that were taken into account by the foreign investor to make the investment.*"[190] The emphasis placed on the basic expectations, the renewal of the operating permit, presents a challenge for the adoption of new regulations that states may take in the changing political and economic climate that follows development. As the expectations in this case were the continued operational capability of the Landfill and this was no longer possible due to the refusal of the operating permit,[191] the tribunal found that the FET provision had been breached.[192]

While *Tecmed* is unique in that Técnicas Medioambientales bore no direct responsibility for the rejection of the operational permit, considerable attention should be paid to the aspect of due diligence on the part of the investor. If there is considerable opposition to a particular industry prior to the investor's presence, the foreign investor should be aware of the potential change of circumstances that could follow the continued operation. Under a plain-meaning interpretation of the FET, it is possible for a tribunal to take these considerations into account, but as can be seen in *Tecmed* it is equally possible for investors to use the clause in this fashion as well.

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184. *Id.* ¶¶ 105–108.
185. *Id.* ¶ 106.
186. *Tecmed, supra* note 181, ¶ 39.
187. *Id.* ¶¶ 127–29.
188. *Id.* ¶ 1.
189. *Id.* ¶ 4.
190. *Id.* ¶ 154 (emphasis added).
191. *Tecmed, supra* note 181, ¶ 116.
192. *Id.* ¶ 154.

In Cochabamba, the privatization contract[193] and the national framework that shortly followed with the passing of Law 2029 to legalize the provisions within the contract[194] provided the investor with a framework for development[195] and tariff regulation.[196] This framework was incompatible with the obligations incumbent upon both Bolivia and the Netherlands, as Aguas del Tunari was a national of the Netherlands, through the creation of subsidiaries in Bolivia in December 1999. This allowed the use of arbitration under the Bolivia-Netherlands BIT[197] to fulfill the right to water as outlined under General Comment 15. If the FET clause within the Netherlands-Bolivia BIT were interpreted using the international minimum standard framework,[198] it would have been possible for Aguas del Tunari to claim unfair treatment by providing an unpredictable framework for investment if the state maintained its contract with the company but altered the tariff standard that had been adopted at the time the concession contract was signed.[199] This remains particularly problematic given the incredibly long concession contracts granted to water investors, as long as 40 years,[200] which may be based upon unreasonable rates of return and variable environmental circumstances.[201] Instead of accommodating this possibility, FET allows for an objective standard of interpretation that has been said to be applicable whether or not the intentions of the state

193. Article 18 specifies that all expansion that is required to take place will be financed by tariffs regulated by the company unless they exceed a 25 percent increase. Concession Contract, *supra* note 147, at ann. 4, art. 18.

194. Article 22 allows for services to be provided to "cualquier Usuario que lo demande dentro de su area de Concession, en funcion a los plazos establecidos en los contratos de Concesion *para la ampliacion de la cobertura de los servicios.*" (emphasis added) (provided to "any User who demands it within his area of Concession, in function to the terms established in contracts of Concession *for the extension of the cover of the services*"). Law 2029, *supra* note 145, art. 22.

195. Article 9 promotes national competition for providing running water and sanitation services. *Id.* at art. 9.

196. *Id.* at art. 24.

197. Aguas del Tunari, *supra* 29, ¶¶ 321-23.

198. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, Neth.-Bol., art. 3(1), Mar. 10, 1992, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/Netherlands_bolivia.pdf [hereinafter Netherlands-Bolivia BIT].

199. Concession Contract, *supra* note 147, at ann. 5, art. 4.2. The investor was guaranteed an annual 15- to 17-percent return on the investment through its contract with the state Concession Contract. *Id. See* Sanchez-Moreno & Higgins, *supra* note 168, at 1778.

200. Law 2029, *supra* note 145, at art. 29.

201. SCANLON ET AL., *supra* note 4, at 17; Norman Frohlich & Joe Oppenheimer, *Alienable Privatization Policies: The Choice Between Inefficiency and Injustice, in* WATER QUANTITY/QUALITY MANAGEMENT AND CONFLICT RESOLUTION 135 (Ariel Dinar & Edna Loehma eds., 1995).

are of "deliberate intention or bad faith,"[202] and that potentially limits the regulatory capacity of states if they may be viewed as being unfair by the investor's standards and the expectations generally held at the time concession contracts enter into force.

The FET clause is meant to establish "fair and equitable" treatment. In order for the right to water to be realized, tribunals should interpret the clause with a full analysis of not just what is fair for investors, but what is fair for states. What is considered fair is highly subjective and has been argued through the international minimum standard argument as well as the ad hoc work of tribunal assessment. If tribunals continue to adopt inflexible interpretations, like that in *Tecmed*, then the "basic expectations" of investors may be violated if any state involvement in regulating tariffs, infrastructure development, or adjusting the provision of subsidies[203] takes place. In particular, there should be recognition that certain industries (e.g., water) are likely to be prone to future regulatory changes and the tightening of restrictions as time passes and that investors could thus have reasonably expected this.

C. "Umbrella" Clauses

While expropriation and FET clauses address wide regulatory challenges that states may face in relation to their permissible actions in regard to overarching investment expectations, recent jurisprudence indicates that states are further liable for the fulfillment of private contracts entered into with investors under international law through the so-called "umbrella" clause. Private contracts entered into between states and foreign investors are within the jurisdiction of municipal, rather than international, law.[204] Introducing an umbrella clause into an agreement addresses this issue by allowing a certain degree of internationalization of private law contracts.[205] The clause itself takes on numerous forms ranging from the implication that states must observe "any obligation" entered into with investors[206] to others specifically noting that various investment instruments, such as investment authorizations or agreements, must be

202. CMS Gas Transmission Co. v. Argentine Rep., ICSID Case No. ARB/01/8, ¶ 280 (W. Bank 2005) (Award), 44 I.L.M. 1205 (2005).

203. *General Comment 15*, *supra* note 21, at art. 27.

204. SHAW, *supra* note 119, at 812; VCLT, *supra* note 119, at art. 3 (specifically noting "the fact that the [Convention] does not apply to international agreements concluded between States and other subjects of international law").

205. *See* Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multinational Investment Claims*, 99 AM. J. INT'L L. 835 (2005).

206. Netherlands-Bolivia BIT, *supra* note 198, at art. 3(4).

observed.[207] Underlying this broad obligation is the simple premise that investors should receive FET when entering a foreign state by allowing for the contracts they enter into with states to be of an international character, and hence governed by international law rather than municipal law.[208]

While the clause has been present for almost 50 years,[209] it was not until the 2002 *Vivendi* arbitration that a contractual claim was submitted to international arbitration through the umbrella clause.[210] There, the umbrella clause was given an international legal effect where the "essential basis" of the claim was treaty fulfillment and it was not primarily concerned with contractual obligations.[211] This means that a claim must be over an alleged breach of a substantive element of the BIT and not simply a minor contractual infringement.

These questions would be addressed in much more detail one year later in *SGS v. Pakistan*, a dispute about the unlawful termination of a state contract.[212] The tribunal found that if they accepted the Claimant's submission that the presence of the umbrella clause elevates disputes to an international wrongful act that triggers a breach of the BIT, then the clause would be

> susceptible [to] almost indefinite expansion...[and the] legal consequences that the Claimant would have us attribute...are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant.[213]

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207. United States of America Model BIT Agreement 2004, art. 24, *available at* http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html.

208. F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B. INT'L L. 241, 243.

209. Treaty Between Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, art. 7, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 28 [hereinafter F.R.G.-Pak. BIT].

210. Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentina Republic (Vivendi v. Arg.), ICSID Case No. ARB/97/341 (W. Bank 2002) (Decision on Annulment), 41 I.L.M 1135 (2002).

211. *Id.* ¶¶ 102-103; ORG. FOR ECON. CO-OPERATION & DEV. [hereinafter OECD], INTERNATIONAL INVESTMENT PERSPECTIVES n.74 (2006).

212. SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, 164 (W. Bank 2003) (Decision on Jurisdiction of Aug. 6, 2003) [hereinafter SGS v. Pak.], 42 I.L.M. 1290, ¶ 164 (2003); Shany, *supra* note 205, at 840; Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L.Q. 371, 391 (2007).

213. SGS v. Pak., *supra* note 212, ¶¶ 166-67.

Furthermore, the tribunal noted that the operation of the clause in such circumstances would make the other investment clauses of the IIA, notably expropriation and FET, "substantially superfluous."[214] In other words, *Pakistan* interprets the clause to hold no legal effect and thus provides no additional protection. The tribunal was immediately criticized for the narrow interpretation provided in the decision by one of the States Parties to the BIT,[215] and it would only be a few months later that the clause would be discussed again in *SGS v. Philippines*,[216] where the decision provided in *Pakistan* was rejected and heavily criticized.[217] Despite this rejection and redefinition of the clause, the tribunal declined admissibility of the claim pending the completion of proceedings taking place within the Philippine judicial system.[218] While the decision reached in *Philippines* is viewed as giving justice to the umbrella clause,[219] the two SGS cases taken together provide little clarification on the specific role and effect of the clause,[220] as is apparent by the actions of subsequent tribunals that have continued to have varying interpretations.[221]

The most recent case to address the umbrella clause, *El Paso Energy Company v. The Argentine Republic*,[222] has also provided little help in the determination of the legal status of the clause extending protection to all obligations entered into by states, particularly since it effectively limits the

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214. *Id.* ¶ 168. It should also be noted in the F.R.G.-Pak. BIT that this particular interpretation is particularly supported by separating the umbrella clause in art. 11 from the substantive section in arts. 3–7. *See* F.R.G.-Pak. BIT, *supra* note 209.

215. SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6, 123 (W. Bank 2004) (Decision on Jurisdiction of Jan. 29, 2004) [hereinafter SGS v. Phil.]; Lowe, *supra* note 150, at 104; Cristoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE L. 231, 253 (2004).

216. SGS v. Phil., *supra* note 215.

217. *Id.* ¶¶ 120–28.

218. *Id.* ¶ 143.

219. Schreuer, *supra* note 215, at 255.

220. *See* U.N. Conference on Trade and Development, São Paulo, Braz., June 13–18, 2004, *State Contracts*, at 19.

221. *See generally* Salini Construttori S.p.A. & Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13 (W. Bank 2004) (Jurisdiction), 44 I.L.M. 569, ¶ 127 (2005); Joy Mining Machinery, Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/03/11 (W. Bank 2004) (Award); Eureko B.V. v. Poland, ¶¶ 246–260 (Ad Hoc Tribunal 2005) (Partial Award), *available at* http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf; AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, ¶¶ 90–99 (W. Bank 2005) (Jurisdiction), *available at* http://ita.law.uvic.ca/ documents/AES-Argentina-Jurisdiction_000.pdf; *Waste Mgmt. II*, *supra* note 131, ¶ 73; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, ¶ 53 (W. Bank 2005) (Award), *available at* http://ita.law. uvic.ca/documents/Noble.pdf.

222. El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15 (W. Bank 2006) (Decision on Jurisdiction) [hereinafter *El Paso Energy*].

clause to only being applicable to "additional investment protections" entered into with investors.[223] In the tribunal's view,

> an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims. These far-reaching consequences of a broad interpretation of the so-called umbrella clauses...have been well understood and clearly explained by the first Tribunal [*Pakistan*] which dealt with the issue.[224]

Beyond these theoretical elements of the clause, *El Paso* applies the "essential basis" test and says that any contract claim that may be made under the guise of the umbrella clause must also rely on a violation of another substantive IIA provision.[225] In this particular case, such a claim was possible and the tribunal found that it indeed did have jurisdiction over "purely contractual claims"[226] based upon the inclusion of a provision within the Argentina-U.S. BIT covering violations of investment agreements entered into with investors.[227]

Many different interpretations of the umbrella clause have left a significant grey area in interpreting them. In adopting new regulations, states should be aware of the potential legal challenges such new measures may cause, not just under the framework of expropriation and FET, but under their contractual obligations to refrain from such involvement under the umbrella clause as well. Despite the potentially incredible broad scope of the clause critiqued by tribunals and scholars,[228] debate continues as to the exact meaning and legal effect of the clause. In light of the recent jurisprudence around the clause, it appears that the clause does carry considerable legal weight if it is used in conjunction with other substantive clauses, and its presence in an IIA effectively establishes the possibility of a breach of contract to amount to an international wrongful act the state is responsible for.[229] Additionally, it may allow for the IIA dispute resolution mechanism to be utilized by the investor if any contractual violation takes

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223. *Id.* ¶ 81.
224. *Id.* ¶ 82.
225. *Id.* ¶ 84.
226. *Id.* ¶ 86.
227. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, art. VII(1), U.S.-Arg., Nov. 14, 1991 (entered into force Oct. 20, 1994), 31 I.L.M. 124 (1992).
228. *See generally* Schreuer, *supra* note 215, at 251; Anthony C. Sinclaire, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARBITRATION INT'L 411 (2004); Van Harten, *supra* note 212; Shany, *supra* note 205; DOLZER & STEVENS, *supra* note 171, at 82; Mann, *supra* note 208, at 246.
229. OECD, *supra* note 211, at 203; Van Harten, *supra* note 212, at 388–91.

place,[230] no matter how small or trivial.[231] IIAs containing umbrella clauses may significantly impair the ability of states to alter concession contracts entered into with private parties since the specific nature of the clause has been interpreted to varying degrees in just the last few years and states cannot be sure their actions are permissible under international investment law as the treaties they enter may well extend beyond the standards prescribed by prevailing customary law.

More than expropriation clauses, which focus on actions of states that restrict the full benefits of the investment, the presence of an umbrella clause may effectively reduce the ability of a state to take any measure, whether or not it affects the profitability, operation, or control of water utilities, to realize the right to water. Despite General Comment 15 calling upon states to adopt appropriate legislative measures,[232] states that have entered into concession contracts specifying tariff rate standards or the monitoring of operations with foreign investors may continue to observe contracts that are less favorable to the full realization of the right to water due to the perceived risk of being in breach of their IIA obligations through the presence of an umbrella clause. This indeed was the case in the only International Centre for Settlement of Investment Disputes (ICSID) tribunal to address the merits of a case concerning water privatization, *Azurix v. Argentina*,[233] and the tribunal ultimately accepted the case as a matter of a treaty violation rather than a pure contractual one.[234] Thus, with the inclusion of an umbrella clause, states must take due consideration during negotiations to ensure that the future ability to adjust water regulations remain within state regulatory capacity despite the full or partial privatization of utilities.

D. Cumulative Effect

Expropriation, FET standards, and umbrella clauses potentially limit the ability of states to impose new regulations that may be consistent with the fulfillment of their progressive realization of the right to water, since any regulatory measure is likely to affect the operation of foreign-owned water utilities. This is particularly evident in the wide range of interpretations provided from recent investment arbitration cases,

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230. KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 78 (1992).

231. Schreuer, *supra* note 215, at 255.

232. *General Comment 15*, *supra* note 21, at art. 1.

233. Azurix Corp. v. Argentine Rep., ICSID Case No. ARB/01/12 (W. Bank 2004) (Jurisdiction), 43 I.L.M. 262, ¶ 76 (2004) [hereinafter *Azurix*].

234. *Id.* ¶¶ 49–54 (Award), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal= ListPending.

particularly *Methanex, Metalclad,* and *Tecmed.* Assessing expropriation on the merits of whether or not an investor has been deprived of the benefits of property allows for measures taken to limit the profitability of water investors (i.e., limitation of tariffs) to be viewed as acts that may constitute an international wrong or require financial compensation to investors that may not be economically possible. Even within the *Methanex* arbitration, little development has actually taken place in a transferable argument to fulfilling the right to water because the "special commitments" entered into through concession contracts may exempt the state from the tribunal's test for non-expropriative regulatory actions. These subsequent contractual guarantees would likely be included in the post-IIA commitments made with states in the form of tariff stabilization or investment returns based upon the needs of the utility, as provided for within the Cochabamba Concession Contract,[235] since it is likely that said terms would have a substantial impact on the choice of the investor to undertake the privatization contract. As the *Aguas del Tunari* case was withdrawn prior to a discussion of the merits, the legal arguments of the parties are not known; however, based upon the events leading up to the submission of the claim it can be assumed that the clauses discussed in this analysis were central to the arbitration between the parties.

Looking at each of these clauses in isolation helps illustrate the challenges states may face once their actions are deemed contrary to the terms of the IIA by investors. The analysis of the full implementation of the right to water, however, necessitates a broader view of the way investors and states interact on the implementation of human-rights legal obligations. While this section has focused on the general use of IIA clauses and their possible interaction with the realization of the right to water, the broader aspects of human rights defenses within tribunals, and the way in which tribunals have responded to measures characterized as such, can help shed light on whether or not the totality of expropriation, FET, and umbrella clauses may be augmented by the situational elements of the fulfillment of the right to water in cases before tribunals.

IV. WIDER REGULATORY IMPLICATIONS IN INVESTMENT LAW

While individual clauses within IIAs have attributes that may protect the basic premise of international investment, collectively they make the fulfillment of the right to water difficult. Due to these unique interactions, it is necessary to assess the broader implications in the use of investment treaties in protecting investor interests. While the previous section looked largely into the post-regulation aspect of fulfilling the right

235. Concession Contract, *supra* note 147, at ann. 5, art. 4.2.

to water, the impact of IIAs extends beyond international tribunals to the extent that it may impact national regulatory development and the realization of the right to water. In order to address some of these wider considerations in relation to the fulfillment of the right to water, it is necessary to take an integrative approach to the various IIA provisions discussed above. This section assesses the way in which they have been utilized in the fulfillment of human rights, the potential challenges states face in adopting new regulations in light of investor influence, and, finally, the recent developments in cases concerning the expansion of municipal water utilities.

A. Promoting Human Rights in Investment Arbitration

Out of the various clauses and provisions that IIAs typically encompass, the protection and promotion of human-rights obligations is currently absent.[236] Instead, IIA protection clauses have allowed investors to challenge policies implemented by states that may allow for the progressive realization of human rights.[237] The right to expropriate is an issue that is not just protected in IIAs, but is an inherent sovereign right of states regardless of treaty provisions.[238] Natural resources, including water, remain the sovereign property of the state,[239] and if a government deems that an industry must be nationalized for a public good,[240] then the act of expropriation is simply the execution of state authority.[241] The inclusion of an expropriation clause within an IIA is simply meant to give clarification for the legitimate reasons upon which a state may nationalize an industry and provide standards of compensation. Despite these intentions, the use of the investment clauses discussed above by investors in international arbitration has limited the scope of national discretion. The issue is not whether it is permissible for a state to take regulatory action, but rather if the actions equate to an act tantamount to expropriation and thus require

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236. Robert McCorquodale & Penelope C. Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations Under International Human Rights Law*, 70 MODERN L. REV. 599, 624 (2007); Suda, *supra* note 41, at 127.

237. Suda, *supra* note 41, at 98.

238. VCLT , *supra* note 119, at art. 53; BISHOP ET AL., *supra* note 125, at 837; North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 83 (Feb. 20).

239. Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), at I, U.N. Doc. A/5217 (Dec. 14, 1962) [hereinafter G.A. Res. 1803]; Sánchez-Moreno & Higgins, *supra* note 168, at 1780.

240. G.A. Res. 1803, *supra* note 239, I, ¶ 4.

241. Certain German Interests in Polish Upper Silesia (The Merits) (F.R.G. v. Pol.) 1926 P.C.I.J. (ser. A) No. 7, at 22 (May 25) [hereinafter Polish Upper Silesia case], *available at* http://www.icj-cij.org/pcij/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf (last visited July 29, 2008); Santa Elena, *supra* note 129, at 71.

compensation. As there is a clear "public purpose" element to the modification of water tariff regulations, the issue is the level at which modification takes place.

While several cases address the ability of states to regulate investor activities for human rights ends,[242] states have yet to defend their actions as arising out of the international human rights regime.[243] Instead, existing jurisprudence is limited to what tribunals have reasoned based upon investor claims, which has so far favored investors' rights. For instance, *Tecmed* notes that in adopting new regulations,

> [t]he government's intention is *less important* than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is *less important* than its actual effects.[244]

In prioritizing the intentions of states as being *less* important than the effects of the measures, legitimate police powers of the state are removed. Effects on the investor are prioritized over possible reasons for regulation, such as human rights fulfillment. While this is not a complete disregard of the reasons for which regulations are implemented, as they are simply "less important," prioritizing them below the rights of investors effectively limits the available options of states in implementing human rights obligations to those measures that may conform to the non-intervention of investor property.

In light of this highly limiting interpretation of the permissible actions of states, it has been claimed that *Tecmed* demonstrates "a clear example in which a tribunal took [into] account the expectations of the investor,"[245] and the use of those expectations may lead tribunals to favor investors over states. The level to which these expectations may influence arbitral tribunals is still uncertain, but the recognition of investment-backed expectations presents a significant barrier in the development of a framework for the realization of the right to water.

1. Investor Protection

The purpose of IIAs is not meant to "eliminate the normal commercial risks of a foreign investor,"[246] but rather to provide certain

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242. *See Metalclad, supra* note 127, ¶ 107; Myers v. Can., UNCITRAL (Partial Award Nov. 13, 2000); Pope & Talbot, *supra* note 170; Santa Elena, *supra* note 129.

243. Suda, *supra* note 41, at 127.

244. *Tecmed, supra* note 181, ¶ 116 (emphasis added).

245. *Azurix, supra* note 233, ¶ 316.

246. *Waste Mgmt. II, supra* note 131, ¶ 177; *see also* Feldman v. Mex., ICSID Case No. ARB(AF)/99/1, ¶ 111 (W. Bank 2002) (Dec. 16, 2002).

guarantees that states will adhere to a reasonable treatment standard in their relations with foreign investors. Execution of business activities that may be inherently risky or made under poor managerial decision making are not afforded any protection within the provisions of IIAs.[247] The right to water requires that certain steps be taken by states to achieve the full realization of the right, including regulation, and investors are aware that their actions in such an industry means that there are certain performance standards they must comply with.[248] With such standards accepted by water companies, tribunals should approach IIA arbitration with a similar view as taken in *Methanex* in that

> Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate...[resulting in] *the very market for MTBE in the United States...[being] the result of precisely this regulatory process.*[249]

States interested in entering water privatization contracts, or "public-private partnerships," do so because of their desire to expand water services to new areas and improve the efficiency and operation of water utilities. This was the case with Cochabamba, where it was written into the contract that services must be expanded to various areas.[250] It is also the subject of a recent performance dispute in *Biwater v. Tanzania*,[251] where a United Kingdom corporation submitted an international investment claim after their contract was terminated by Tanzania[252] due to poor performance.[253] There, the contract entered into with Tanzania was meant to extend water services to poorer areas of Dar es Salaam over a ten-year period.[254] Two years into the contract the corporation had invested too little in the infrastructure and had increased the tariff rates that led to substantial

247. Maffezini v. Spain, ICSID Case No. ARB/97/7, ¶ 64 (W. Bank 2000) (Nov. 13, 2000).

248. *See, e.g.*, Thames Water Utilities, http://www.thameswater.co.uk/cps/rde/xchg/corp/hs.xsl/536.htm (last visited July 30, 2008).

249. Methanex Final Award, *supra* note 128, pt. IV, ch. D, ¶ 9 (emphasis added).

250. Sánchez-Moreno & Higgins, *supra* note 168, at 1756.

251. *Biwater Gauff*, *supra* note 15.

252. *Id.* ¶ 12 (procedural order No. 1) [hereinafter Biwater Procedural Order No. 1].

253. Food and Water Watch, http://www.foodandwaterwatch.org/water/corporations/Biwater (follow "Biwater: A Civil Society Perspective" hyperlink) (last visited July 30, 2008).

254. Biwater Procedural Order No. 1, *supra* note 252, ¶ 10.

disconnection from existing services.[255] In the state's frustration, the contract was terminated in 2005.[256]

If the expansion of water services and the affordability of such services are the primary driving forces of state actions to privatize a water utility, it should not be surprising that future regulations may be taken to realize these goals. In order to address some of these wider concerns, *Biwater*, unlike *Aguas del Tunari*,[257] is allowing for amici to be submitted because, as in *Methanex*,[258] "there is an undoubtedly public interest in this arbitration."[259] *Biwater* also noted the same concerns as *Aguas Argentinas et al v. Argentina* in that

> the investment dispute centres around the water distribution and sewage systems of a larger metropolitan area...Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favour of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.[260]

Biwater has thus allowed for joint amici to be submitted to the tribunal to "address broad policy issues concerning sustainable development, environment, human rights and governmental policy."[261] In fact, in the six years amicus curiae has been granted in tribunals, all of the tribunals to allow submissions have been centered on some element of the protection[262] or expansion of water services[263] in explicit reference to their impact on human rights.

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255. World Development Movement, *supra* note 25.

256. Biwater Procedural Order No. 1, *supra* note 252, ¶ 12.

257. *Aguas del Tunari*, *supra* note 29 (Response to Petition on Jan. 23, 2003).

258. Methanex Corp. v. United States, NAFTA/UNCITRAL, ¶ 49 (Decision on Amici Curiae Jan. 15, 2001).

259. *Biwater Gauff*, *supra* note 15, ¶ 51 (procedural order No. 5) [hereinafter Biwater Procedural Order No. 5].

260. *Id.* ¶ 52 (quoting Aguas Argentinas v. Arg., ICSID Case No. ARB/03/19, ¶¶ 19-21 (W. Bank 2005) (Amicus Curiae May 19, 2005)).

261. Biwater Procedural Order No. 5, *supra* note 259, ¶ 64.

262. Methanex Final Award, *supra* note 128.

263. Suez v. Arg., ICSID Case No. ARB/03/19, ¶ 19 (W. Bank 2007) (Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make a Submission Feb. 12, 2007); Suez v. Arg., ICSID Case No. ARB/03/17 (W. Bank 2006) (Order in Response to a Petition for Participation as Amicus Curiae Mar. 17, 2006); Biwater Procedural Order No. 5, *supra* note 259, ¶ 52.

It is generally accepted that BITs are not meant to provide investors with "blanket protection" from regulatory actions that may disappoint or diminish the profits of foreign investors.[264] Just as *Methanex* notes that the political situation must be taken into account when investing in an industry that is likely to be regulated, "it is the responsibility of the investor to assure itself that it is properly advised."[265] When electing to invest in a water privatization agreement with a foreign government, it cannot be expected that the regulations and aims of the privatization will remain constant throughout the term of the contract that may last for up to 40 years, particularly if the privatization is taking place for reasons of expanding services with the aim of realizing the human right to water. Thus, even in the existing framework, respondents can submit these arguments and amicus curiae can be presented to address the balance between investor protection and state action to realize the right to water.

2. *Proportionality*

In addition to the responsibility of investors and states to consider the purpose of development, there remains an obligation upon states to take action proportional to the aims being sought. *Tecmed* paid particular attention to this attribute in its discussion of what constituted "fair" treatment by determining that if any state action is to interfere with investor economic rights there "must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized."[266] By assessing the proportional measure of the actions of states, *Tecmed* establishes a new test for tribunals to apply that could be either beneficial or detrimental to the promotion of human rights. The beneficial aspect of the test is that it recognizes the necessity of governmental action when the situation requires it, while limiting the amount of interference to simply what is proportional to the need (i.e., to remedy the situation) and not more. To put it simply, "the Arbitral Tribunal should consider whether community pressure and its consequences [are] so great as to lead to a serious emergency situation, social crisis or public unrest, in addition to the economic impact of such a governmental action."[267] What these measures would constitute in reference to the right to water cannot be articulated as a generic minimum or maximum that would amount to a proportional action of states because each individual

264. Azinian v. Mex., ICSID Case No. ARB(AF)/97/2, ¶ 83 (W. Bank 1999) (Award of the Tribunal Nov. 1, 1999).

265. MTD Equity Sdn. Bhd. v. Chile, ICSID Case No. ARB/01/7, ¶ 164 (W. Bank 2004) (Award May 25, 2004).

266. *Tecmed, supra* note 181, ¶ 122.

267. *Id.* ¶ 133.

situation is unique and should be responded to in a reasonable manner. All that is certain is that the regulation imposed by the state must explicitly target the situation and not exceed what the situation necessitates.[268]

Tecmed applied the proportionality test to the "widespread and aggressive" opposition to the Landfill[269] but ultimately determined that it was not important to assess how "intense, aggressive and sustained" the opposition was, but rather whether or not the opposition was "massive" enough to warrant the refusal of the operating permit.[270] It is at this particular point where the beneficial nature of proportionality can be put into question. If states are only allowed to respond to the explicit situational element of civil unrest, which must be widespread, then they are unable to take progressive measures *before* any opposition is present because they would then bear the responsibility for justifying the necessity of the pre-emptive nature of the measures. More importantly, if the focus remains on the size of the opposition to dictate what measures are considered proportional, then there remains the very real possibility of exploiting minority populations that already lack access to water[271] and do not reach the "massive" level of opposition *Tecmed* describes to warrant a widespread regulatory reform or tariff stabilization.

If the principle of proportionality is extended to the right to water,[272] states are left with a significant grey area between what may be necessary for the achievement of the full realization of affordable and equitable access to water[273] and investor rights on maintaining profit or expanding operations.[274] What constitutes the minimum or maximum level of interference is uncertain and will undoubtedly vary based on the individual circumstances of each case. However, if tribunals continue to apply the principle of proportionality, it is possible for both states and investors to utilize the test for their own submissions. Whether or not these claims will be successful is uncertain, depending on the individual circumstances of each case and the recognition of the right to water as a human rights obligation all members of society are required to fulfill.[275]

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268. *Id.* ¶ 138.

269. *Id.* ¶ 108.

270. *Id.* ¶ 144.

271. HUMAN DEVELOPMENT REPORT 2006, *supra* note 1, at 52.

272. However, Coe and Rubins note that this is the first time proportionality was assessed in investment arbitration, so its future usage is unknown. Jack J. Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 597, 664 (Todd Weiler ed., 2005).

273. *General Comment 15*, *supra* note 21, ¶ 27.

274. Concession Contract, *supra* note 147, at art. 18(3)(2).

275. *General Comment 15*, *supra* note 21, at 60.

B. Regulatory Chill

Of all the challenges and issues that states have faced in realizing their human rights obligations or incorporating sustainable development policies, none have been as problematic as those of the regulatory chill hypothesis.[276] Through the use of expropriation, FET, and umbrella clauses, it is at least questionable whether or not a particular regulatory action taken by a state breaches any, or all, of the investment protection within an investment treaty. However, investors may use the simple *threat* of arbitration as a way to deter or "chill" state regulation from ever taking place.[277] The effectiveness of this tactic appears logical in light of the extensive costs that may be borne by states as a result of arbitration and the prospect of losing and bearing further compensatory costs to the investor.

In practice, the use of regulatory chill can best be seen in *Ethyl Corp. v. Canada*,[278] the first expropriation case under NAFTA to address discrimination.[279] The *Ethyl* case concerned the implementation of Canadian Bill C-29, which aimed to limit the trade of methylcyclopentadienyl manganese (MMT), a fuel additive used during the processing of unleaded gasoline.[280] Although Bill C-29 would not limit the ability of Ethyl Corporation to operate in Canada, its ability to do so was severely diminished by the inability to transfer MMT between provinces under the new regulation.[281] The case itself is meant to address questions concerning national treatment standards, performance requirements, and expropriation, but the merits of these claims have not been addressed as the parties came to a settlement resulting in Canada providing U.S.$13 million in compensation to Ethyl Corporation, down from the original U.S.$900 million claim in compensation,[282] and the removal of the MMT ban.[283] Nevertheless, for the purposes of this discussion, it is the actions taken prior to the settlement that are pertinent.

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276. *See* S.G. Gross, Note, *Inordinate Chill: BITS, Non-NAFTA MITs, and Host-Regulatory Freedom – An Indonesian Case Study*, 24 MICH. J. INT'L L. 893 (2003).

277. Suda, *supra* note 41, at 100.

278. Ethyl Corp. v. Canada, N.A.F.T.A. Chapter 11 Arbitral Tribunal (Award on Jurisdiction June 24, 1998) [hereinafter *Ethyl Corp.*], 38 I.L.M. 708 (1999).

279. Esther Kentin, *Sustainable Development in International Investment Dispute Settlement: The ICSID and NAFTA Experience*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE 309, 334 (Nico Schrijver & Friedl Weiss eds., 2004).

280. *Ethyl Corp.*, *supra* note 278, ¶ 5.

281. *Id.* ¶ 6.

282. *Id.* ¶ 18.

283. Kentin, *supra* note 279, at 334.

In *Ethyl*, the Ethyl Corporation *threatened* to make a claim under NAFTA in an effort to deter domestic regulations that would negatively affect their business. The Notice of Intent was filed on September 10, 1996, while the debate within the House of Commons as to whether or not Bill C-29 would pass was still ongoing.[284] Despite this attempt to influence the state legislature,[285] the House of Commons passed Bill C-29. In response to this passing, Ethyl Corporation once again made a formal statement to the Senate Standing Committee on Energy, the Environment and Natural Resources on February 5, 1997, and "proposed as a means to resolve the dispute that Ethyl Corporation would not proceed with its pending NAFTA claim if the Government of Canada would *not pass Bill C-29*."[286] The Senate rejected this ultimatum, and Ethyl Corporation advanced its claim under NAFTA and filed its Notice of Arbitration just five days later without waiting for the six-month "consultation and negotiation" period required under NAFTA Article 1118.[287]

The regulatory chill hypothesis is not always so clear, and some scholars debate the very existence of such intentions by claiming that it could never be proved or disproved because too many variables are at play.[288] In addition, some scholars submit that accepting the effects of the regulatory chill thesis as having a bearing on the actions of the legislative bodies of states is tenuous since this would assume that legislators are aware of the international legal implications of their actions, which the author submits is unrealistic.[289] This logic, however, fails to explain the actions of the *Ethyl* case where the state knew from the threats from Ethyl Corporation that if they passed their legislation a claim would be brought against Canada under NAFTA.[290] Furthermore, the assumption that state

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284. *Ethyl Corp., supra* note 278, ¶ 87. This, in and of itself, may be contrary to prevailing customary law on the non-interference of aliens in the internal political affairs of host states. *Id.*

285. This is particularly related to the influence in state politics by foreign state authorities, as seen in the Vienna Convention on Diplomatic Relations (VCDR) (adopted Apr. 18, 1961), 500 U.N.T.S. 95 Art. 41(1), but its extension to corporations is commonly accepted, as noted in *Tecmed, supra* note 181, ¶¶ 121-22.

286. Kentin, *supra* note 279, at 334 (emphasis added).

287. *Ethyl Corp., supra* note 278, ¶¶ 84-85. In the Tribunal's view, however, the date of filing and attempted regulatory influence are irrelevant to the jurisdictional phase and are futile, "since the fact is that...six months and more have passed following Royal Assent to Bill C-29 and the coming into force of the MMT Act." *Id.* As such, the actions taken by Ethyl Corporation are clearly within the scope of understanding of the regulatory chill hypothesis: the threat of the claim under NAFTA was made in an effort to deter domestic regulations that would negatively affect the business.

288. Coe & Rubins, *supra* note 272, at 599.

289. *Id.*

290. *Ethyl Corp., supra* note 278, ¶ 87.

legislative bodies operate in an isolated environment of which the investors are oblivious appears to be at odds with the reality of contemporary investor-state relations.[291] The *Ethyl* case alone demonstrates the *possibility* of investors using investment treaty clauses as an acceptable avenue of deterring regulations. That *Ethyl* clearly identifies the influence of corporations on the state legislative process but then fails to comment on such influence opens the door for future state involvement by foreign investors in their attempts to limit undesirable regulations, an issue that did indeed surface again during the contract renegotiation in *Azurix* when the Claimant used its ability to bring a claim against Argentina[292] to gain leverage during negotiations.[293]

Since the *Ethyl* judgment was released in 1997, there has only recently been discussion as to the merits of the regulatory chill hypothesis and the actions associated with it. In the amicus curiae submitted in the *Methanex* arbitration, particular attention was paid to the effects of regulatory chill and the future of investment arbitration if the costs of arbitration in determining the lawfulness of regulatory measures remain with states.[294] Regardless of whether or not the tribunal took this information into account, the Claimant was faced with considerable costs when the tribunal dismissed the case and left the Claimant responsible for the legal fees of both the United States and Methanex totalling over U.S.$15 million.[295] If more judgments are to be released penalizing claimants to such an extent, it may be possible to avert further arbitration threats from investors as their penalty for losing such a case may be more damaging than the possible outcome.

C. Integrating Human Rights with Investment Law

One way to ensure that human rights considerations, including the right to water, are taken into account is to begin incorporating human rights clauses within IIAs.[296] Just as in *El Paso*, where it was the modification of the umbrella clause that gave the tribunal authority over the case,[297] if states introduce a human rights clause into IIAs, it will allow each of the

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291. *See generally* Celia Wells & J. Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, *in* NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005).

292. *Azurix*, *supra* note 233, ¶¶ 168–72.

293. Costamagna & Sindico, *supra* note 38, at 9.

294. Howard Mann & Don McRae, Int'l Inst. for Sustainable Dev., *Amicus Curiae Submissions to the NAFTA Chapter 11 Tribunal: Methanex Corp. v. United States of America*, ¶ 97 (2004), http://www.iisd.org/publications/pub.aspx?pno=608 (last visited Dec. 4, 2008).

295. Methanex Final Award, *supra* note 128, at pt. V, ¶¶ 12–13.

296. Suda, *supra* note 41, at 156–60.

297. *El Paso* Energy, *supra* note 222, ¶ 86.

investment clauses included in the treaty to be interpreted in light of the realization of the state's human rights obligations and create a framework conducive to the development of states.

The inclusion of human rights responsibilities of foreign investors does not necessarily limit the scope or protection of the traditional IIA. As noted by the International Institute for Sustainable Development, the substantive nature of the expropriation[298] and FET clauses[299] does not change, but is instead modified by the inclusion of an obligation for investors to recognize the obligation of states to "ensure that its laws and regulations provide for high levels of...human rights protection."[300] This allows for legitimate state authority to impose whatever regulations it deems appropriate to satisfy its international development goals while still safeguarding the fundamental elements of the IIA. Under the existing framework of international investment law, and in particular the emerging jurisprudence concerning the full application of the expropriation clause and the differing interpretations on what constitutes "public purpose," states are not given this protection and framework.

In implementing the right to water, as envisioned by the CESCR, clear and demonstrable steps must be taken toward the full realization of the right to water. This obligation is central to the international investment law framework.[301] International law itself is composed of the interaction between states; IIAs, in representing the treaty aspect of this interaction, allow trans-national corporations to enjoy international legal protection for their foreign investment in host states, but this extension must not be viewed in isolation from further international obligations. International human rights law is one facet of a larger system, and treaties that states willfully enter within its realm are equally binding as those entered into in investment law under the principle of *pacta sunt servanda*.[302] In fulfilling the right to water, tribunals should examine the relevant treaties and the interpretive guidance provided by the CESCR to determine whether or not measures taken constitute the existing "public purpose" requirements that

298. HOWARD MANN ET AL., INT'L INST. FOR SUSTAINABLE DEV., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT, art. 8(a) (2005), *available at* http://www.iisd.org/pdf/2005/investment_model_int_agreement. pdf.

299. *Id.* at art. 7(a).

300. *Id.* at art. 21(b).

301. *See e.g., General Comment 15, supra* note 21, ¶ 35 (noting that states must take account of the obligations when entering into international agreements).

302. This is often evident in the course of tribunal assessment and the use of the Vienna Convention on the Law of Treaties to determine the applicable standard of interpretation for investment treaty clauses. *See Azurix, supra* note 233, ¶ 307; *SGS v. Phil., supra* note 215, ¶ 99; *Tecmed, supra* note 181, ¶ 70; *Metalclad, supra* note 127, ¶ 70.

are proportional to their human rights obligations in the fulfillment of the right to water.

One of the ways that these issues can begin to be heard more frequently within tribunals is through the use of amicus curiae submissions where environmental and human rights groups can contribute to the discourse that takes place within these sessions.[303] Through the increased acceptance of amicus curiae submissions, it is likely that human rights concerns will continually be raised in investment arbitration in conflicts concerning water privatization contracts. This is particularly the case when it is viewed that the privatization contract that is entered into with investors is done in good faith that the investor will expand water services to new areas, as in *Aguas del Tunari* and *Biwater*, since this is the basic premise of a contractual arrangement existing to have a mutual obligation of both signatories to comply with their said agreement.[304] Within the realm of water privatization, this means that the state is willing to give up some of its sovereign rights through the provisions of an IIA while the investor is promising to act in a responsible and reasonable manner in accordance with the state's development aims. While there is considerable weight in each of the investment clauses that investors are protected against, the growth of the recognition of water as a human right must be given due consideration in the determination of whether or not the regulation or nationalization of water utilities is proportional to the performance of the utility.

This section has examined the way in which IIA obligations interact with the fulfillment of the right to water and the sovereign regulatory capacity of states in light of these commitments. In examining the way in which IIA obligations have been utilized in investment arbitration, it has been submitted that the absence of human rights IIA provisions has resulted in investors having a large amount of investment security while the threat of using any such protection may have been a deterrent for the progressive realization of human rights and thus could limit the ability of states to realize the right to water. With the recent acceptance of amicus curiae in investment arbitration in cases concerning water utilities, some of these clauses may be interpreted in light of such obligations to fulfill the human right to water and, therefore, unlike *Aguas del Tunari*, the ongoing *Biwater* arbitration has the potential to address these clauses in full regard of the wider policy implications of the actions of states that expropriate the property of a poorly performing foreign water utility.

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303. The *Methanex Corp. v. United States* decision on amici curiae of January 15, 2001, was the first investment tribunal to allow for an amici curiae submission as noted by The International Institute for Sustainable Development. Mann & McRae, *supra* note 294, ¶ 2.

304. Inceysa v. El Salvador, ICSID Case No. ARB/03/26, ¶ 232 (W. Bank 2006) (Aug. 2, 2006).

V. CONCLUSION

This article has assessed the legal challenges states may face when implementing regulations to fully realize the right to water. While the right to water is not explicitly recognized within the IBR, the subsequent recognition within international and regional human rights treaties, along with the CESCR interpretation of ICESCR state obligations, determines that the right to water is present within the international human rights obligations of states. Through the development of international law, the responsibility for the fulfillment of the right to water resides with states regardless of whether or not their municipal water utilities have been privatized.[305] While the sovereign power of states allows implementation of the steps articulated within General Comment 15, the presence of foreign investors in the management or operation of water utilities presents potential barriers to progressive regulatory measures states may deem appropriate if an IIA exists between the contracting states. Specifically, poor countries may be worried about the financial costs of regulation, whether in terms of compensation for expropriation or simply bearing the costs of arbitration with investors.

States are faced with a variety of challenges to progressively implementing the right to water. The traditional full-cost recovery approach that has been promoted in privatization contracts is inconsistent with contemporary human rights approaches to the fulfillment of state treaty obligations.[306] Although international investment law does not encompass inherent inconsistencies with human rights law, the way in which it has been used has reduced the capacity of states to realize the right to water. In particular, the ability of investors to seek compensation for actions that interfere with investment expectations when states take regulatory measures to fulfill their human rights obligations poses significant challenges to states, as well as arbitration tribunals.

Expropriation and FET clauses are particularly problematic due to the varying interpretative analyses taken by tribunals in that the profitability of investors is placed above the intention of sovereign regulations. This is particularly problematic in the development of the new regulations most states use to "achieve a range of equity and efficiency objectives."[307] If these measures are deemed to be expropriatory by the investor, and the host state becomes liable for compensation that exceeds their financial capacity, the very states that most need to expand the right

305. Miller, *supra* note 116, at 239.
306. Bluemel, *supra* note 22, at 965.
307. HUMAN DEVELOPMENT REPORT 2006, *supra* note 1, at 84.

to water will be unable to adopt effective measures. While *Methanex* may be viewed as "pivotal"[308] in some regards, the exigency of the claim and the actions taken by the government of California are markedly different from the state involvement required in the fulfillment of the right to water. As investors increasingly bring claims under the dispute resolution clause of IIAs containing umbrella clauses, states may face added pressure during their contractual negotiations. Recognizing human rights obligations and accessibility and affordability of water services within IIAs and concession contracts will allow for tribunals to take due account of the measures taken by states and investor responsibility in the fulfillment of the right to water.

The right to water, as noted within the ICESCR, CEDAW, and CRC, is recognized as an independent human right that has binding authority upon all States Parties. Now that states have a clear framework for the realization of the right to water through General Comment 15, the necessary steps that states may want to take must be feasible in all tenets of international law, most importantly in investment arbitration. The importance of this recognition is not just an issue for academic debate, but also to avert future resource wars[309] that may develop in response to poor water management on behalf of the state and investor. The riots that followed the privatization contract in Cochabamba represent one possible outcome of the drafting of concession contracts that fail to take due account of the human rights aspect of water, and while the discussions that took place between the state and investor during the rebellion may not be available, the threat of ICSID arbitration on behalf of Aguas del Tunari should not seem unreasonable given the subsequent submission and examples of *Azurix* and *Biwater*.

We are already beginning to see disputes over the property rights of investors[310] and the performance of foreign water utilities.[311] *Biwater* has the opportunity to articulate the precise nature of state obligations to observe contracts in the face of a poorly performing investor in the fulfillment of water as a human right, and the outcome of the case has the opportunity to clarify the permissible actions of states in their efforts to extend water services. While the ICSID case is still ongoing, a United Nations Commission on International Trade Law (UNCITRAL) tribunal in London recently decided that the Tanzanian government was justified in its termination of the contract with Biwater and awarded the Tanzanian

308. MANN, *supra* note 169, at 13.

309. Mike Thomson, *Ex-UN Chief Warns of Water Wars*, BBC NEWS, Feb. 2, 2005, http://news.bbc.co.uk/1/hi/world/africa/4227869.stm (last visited Dec. 4, 2008).

310. Bayview Irrigation Dist. et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1, ¶ 28 (W. Bank 2007) (Final Award June 19, 2007).

311. *Aguas del Tunari*, *supra* note 29; *Biwater Gauff*, *supra* note 15.

government damages.[312] However, while this may seem like a step forward in the realization of state regulatory authority in the provision of water, the UNCITRAL case examined only the contractual obligations of the state and the remaining treaty issues within the ICSID tribunal are still unknown.[313] If these issues are not resolved within investment arbitration it is unlikely that states will be able to fulfill their human rights obligations to *respect, protect,* and *fulfill* the right to water in the coming years.

312. Press Release, The United Republic of Tanzania Ministry of Water, DAWASA Awarded Tsh 15.8 Billion in City Water Arbitration, http://www.foodandwaterwatch.org/world/africa/water-privatization/copy_of_tanzania/Tanzania_PRESS%20RELEASE.pdf (last visited Dec. 4, 2008).

313. Ashley Seager, *Tanzania Wins £3m* Damages *from Biwater* Subsidiary, THE GUARDIAN, Jan. 11, 2008, http://www.guardian.co.uk/business/2008/jan/11/worldbank.tanzania (last visited Nov. 4, 2008).