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Water as commodity or human right

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Content

1. The role of water in public and private

According to experts, the world's population will be 9.7 billion in 2050 (cf. United Nations 2019). That is 2 billion people more than in 2020. At the same time, 2.2 billion people worldwide currently have no clean water at home (cf. World Bank 2020). As the world's population grows, it can be assumed that water will become scarcer and more than 'just' 2.2 billion people will not have clean drinking water. To address this problem, some see the privatization of water as a solution. In this century and the last, the rise of such privatization of water supply has been observed in developing and developed countries. But does the privatization of water supply systems really solve the problem of the scarcity of clean drinking water? Analyses from an economic and political science perspective are primarily concerned with this question and thus with the effects that these various forms of water supply privatization have on access to water (cf. Cesar 2019, Kirkpatrick, Parker & Zang 2006, Al-Hmoud & Edwards 2004, Estache & Kouassi 2002, Estache & Rossi 2002).[1] But in order to understand those analyses and my review of these analyses, the different player constellations and their relationship must first be explained. In the privatization of drinking water supply, the interests of the investors who invest in this supply and the states interest in granting the human right to water come together.[2] As already mentioned, more and more private companies are investing in the water supply systems of states. But developed countries usually have a water supply system, where the investor is frequently only responsible for water management. In developing countries, on the other hand, governments often cannot afford to expand the water supply system, decide to privatize the system. They are therefore financially dependent on the involvement of the investor. In so-called bidding

[1] The form of water privatization can be distinguished by the degree of responsibility of the public and private sectors. In the case of a service contract, the responsibility is almost entirely in public hands. Private companies perform only very limited tasks, such as sending water bills. The state remains the owner of the water installations. In the case of management contracts, the responsibility of the private sector increases compared to service contracts. A private company assumes responsibility for operational management and maintenance of the infrastructure, but the state still takes budgetary planning and investment decisions. In lease contracts, a private company pays a price for assuming responsibility for the operational management and maintenance of the infrastructure. The Build-Operate-Transfer model is usually chosen in case of construction or expansion of a facility. At the end of the contract, the state becomes the owner of the plant again. Concessions are the most commonly chosen model for water privatization. The state still owns the plant, but the private owner manages the plant, makes investments and assumes the business risk. The private company bears full responsibility in the event of sales (cf. Al-Hmoud & Edwards 2004, Stadler & Hoering 2003).

[2] Although an investor can be both a private person and a company, in this paper I refer to private companies when writing about investors. In the privatisation of water supply, it hardly ever happens that private individuals invest. Private companies act as investors here.

processes, private companies submit bids for water contracts. For investors to invest at all, they must see a financial benefit in the investment. Water must therefore be regarded as an economic commodity. If an investor was commissioned, it may happen that, in order to operate profitably, he raises water tariffs, does not fully expand the infrastructure or does not adequately maintain the supply system (cf. Kriebaum 2018: 17). If the company, for example, raises tariffs, poor parts of the population in particular may no longer be able to afford water prices. The dilemma in dealing with water becomes clear. From the investors' point of view, water must be treated as a commodity, while the human right of the population to water is violated by this treatment of the resource. It is often observed that states now take measures, such as new regulations or taxes, that burden the investor, to appease the population (cf. Peterson 2017: 584). However, by this they often violate the rights of investors by enforcing the human right to water. If no out-of-court settlement can be reached, this dilemma is settled in arbitration. In such investor-state proceedings, the conflict between treating water as a commodity and as a human right becomes apparent. The dilemma between investors' rights and the human right to water, and thus the clash between water as a commodity and water as a human right, which becomes particularly visible through and in arbitration proceedings, must therefore be investigated further. It is this relationship between actors and their disputes that is not considered in the political science and also economic literature on water privatization (cf. Cesar 2019, Kirkpatrick, Parker & Zang 2006, Al-Hmoud & Edwards 2004, Estache & Kouassi 2002, Estache & Rossi 2002). They neglect the legal relationship between investor and state as well as the motives and reasons for treating water either as an economic commodity or as a human right. If these aspects were taken into consideration in the analyses, not only could the impact of privatization on more access to water be better examined, as the motives of all players, including arbitrators, to treat water as a commodity or a human right would become clearer, but policy recommendations could be made by linking the motives behind privatization and its impact on better access to water. Papers from international law deal with the legal framework of investor-state and arbitration proceedings as such, but not to what extent these framework conditions affect the treatment of water as a commodity and water as a human right (cf. Kriebaum 2018, Langford 2017, Reinisch & Kriebaum 2007). Simma (2011) and Marrella (2010) explain this dilemma between the investors' rights and the human right to water as well as the reason for this dilemma, but they do not satisfactorily address how this conflict is determined by the interests of the involved actors. How water could be

treated as a commodity and as a human right at the same time, and what consequences this conflict can have on water supply, is not further addressed in these papers either.

Furthermore, since water is also a human right, it cannot be compared with theories on the privatization of other commodities, such as telecommunications. Therefore, the special case of water cannot be explained by existing theories.

The present bachelor's thesis attempts to connect different approaches in research on the privatization of water and raises the question, why different views do not yet complement each other. Is water treated more as a commodity or as a human right because of the different interests of the actors involved? Water still appears to be treated preferentially as a commodity, following the investor's preference in all water privatization arbitrations conducted by the World Bank's International Centre for Settlement of Investment Disputes (ICSID).[3] By analysing all ICSID proceedings on the privatization of water supply, where this clash is particularly evident, I intend to shed light on the treatment of water as a commodity and water as a human right, examine the reasons for the preferential treatment and inspect whether these two treatments are compatible.

My analyses showed that the tribunals ruled in favour of the investor in all the cases examined. Consequently, one might think that water is still treated primarily as a commodity. Although no variance in the tribunals' rulings can be observed, a development in the treatment of water as a human right can be seen over time. The human right to water is increasingly reflected in the cases studied on all sides involved. Through my analyses, the reason for the continuous decision for the benefit of the investor in the judgements also became clear. Due to the legal framework, which means that there are no human rights clauses in the investor-state treaties, the violation of the human right to water cannot be punished on the legal basis of the investor-state treaties and thus also not before ICSID. Therefore, the legal framework needs to be readjusted in order to simultaneously establish the treatment of water as a commodity and as a human right.

[3] Arbitration proceedings before the ICSID arbitral tribunals are examined, as these arbitral tribunals rule on most investor-state disputes over water, and as these find their way into the public domain compared to other investor disputes (cf. Peterson 2017: 583 et. seq.).

2. Literature review

Basically, two different trends can be identified in the literature, which do not or not sufficiently integrate the view and results of the other into their analyses. For this reason, these different trends will now be discussed.

2.1. Political sciences and economic scholars

In predominantly political science and economic analyses scholars question, whether privatization of water utilities actually results in more access to water (cf. Cesar 2019, Al-Hmoud & Edwards 2004) and whether privatization of the water supply system actually affects the performance of water services (cf. Kirkpatrick, Parker & Zang 2006, Estache & Kouassi 2002, Estache & Rossi 2002). Cesar (2019) analysed in particular, whether the privatization of water provision in developing countries results in more access to water. She tested this relationship using data on weighted percentages of private ownership of water utilities, and access to improved water sources over time (1990-2015) across 62 countries. As she herself criticised, a causal mechanism cannot yet be assumed in her results, as the measured effects "(…) could be capturing the result of an increase in investment that is associated with private ownership of water utilities" (Cesar 2019: 5). But "(…) private ownership of water utilities per se may not be a catalyst for improvement in access to water, but if private companies provide more capital for the provision of water services, then privatization is favourable for ensuring water access" (Cesar 2019: 20 et seq.). It can therefore be concluded that according to Cesar (2019), private involvement, combined with more capital, can have a positive effect on access to water in developing countries. Al-Hmoud & Edwards (2004) also examined the effects of privatization of water on water access through testing the impact of private sector participation in the provision of water and sanitation on the average individuals' welfare with regard to water and sanitation.[4] They conclude that the private sector has the potential to drive social aspects as well as environmental benefits through, inter alia, greater efficiency in the sector and larger investments. It should be noted that while Al-Hmoud & Edwards (2004) appear to be investigating "(…) whether the privatization of the water and sanitation sector would be beneficial to current and future generations" (Al-Hmoud & Edwards 2004: 7) in order to make water privatization measurable, they are using the number of private investments in the water and sanitation sector. It is however questionable whether the degree of

[4] Some literature examines the provision of sanitation in addition to the supply of drinking water. For the sake of completeness, sanitation is mentioned but not dealt with further in my bachelor's thesis.

privatization can actually be operationalized with the amount of investment. After all, the degree of privatization can be high without much investment. At the same time, it is theoretically possible to invest a lot without fully privatizing the water supply. As Cesar (2019) also stated, the result is distorted if a higher investment is equated with private ownership of water utilities. Kirkpatrick, Parker & Zhang (2006) examined the effects of water privatization in developing countries by limiting it to developing economies in Africa. Moreover, in contrast to the two researchers mentioned above, they analysed the extent to which different forms of water privatization in developing countries influence the performance of these economies. They tested the effects of water privatization using binary variables (state-owned or privately owned). As they themselves say, "[t]his is a limitation of our study (…)" (Kirkpatrick, Parker & Zhang 2006: 11). Their findings "(…) do not provide strong evidence of differences in the performance of state-owned water utilities and water utilities involving some private capital in Africa" (Kirkpatrick, Parker & Zhang 2006: 26) and note that their results depend on their data, which are not ideally chosen. Estache & Rossi (2002) analysed as well as Kirkpatrick, Parker & Zhang (2006) the impact of ownership (publicly and privately owned water utilities) on efficiency. However, they are investigating cases in both the Asian and Pacific regions. They neither found strong evidence that "(…) private providers are globally more efficient than public operators" (Estache & Rossi 2002: 145). On the other hand, Estache & Kouassi (2002) did find statistically significant results on the performance of water utilities in "(…) many African countries (…)" (Estache & Kouassi 2002: 17). However, these results are based on data for three privatized utilities in a sample of 21 water utilities in Africa (cf. Kirkpatrick, Parker & Zhang 2006: 26).

It is striking in this trend in literature that although the effects of the various forms of water supply on more access are analysed, the motives of water suppliers and consumers and their effects on access to water are ignored. Why could private water supply, despite the need to operate profitably, still lead to more water access? Why is the human right to water always used as a counter-argument in the debate on whether the privatization of water is reasonable on a social level? And why is water as a human right and water as a commodity not necessarily mutually exclusive? These questions, which are not addressed in the existing literature from a political science and an economic perspective, can be explored partially by reviewing the legal literature. The legal literature and more explicitly the international law literature on

investor-state disputes deals with the explained clash of the different interests of the actors involved in the privatization of the water supply system. Hereinafter, I provide an introduction into this trend in literature to complement the viewpoint existing in the more political and economic science literature.

2.2. Legal scholars

Marrella (2010) described this supposed clash in his approaches and explained the interests of investors and the human right to water. He also analysed various ICSID arbitration procedures to illustrate this clash. However, he neither discussed the consequences of treating water as an economic commodity versus treating water as a human right on the privatization of water supply nor the possibility of a convergence of these interests and their impact on water availability. He discussed the solution to the dilemma between the players interests vaguely, but did not go into detail. In contrast to Marrella (2010), Langford (2017) dealt with the normative dilemma of water privatization and the human right to water as well as their compatibility. However, he wrote about the privatization of water and does not mention the rights of investors. Consequently, the reasons for this dilemma are not clearly explained. He also described the conflict between water privatization and the human right to water, but does not describe how this clash manifests itself in reality. As opposed to Marrella (2010), Langford (2017) used case studies to examine how the human right to water is increasingly reflected in the constitutions of some countries, but does not go into detail about the implications on the privatization of water and the dilemma between water as a commodity and water as a human right. Simma (2011), like the two scholars mentioned above, dealt with the supposedly irreconcilable handling of water as a commodity and the handling of water as a human right. Simma (2011) explained the reasons for this conflict by looking at the rights of investors. Unfortunately, however, he does not substantiate this by empirical examples. In particular, as Simma (2011) made suggestions as to how these two interests could be reconciled, a closer look at the actual conflicts would be useful.

The present bachelor's thesis attempts to close the gaps identified by Marrella (2010), Langford (2017) and Simma (2011) by examining the ICSID procedures, in which water is treated as a commodity and as a human right. What conclusions can be drawn from analysing ICSID arbitration procedures on the treatment of water as a commodity and water as a human right? Is water seen as a commodity or a human right in ICSID arbitration proceedings? Is one

side chosen? If so, why? Is it possible to treat water as a commodity and water as a human right simultaneously? How could this be possible? Would this require a revision of the legal framework and what would be the consequences for the water supply of the population? These questions are to be investigated in the present bachelor's thesis. In order to get to the bottom of these questions, the existing legal framework of water as a human right and as a commodity will first be explained.

2.3. Legal framework of the human right to water

In General Comment No. 15 of the United Nations Committee on Economic, Social and Cultural Rights, decided in 2002, it was stated for the first time that water is a prerequisite of other human rights.[5,6] The Committee also accentuated that the availability, quality and accessibility of water must be guaranteed under all circumstances (General Comment No. 15). Furthermore, to reinforce the comment, it derived the human right to water from Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) "[as] an adequate standard of living" and from Article 12 ICESCR "[as] the highest attainable standard of mental and physical health" (Salman & Mclnerney-Lankford 2004: 5). However, the human right to water often cannot be respected because states cannot guarantee the right or states grant water rights to investors who do not respect the human right to water.

2.3.1. The states' obligation to respect the human right to water

In 2011, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht Principles) were adopted to clarify the extraterritorial obligations of states on the basis of applicable international law. According to Article 3 of the Maastricht Principles, "[a]ll states have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially" (Maastricht Principles, Article 3). Furthermore, Article 5 of the Maastricht Principles states that "[a]ll human rights are universal, indivisible, interdependent, interrelated and of equal importance. The present Principles elaborate extraterritorial obligations in relation to economic, social and cultural rights, without excluding their applicability to other human rights, including civil and political rights" (Maastricht Principles, Article 5). The responsibility of a state also extends to acts and omissions of natural and legal persons who are not organs of the state, for example

[5] Human rights are those rights that individuals own as a matter of fact being human.
[6] General Comment No. 15 is not binding (cf. Curry: 118).

commercial enterprises, if they are authorised by the state to exercise elements of state authority, provided that these persons act in this capacity in the individual case (cf. Maastricht Principles, Article 12b). General Comment No. 15 also stresses that the state must prevent third parties from interfering in any way with the human right to water, prevent companies established on its territory from infringing the human right to water and prevent arbitrary or unjustified interruptions or exclusions of water services or facilities (cf. General Comment No. 15, Article 23). Consequently, it can be considered that, in the event of water rights being granted to third parties, the state must accept responsibility if the human right to water is not respected by those third parties.

2.3.2. The privatization of water as an inevitable intervention in the human right to water – Chile

It is questionable, however, whether the privatization of water already by itself necessarily constitutes an interference with the human right to water or whether such an interference only occurs when the investor does not comply with the human right to water. To get to the bottom of this question, the case of Chile needs to be considered. The fully privatized water supply system in Chile meets the standards of access, quality, and affordability (cf. Baer 2014: 142). One could conclude from this fact that the privatization of water services has had a positive impact on the population's access to water. However it must be noted, that the public water sector in Chile was already efficient and offered high-quality services before the privatization of the water sector (cf. Baer 2014: 147). Consequently, I do not assume that the privatization of water per se is necessarily an interference with the human right to water. For example, the privatization of water only constitutes an interference with the human right to water if the investor can no longer guarantee the availability, quality or accessibility of water.

2.3.3. State measures to restore the human right to water

Conflicts over water that are relevant to this paper can be divided into three groups. There are cases, in which disagreement in price regulations arise between the investor and authorities. The lack of expansion of water infrastructure can also lead to disputes. Disputes also arise from the pollution of ground and drinking water (cf. Kriebaum 2018: 17). To ensure the availability, quality and accessibility of water, the state must take measures to restore the right to water. This can be achieved either by expropriating the investor and thus renationalising the water supply, or by regulatory measures that the state imposes on the investor. As a result, state measures often lead to violation of investor's rights. In most

contracts there is a wide range of possibilities for resolving such disputes (cf. Peterson 2017: 583).

2.4. Legal framework of investor-state disputes

The legal frameworks for investments are laid down in Bilateral Investment Treaties (BITs) as well as in Multilateral Investment Treaties (MITs) (cf. Schöbener et al. 2010: 247).[7,8] In many water disputes, the state often revokes the investor's rights on water without paying compensation. If this measure is classified as expropriation, the non-payment of compensation is in principle a violation of international law. Whether it is an indirect expropriation or a regulatory measure is therefore particularly relevant to the legal consequences. Regulatory measures are all state measures that are intended to regulate a certain situation and intervene de facto, meaning without a formal legal act, in the economic circumstances of the investor (cf. Schuppli 2019: 118). Whereas indirect expropriation is understood as the formal withdrawal of a person's power over his or her property by an act of state sovereignty (cf. Krajewski 2017: 180). Since Article 10 of the Maastricht Principles states that the enforcement of human rights reaches its limits if the state violates international law, the question arises as to what measures the state should take, since a state measure classified as a regulatory measure is not contrary to international law, whereas a measure in the form of expropriation without compensation would be contrary to international law. The rights of the investor may also be infringed by state measures that do not qualify as expropriation. This is the case, for example, if measures violate fair and equitable (FET) standards or the principle of full protection and security. The BITs grant the investor, among other things, the right to take action against a host state in international arbitration. The most common means of settling disputes is arbitration under the rules of the International Centre for Settlement of Investment Disputes (ICSID) (cf. Peterson 2017: 583).

In order to reconcile the two research states of the different streams of trends in literature on the privatization of water, I will analyse whether water is treated more as a commodity or as

[7] BITs cover the scope and definition of the investment, approval and establishment, non-discrimination in the form of most favoured nation and national treatment, fair and equitable treatment (FET), full protection and security, compensation in case of direct or indirect expropriation of the investment, guarantees for free transfer of funds and dispute settlement mechanisms. Likewise, BITs provide for dispute settlement at the state-state and investor-state levels (cf. Reinisch & Kriebaum 2007: 166).

[8] Investments are legally protected. An international investment is the investment of capital by an investor (private individual or company) in foreign means of production (cf. Krajewski 2017: 159).

a human right. Since this treatment can be traced in ICSID proceedings, the extent to which the human right to water is reflected in these proceedings over time will be examined. Furthermore, the reasons for preferential treatment of water as a commodity or as a human right can be concluded through this investigation. When these reasons become evident, solutions to this dilemma of preferential treatment can be discussed. If solutions are implemented, it is likely that more people will have access to clean drinking water in the future.

3. Dilemma between water as economic good and water as human right in arbitral proceedings

The aim of my bachelor's thesis is to examine ICSID arbitration proceedings on water disputes in order to observe whether water continues to be treated preferentially as a commodity or whether the human right to water is increasingly respected over time. Thus, all cases, except SAUR International against the Republic of Argentina, are analysed, but within them only those proceedings that are relevant to the human right to water.[9] I analyse all cases in chronological order, starting with the earliest case. So I qualitatively examine the significance of the human right to water in investor-state disputes by analysing to what extent this human right is mentioned by the different actors involved, how strongly it is emphasized, and what importance is attached to the human right to water. Since the investor sued in all cases (except in the counterclaim in the last case analysed), I begin by discussing the investor's arguments. Here, I only briefly address the actual legal basis of the claim. Then I analyse the claimant's arguments regarding the human right to water. Afterwards I look at the respondent's defence in each case, particularly the justification of its actions in relation to the human right to water, as well as, where relevant in each case, the respondent's accusations against the claimant regarding non-respect of the human right to water. In some cases, an amicus was also involved. Their arguments regarding the human right to water will be addressed.[10] In the final point of each analysis, I examine the tribunal's position in the individual cases. Here, too, I analyse the tribunal's position on the human right to water. At the end of each analysis, I summarize the findings and their relevance for my bachelor's thesis, in which I explicitly

[9] The case files are only available in French and Spanish.

[10] "In short, a request to act as amicus curiae is an offer of assistance – an offer that the decision maker is free to accept or reject. An amicus curiae is a volunteer, a friend of the court, not a party." (ICSID Case No. ARB/03/19: Order in response to a petition for transparency and participation an Amicus Curiae: 346)

address the difference to the previous cases with regard to the treatment of the human right to water. To illustrate my findings, I present and summarize the development of treating water as a human right in all individual cases in a table and graphically visualize the change in the treatment of water as a human right over time. I am able to do this by classifying the treatment of water as a human right by the different actors involved in the individual proceedings into categories. These categories are described in detail in 4. Through these analyses I can also investigate whether a simultaneous treatment of water as a commodity and as a human right is conceivable and how the treatment of both sides could be possible.

3.1. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic – case 1

This is the first known case, in which an investor filed arbitration against a state for breach of an investment treaty over water. In 2003 ICSID received request for arbitration submitted by Compagnie Générale des Eaux[11], incorporated under French Laws, its Argentine affiliate, Compañia de Aguas del Aconquija S.A. Benito Roggio e Hijos S.A. against the Province Tucumán on the plea that the state had infringed the BIT between France and Argentina.[12]

3.1.1. Background

In 1994 the Province of Tucumán awarded the concession to the investor. In 1995 and in 1996 the water supplied by the investor became turbid. Due to water turbidity and increasing tariffs, the province took measures, which the investor considered to be in breach of its rights under the Argentine-French BIT. The investor therefore sued the Argentinean state for damages amounting to over USD 300 million.[13,14]

3.1.2. Claimant's arguments

The investor claimed that his rights had been infringed by the measures taken by the province, since the company itself had complied with all of its contractual obligations (cf. ARB/97/3:

[11] now Vivendi Universal S.A.

[12] The first proceeding already took place in 1996. Since the first proceeding is irrelevant to the human right to water, it is disregarded. Although after the annulment of the first proceeding in 2001, the claimant filed a new request in 2004 and, for example, the case discussed below was filed in 2001, the present case is considered to be the first case in time because of its first proceeding in 1996.

[13] Since in the following cases, as well, different provinces often took measures and it was not the state itself that took measures, but the concession contracts were concluded on the legal basis of the BIT enacted by the Argentine state, it is not repeatedly pointed out that the state can be held responsible for the actions of the provinces.

[14] Particularly relevant to my bachelor's thesis are the arguments in favour and against expropriation of the investor, as these arguments are in the direction of human rights to water. Therefore, the arguments concerning other possible infringements are left aside.

35).[15] The claimant pointed out in the arbitration proceedings that both cases of turbidity did not pose a health risk to the population. Furthermore, the investor stressed that these events were not caused by him and that, when the turbidity of the water became known, the water company corrected the turbidity and took measures to prevent such incidents in the future (cf. ARB/97/3: 140).

3.1.3. Respondent's arguments

The respondent argued that the state regulatory legislation was legitimate because the "(…) measures directed to protecting public health and the well-being of the population in response to Claimants' failure to provide a reliable supply of quality water, a fundamental human need which the state has a responsibility to safeguard and maintain" (ARB/97/3: 157). In the course of this argument, the respondent also spoke of "(...) an essential necessity of life, such as water (...)" (ARB/97/3: 162) and stressed that even if the regulatory measures of the province had an impact on the expected profitability of the concession for the claimant, this result was an "(…) incidental and appropriate (…)" (ARB/97/3: 165) side-effect in order to guarantee the public interest. Furthermore, the respondent pleaded as the provision of water by the investor created a serious risk to public health, the province had to act (cf. ARB/97/3: 170).

3.1.4. Tribunal's analysis and conclusion

The tribunal found that Tucumán's actions were not "(…) responsible, proportionate and appropriate" (ARB/97/3: 209). The arbitrators argued that the water turbidity was "(…) unforseen and unforseeable" (ARB/97/3: 212 et seq.) and witness testimonies judged "[w]ithin 72 hours, treatment was implemented for oxydising the colorless, soluable manganese that was detectable only by chemical analysis, after precipitation, filtration and as a result of its removal" (ARB/97/3: 213). The tribunal also referred to a statement of Tucumán's Minister for Health that water would endanger the health of the population and found that he could not provide evidence of such an analysis nor, following analyses by experts, could he confirm the statement that water posed a health risk (cf. ARB/97/3: 83).
It is therefore unlawful that the respondent expropriated the claimant without compensation (cf. ARB/97/3: 264).

[15] ICSID Case No. ARB/97/3: Award

3.1.5. Case relevance

In this case, the tribunal ruled for the benefit of the claimant, inter alia, because the turbidity of the water did not infringe the concession contract. In its statement, the tribunal referred in particular to witness testimony confirming that the claimant had remedied the turbidity of the water as soon as possible and that, consequently, the measures taken by the Province were not "(…) responsible, proportionate and appropriate" (ARB/97/3: 209). This case is of little relevance to my bachelor's thesis, because, although the investor's rights conflict with the population's right to clean water, according to witness testimonies the population's right was not violated. But it is to be noted, that the Argentinean Government stressed several times in its defence that it had taken these measures for "(…) protecting public health and the well-being of the population (…)" (ARB/97/3: 157), "(...) an essential necessity of life, such as water (...)" (ARB/97/3: 162), "(…) matters of public service and health (…)" (ARB/97/3: 172), "(...) public interest (...) protect public health, including the provision of adequate and accessible potable water" (ARB/97/3: 188). Thus, approaches towards an argumentation in favour of the human right to water can be seen.

3.2. Azurix Corp. v. The Argentine Republic – case 2

In 2001 ICSID received a request for arbitration submitted by Azurix Corp., a company incorporated in the State of Delaware, United States of America, against the Republic of Argentina on the basis that the state had violated the BIT between Argentina and the United States of America.

3.2.1. Background

Azurix took over service in the Province of Buenos Aires in 1999. After an algae bloom in a water reservoir, the province encouraged its population to stop paying the water bills, as the water was undrinkable and the investor was responsible. The claimant then attempted to terminate the contract, which the respondent refused, and the claimant was forced to declare bankruptcy. Subsequently, the respondent terminated the concession, because the claimant had not provided the services which were laid down in the concession contract. Although the Argentinean Republic stated "(…) that the institutional, social and economic crisis that it endured in the period 1998-2002 was the worst in its history" (ARB/01/12: 18) both parties found that this crisis did not influence the actions of the province or Azurix.[16]

[16] ICSID Case No. ARB/01/12: Award

3.2.2. Claimant's arguments

Azurix claimed that the respondent had expropriated its investment through expropriation-like measures.[17] The investor pleaded that he was not responsible for the failure of the repair work on the "Paso de las Piedras dam" water reservoir, which was polluted by algae, and that the government's statements that the water was polluted caused panic among the population. The government's request to its people not to pay the water bill was unlawful. Furthermore, the investor argued with regard to human right to water raised by the respondent, that consumers' rights were adequately protected by the concession contract (cf. ARB/01/12: 89).

3.2.3. Respondent's arguments

The Argentinean state defended its measures by referring to previous proceedings in which it was held that not all regulatory activities of the government, which make the investor's actions difficult or impossible, can be classified as expropriation.[18] The government must sometimes exercise regulatory powers to respond to changing economic circumstances or changing political, economic or social conditions. These measures may affect certain activities and make their continuation less profitable or even uneconomic (cf. ARB/01/12: 105). With regard to algae pollution, the respondent pointed out that the concessionaire was under the concession agreement responsible for the quality and quantity of the drinking water, consequently for the protection of public health (cf. ARB/01/12: 42). It must be stressed in this case that the respondent briefly referred to the human right of water in the present case, although argued that a conflict between a BIT and human rights treaties must always be decided in favour of human right, since the general interest of the community takes precedence over the interest of the investor (cf. ARB/01/12: 89).

3.2.4. Tribunal's analysis and conclusion

The tribunal took the position of the claimant that the respondent had taken expropriatory measures without compensating him. It stated that the respondent took those measures "(...) in use of its public authority and go beyond the contractual rights as a party to the Concession Agreement. The tribunal understands that governments have to be vigilant and protect the

[17] and had infringed FET standards, non-discrimination and full protection and safety standards. As in the previous case, the arguments for and against the expropriation of the investor are particularly relevant for my bachelor's thesis, as these arguments go in the direction of the human right to water. Therefore the arguments concerning other possible violations are left aside.

[18] S.D. Myers v. Canada: Partial Award

public health of their citizens but the statements and actions of the provincial authorities contributed to the crisis rather than assisted in solving it" (ARB/01/12: 47). The arbitrators also found that the standards of conduct established in the BIT require a positive attitude towards foreign investors and therefore a "(…) pro-active behavior of the State to encourage and protect it" (ARB/01/12: 135). They clarified that a BIT party would be in breach of the obligations of the FET standards even if it did not act in bad faith. Furthermore, the arbitrators held that the respondent's argument that a human right must take precedence over the interests of the state was not reproducible. "The matter has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case" (ARB/01/12: 91).

The tribunal finally ruled that the respondent had violated FET standards as well as the standard of full protection and security under the BIT and breached the BIT by taking arbitrary measure (cf. ARB/01/12: 158).

3.2.5. Case relevance

In the case of Azurix Corp. v. the Argentine State the tribunal ruled in favour of the claimant. This case stressed that respondents increasingly justify their measures, which the investor sees as expropriation, with the human right to water. At the same time, however, this case also shows that the tribunal in this case did not go further into the hierarchy of norms, since "(…) the Tribunal fails to understand the incompatibility (…)" (ARB/01/12: 91).

3.3. Aguas del Tunari, S.A., v. The Republic of Bolivia – case 3

In 2001 ICSID received request for arbitration submitted by Aguas del Tunari, S.A. against the Republic of Bolivia on the plea that the state had infringed the BIT between the Netherlands and Bolivia.

3.3.1. Background

Aguas del Tunari took over the concession in 1999. Shortly after taking control over the water system, the company raised water rates. Unable to pay their bills the consumers participated in large public protests, which caused the Government of Bolivia to call the State of Emergency and to suspend constitutional rights. The respondent also took violent measures to supress the protest (cf. ARB/02/3: 2).[19] After those incidents the Concession was terminated

[19] ICSID Case No. ARB/02/3: Petition of la Ccordinadora para la Defensa del Agua y Vida, la Federación Departamental Chochabambina de Organizaciones Regantes, Semapa Sur; Friends of the Earth-Netherlands, Oscar Oliviera, Omar Fernandez, Father Luis Sánchez, and Congressman Jorge Alvarado to the Arbitral Tribunal.

prematurely (cf. ARB/02/3).[20] Since the parties involved found that the concession ended only because of these protests and the State of Emergency in Cochabamba, they agreed that neither party would receive compensation and that the ICSID claim would be withdrawn. For this reason, no arguments were put forward by any involved party concerning the human right to water. In this case, however, a development within the investor state disputes can be identified, as this is the first time ever that an amicus curiae has applied for participation and referred to the human right to water.

3.3.2. Amicus Curiae

In the amicus curiae submission, the amicus pleaded in favour of its inclusion in the proceedings, since this arbitration procedure has an impact on the entire population and all members of the amicus "(…) depend on such access for their lives, health and livelihoods" (ARB/02/3: 7: Amicus Curiae Petition). Firstly, the amicus stated that the privatization of water was generally an interference with the human right to water (cf. ARB/02/3: 4; 5: Amicus Curiae Petition). After the amicus made this argument, he also argued what impact an arbitral judgment for Aguas de Tunari would have on the human right to water. The tribunal's decision would effect governance, as, "(…) to guarantee public order and access to water (…)" (ARB/02/3: 8: Amicus Curiae Petition). "(…) The decision could also alter the legal obligations that apply to the government of Bolivia when it regulates to protect public order and human health (…)" (Ibid.). Ultimately, the amicus emphasized that the tribunal would have to judge the obligations of the state and which of these obligations took priority over the other (cf. ARB/02/3: 8: Amicus Curiae Petition).

3.3.3. Case relevance

After the two parties to the dispute reached an agreement, the treatment of water as a human right cannot be observed either in the acts of the respondent, who did not have to defend his measures because of the agreement, nor of the tribunal. Nevertheless, in this case an amicus was for the first time in the history of arbitration proceedings on water involved and pleaded in favour of the human right to water. Although this amicus argued with the human right to water, he also stressed that the privatization of the water supply is basically an interference with the human right to water. As discussed under 2.2.1.2, I argue that the privatization of water does not in principle constitute an interference with the human right to water. In the

[20] ICSID Case No. ARB/02/3: Decision on Respondent's Objections to Jurisdiction

present case, however, it may well have been the case that privatization in itself restricted the human right to water. In addition to the assumption that the privatization fundamentally interferes with the human right to water, the amicus also explained, what consequences a decision of the tribunal would have for the claimant. Consequently, the amicus did not, as the respondents in other cases have done, focus on certain actions of the claimants as violations of the human right to water. As mentioned above, it is not possible to observe in this case how the tribunal and also the state treat the human right to water.

3.4. Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.[21] v. Argentine Republic – case 4

In 2003 ICSID received request for arbitration submitted by Suez, Vivendi Universal S.A., both incorporated under the laws of France, Sociedad General de Aguas de Barcelona, S.A., incorporated under the laws of Spain, Aguas Argentinas S.A., incorporated in Argentina, AWG Group Ltd, incorporated in the United Kingdom, against the Argentine Republic for breaching the BITs between Argentina and France, Argentina and Spain and between Argentina and the United Kingdom.[22]

3.4.1. Background

In 1992 the claimant was awarded the water concession over an area of about 280.00 hectares within a population of about 9 million. This contract represented the largest in the world (cf. ARB/07/26: 70).[23] After the Argentinean State had to face serious economic and financial crisis, beginning in 1999, the state decided to take measures by which the claimant felt that his rights had been violated. As a result, the investor introduced tariff increases and other changes in operating conditions. This led to negotiations between the Argentine State and the investor, which did not produce any results. In 2003, the claimant submitted the dispute with the Argentine Republic to ICSID under the ICSID Convention under the Argentine-France BIT, the Argentine-Spain BIT and the Argentina-U.K. BIT for settlement by arbitration. In the present case (ICSID Case No. ARB/03/19: Decision of Liability) the question of violation of the FET standards is particularly relevant. Although the claimant also complained about the infringement of other of his rights, these are less relevant in the present case. After it became

[21] Formerly Interaguaa Servicios Integrales de Agua S.A

[22] For my bachelor's thesis, only the Decision on Liability (ICSID Case No. ARB/03/19: Decision on Liability) will be examined, as the other proceedings, on Jurisdiction (ICSID Case No. ARB/03/17), and Damages (ICSID Case No. ARB/03/19: Award), have no relevance to the human right to water.

[23] ICSID Case No. ARB/07/26: Award

apparent that the tribunal would dismiss those claims, which was ultimately the case, the respondents also hardly addressed further claims in their justification. Consequently, in the analysis of this case, I will focus mainly on the violation of the FET standards.

3.4.2. Claimant's arguments

The claimant noted, inter alia, that the respondent took measures only in the water sector, but not, for example, in gas production. Thus, the claimant stressed that the respondent had, "(...) violated fair and equitable treatment with respect to the Claimant's investments" (ARB/03/19: 74). With regard to the human right to water, the claimant made it clear that he had never questioned the population's right to water. He dismissed all accusations that he was responsible for putting the population's right to water at risk, arguing that the actions of the Argentine Government during the crisis had led to this risk to the population's water supply. "Finally, the Claimants argue that what is at issue in these cases is whether Argentina breached its legal commitments under the BITs and that human rights law is irrelevant to that determination" (ARB/03/19: 99).

3.4.3. Respondent's arguments

As Argentina was in a period of serious economic and financial crisis, the state justified his measures as "(…) reasonable, responsible, non discriminatory and proportionate manner (…)" (ARB/03/19: 78) and that "(…) the provision of drinking water and sewage services being of the highest of public purposes" (Ibid.). He also argued, that these measures taken by Argentina in relation to the investments made by the claimants were taken by the state "(…) in order to safeguard the human right to water of the inhabitants of the country (…) Argentina states that water cannot be treated as an ordinary commodity. Because of the fundamental role of water in sustaining life and health and the consequent human right to water, it maintains that in judging the conformity of governmental actions with treaty obligations this Tribunal must grant Argentina a broader margin of discretion in the present cases than in cases involving other commodities and services" (ARB/03/19: 98).

3.4.4. Amicus Curiae

In 2007, five non-governmental organisations submitted an amicus curiae application. They stressed that the right to water is recognized by human rights "(…) and its close linkages with other human rights, including the right to life, health, housing, and an adequate standard of living" (ARB/03/19: 100). The amicus also justified the measures taken by the state, since they were directed "(…) to ensure access to water by the population, including physical and

economic access, and that its actions in confronting the crisis fully conformed to human rights law" (Ibid.).

3.4.5. Tribunal's analysis and conclusion

The tribunal stated that it is aware of the difficult situation in which Argentina found itself (cf. ARB/03/19: 95). It stressed the importance of the provision of water and sewage services for "(…) the health and well-being of nearly ten million people (…)" (ARB/03/19: 101). Regarding the measures taken by the respondent the tribunal argued that the respondent could have tried to implement more flexible means to provide continued water and sanitation services to the people of Buenos Aires, while meeting its obligations for fair and equitable treatment (cf. ARB/03/19: 101). The tribunal also referred to the balancing of the rights of the investor and the obligations of the state by accentuating that, although Argentina was allowed to regulate tariff structures and services itself within the concession, for example, these regulatory powers must be within the discretionary scope of the legal framework laid down in the concession contract (cf. ARB/03/19: 92). According to the tribunal Argentina needs to fulfil its human rights obligations as well as the treaty obligations (cf. ARB/03/19: 102). Furthermore, the tribunal found that the amicus "(...) developed the relationship of the human right law to water and to the issues in this case" (ARB/03/19: 99), it cannot, however, share the view of the amicus and the state that the human right to water would outweigh the obligations under the BIT and that this human right grants the power to take measures which violate the states obligations under the BIT.

The tribunal held that the respondent had infringed the FET standards (cf. ARB/03/19: 107).

3.4.6. Case relevance

In the case of Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic the tribunal ruled in favour of the claimant.[24] Both the state and the amicus stressed in this case the human right to water. The Argentinian State justified its actions by the pursuit of that human right, as does the amicus. On the other hand, the tribunal emphasized the human right to water, so that the respondent, in the view of the tribunal, is "subject to both international obligations" (ARB/03/19: 102). Nevertheless, in the present case the tribunal was "(…) not convinced that the only way that Argentina could satisfy that essential interest was by adopting measures that would subsequently violate the treaty rights

[24] Formerly Interaguaa Servicios Integrales de Agua S.A

of the Claimants' investments to fair and equitable treatment. As discussed above, Argentina could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Buenos Aires and at the same time respected its obligations of fair and equitable treatment. The two were by no means mutually exclusive" (ARB/03/19: 101). This case showed that the tribunal is increasingly responsive to the arguments of the state, which increasingly justified its actions on the basis of the right to water on the part of the population and a hierarchy of norms. Furthermore, it can be observed that the role of the amicus is evolving, particularly with regard to the human right to water.

3.5. Biwater Gauff (Tanzania) LTD., v. The United Republic of Tanzania – case 5

In 2005 Biwater Gauff (Tanzania) Limited, a company incorporated under the laws of England and Wales, requested arbitration against the United Republic of Tanzania on the plea that the state had infringed the BIT between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania.

3.5.1. Background

In 2003 the parties agreed on three contracts over the water supply with the Dar es Salaam Water and Sewerage Authority.[25] Both parties to the dispute had difficulties in fulfilling their contractual obligations. Among other things, this did not result in the desired expansion of the water supply. What is particularly striking in this case is that although the amicus emphasized the human right to water, the state referred to it only very indirectly and does not justify its measures on that basis. Consequently, in these proceedings, the arguments of the amicus and the position of the tribunal with reference to them are predominantly relevant to my bachelor's thesis.

3.5.2. Claimant's arguments

The claimant stated that the state expropriated its investment and breached the FET standards and the obligation to grant full protection and security to investors (cf. ARB/05/22: 6).

3.5.3. Respondent's arguments

As already mentioned, Tanzania only relied on the human right to water in a very indirect way by justifying its measures: "Water and sanitation services are vitally important, and the

[25] "the Water and Sewerage Lease Contract; the Supply and Installation of Plant and Equipment Contract and the Contract for the Procurement of Goods; together the "project Contracts" (ARB/05/22: 2).

Republic has more than a right to protect such services in case of crisis: it has moral and perhaps even a legal obligation to do so" (ARB/05/22: 126). Moreover, the respondent referred vaguely to the human right to water by stating "(…) City Water had created a real threat to public health and welfare" (Ibid.).[26]

3.5.4. Amicus Curiae

In 2006 five NGOs filed a petition for amicus curiae status (cf. ARB/05/22: 16). The tribunal agreed to the this application. The petitioners stressed that the investor's responsibility needs to be discussed "(…) in the context of sustainable development and human rights"(ARB/05/22: 107) and that "[a]ccess to clean water is, moreover, characterised as a basic human right by the United Nations Committee on Economic, Social and Cultural Rights in 2002" (Ibid.). According to the amicus, the investors failure to fulfil its obligations under the contracts "(…) create[s] significant risks to human health (…)" (ARB/05/22: 106). He also made it clear that even Biwater Gauff itself acknowledged that right by writing "(…) every man, woman and child has the right to reliable system of clean water and good sanitation" (ARB/05/22: 108). At the same time, it could be observed that the activities of Biwater Gauff are not only beneficial to its own profits, but also "(…) the people of Dar es Salaam who were dependent on BGT for water delivery during the contract period and in the future" (ARB/05/22: 109). Furthermore, the amicus made clear that it is the government's "(…) duty to provide access to water to its citizens (…)" (ARB/05/22: 111) and that the government "(…) had to take action under its obligations under human rights law to ensure access to water for its citizens" (Ibid.).

3.5.5. Tribunal's analysis and conclusion

Firstly, the tribunal confirmed the importance of the amicus: "(…) the particular qualifications of the Petitioners (…) the Petitioners would address broad policy issues concerning sustainable development, environment, human rights and governmental policy" (ARB/05/22: 103) and emphasized that „[i]t was also important that the Arbitral Tribunal be provided with information and submissions on the issues in dispute from all relevant standpoints. (…) there is an undoubtedly public interest in this arbitration. (…) The public interest in this arbitration arises from is subject-matter, as powerfully suggested in the Petitions" (ARB/05/22: 100 et. seq.).

[26] City Water Services Limited was incorporated by Biwater and Gauff the laws of Tanzania on 17 December 2002, as the Operating Company (cf. ARB/05/22: 2).

Despite the tribunal's recognition of the importance of the amicus, it does not address the petitioner's substantive arguments and thus excludes the arguments relating to the human right to water in its judgment.

The tribunal decided that Tanzania had breached the FET standards, as well as violated the BIT through unreasonable and discriminatory conduct and expropriated the investor without paying compensation, but did not have to pay any damages because the states violation of the BIT did not cause any loss or damage for the claimant (cf. ARB/05/22: 239; 242).

3.5.6. Case relevance

In addition to the importance of the amicus in arbitration proceedings on water, this case showed that the Tanzanian State mentioned the human right to water only very indirectly. It can be assumed that the state justified its measures only very vaguely on the basis of the human right, as the state could presumably foresee that the tribunal would not consider it liable to pay compensation. Therefore, it can be assumed that such a justification would have been unnecessary.

3.6. Impregilo S.p.A. v. Argentine Republic – case 6

In 2007 ICSID received a request of arbitration submitted by Impregilo S.p.A., a company incorporated in Italy, against the Argentine Republic on the basis of infringing the BIT between Argentina and Italy.

3.6.1. Background

In 1999 Impregilo took over the concession over the Province of Buenos Aires, which was previous held by Azurix. This case arose similar to case 4 during the economic crisis in Argentina beginning in mid-2001. Due to the economic crisis the respondent took measure in which the claimant felt infringed by his rights guaranteed through the BIT.

3.6.2. Claimant's arguments

The claimant accused the respondent for directly nationalising his investment without paying any compensation, infringing the FET standards, impairing unjustified and discriminatory measures, failing to provide full protection and security for the claimants investment and violating specific obligations (cf. ARB/07/17: 30).[27]

[27] ICSID Case No. ARB/07/17: Award

3.6.3. Respondent's arguments

The respondent justified his measures by stating that those measures "(…) are general measures adopted by the Argentine Republic and the Province of Buenos Aires in the context of a systematic and serious crisis. These measures violated neither the Argentine-Italy BIT nor international law" (ARB/07/17: 46). Furthermore, the respondent stated that the measures "(…) were particularly important in order to guarantee its inhabitants the human right to water" (ARB/07/17: 49). The state accentuated that the investor's rights do not prevail over the obligation to guarantee the human right to water. "Treaties on human rights proving the human right to water must be especially taken into account in this case" (Ibid.).

3.6.4. Tribunal's analysis and conclusion

In the present case the tribunal does not mention the human right to water at all. It only refers to Decree No. 1666/06, in which the province governor justified the termination of the concession contract by stressing that the quality of the water poses a permanent threat to the life and health of the population (cf. ARB/07/17: 61).

The tribunal concluded that the respondent had breached the FET standards, in particular by failing to take appropriate measures to restore the investors right that had been injured by the measures taken during the economic crisis.

3.6.5. Case relevance

The tribunal ruled that the state had breached the BIT between Argentina and Italy by violating the FET standards and had to compensate the investors for the damage. It can be assumed that the tribunal did not see the relevance of the reference to human right to water because it ruled that the state had not violated the investor's rights through the expropriation, and the state justified the measures, by which the investor felt expropriated, with the human right to water. Hence, this case only contributes to the analyses of the development of the human right to water in arbitral proceedings insofar as it illustrates that states are increasingly mentioning the human right to water in their defences.

3.7. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic – case 7

These legal proceedings are the most recent ones in the arbitrational proceedings history in water disputes. In 2007 the tribunal received a request of arbitration by Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa against the Argentine

Republic for breaching the BIT between Argentina and Spain. In 2013 the respondent filed counterclaim.

3.7.1. Background

The case arose also during the economic crisis. After the termination of the contract between Aguas Argentinas S.A. (discussed under 3.4.) and the Argentine Republic Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa took over the concession in the province of Buenos Aires. Due to the economic crisis the state took emergencies measure by which the investor felt infringed in his rights.

3.7.2. Claimant's arguments

The claimant requested the Argentine Republic to compensate for all damages. The investor confirmed the states obligation to respect the human right to water, but stressed that a private company is not obliged to respect this right (cf. ARB/07/26: 183; 308). In addition to the state's obligation to guarantee the human right to water, the investor stated that the state has obligation towards him and should fulfil both kinds of obligations simultaneously (cf. Ibid.).

3.7.3. Respondent's arguments

The state justified its measures by stating that those "(…) intended to preserve most essential human rights" (ARB/07/26: 171). According to the respondent "(…) the main goal of the concession was the expansion of drinking water and sewer service (…)" (ARB/07/26: 72) and emphasized within the context of this economic crisis that despite the circumstances its obligation "(…) to guarantee one of the most basic human rights: the human right to water (…)" (ARB/07/26: 171). The respondent accused the claimant of infringing "(…) such fundamental rights as the right to access to water" (ARB/07/26: 47) through the suspension of the water supply service.

3.7.4. Tribunal's analysis and conclusion

The tribunal stated at the beginning of the proceeding "(…) that a significant portion of the population does not have running water network services (…) " (Case No. ARB/07/26: 17) and referred to studies that "(…) indicated a lack and/or poor quality of drinking water (…) [n]on-access to drinking water and sanitation was one of the main causes of high percentages of disease in the population (…)" (ARB/07/26: 18). By stating that the main purpose of the concession is "[t]he imperative need to expand the drinking water and sewerage services (…)" (Ibid.), and that "(…) a high risk to be taken by the party to be awarded the Concession" (Ibid.)

the tribunals stressed the responsibility of the concessionaire. The tribunal found in relation to the investor's argument that private parties were not committed to the human right to water: "(…) [i]t does not resolve the conflict between the obligation to guarantee the Concessionaire's right under the Concession and the access of the poor and vulnerable population to water when this cannot be ensured otherwise than by failing to comply with the host State's obligations toward the Concessionaire" (ARB/07/26: 189). After taking a position on the claimant's obligations, the tribunal further addressed the state's obligations. It weighed the obligations of the state to guarantee the human right to water against the rights of the investor granted by the FET standards. If measures were taken to protect fundamental rights, these measures do not violate FET standards, as the investor was aware of those fundamental rights before concluding the concession agreement. Nevertheless, those fundamental rights are subject to the FET standards. Therefore, these state measures must be in accordance with the FET standards (cf. ARB/07/26: 163 et. seq.) In the course of balancing the rights of the two parties to the dispute, the tribunal also stressed the clash between the state's obligation to guarantee the human right to water as well as the investor's rights. The tribunal illustrated that it was equally important for the concessionaire to be able to cover its costs and generate sufficient profits (cf. ARB/07/26: 78).

3.7.5. Counterclaim by the state

After the investor claimed the state infringed his rights, the state filed a counterclaim in 2013. The tribunal accepted jurisdiction for this counterclaim (cf. ARB/07/26: 304; 307). In the counterclaim the state sued for damages to the amount that the investor would have had to pay for the investment, since the investments defined in the concession contract were not made (cf. ARB/07/26: 302; 310).

3.7.5.1. Respondent's arguments

The state argued that the claimant's failure to make the investments caused a violation of the "(…) fundamental right for access to water (…)" (ARB/07/26: 307). However, this had been "(…) the very purpose of the investment agreed upon in the regulatory framework and the concession contract and embodied in the protection scheme of the BIT" (Ibid). By breaching the investment agreements, the investor violated "(…) basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty" (ARB/07/26: 308). The state also referred to the investor's argument "(…) that guaranteeing the human right to water is a duty of the State, not of private companies like the Claimants"

(Ibid.). The respondent denied this argument: “(…) the right to water is an essential human right that represents not only an obligation of States but also (…) [i]t is a fundamental right (…) [t]herefore, it is evident that rules of International Human Rights Law create obligations that must also be respected by multinational companies” (Case No. ARB/07/26: 309 et. seq.). Furthermore the state responded to the accusation that it has taken expropriationlike measures similar to expropriation against the investor by arguing that if the water supply "(…) were provided by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water (Case No. ARB/07/26: 310).

3.7.5.2. Claimant’s arguments

In its justification, the investor stated that the violation claimed by the state is not based on the BIT between Spain and Argentina and hence the counterclaim must be dismissed according to the claimant (cf. ARB/07/26: 300 et. seq.).

3.7.5.3. Tribunal’s analysis and conclusion

This case is a pars pro toto for the development in the procedural history of conflicts over water. The tribunal explicitly addressed the human right to water. It accentuated that it is everyone’s duty, i.e. public and private parties, to ensure the human right to the dignity of every human being and the right to adequate living conditions (cf. ARB/07/26: 318) and explicitly referred to General Comment No. 15 (details under 2.2.1.) (cf. ARB/07/26: 322). Furthermore, the arbitrators presented their attitude towards the obligations of the state regarding the human right to water, but also of the investor towards this human right. The tribunal did not share the investor’s view that only the state is obliged to guarantee the human right to water. It is of the opinion that companies are indeed subject to obligations under international law (cf. ARB/07/26: 319 et. seq.). The tribunal also addressed the clash between the interests of the parties regarding the human right to water. It noted that the legal basis on which the dispute is being conducted in the present case, the BIT, is primarily the rights and interests of the investor, "(…) which are retained for the purpose of inducing and protecting foreign investments” (ARB/07/26: 314). It also stated that the BIT is not to be understood as an isolated set of rules and therefore does not lie outside the consideration of the rules of international law (cf. ARB/07/26: 316). Furthermore, the arbitrators addressed the explicit case and thus the conflicting rights of the parties. According to the tribunal, the respondent correctly did not refer to the claimant's obligations under international law, but

only to its obligations under the concession agreement, hence making it clear that the services are part of the human right to water. The problem with the counterclaim, however, is that the respondent's argumentation, in which it emphasized the investor's obligation to provide the services as if this obligation were based on the human right to water and thus on international law, is wrong (cf. ARB/07/26: 320). The tribunal concluded that the enforcement of the human right to water constitutes an obligation to perform, which, however, is applicable to an investor only by a contract or other civil-commercial legal relationship. Therefore, the obligation to provide services to enforce the human right to water would be based on domestic law and not on general international law. In the present case, since there were no human right's obligations on the concessionaire by the BIT or by the concession contract prior to the conclusion of the concession, this means that there was no obligation to perform in order to safeguard human rights on the part of the investor. The responsibility to grant the human right to water and to exercise pressure on the investor to ensure that this human right is granted through the investor's services was, since the human right to water was not included in the BIT or the concession contract, solely in the hands of the state (cf. ARB/07/26: 322). The tribunal also found that the state has not invoked any legal basis for the individual's right to compensation for the alleged violation of the human right to water.
It declared the respondent's counterclaim was unsuccessful.

3.7.6. Case relevance

The tribunal found that the respondent had violated the FET standards and rejected the legal arguments of the prosecution and the respondent's counterclaim. The case highlights the development of arbitration in water disputes. Already in the first proceedings of the Urbaser case, not only did the respondent justified his actions by emphasizing his obligation to guarantee the human right, as observed in some cases before, but also the claimant argued that the state had to guarantee his rights and the human right to water at the same time. This argument appeared for the first time in the history of arbitration of water disputes on the side of the claimants. In previous cases, only the states and the tribunals (partially) invoked simultaneous treatment of both rights. Also, particularly striking about this case is the tribunal's balancing of the human right to water and the investor's rights and hence indirectly highlighting the dilemma, in which the state finds itself due to its obligations. The variance over time in argumentation trends of the players involved culminates in the tribunal's acceptance of the counterclaim. In the previous cases, the state was sued for measures that

it justified in part by upholding the human right to water. In addition to these justifications, it can be observed in some cases that the state also addressed the claimant's obligations regarding the human right to water. However, it is only in the present case, both in the first claim and in the counterclaim, that all three parties address the claimant's duty to respect the human right to water. In the course of this, the tribunal analysed in detail the obligations of the two parties to the dispute to respect the human right to water. It makes clear that it does not share the claimant's argument that it is not obliged to respect the human right to water. It also explains in detail, why the investor cannot be held responsible for violating the human right to water, regardless of whether this violation occurred or not.

4. Water as commodity or human right?

The cases examined show a variance in the development from treating water as a commodity to treating water also as human right over time. In the following table, I have categorised all the actors' positions relevant to my bachelor's thesis. The first category indicates whether the claimant mentioned the human right of water. The second category expresses whether the claimant agreed that the state has a duty to uphold the human right to water. Through the third category, I can illustrate whether the respondent justified its actions on the basis of the human right to water. The fourth category expresses whether the tribunal mentioned the human right to water, and the fifth category illustrates whether the tribunal attached any importance to the human right to water. This table thus visualized the positions of the actors involved and stresses the development from treating water as a human right over time.

Table 1: Illustration of the development of the treatment of water as a human right over time

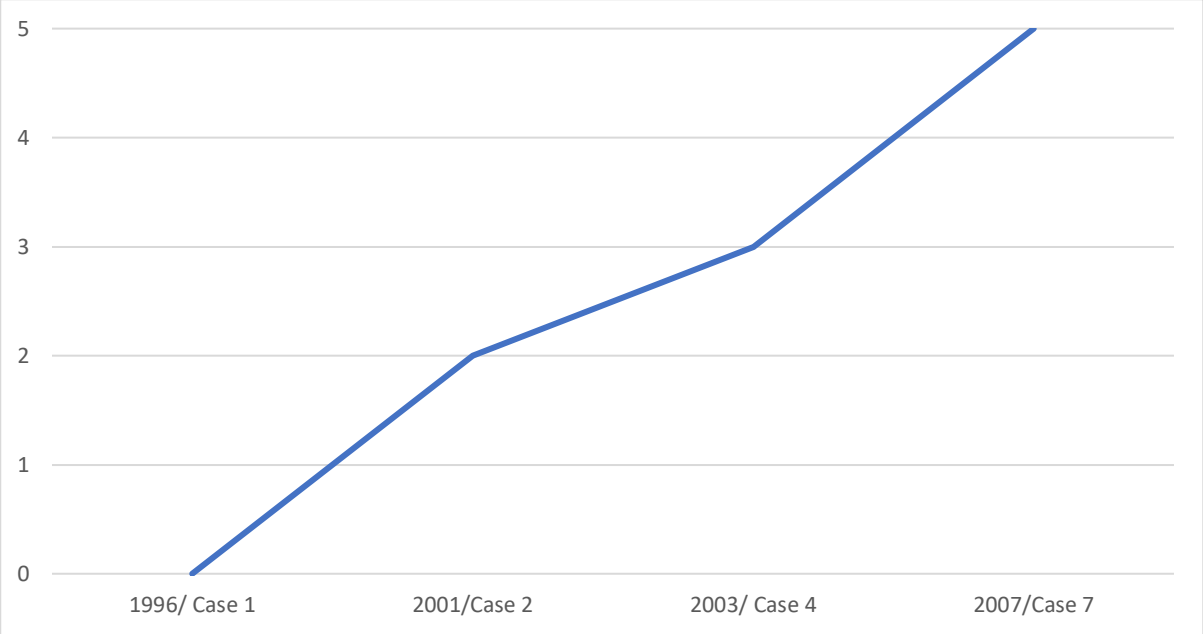
Cases	1. Claimant mentioned arguments regarding the human right to water	2. Claimant confirmed state's duty to uphold water as a human right	3. Respondent's arguments regarding the human right to water	4. Tribunal's mentioned arguments regarding the human right to water	5. Tribunal attached importance to human right to water
Case 1	No	No	No	No	No
Case 2	No	No	Yes	Yes	No
Case 3	-	-	-	-	-
Case 4	Yes	No	Yes	Yes	Yes
Case 5	-	-	-	-	-
Case 6	-		-	-	-
Case 7	Yes	Yes	Yes	Yes	Yes

While in the first case (case 1) ever filed on a water conflict the human right to water is not mentioned at all, in case 2 the respondent justified his measures with the human right to water and argued that this human right would weight heavier than the investor's rights. The tribunal also addressed the respondent's arguments in Case 2, and thus mentioned the human right to water. At the same time, a development in the tribunal's analyses can already be seen in the comparison between case 2 and case 4. In the latter, the tribunal addressed the state's argument regarding the human right to water and finds that in the present case there is no "incompatibility" between the BIT and the human rights treaty (ARB/01/12: 91). In case 3 such a development can only be observed to a limited extent, as the two parties to the dispute were able to reach an agreement without the tribunal having to take a position on the human right to water. Consequently, this case is coloured grey in the table. However, a development can be noted, as an amicus curiae application was observed here for the first time and this amicus took a stand in the case. The amicus accentuated the existence of the human right to water and its importance for the population. Furthermore, he outlined the consequences for the population that would result from a decision of the tribunal in favour of the investor. In case 4, the treatment of the human right to water developed noticeably, as all three (four including the amicus) players involved addressed the human right to water. The claimant emphasized that it would not question the human right to water, but that it was nevertheless not relevant to the case. The respondent, on the other hand, explicitly addressed the human right to water in its justification for the measures taken, pointing out "(…) water cannot be treated as ordinary commodity" (ARB/03/19: 98). Similarly, in this case, the amicus' engagement and how he addresses the human right to water can be observed. For the first time in the history of water arbitration, the tribunal weighed the rights of the players in this case and found that the state must grant both the investor's rights and the human right to water. Since in case 5 it was presumably clear in advance that the state would not have to pay any compensation, it also invoked the human right to water only very indirectly, speaking of a "(...) perhaps legal obligation (...)" (ARB/05/22: 126). Thus, I coloured this case grey in the table. The role of the amicus is particularly stressed in these proceedings, as the tribunal stated "(…) the particular qualifications of the Petitioners (…)" (ARB/05/22: 103). The tribunal does not mention the human right to water. As in case 5, comparatively little importance is given to the human right to water in the proceedings in case 6. Since the state in this case only justified its measure with the human right to water and this measure is considered to be lawful

by the tribunal, the tribunal did not go further into the human right to water. Therefore, case 6 does not show any development in the respect of the human right to water. Consequently, I also coloured this case grey in table above. In the last case examined and also the last known case of arbitration on water, a development over time from treating water as a commodity to treating water also as a human right can be noted in comparison to the previously proceedings analysed. This development can be observed from case to case over time. In Urbaser v. Argentina, the human right to water was not only mentioned but also stressed by all three actors. What is special about this dispute regarding the human right to water is that for the first time there was also a dispute about a possible obligation of the investor to guarantee the human right to water in addition to the states obligation. The investor claimed that the state had an obligation to guarantee the human right to water, but that the investor, as a private company, did not have this obligation. Consequently, the investor argued, the state must fulfil its obligation to guarantee the human right to water in addition to the investor's rights. The respondent justified his measures on the basis of the human right to water. However, other than in the prior cases, the state also explicitly emphasized the investor's duty to guarantee the human right to water. Unlike in all previous cases, the tribunal stressed the importance of the human right to water and the responsibility of the concessionaire by considering the main purpose of the concession to be the development of the water supply system (cf. ARB/07/26: 47). The tribunal also accentuated and balanced the state's obligations towards the investor, the concession and the human right to water. Of particular interest is the fact that the state filed a counterclaim in which it sued the claimant for violating the concession agreement and thus also violating the human right to water (cf. ARB/07/26: 308). However, the investor stated that the human right to water is not part of the BIT and therefore has no jurisdiction granted by the BIT in the present case. In contrast, the tribunal explicitly accentuated the human right to water in this counterclaim. The arbitrators clarified that both parties must guarantee the human right to water, hence contradicting the investor's opinion that only the state is obliged to guarantee the human right to water. The tribunal also addressed the collision between the investor's rights and the human right to water. Since the human right to water is not explicitly part of the concession contract, the state cannot invoke the investor's obligation to guarantee the human right to water.

Through the analyses conducted in my bachelor's thesis, it is evident that water is also increasingly treated as a human right. Graph 1 illustrates this development over time. As in Table 1, I have excluded cases 3, 5 and 6 from the graph because, as discussed earlier, case-specific circumstances mean that no observations relevant to my bachelor's thesis can be made about the treatment of water as a human right. I have also integrated the categories illustrated in Table 1 into Graph 1 to show the variance over time on all sides of the actors involved. The Y-axis shows how often "yes" could be assigned to the individual categories in cases 1,2,4 and 7, in other words how strongly the individual actors weighed the human right of water in the individual cases.

Graph 1: Development of the treatment of water as a human right over time



However, the development over time of treating water as a human right is not reflected in the judgements. In all proceedings in which the respondent justified his measures with the human right to water, the tribunal ultimately always rules in favour of the investor. This variance in the proceedings, but not in the decisions, can be explained by the legal framework of the relationship between the state and the investor, as discussed for the first time in case 7. Since the human right to water is not included in any BIT, even if the claimant does not respect the human right to water, he cannot be legally prosecuted. How this problem can be solved will be discussed in the further course of my bachelor's thesis. Firstly, however, anomalies in my analyses need to be discussed in order to address and answer any potential inconsistencies in my finding that the human right to water is increasingly reflected over time in arbitral proceedings on water disputes.

5. Discussion

In the following, anomalies in the analyses are discussed. Due to the small number of cases, I was able to analyse the question of how the treatment of water as a commodity and water as a human right developed over time in a purely qualitative manner. Despite this low number, it was possible to make statements about the treatment of water. However, it remains questionable to what extent my results can be generalized because of the limited data available. Furthermore, it is striking in my analyses that Argentina was the respondent in five out of seven cases. Consequently, on the one hand, the assumption could arise that Argentina was frequently involved because the state does not respect the rules of privatization per se. On the other hand, it could be argued that the arbitrators in the proceedings were biased by previous decisions. If the explanation that the state was not cooperative regarding the privatization of water and therefore sat in the dock comparatively often were true, then no conclusions could be drawn regarding the tribunal's treatment of water as a commodity. For in that case the tribunal would see Argentina as guilty because of its non-cooperative behaviour and not because it protects the human right to water through its measures, but rather because the human right to water acts as a cover. Thus, it could not be concluded that the tribunals would rather treat water as a commodity, but would rather condemn Argentina's "wanton" violations of the water treaties. Since a development can be observed within the proceedings, also on part of the tribunal, towards greater consideration of the human right of water, and hence Argentina's arguments are not only seen as an unjustified defence by the tribunal, this accusation can be rejected. The criticism that my result could be biased towards Argentina by the tribunals and thus endogenous factors influenced my result can also be rejected. As explained above, over time the tribunals have increasingly considered the respondents' arguments that they were upholding the human right to water, especially in cases involving Argentina, which argues against such bias. What actually triggered the disputes, such as a tariff increase by the investor or measures taken by the state, and which arguments were brought forward by the disputing parties only as a complaint or defence, cannot be traced from an ex-post perspective. This is particularly difficult because arbitration proceedings are confidential (cf. Peterson 2017: 599). Consequently, it could be criticised that the variance in the procedures is also due to different triggers. However, the analyses showed that despite the difficulty of verifying the accuracy of the arguments, the facts of the individual cases nevertheless became evident and helped to classify the treatment of water as a

commodity or as a human right. In case 3 the tribunal found that the state's actions were unjustified because the water pollution was not caused by the investor, so a justification by the respondent on the basis of the human right to water, which did not take place, would not only have been unhelpful but also unsubstantiated. In case 5, it was presumably already clear in the preparation of the proceedings that the state would not have to pay any compensation, which is why it can be considered that the state saw no need to justify its measures on the basis of the human right to water. Since the measures taken by the state in case 6 were lawful, it is evident that the state is not simply exploiting the human right to water and that the triggers of the disputes are nevertheless reflected in the cases. Furthermore, it could be argued that since the World Bank, to which the ICSID is affiliated, is often said to have an interest in the privatization of water, the ICSID can also be assumed to have this as well as investor proximity (cf. ARB/02/3: 8). Consequently, the decisions of the tribunals could be influenced and my analyses distorted. Despite the above criticism of ICSID for its potential partiality, it can be observed in this paper that a shift is also taking place on the part of the tribunals towards greater respect for the human right to water. As shown in case 7, the low variance in the arbitrators' rulings is due to the legal framework rather than any partiality on the part of the arbitrators.

6. Conclusion

It can be seen that the privatization of drinking water supply in developing countries may be helpful from a financial point of view, as capital is needed to supply the population with clean drinking water in a financially weak state. If the investor acts out of purely monetary interests, the supply of drinking water to the population cannot take place to the desired extent. Likewise, investor-state disputes can have a negative impact on the supply of drinking water. Due to financial restrictions of these states, they do not act as investors in the cases examined.[28]

Ideally, therefore, water would have to be treated as both commodity and human right. This paper shows how this simultaneous satisfaction of both interests can be possible. In order to

[28] Whether states acting as investors respect the human right to water is questionable. However, since they presumably do not sue themselves, no arbitration proceedings with such a constellation of actors can be found.

be able to develop this approach, it was first necessary to analyse whether water is currently treated more as a commodity or as a human right and for what reasons one right is preferred. If I compare the results of the analyses of the first and the last case, this development becomes particularly clear. In the first case examined, the analysis showed that the respondent hinted at the human right to water, but did not explicitly mention it. In the last case, on the other hand, not only did all parties address the human right, but the tribunal also emphasized the obligation of both the investor and the state to the human right to water. Furthermore, the tribunal noted that the human right to water is not addressed in contracts between the state and the investor, and therefore the tribunal cannot sanction the failure to respect this human right. As already explained, there was a variance in the individual proceedings over time, but none in the judges' rulings. This is presumably due to the lack of a human rights clauses in investor-state treaties as just mentioned. Concession agreements, but also bilateral investment treaties, do not bind the investor to the human right to water, if this human right to water is not addressed to. In order to ensure the treatment of water as a commodity, but above all as a human right, it is therefore necessary to secure this human right in investment contracts. Simultaneous treatment of water as a commodity and water as a human right may be possible by implementing this right in those contracts (cf. Simma 2011: 580). However, for the integration of the human right to water in investment contracts, the will of the contracting parties is essential. Studies showed that various institutional factors, for example the degree of corruption of a state, can have an impact on the privatization of water supply (cf. Moncayo & Wichert 2017, Baer 2014). The example of Chile illustrates this assumption. Moncayo & Wichert (2017) investigated whether water privatization leads to better access in the case of Bolivia, where water privatization was much less successful than in the second case they studied, Chile. They found that in Chile the governance index, according to which the state would have higher regulatory capacities, is higher than that in Bolivia and concluded that water privatization in Chile was such a success story due to stable institutional frameworks. Baer (2014) also accentuated that the state plays a crucial role in the governance of water and sanitation services in Chile: "Rather than being a neoliberal success story that reduces the role of the state, the Chilean water services sector can serve as a model for building a strong public water sector and embedding reforms in state interventions to protect the public interest" (Baer 2014: 142). Consequently, ensuring the human right to water requires not only financial resources, but also a state's interest in treating water as a human right. It can therefore be

considered that institutional factors have a positive or negative impact on the implementation of the human right to water in investment treaties. At this point, it should also be mentioned that the privatization of drinking water supply seems to be reasonable in developing countries and in countries that have no or poorly developed drinking water supply systems due to monetary restrictions. In developed countries, which were disregarded in my bachelor's thesis, and in which no system has to be built up, but only administered, further negative effects of the privatization of water can become apparent, which, however, played no role in my bachelor's thesis.

My bachelor's thesis highlighted the need for capital to enable the expansion of water supply, especially in developing countries. Since the state is often unable to raise this capital, an investor is needed. But this is where the dilemma comes in. The investor must act economically in order to be profitable. But without the investor, hardly any water supply can be built in developing countries. Therefore, legal frameworks must guarantee that the investor not only operates profitably, but also grants the human right to water. This legal framework must be anchored in investment contracts. It is the only way to prevent violations. It remains to be seen whether the influence of investors is too large for securing the human right to water in contracts. However, this would not only be necessary in order to reduce the number of state-investor disputes in the future, but also to ensure that the population affected by these disputes has access to clean drinking water. As described at the beginning of bachelor's thesis, the world population will increase. As the world population increases, but also as the climate crisis continues to worsen, water will become scarcer. Here it is up to natural scientists to find ways to produce clean drinking water. Increased promotion of the construction and use of desalination plants that run on CO2 neutral electricity could be one such start. It is also a start to bring light into the darkness of private water supply. Private water supply, especially in developing countries, can be beneficial, but it is up to social and legal scientists as well as economists to analyse the problems of privatizing drinking water supply and to provide suggestions for solving the dilemma between water as commodity and water as human right described above. One solution would be the adaptation of new legal frameworks in investment contracts by decision-makers.

7. References

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