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"The State Duty to Protect from Business-Related Human Rights Violations in Water and Sanitation Services: Regulatory and BITs Implications"

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Abstract

The human right to water and sanitation (HRWS) has called primary attention since General Comment N° 15 (GC 15) -issued in 2002 by the UN Committee on Economic, Social and Cultural Rights- interpreted articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Since then, much has been written on this human right, but very little on the existing linkage between it and private corporations providing public water and sanitation services (WSS), and even less on the regulatory and Bilateral Investment Treaties (BITs) implications of the state´s duty to protect this right.

This article will therefore study the state´s duty to protect from business-related human rights violations in the specific field of WSS from two interrelated perspectives. On one hand, the domestic regulatory front, which raises questions such as: Should regulation of private water and sanitation companies be based on human rights standards? If so, to what extent? What are the concrete regulatory implications of the two previous responses? Has existing case law outlined minimum regulatory standards based on international human rights norms?

On the other hand, in terms of international liability, the following questions are crucial: How should we interpret BITs that protect foreign companies providing water and sanitation in light of the state´s duty to protect from business-related human rights violations? How to reconcile the state´s BITs commitments with its obligations under human rights treaties in WSS?

Introduction

This article will not address either the state´s duties to respect or fulfill HRWS, even assuming that they are complementary and may overlap with the duty to protect, or the state duty to protect from different causes of those of business-related human rights violations in WSS. Therefore, the

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violations perpetrated directly by states by providing either, inadequate public services or no services at all will not be considered here. Instead, this article explores the state duty to protect the HRWS from violations caused by water and sanitation private companies, focusing on its regulatory and BITs implications.

Considering the call this paper intends to address, it is necessary to clarify in first place some basic theoretical frameworks that are frequently misunderstood by the literature on this and related topics.

Water as a natural resource or a commodity is a very different concept from water as a human right. Even though these concepts refer to diverse legal frameworks, they are all interrelated in many complex ways, as the GC 15 has made explicit, but not explained in detail. Sometimes they match, sometimes there is a contradiction between them, but they always influence each other. As this workshop proposes, they cannot be studied separately. Therefore, the multiple linkages between them need to be explored.

a) Since 20th century water as a natural resource has been primarily thought of as private property or as public good. This legal framework applies to every type of continental water, including surface and groundwater, but it is necessary to take into account that 90% of this water is being used for economic purposes (70% agriculture, 20% industry) and therefore, only 10% accounts for domestic use, and of this 10% a very small percentage accounts for fulfilling the HRWS[2].

The public nature of water as a natural resource might increase state powers and for this reason it is treated as a public good in most countries, but this does not necessarily ensure better distribution or fulfillment of the HRWS. In fact, water rights on public waters can in some instances be as or more protected than private property in some countries[3]. Companies or private investors normally hold water rights that are constitutionally protected as private property regardless the water is private or public. Therefore, water rights may constitute a major issue when harmonizing with HRWS, private property, foreign investment and sustainable development.

b) The right of access to water has been long recognized in national laws of many countries through various legal concepts (domestic or free uses, public service), but it has acquired greater relevance since its consideration as a human right, with the growing weight of international human rights law. Notwithstanding the importance of its positive endorsement, we have previously concluded that, at least in developing countries, the main factors obstructing the implementation of the HRWS do not exclusively refer to a lack of normative recognition, a problem of legal efficacy, a fragmented and contradictory global legal order, or even to a lack of hydric resources, but fundamentally to political-economic problems of development and unequal resource´s distribution at both international and local levels[4].

c) The link between WSS, water rights, the duty to protect HRWS and BITs is related with very urgent challenges for the world. First, water is essential for providing such services and in most countries water rights for WSS have absolute priority over other uses. Therefore, whether water is considered a private or a public good is not determinant for WSS. Similarly, HRWS does not

[2] Source: UN World Water Assessment Programme 2012 (WWAP).
[3] US, Chili, etc.
[4] Martin, L., "International Legal Discourse on Human Right to Water and Sanitation from the Latin American Standpoint", *Inter-American and European Human Rights Journal*, by Intersentia. Vol. 4, 2011; Justo, J. B., El Derecho Humano al Agua y Saneamiento frente a los Objetivos de Desarrollo del Milenio (ODM), Santiago, CEPAL, 2013.

require specific public or private WSS even when the choice can have very different impacts and results in diverse social, economic and cultural contexts[5].

Secondly, WSS are essential to satisfy the HRWS in a sustainable and safe way, especially in urban areas. This means that by 2050, 70% of the world population will be covered by the HRWS and WSS legal frameworks simultaneously, while foreign corporate providers play an important role in this area. In other words, harmonizing HRWS, WSS and BITs legal frameworks will be a crucial task for enforcing this right while respecting preexisting ones[6].

II. The HRWS framework. Human rights treaties

The HRWS has been defined as "the most notable water management innovation in modern history, as it seeks to place the individual back at the center of resource management".[7] Although the right of access to water has long been recognized at national level in many forms, its consideration as a human right involves a paradigm´s change.

That is so because giving water this classification means subjecting it –and its related activities- to a normative system –the one of human rights treaties- that embodies the following guidelines: a) the establishment of minimum levels of protection of the right that limit the scope of action of the state; b) the inability of states to invoke its domestic legal system, cultural traditions or any other element of their national identity to justify the withdrawal of those minimum levels of protection, and, c) the establishment of international bodies with the power to control the compatibility of domestic practices of any kind with the rules of the treaties, declare the international responsibility of the state in case of violation of these rules, oblige him to put an end to the infringement and repair the damage.

In this context, HRWS is interdependent on and interrelated to other human rights, like the right to food, health, a decent quality of life, a decent home or an adequate environment; it is of limited content, variable scope and of progressive satisfaction always according to the context and the country. As the HRWS and interdependent human rights are all economic and social rights, the most suitable framework for this article is the ICESCR, by far, the most developed and significant international convention on the subject[8].

Human rights covenants –like the ICESCR- have a number of unique features that differentiate them from traditional treaties.[9] Basically, this type of convention establishes a new legal order -and not just reciprocal engagements-[10] consisting of a series of objective obligations that are binding

[5] Harris, Leila M. Roa-García, María Cecilia, "Recent waves of water governance: Constitutional reform and resistance to neoliberalization in Latin America (1990–2012)", *Geoforum* 50 (2013) 20–30; Bohoslavsky, J. P., Fomento de la eficiencia en prestadores sanitarios estatales: la nueva empresa estatal abierta, Santiago de Chile, CEPAL, 2011; Ducci J., *Salida de operadores privados internacionales de agua en América Latina*, Washington, BID, 2007.

[6] Solanes, M. and Jouravlev, A., "Revisiting privatization, foreign investment, international arbitration, and water". SRNI Nº 129, Santiago, 2007, LC/L.2827-P/I; 17 pp.

[7] McGraw, G., "Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence", v. 8, 2 *Loyola University Chicago International Law Review*, p. 102

[8] Adopted by the UNGA 1966, and in force from 1976, as of 2013 it had 160 States parties. This does not mean, however, that there is no other relevant framework. In fact, for instance, at a regional level, the Additional Protocol to the American Convention of Human Rights on Matters of ESCRs (San Salvador Protocol, 1988) recognizes the right to "...live in a healthy environment and count on basic public services" (Art. 11).

[9] See generally Teitel, Ruti, *Humanity's Law*, Oxford University Press, 2011.

[10] This is so to the extent that the making of a treaty of this nature does not respond to a negotiation under guidelines of reciprocity -a compromise of competing interests- but to the existence of common challenges -the defense of human rights- for whose achievement a joint effort is needed. After the ratification of a human rights treaty there are no areas of

between states even without proof of the involvement of a national,[11] and must be secured by joint action of states (collective enforcement).[12] At the same time, human rights obligations are grounded on constitutive and substantive norms representing the adherence to a normative system, not on an exchange of rights and duties.[13]

Human rights treaties, therefore, provide a comprehensive legal system for all areas of government activity,[14] whether they are internal or linked to the signing and implementation of other international agreements. In this line, the United Nations Sub-Commission on the Promotion and Protection of Human Rights has affirmed the "centrality and primacy of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial policies, agreement and practices".[15]

That is why HRWS conditions both regulatory domestic practices and international commitments embodied in the BITs.

III. The duty to protect the HRWS. Background

HRWS generates a series of state duties, the key factor being protection in order to examine the regulatory role of national authorities in WSS and their relationship with BITs.

Irrespective of other general obligations, according to the GC 15, when WSS are provided by third parties the state duty to protect implies both general and specific obligations as follows:

a) The general obligation consists of preventing third parties –including corporations- from interfering in any way with the enjoyment of the right to water by adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.

This general obligation includes very different situations such as competing uses, water pollution or WSS, highlighting the multiple linkages that have already been remarked in the introduction to this

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state activity exempt from the network of commitments and guarantees. The system exists "to recognize rights and freedoms to the people and not to empower states to do so" (IACHR, AO-7/86, *Exigibilidad del derecho de rectificación o respuesta - artículos 14.1, 1.1 y 2 Convención Americana sobre Derechos Humanos*, 29 August 1986, at para. 24. Malan, Koos, "The nature of human rights treaties: Minimum protection agreements to the benefit of third parties", *De Jure*, 2008, 82).

[11] As a consequence of the *erga omnes* nature of human rights obligations "it cannot be lightly presumed that a State would conclude a bilateral treaty that would impose obligations that would place the State in breach of obligations owed to multiple other States, if not to the international community as a whole" Bruno Simma & Theodore Kill, "Harmonizing Investment Protection and Human Rights: First Steps Towards a Methodology" in Christina Binder *et al*. (eds.) , *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (2009), p. 706.

[12] ECHR, *Ireland v. United Kingdom*, 18 January 1978, at para. 239; *Loizidou v. Turkey*, 23 March 1995, at para. 70; *Mamatkulov & Askarov v. Turkey*, 4 February 2005, at para. 100; IACHR, AO-1/82, *"Otros Tratados" Objeto de la Función Consultiva de la Corte (artículo 64 Convención Americana sobre Derechos Humanos)*, 24 September 1982, at para. 24; *Ivcher Bronstein v. Peru*. 24 September 1999, at para. 42.

[13] Provost, Rene, "Reciprocity in Human Rights and Humanitarian Law", *British Yearbook of International Law*, 1994, Vol. 65, p. 386.

[14] Human rights *erga omnes* obligations "are grounded not in an exchange of rights and duties but in an adherence to a normative system" (Provost, René, "Reciprocity in Human Rights and Humanitarian Law", supra, 386).

[15] UN, "Human Rights as the Primary Objective of Trade, Investment and Financial Policy", Doc./E/CN.4/Sub.2/RES/1998/12.

article. When talking about competing uses, for instance, these conflicts arise all the time since water as a natural resource is normally granted to private or public investors for economic purposes. These companies normally hold water rights, simultaneously protected by domestic law as private property and by international law as foreign investment. These water rights or their exercise often conflict with domestic, local, free or even customary uses and settling these disputes is highly complex, even when legal domestic frameworks normally confer absolute priority to both domestic or free uses, and to water rights for WSS over any other use. Many hypotheses can be made around this general formula, and for this reason, this article focuses the analyses on the specific obligations as follows.

b) The specific obligations consist of preventing the companies from compromising equal, affordable, and physical access to sufficient, safe and acceptable water by means such as independent monitoring, genuine public participation and imposition of penalties for non-compliance.

These specific obligations apply within the territory or jurisdiction of the state and will be addressed in point IV. With respect to the state duty to protect from business-related human rights abroad, the CESCR has also referred to the HRWS by saying that states should take "steps to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where states parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law" (GC15)[16].

At the same time, the state duty to protect from business-related human rights violations must be considered within the context of the UN "protect, respect, and remedy" framework endorsed by the UN Human Rights Council on 16 June 2011[17]. This framework rests on three pillars: i) the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; ii) the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; iii) greater access by victims to effective remedy, both judicial and non-judicial.

According to this framework, the state duty to protect involves 10 principles but only a few of them are useful for the purposes of this article. GP 1 requires the States to take "appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication". GP 2 requires states to "set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations". In meeting their duty to protect, GP 3 establishes that states should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights; (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations; (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

[16] See Seck, Sara L., Conceptualizing the Home State Duty to Protect Human Rights (2010). *Corporate social and human rights responsibilities: global legal and management perspectives*, Karin Buhmann, Lynn Roseberry, Mette Morsing, eds., Macmillan, 2010.

[17] Backer, Larry Catá, "On the Evolution of the United Nations' 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context" (June 3, 2010). *Santa Clara Journal of International Law*, Vol. 9, No.1, 2010.

Very important for water and sanitation services is GP 4, requiring states to "take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the state, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence". Finally, GP 5 provides that "states should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights"[18].

Notwithstanding the adoption of these guiding principles contributes to the sizeable challenge of making companies responsible for human rights violations, it is worth recalling that, in part, these principles emerged because states have been failing to enforce economic, social and cultural rights (ESCRs) for the last 30 years, mostly in developing countries. Therefore, the current duty to protect must take into account the systematic failure of developing states in respecting, protecting and fulfilling ESCRs.

The state duty to protect becomes crucial once assumed that the corporate obligations referred to by these guiding principles are not legally binding. If those international obligations depend on the willingness of corporations, therefore, the state responsibility appears as one of the main instruments to make corporations respecting human rights. This is so because this duty implies that the state must introduce all the necessary rules and practices to ensure the prevention and reparation of HRWS violation by companies. This allows to overcome, at least partially, the gap caused by the lack of binding force to the private sector through the reception of the international standards in the domestic regulatory system.

IV. Regulatory implications of the duty to protect HRWS

Generally speaking, irrespective of the country recognizes the HRWS by ratifying international human rights treaties, like the ICESCR, by including it in the constitution or by passing domestic laws, according to its hierarchy and particular content, private companies providing WSS must respect HRWS standards. They are responsible and can be sued at domestic level as well as the states for protecting, respecting and fulfilling this right.

The law sources of that recognition and its hierarchical order must be taken into account in order to identify states violations of the duty to protect and the concrete scope of the HRWS. This is why while some countries include the ICESCR as part of the constitution (Argentina and Colombia, for example), others have not ratified international treaties recognizing the HRWS (the US); and while some countries have an explicit constitutional reception (Ecuador, Bolivia, Uruguay), others recognize the right with an act (Belgium, Peru). Therefore, some conflicting but very different situations arise when HRWS standards contradict the regulatory legal framework and/or contracts granting WSS.

Companies providing water and sanitation on a national scale must comply with the domestic legal regulatory framework for WSS, the contracts they hold as well as with international standards of HRWS, such as: (a) availability (b) quality (c) and accessibility, including i) physical accessibility, ii) economic accessibility iii) non discrimination, and iv) information accessibility (GC 15).

[18] See in general Ruggie, J. "Protect, Respect and Remedy: a Framework for Business and Human Rights", A/HRC/8/5, 2008.

As HRWS legal sources (mostly international treaties and constitutions) have normally a higher hierarchy than concession contracts or regulatory frameworks, both states and companies providing WSS must abide by HRWS standards when contracting[19] and while providing the service, even when these standards have not been included originally or explicitly in their contracts. It has been clearly stated that the legal obligations of the state to respect and protect human rights are additional to the enterprise's own responsibility to respect human rights and do not diminish it in any regard[20]. The IACHR has consistently declared that when states delegate or transfer public functions or powers to third parties, in order to provide public services related to human rights, as water and sanitation are, far from liberating the state, it makes both the state and the company simultaneously responsible[21].

Therefore, companies are responsible and can be sued by water users at a domestic level for violating the HRWS in most countries. This fact constitutes a significant difference with respect to the international arena, not because companies are not legally bound by those mandates but because international courts do not have jurisdiction over corporations. On the contrary, states might be sued for violating the duty to protect at a domestic level but also notably before an international human rights court (vgr. ECHR, IACHR).

In establishing state's responsibility, different rules may apply at national and international levels. Concepts such as progressive fulfillment, due diligence, availability of resources, reasonable, discretionary, etc. are crucial in determining the violation of the state duty to protect in concrete situations. Due to the extreme ambiguity that characterizes these concepts and the HRWS standards such as availability, affordability and accessibility, case law has played a crucial role in clarifying these terms, which vary considerably in different contexts and countries.

1) Establishing the duty to protect the HRWS in WSS

At the domestic level, state human rights obligations frequently appear complemented by other responsibilities, such as the state duty to control and regulate WSS companies. Therefore, the existing direct responsibility of companies for providing the service does not prevent the indirect domestic state´s liability for omitting the appropriate control. In a nutshell, the state action to control WSS companies must be also considered a measure to enforce the state duty to protect from business-related human rights violations in the international arena.

Although the responsibility for the state´s duty to protect from business-related human rights violations in WSS may arise from acts of commission, it normally arises from state omissions. This normally occurs when the state fails to properly regulate or control the companies providing WSS and the principal obstacle will be to effectively prove that the state omission to regulate or control companies was a facilitating factor to the violation.

Not only the legislative but also the executive and the judicial branches of the state may fail in fulfilling the duty to protect when, for instance: a) enacting legal/regulatory frameworks that do not match with HRWS standards, b) signing contracts that do not respect the HRWS standards, c) not demanding the company to abide by regulatory frameworks/contracts as measures for protecting the HRWS d) not settling disputes according to HRWS standards.

[19] This is expressly referred to by the PR5.
[20] UN, *The corporate responsibility to respect human rights*, United Nations, New York/Geneva, HR/PUB/12/02, 2012, p. 18.
[21] IACHR, *Ximenez Lopez vs. Brasil*, 4 July 2006.

The main role played by courts in determining the scope and minimum standards of the HRWS requires further explanation. Even when the existing case law does not refer expressly and/or exclusively to the state duty to protect, it may be useful to determine its potential breach and to reduce the uncertainty of the ambiguous standards referred to above.

As it was mentioned above, the state duty to protect the HRWS according to GC 15 involves both general duties and specific obligations when it comes to apply the state duty with respect to third parties providing WSS. In particular, it establishes that states parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water by means such as independent monitoring, genuine public participation and imposition of penalties for non-compliance (GC15). Bearing in mind that these concepts vary considerably from country to country, we will analyze some of the most frequent, important and controversial cases:

a) Unequal physical access: The state breaches the duty to protect when failing to enforce third parties to enlarge the service area according to regulatory framework requirements or contracts compromises.

Human rights are as universal in the international arena as public services are in the domestic sphere. These are the main principles which form international human rights law and public law at domestic level but paradoxically this constitutes one of the more frequent and silenced violations of the HRWS. This is linked to the non-discrimination standard, providing that water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds (GC15, para.12).

There is only one situation worse than an inadequate service, which is the case of people lacking water and sanitation services, who are normally the poorest and need to spend much more money to get safe water. Unequal physical access is much more of a problem for poor countries than for developed countries, where nearly 99% of the population is covered by WSS or equivalent solutions. In developing countries, states, regulatory frameworks and public policies may or may not succeed in regulating the covered population, keeping affordable rates and even an acceptable water quality, but they fail strongly in ensuring equal WSS for everybody[22].

This is why the GC 15 expressly refers that "States parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society. Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population".

States can breach this duty in different ways, but they usually do it by not enforcing key contract clauses, as expansion plans, terms or infrastructure investment compromises[23]. Not enforcing means in general not obliging the company to comply with the contract, but also postponing compromised investments or not imposing or waiving fines. Even though, as it was pointed out earlier, it is not

[22] The Constitutional Court of Colombia held that the State violated the right to water of the plaintiffs, when lacking a plan or program to ensure progressively access to adequate drinking water for all, including rural population. In particular, the State failed to ensure their right not to be "the last in the line" to have that universal service. CCC, Sentencia T-418 de 2010.

[23] Bohoslavsky, Juan Pablo, Fomento de la eficiencia en prestadores sanitarios estatales: la nueva empresa estatal abierta, Santiago de Chile, CEPAL, 2011; Ducci J., *Salida de operadores privados internacionales de agua en América Latina*, Washington, BID, 2007.

easy to make the state responsible for those cases. Since these state powers are discretionary, the courts are reluctant to control their exercise in order to find the states liable for non-compliance of the state duty to protect.

b) Unaffordable access: The states become responsible for the duty to protect when failing to establish, control or maintain affordable rates for water and sanitation services.

Economic accessibility means that the costs and charges associated with water, water facilities and services must be affordable for all, and must not compromise the realization of other Covenant rights. This is the key concept when WWS are provided by private companies looking for profit, even when charging users for water is not normally the company's only income. Many factors must be taken into account to establish when a water rate is not affordable. Comparison between family income and water rates is useful, but according to the context it should include other factors, such as subsidies, efficiency, quality standards, expansion costs and many others. At a domestic level, legal standards for water pricing normally require rates to be open to the public, proportionate, equitable and reasonable. Some countries also state that, as a user's right, water rates must be as low as possible.

Prices are normally regulated or approved by the state, so it will be clear when the states fail to fulfill the duty to protect in this case. It may occur when states allow third parties to charge disproportionate rates or when they approve unjustified increases.[24] When prices are not regulated by states, it is easier to find it responsible for breaching the duty to protect. As a consequence, the state fails to fulfill the duty to protect when enacting a regulatory framework that allows companies to charge and/or increase rates without any regard for the user's rights.

As in the previous case, it is not easy to find a balance, since water rates can include many different costs or components depending on the economic, social, legal and cultural context. In any case, although it is difficult to establish the scope of the state duty to protect in this area, the affordability standard remains applicable to both companies and states at the internal and international level.

Within this standard we can also include one of the most controversial measures in comparative case law: the disconnection of water supply for non-payment. Many courts all over the world have stated that this measure may violate the HRWS. The same has been consistently established by the Argentinean courts when regarding the poor, the disabled or children despite both the legal regulatory framework and the concession contract allowing the company the disconnection for non timely payment[25].

c) Insufficient or inadequate water: The state fails to meet the duty to protect when not preventing third parties from providing insufficient or inadequate water

As GC 15 states, sufficient water is continuous water supply for personal and domestic uses including drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. Adequate water means that it must be safe, therefore free from micro-

[24] For instante, the Bolivian case, known as the "water war", where a disproportionate increasing of water rates after WSS privatization in 1999 triggered an enormous social protest that forced the government to rescind the concession to the company *Aguas del Tunari* in April 2000. The Bolivian state not only failed strongly in protecting citizens from business-related human rights violations in WSS, but also was sued by the investors before the ICSID for violating BITs in 2005. *Aguas del Tunari SA v. The Republic of Bolivia* (ICSID Case No. ARB/03/2).

[25] Superior Tribunal de Justicia de la Provincia de Corrientes, "Encina de Ibarra, Carmen c. Aguas de Corrientes S.A." 13/05/1998). Idem "Romero, Adolfo Wenceslao" (2002); Juzgado Contencioso Administrativo nº 1, Dpto. Judicial La Plata, "U.M.T. c/ABSA s/Amparo", 21/03/05; Cámara de Apelaciones en lo Contencioso administrativo de Tucumán, sala I, "Ramos, Elsa Mirta c. Sociedad Aguas del Tucumán", 25/02/2010.

organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Furthermore, it should be of an acceptable colour, odour and taste for each personal or domestic use.

Even when drinking water parameters provided by third parties meet the requirements of both the regulatory framework and the concession contract, some courts have obliged companies in several cases to provide water according to parameters that better satisfy the human right to water and health standards[26]. In this case, neither the legislative nor the executive branches but the judiciary fulfills the duty to protect.

2) The means to comply the duty to protect the HRWS when WSS are provided by third parties

The GC 15 -as well as GPs 1/3/4- have been clear in stating that one of the main obligations derived from the state duty to protect is to adopt necessary and effective legislative measures[27]. These general measures or regulatory frameworks for WSS are crucial for establishing user rights, company obligations as well as state functions, meaning the "rules of the game"[28].

However, in certain contexts, such as in developing countries, effectiveness and enforceability are much more important than the mere adoption of legal regulatory frameworks. Many of these legal frameworks, including the means mentioned above by the GC 15 (i.e. independent monitoring, genuine public participation and imposition of penalties for non-compliance) have been enacted but some states simply do not apply them, or even worse, pervert their application in practice, allowing private companies to violate HRWS. It was common during the last two decades of expansion in private WSS to see how developing and even developed states did not oblige companies to comply with contracts and legal frameworks[29]. Notably, public authorities did not enforce key contract clauses, as expansion plans, terms, infrastructure investment compromises or quality standards[30].

Something similar happens when it comes to imposing fines. Normally, both legal regulatory frameworks and contracts establish fines for violating them, but the main problem comes when applying them effectively. At this point, the duty to protect becomes more important. Imposing fines normally falls within discretionary state powers, but a state that does not impose a due fine or waives it when it was necessary for sanctioning and preventing new violation of the HRWS may be considered responsible. These few examples are not just a formal or legal issue since, as it was mentioned earlier, the right of many people lacking WSS heavily depends on the compromised investments that the companies did not make and the state did not demand.

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[26] Cámara Contencioso Administrativo San Nicolás, Conde Alberto, c/ Aguas Bonaerenses SA (30/10/2008); Suprema Corte de Justicia de Buenos Aires, "Boragina, Juan Carlos, Miano, Marcelo Fabián y Iudica, Juan Ignacio contra Municipalidad de Junín. Amparo" (15/08/2009); Cámara de Apelaciones en lo Contencioso Administrativo La Plata, Solari, Marta y otros c/ Municipalidad de Alberti" (10/08/2010).

[27] The South African Constitutional Court ratified this principle. See Barret, Damon and Jaichand, Vinodh, "The Right to Water, Privatisation Water and Access to Justice: Tackling United Kingdom Water Companies Practice in Developing Countries" 23(3) *South African Journal of Human Rights* (2007) 543.

[28] See Barret, Damon and Jaichand, Vinodh, "The Right to Water, Privatisation Water and Access to Justice: Tackling United Kingdom Water Companies Practice in Developing Countries" 23(3) *South African Journal of Human Rights* (2007) 543.

[29] Budds, J., and G. McGranahan. 2003. Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America. *Environment and Urbanization* 15: 87-113.

[30] Bohoslavsky, J. P, Fomento de la eficiencia en prestadores sanitarios estatales: la nueva empresa estatal abierta, Santiago de Chile, CEPAL, 2011; Ducci J., *Salida de operadores privados internacionales de agua en América Latina*, Washington, BID, 2007.

V. BITs implications of the duty to protect HRWS

In the water and sanitation sector two international legal regimes intersect, imposing sometimes conflicting obligations on states: a) A system designed to protect foreign investors involved in the service –based on BITs- and; b) One designed to protect the recipients of that activity –centered in the ICESCR, which enshrines the HRWS, as explained in detail in the previous sections-. This diversity of global constraining factors turns the sector into a "hot spot" for international relations.[31]

We will outline in this section some of the peculiarities that the interaction of these regimes produce in the regulatory work of national authorities in the water field. Basically, the first legal regime (BITs) tends to *weaken* the regulatory powers of the state, while the second (HRWS) tends to *reinforce* them.

Faced with these two conflicting trends, the challenge is to prevent public authorities from remaining trapped in a dilemma that generates large uncertainties: if action is taken towards the realization of the HRWS the state risks being found liable under the BITs, but if not, it risks being so under the ICESCR.[32] To mitigate this dilemma and its consequences, it is necessary to avoid conceiving the two models as isolated from each other and seek for harmonizing patterns.

1) The BITs regime

The structure of investor protection -integrated by the Convention of the International Centre for Settlement of Investment Disputes (ICSID) of 1965 and the network of BITs signed steeply by countries since then is based on two foundations: the first procedural, the second substantial.

a) From a procedural perspective, that is, from the mechanisms used to solve a dispute between an investor and the host state, the system presents the following guidelines:

i. The BIT applies to all foreign direct investments, except those that are specifically excluded, regardless of the strategic role or national importance of the activity in which they are inserted (e.g. drinking water and sanitation);

ii. When investors (or a minority shareholder of them) feel affected by any decision of the state involving any aspect of their investment, they may sue it directly (without the need to exhaust domestic remedies)[33] outside of its courts and before arbitral forums in which the political and voting power is concentrated in the major capital exporting countries (e.g. the World Bank);

[31] On the bilateral conflict between the governments of Argentina and France in 2006 in the context of the nationalized French water supply company, *see* "Dura réplica de Kirchner al gobierno francés", La Nacion, 23 March 2006, available at http://www.lanacion.com.ar/791203-dura-replica-de-kirchner-al-gobierno-frances.

[32] Kriebaum, U., "Privatizing Human Rights The Interface between International Investment Protection and Human Rights" in A. Reinisch & U. Kriebaum (Eds.), *The Law of International Relations – Liber Amicorum*, Hanspeter Neuhold, 188.

[33] Unlike human rights treaties, international jurisdiction under BITs is principal and not subsidiary, meaning it displaces –rather than complements- the work of local judges (Montt, S., "What international investment law and Latin America can and should demand from each other. Updating the Bello/Calvo doctrine in the BIT generation", El Nuevo Derecho Administrativo Global en América Latina, Res Publica Argentina, 2009.

iii. Through the "umbrella clauses" contractual breaches by the state can be elevated to violations of its international obligations, making that any aspect of the service may result in being settled in the jurisdiction of the ICSID;[34]

iv. The arbitrators who solve the dispute may review the conduct of any branch of the state and displace national law from the analysis, using only the criteria of the BIT;

v. The decision adopted by these referees has a very limited review framework at the international level[35] and simply non-existent at the local one.[36] National courts cannot control the award and should implement it (e.g. seizing state assets) as if it were *res judicata*.

b) This dispute resolution system that, as we see, draws the conflict from the realm of the host country, applies a set of substantial principles of investors' protection established in the BITs network, like fair and equitable treatment, national treatment and most favored nation or the prohibition of directly or indirectly expropriate the investment without compensation.

The legal architecture for the protection of foreign investment implies, thus, an inevitable transfer of national regulatory powers to arbitral panels that solve the disputes between investors and host states.

2) The human rights system and other international commitments of the state

Like BITs, supranational systems of human rights protection also involve a significant transfer of national powers to agencies that are not directly dependent on the will of the state and impose a number of obligations that increasingly restrict the scope of action of local authorities. As we have seen, HRWS constitutes a key part of this system, and that is why it conditions the WSS in such a strong way.

As explained in section II, human rights treaties provide a comprehensive legal system for all areas of government activity,[37] whether they are internal or linked to the signing and implementation of other international agreements.

[34] The specific scope of this clause is the subject of a not concluded debate. Some awards tend to expand their reach, and thus to submit to ICSID contract issues, like *Compañía de Aguas del Aconquija S.A. y Vivendi Universal v. Argentina* (2002, ICSID Case Nº ARB/97/3, Annulment Proceeding); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (2004, ICSID Case Nº ARB/02/6); *Astaldi S.p.A. v. Honduras* (2010, ICSID Case Nº ARB/O7/32). A different perspective, aimed at limiting the claims likely to reach the referees, we find in *Azinian v. México* (1999, ICSID Case Nº ARB.F./97/2); *SGS Société Générale de Surveillance S.A. v. Pakistan* (2003, ICSID Case Nº ARB/01/13, Decision on Jurisdiction); *El Paso Energy International Company v. Argentina* (2006, ICSID Case Nº ARB/03/15, Decision on Jurisdiction); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (2010, ICSID Case Nº ARB/07/24).

[35] The art. 52 of the ICSID convention only allows annulment of the award on the following grounds: a) that the Tribunal was not properly constituted; b) that the Tribunal has manifestly exceeded its powers; c) that there was corruption of any member of the Tribunal; d) that there has been a serious departure from a fundamental rule of procedure; or; e) that the award has failed to state the reasons on which it is based. Legal errors in the decision do not justify, hence, the reversal of the award.

[36] The art. 54 of the ICSID convention provides that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state". Exploring the possibility of exercising conventionality control over the awards, see Bohoslavsky, J. & Justo, J. "The Conventionality Control of Investment Arbitrations: Enhancing Coherence through Dialogue", TDM 1 (2013).

A state party cannot conclude, as a consequence, a treaty that renders it unfit to perform its duties under the covenants without engaging in international responsibility within that field.[38] In order to justify the violation of a human rights treaty, international commitments different from the covenants are considered extra-conventional. Just as the admission of the invocation of domestic law as justification would compromise the effectiveness of the supranational human rights system establishing obligations towards the international community as a whole,[39] other international agreements that the state may engage into would lead to the same result. Thus, attempts to oppose an international commitment to the fulfillment of treaty obligations (e.g Paraguay`s attempt to invoke a BIT against indigenous communities)[40] generate the same objections as those of the allegation of municipal law as a defense, eventually leading to their dismissal.[41]

The key point in the interaction with BITs is that international responsibility of the state in this system does not only arise from the application of municipal law incompatible with human rights conventions, but also from the implementation of practices contrary to them that can derive from other international orders. It is a problem of accountability that has been addressed by human rights case law with a rather uniform response: the compliance with an international commitment does not justify the violation of human rights treaties, whether by act or omission.[42]

3) The interpretation of BITs protecting foreign companies providing WSS in light of the state duty to protect from business-related human rights violations

BITs enshrine a set of principles of substantial protection, such as fair and equitable treatment, most favored nation, or the prohibition of directly or indirectly expropriate the investment without compensation. The problem is that those agreements establish these standards with a high degree of generality and even ambiguity, without detailing precisely the rights and obligations of the parties. Arbitrators are, thus, who ultimately set the specific extension of the investors protection parameters, with virtually no chance of review. The situation is aggravated because the referees are appointed for each case and there is not a system of unification of criteria, for example, through a permanent system of review.

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[37] Human rights *erga omnes* obligations "are grounded not in an exchange of rights and duties but in an adherence to a normative system" (Provost, René, "Reciprocity in Human Rights and Humanitarian Law", supra, 386).

[38] ECommHR, Decision n° 235/56, 10 June 1958, Yearbook 2, 256, at 300; M. & Co., 9 February 1990.

[39] See generally Fastenrath, Ulrich et al. (eds), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma*, Oxford University Press, 2011 (esp. chapters 2-39).

[40] IACHR, *Comunidad Indígena Sawhoyamaxa v. Paraguay*. 29 march 2006, at paras. 137 - 140.

[41] IACHR, AO-14/94, *Responsabilidad Internacional por Expedición y Aplicación de Leyes Violatorias de la Convención (artículos 1 y 2 Convención Americana sobre Derechos Humanos)*, 9 December 1994, at para. 35.

[42] ECHR, *Pellegrini v. Italy*, 20 July 2001, at para. 40; *Maumousseau and Washington v. France*, 6 December 2007, at para. 96; *Bosphorus Airlines v. Ireland*, 30 June 2005, at para. 153-154; *Al-Saadoon y Mufdhi v. United Kingdom*, 2 March 2010, at para. 128; *Woolley v. United Kingdom*, 10 April 2012, at para. 77. The IACHR shares the same orientation and has had the opportunity to specifically address the invocation of BITs in contentious cases of state liability, stating that "the enforcement of bilateral trade treaties does not justify non-compliance with state obligations under the American Convention; on the contrary, their application must always be compatible with the American Convention, which is a multilateral treaty on human rights that stands by its own, that generates rights for individuals and does not depend entirely on reciprocity among states" (IACHR, *Comunidad Indígena Sawhoyamaxa*, supra, at para. 140). In fact, "precisely because the human rights norms are constitutive, other norms must be reinterpreted in their light (…)" (Reisman, Michael, "Sovereignty and Human Rights in Contemporary International Law", *American Journal of International Law*, Vol. 84, 1990, p. 873). *See* Kriebaum, U. "Privatizing Human Rights. The Interface between International Investment Protection and Human Rights", *supra* note 32.

When the discretion that the open clauses of BITs allow is combined with a vision of the bilateral agreement that does not take into account the state's duties against its population (e.g. HRSW) expansive interpretations of investor rights[43] can arise, compromising the chance of institutional evolution and development of the host country.[44]

A clear example of this tension can be seen in *Biwater*.[45] After the privatization of water supply services and sanitation in Dar es Salaam, Tanzania, the company began to bill more and invest less than its state predecessor, and it was clear that the rate with which it had obtained the contract was too low. The investor requested a review of the contract and a rate increase to make the necessary investments and provide the service properly, which was denied by the authorities. Investments were not made and the service continued to deteriorate markedly. Finally, the state terminated the concession and assumed the service.

The investor sued Tanzania before the ICSID and the award stated that there had been an illegal expropriation of the foreign investment, although no connection between that illegal conduct and the economic damage claimed by the investor was found, since the value of the company at the time of expropriation was negative. Basically, it was provided that the termination and assumption of water supply service by the state as a result of a blatant failure of the private operator had implied an expropriation in violation of international standards for the protection of investors. The panel did not considered whether there was any relationship between the HRWS, the termination of the contract and the rights of the investor.

In the same way, in the awards that condemned Argentina for the extraordinary measures adopted in the context of the deep economic and social crisis suffered by that country during the period 2001-2005 -which were intended to ensure economic accessibility to certain basic public services-[46] the arbitral panels did not deliver an analysis of human rights standards involved in socio-economic cataclysms.

Another tension between the duty to protect HRWS and BITs can be seen in the recent dispute involving thousands of ecuadorians, their government and the oil multinational Chevron. In 2012, a court in that country decided to reject the request made by an arbitration panel[47] to suspend a local judgment condemning Chevron to pay around 18,000 USD million for environmental damage caused affecting over 30,000 people.[48] Ecuadorian judges clearly stated that their duty –even before

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[43] *See* Gus Van Harten, "Pro-Investor or Pro-State in Bias in Investment-Treaty Arbitration?", 2, 3, Investment Treaty News (2012), 8.

[44] William Burke-White & Andras von Staden, "Private litigation in a public law sphere: The standard of review in investor-state arbitrations", 35, *Yale Journal of International Law* (2010), 283, 285.

[45] *Biwater Gauff v. Tanzania*, 2008, ICSID Case Nº ARB/05/22.

46 *CMS Gas Transmission Company v. Argentina* (2005, ICSID Case Nº ARB/01/8); *Enron Corp., Ponderosa Assets, L.P. v. Argentina* (2007, ICSID Case Nº ARB/01/3). See Alvarez, José & Khamsi, Kathryn, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment", *International Law and Justice Working Papers*, 2008/5, New York University; Kurtz, Jürgen, "Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis", *The Jean Monnet Working Paper Series*, 06/08, New York University, 2008. More recently a case involving domestic access to drinking water, rejecting the state of necessity defense, *Suez.*

47 *Chevron Corporation (USA) & Texaco Petroleum Company (USA) v. The Republic of Ecuador* (PCA Case Nº 2009-23) second interim award, 16 february 2012, at para. 3. The Tribunal stated that it had a sufficient case as regards both the jurisdiction to decide the merits of the parties' dispute and the claimants' case on the merits against Ecuador; a sufficient urgency given the risk that substantial harm may befall the claimants before the Tribunal decide the dispute by any final award; and a sufficient likelihood that such harm to the claimants may be irreparable in the form of monetary compensation payable by the respondent in the event that the claimants' case on jurisdiction, admissibility and the merits should prevail before the Tribunal.

48 Provincial Court of Sucumbíos, *Maria Aguinda y otros v. Chevron Corporation*, ruling of 17 February 2012, available at www.funcionjudicial-sucumbios.gob.ec/sucumbios/index.php/consulta-de-causas.html.

the binding force for the Ecuadorian state of arbitral awards (in investment)- was to ensure the effective enjoyment of human rights in order to comply with the American Convention on Human Rights.[49]

The approach from the duty of protection is intended to compensate the expansive interpretation of BITs, without neglecting the need for investor protection against abuse and arbitrariness. This is so because that duty serves both as justification of the measure and as its limit. When the state decision does not pursue that goal in a necessary, appropriate and proportionate way a breach of the BIT parameters will be confirmed. On the contrary, when these ends are present, the consistency of the investment protection system with human rights covenants will require the support of the government action. The analysis from the duty to protect covers both the state -to defend its decisions under the fulfillment of an international obligation- and the investor -to dismantle misuse of power, persecution or discrimination-.

More specifically, from the perspective of the state defense, the duty to protect provides support to the public authority to limit the exercise of rights so as to ensure their coordinated enjoyment. The state that omits enacting the measures aimed to ensure that coordination fails in its role of human rights guardian.

However, in parallel to the justification of public powers, this feature of the conventional obligations marks the limit of those powers from a finalist point of view, and thereby protects investors against arbitrariness. It imposes on the state the need to prove the protection aim of the measure. While the state has powers of regulation, taxation or expropriation whose recognition depends on their status of instruments for achieving the duty of protection, he must demonstrate the effective respect for this purpose, showing that the rights limitation is related to the protection of other correlative interest.

The study of the provisions of BITs from this point of view allows finding solutions more suited to an efficient performance of the state in fulfilling its role of guardian, and, at the same time, protects the investor against the conduct that constitutes the historical axis of the foreigners' protection system: discrimination.[50] When that discrimination does not exist, because all citizens support the measure, it is inappropriate to concede the investor a preferential treatment, unless expressly granted. The privileges must be interpreted strictly and never presume bestowed unless there is an explicit statement to that effect, while the right to equal treatment should be interpreted broadly.

As a result of the above, the key of the harmonious interpretation of BITs standards when the validity of human rights is at stake is as follows: when it comes to protect the investor against discriminatory measures, the interpretation is wide in his favor, but when the investor wants to be treated differently than the population of the host country, the interpretation is against him and only what is expressly granted can be recognized.

The terms of the agreements must be, then, read in light of the interpretive standard in the US jurisprudence[51] with notable influence in Latin America concerning the granting of privileges for state delegates: any doubt is resolved in adverse effect to the investor, by application of the doctrine according to which in the interpretation of privileges, nothing should be taken as granted but when

49 Provincial Court of Sucumbíos, *supra* note 48.
[50] McDougal, Myres S.; Chen, Lung-chu; and Lasswell, Harold D., "Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights" (1976), *Faculty Scholarship Series*. Paper 2648. Available at http://digitalcommons.law.yale.edu/fss_papers/2648
[51] USSC, *Northwestern Fertilizing C° v. Village of Hyde Park*, 97 U.S. 659.

given in unequivocal terms or by implication equally clear. The affirmative needs to be demonstrated, silence is denial and doubt is fatal to the right of the investor.

This perspective, which stands to the prohibition of discrimination as fundamental hermeneutics pattern, allows an understanding of the clauses of BITs that harmonizes with an effective, but not arbitrary, exercise of public powers.

As stated in *Saluka*, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies "not motivated by a preference for other investment over the foreign-owned investment".[52]

a) Fair and equitable treatment vs. stabilization clauses

The duty of protection approach allows us to interpret this safeguard in a way that reconciles a reasonable exercise of state prerogatives with the prohibition of abuses by these same authorities.

To achieve this it is necessary to avoid the identification of this standard with a right to the freezing of the regulations and policies that govern the enterprise. Only when stabilization clauses[53] are faced we should acknowledge a right to the permanency of regulation, and even those are not unconditionally enforceable against the duty of protection, as these commitments should be reconciled with human rights limits.[54] That is so because –as we have seen- in providing commitments to the investor, the state cannot impair the human rights held by third parties that may be affected by the investment. Doing so would breach the state´s adherence to the human rights normative system.

As it has been said in a recent award,[55] in the absence of a stabilization clause or similar commitment, changes in the regulatory framework can only be considered as violation of fair and equitable treatment in the event of drastic or discriminatory alterations of the essential conditions of the commercial operation. Again, the interpretive principle for integrating the BITs´ conceptual gaps is the prohibition of persecutory conduct, but not infer privileges.

In the opposite to that vision, awards like *Tecmed v. Mexico* or *MTD v. Chile* emphasizes a broad notion of fair and equitable treatment that appears to assure the investor that fastness, requiring from the state not only a treatment that does not affect the basic expectations that were taken into account by the foreign investor to make his investment, but also the immutability of the policies pursued by legislation and administrative practices governing his activities.[56]

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[52] *Saluka v. Czech Republic* (2006, CNUDMI, § 307)

[53] *See*, "Stabilization Clauses and Human Rights", IFC and United Nations Special Representative to the Secretary General on Business and Human Rights, 2008.

[54] Sheldon Leader, "Human Rights, Risks, and New Strategies for Global Investment", 9, 3, *Journal of International Economic Law* (2006), 657–705.

[55] *Toto Costruzioni Generali S.p.A. v. Lebanon Republic* (2012, ICSID Case Nº ARB/07/12, § 244).

[56] *Biwater Gauff v. Tanzania* (2008, ICSID Case Nº ARB/05/22, § 602). In CMS was stated that "there can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment" (*CMS Gas Transmission Company v. Argentina*, 2005, ICSID Case Nº ARB/01/8, § 274), also *LG&E Energy Corp. v. Argentina* (2006, ICSID Case Nº ARB/02/1, § 127 y ss.) and *Duke Energy v. Ecuador* (2008, ICSID Case Nº ARB/04/19, § 340). With a less pro-investor view see *Parkerings-Compagniet AS v. Lithuania* (2007, ICSID Case Nº ARB/05/8, § 333). Case law also stresses that fair and equitable treatment is an objective requirement unrelated to whether the State has had any deliberate intention or bad faith in adopting the impugned measure. Thereby, even where the public authority has acted pursuing a legitimate aim without abuse, discrimination or arbitrariness, a breach to this standard con arise. See *CMS*,

This expansive reading of the investors' rights may cause an imbalance to the detriment of the regulatory powers of the state,[57] and it is therefore necessary to specify the limits and conditions, preventing their assimilation with a right to the freezing of the rules applicable to investment.[58] Again, investor protection is about preventing hostile behavior but not generating areas of immunity that impair -or make prohibitively expensive- state progress in protecting the rights of its people.

Moreover, in virtue of this principle the state must refrain from unreasonable actions, but it is not obliged to actively preserve and promote the interests of the foreign company. It is not consistent, then, to claim a sort of "paternalism" on the investor, as if he were unable to evaluate his decisions with minimal thoughtfulness. Rather, the FET should be interpreted in line with the compliance by the investor due diligence duties, respect for the law, efficiency, accountability and transparency in its assessment and execution.[59]

The Separate Opinion of arbitrator Pedro Nikken in *Suez* exposes the correct approach, stating that "the interpretation that tends to give the standard of fair and equitable treatment the effect of a legal stability provision has no basis in the BITs or in the international customary rules applicable to the interpretation of treaties" and that "the expectations of investors are not the appropriate instrument for measuring whether a government acted correctly or not according to the canons of a well-organized state".[60]

Moreover, "the standard of fair and equitable treatment has been interpreted so broadly that it results in arbitral tribunals imposing upon the Parties obligations that do not arise in any way from the terms that the Parties themselves used to define their commitments" and "the interpretation that fair and equitable treatment includes an obligation of stability of the legal environment for investment is even more excessive than the doctrine of legitimate expectations. An international obligation that includes the State declining to exercise its regulatory power cannot be presumed. The regulatory power is essential to the achievement of the goals of the State, so to renounce to exercise it is an extraordinary act that must emerge from an unequivocal commitment. That commitment would touch on core competencies of the State, which it is inconceivable the State would impliedly renounce".[61]

In short, "Fair and equitable treatment does not impose on the State an obligation not to alter the legal environment of the investment, but to require that the exercise of its regulatory power in matters connected with the foreign investment comply with the requirements in a way that is timely, consistent, reasonable, proportionate, even-handed, and non-discriminatory. In other words, what should be subject to scrutiny is whether these measures conform to the canons of good governance in a modern and well-organized State".[62]

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supra, § 280; *Azurix v. Argentina* (2006, ICSID Case Nº ARB/01/12, § 372); *Mondev v. United States* (2002, ICSID Case Nº ARB-AF/99/2, § 116); *Waste Management v. México* (2004, ICSID Case N° ARB-AF/00/3, § 97).

[57] A less deferential reading to the investor can be found in *Marvin Feldman v. México* (2002, ICSID Case Nº ARB-AF/99/1) and *Waste Management*, supra.

[58] *EDF (Services) Limited v. Romania* (2009, ICSID Case Nº ARB/05/13, § 217)

[59] Bohoslavsky, J. "Tratados de protección de las inversiones e implicaciones para la formulación de políticas públicas (especial referencia a los servicios de agua potable y saneamiento)", ECLAC, 2010, avalaible at http://www.gtz-cepal.cl/newsletter/newsletter_21/tratados_de_proteccion.pdf .

[60] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, 2010, ICSID Case Nº ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic). Separate Opinion of Arbitrator Pedro Nikken § 20.

[61] Supra note 60 § 31.

[62] Supra note 60 § 34.

b) Expropriations, special burden and discrimination

BITs generally prohibit expropriation, direct or indirect, if discriminatory, arbitrary not justified in the public interest or not followed by compensation. However, the precise scope of such safeguards, especially regarding indirect expropriation, is highly controversial and exegesis is entirely left to arbitrators, which makes little favor to the legitimacy of the system of BITs.[63]

Some examples of fundamental questions: When does regulation become expropriation? Can a general regulation be a case of expropriation or a special burden is required to the investor? [64] Are expectations included in the concept of property? Which ones? Do they include only explicit government commitments or also implied ones? [65] Are the purposes of the measure relevant to calculate compensation? [66] What should be compensated?

The extent of state`s regulatory capacity will depend on the answer we give to these questions and what certain arbitral jurisprudence implies is a tendency to expand the scope of this clause to situations in which the state only implements his public powers in a regular and proportionate way.

To avoid new blockings of protection measures we should point out some limitations of this safeguard, especially in the field of regulatory takings, expectations and *quantum* of compensation.

By way of principle, general measures of the state rarely justify economic compensation. That aspect is a natural outgrowth of the open and dynamic nature of democracy, which prevents a compensatory rule before legislative changes affecting the generality of citizens.[67] This notion is expressed in the idea of legal duty and makes compensation acceptable only when their equal distribution is altered. Reparation has precisely this sense of restoration of equal treatment under community duties.

Obedience to collective decisions in a democracy does not necessarily bring a compensable injury. That is so because the very existence of the state organization depends on the duty of every citizen to bear the costs generated by their decisions. Only when the measure alters the equality, that duty may give rise to compensation, to the extent that the absence of repair can lead to the imposition of a differential burden. Beyond that exceptional case, the very existence of government implies the absence of immunity against his regulations by their recipients.[68]
Naturally, the right not to obey the law sanctioned by the democratic authority is far from setting up a legally protected status,[69] and therefore the lack of compensation before a reasonable and

[63] According to some case law, direct expropriation occurs in case of "takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State", while the indirect one refers to the "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 even if not necessarily to the obvious benefit of the host State" (*Metalclad Corporation v. México*, 2000, ICSID Case Nº ARB AF/97/1 § 103).
[64] *Continental Casualty v. Argentina* (2008, ICSID Case Nº ARB/03/9).
[65] *Azurix*, supra.
[66] In *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica* (2000, ICSID Case Nº. ARB/96/1) the "sole effects" doctrine prevailed, according to which the purpose of the governmental measure is without relevance for the determination whether an expropriation has occurred. The 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.
[67] Eduardo García de Enterría, "El principio de confianza legítima como supuesto título justificativo de la responsabilidad patrimonial del Estado legislador", *Revista de Administración Pública*, 159, septiembre-diciembre (2002), 182.
[68] *Marvin Feldman*, supra § 112; *Thunderbird v. México* (2006, NAFTA, § 208); *Saluka v. Czech Republic* (2006, CNUDMI, § 262); *Methanex v. United States* (2005, NAFTA, p. IV, ch. d, § 7).
[69] That protected status does not depend on the investor's expectations or on implicit government statements (vs. *Azurix*, supra, § 318). It must be the result of the acquisition of a right under the terms set by the law of the State party. Therefore,

proportionate regulatory action -condition of enforceability- can only involve a violation of the right of property if it constitutes a discriminatory determination, in the way that it imposes only on the foreign investor the costs of a decision that benefits the community. If that unequal treatment does not occur, because costs fall on every operator in the country, the interference would not be compensable, as it would be a simple expression of the exercise of state powers aimed at fulfilling the duty of protection of human rights.[70] As a result of the above, only the state measures that generate a special sacrifice, understood as the particularized injury in a legally protected status should qualify as expropriation, directly or indirectly.

In conclusion, interpretations of BITs must avoid jeopardizing the state`s capacity to fulfill its duty to protect. That is possible when we recognize discriminatory treatment interdiction as the central hermeneutical standard of those agreements.

In this regard, an unreasonable or discriminatory measure has been defined as –alternatively- (i) a measure that inflicts damages on the investor without serving any apparent legitimate purpose; (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference, (iii) a measure taken for reasons that are different from those put forward by the decision maker, or (iv) a measure taken in willful disregard of due process and proper procedure.[71]

It is essential, thus, to assess the presence of persecutory motivations or special burden. Conversely, it is not enough to compute only the consequences of the measure on the investor, as this implies immunity and not equality. If those consequences are suffered by all, there is no discrimination.

That is why "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 or compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation".[72]

In the same vein, "the principle that a state does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today".[73]

In light of the above, the safeguards of fair and equitable treatment and expropriation are operationalized only against discriminatory or arbitrary behavior, but do not enable claims of investors for general legislative changes affecting the entire population. If that was the criterion,

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the conception according to which indirect expropriation may derive from "incidental interference" affecting the "reasonably-to-be-expected economic benefit of property" (*Metalclad*, supra, § 103) is too broad.

[70] A useful guide for that analysis can be the test prescribed in Annex B.4 of U.S. model BIT, which embodies the scrutiny of *Penn Central* (USSC, *Central Penn Station Co. v. New York City*, 438 U.S. 104, 1978) -economic impact of the regulation, interference with investment-backed expectations and character of the governmental action- and provides two relevant clarifications: first, adverse effect on the economic value of an investment does not establish per se that an indirect expropriation has occurred. Second, it adds to the three Penn Central factors the following: Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations. The reference to the non-discriminatory nature of the measure as a guide to discern the right to compensation confirms the relevance of this issue if we seek to avoid blocking all legal progress in the host country. On the regulatory principles and their impact on investment arbitrations, see Bohoslavsky, supra.

[71] *Toto Costruzioni Generali S.p.A*, supra, § 157.

[72] *Methanex*, supra.

[73] *Saluka*, supra, § 262.

such guarantees would be treated as stabilization clauses and this would counteract the restrictive interpretation concerning privileges for investors. In other words, fair and equitable treatment is the absence of hostility but not unalterable laws, risk-freedom, or paternalism. Similarly, indirect expropriation presupposes special burden but does not ensure immunity from general regulatory changes. Finally, it is possible that –in order to achieve promotional purposes- the state takes commitments under stabilization clauses. However, the duty to protect human rights is the necessary exception to that engagement and therefore does not apply to the scenarios examined here.

4) Reconciling the state BITs commitments with the duty to protect the HRWS in the specific field of water and sanitation services

From this we draw the following guidelines:

a) The water sector is currently influenced by two global conflicting trends: the first aims to look at BITs isolated from other international obligations and expand safeguards for investors, eroding the regulatory capacity of the state; the second one requires from the state a major initiative to ensure today the minimum core and progressively the fulfillment of the HRWS.

b) To avoid the scenario of international contradictory mandates, these two constraints that globalization imposes on the sector must be compatibilized. This goal focuses on two possible situations:

i. At the time of negotiating the BIT, states should reserve their duty to protect the HRWS and clarify that the measures associated with it cannot involve responsibility towards the investor, except in exceptional circumstances, such as direct expropriation. This implies that the proportional and non-discriminatory protection of this right cannot be conceived as a breach of the BIT.

That is the reason why Ruggie´s GP 9 establishes that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through investment treaties or contracts". States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of BITs, while providing the necessary investor protection.

Also greater policy coherence is needed at the international level, including and effective approach from the duty to protect when states participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States should seek to ensure that those institutions neither restrain the ability of their member to meet their duty to protect nor hinder business enterprises from respecting human rights (GP 10).

As stated in GC 15, "Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water".

ii. When applying BITs and give concrete meaning to the guarantees that they enshrine, arbitrators should compute the impact of the duty of protection on the regulatory action that causes the conflict. If the impugned state decision aims to comply with international human rights obligations it deserves deference from panels. Actually, arbitral panels must interpret investment treaty rights in light of other applicable rules of international law. Unlike some awards have stated, HRWS has a say in the key matters of water and sewage arbitrations, such as the level of tariffs (affordability); the cessation of provision (availability) or the quality of the service.

The state must demonstrate convincingly that a particular measure that results in material limitation of the rights of the investor is intended to meet appropriately, necessarily and proportionally[74] the duty to protect the rights of identifiable individuals or groups. In other words, it must prove that the tangible and feasible purpose of the measure is to abandon its role of offender in this area and *vis-à-vis* those people. It does not suffice to call upon concepts such as the public interest, nor to rely on the mere change of governmental strategies or orientation of public expenditure if it is not shown that those decisions are legally required by the conventions. For example, the state must prove that the concrete course of action is the only way[75] to meet the basic obligations under the ICESCR - access to the minimum core of each right and non-discrimination- or their progressive full realization- which involves the use of the maximum available resources.

VI. Concluding remarks

This article attempted to make two main arguments. As a representation of a state duty to protect from business-related human rights violations, HRWS should be the central pillar of domestic regulation of private corporations in the field of WSS; and arbitrators, when interpreting BITs, should consider the human rights fiber of the regulation under scrutiny in order to verify its international legality.

The reasons why questions around regulation of private corporations providing water and sanitation services, BITs and human rights are studied together in this article are twofold. First, if this regulation is (should be as proposed in this piece) based on human rights standards, this affects the way in which BITs have to be interpreted when analyzing the legality of this same regulation and its enforcement. Ignoring this legal (even ethical) driving force of regulation is just developing a foreign investment law disconnected from the real world. Second, as BITs impose limits to states in terms of what they can do when regulating foreign corporations, the criteria chosen by the arbitrators will also have influence on the physiognomy of domestic regulations (*chilling effect*), therefore, on the socio-economic situation of the country.

This article aims at contributing to solve this intricate conundrum by better understanding the legal, social and economic relevance of human rights standards when designing, establishing and enforcing water regulation and, correlatively, the need of arbitrators of verifying whether the regulation that caused the claim is genuinely grounded on human rights considerations.

As the ultimate and explicit goal of most BITs is not only to provide an independent dispute resolution mechanism but also to generate capital inflows that facilitate the development of the host country, giving paramount importance to human rights law in water regulation and international arbitrations leading with cases in this field is something not only possible but also desirable.

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[74] ECHR, *Levages Prestations Services v. France*, 23 October de 1996, at para. 40; *Tinnelly & Sons Ltd and others v. United Kingdom*, 10 July 1998, at para. 29; *Runkee y White v. United Kingdom*, 10 July 2007, at para. 40 y ss. IACHR, *Kimel v. Argentina*. 2 May 2008, at para. 70 y ss.; *Barreto Leiva v. Venezuela*. 17 November 2009, at para. 55; *Ricardo Canese v. Paraguay*. 31 August 2004, at para. 132; UN, Human Rights Committee, GC Nº 27, *Freedom of movement - Art.12-*, 1999, at para. 14, 15 and 16.

[75] On this complex issue see Skogly, Sigrun, "The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?", *Human Rights Law Review*, 2012, Vol. 12, N° 3, 393.