Integrating Social Rights in International Investment Law: Framing the Legitimate Expectations of Public Service Providers

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To my dad,
Whose love and support
has made so many dreams possible.

En ti, tirito,
he encontrado el verdadero significado,
de lo implica amar sin condiciones.

~

And to my mom,
who I wished was still here,
to see this and other dreams come true.

Te quise,
te quiero,
y te querré;
porque el amor es para siempre.

Abstract

An investor that decides to invest in privatised social rights services – the provision of water, health, education, among others – enters into an environment which differs to other forms of investment. Two key reasons demonstrate this: i) there is a unique relationship between the investor, the state, and the general population, which differs tremendously to other forms of investments; and most importantly ii) an investor enters into an investment on services that are conditioned under international human rights law to a set of unique obligations – progressive realisation, non-retrogression, adequacy, among others – which are not found in other services such as banking or transportation.

This thesis is centred on this unique and complex relationship. The thesis explores the relationship between international investment law and international human rights law, with the aim of reconciling both areas of law though a systemic integration approach. The research looks at the unique case of the privatisation of social rights services, and the consequences that international investment law has had on the ability of the host state to ensure that privatised social services can ensure the satisfaction of its human rights obligations.

Under such premise, the thesis analyses the protection of legitimate expectations, as a broad and open-ended protection afforded in international investment law, which has had important consequences in the state's ability to regulate in favour of human rights. By using legitimate expectation as an example, the thesis proves how the systemic integration of human rights and investment norms can be done. The thesis suggests a detailed method that can be used by investment tribunals to integrate both areas of law, using what the author calls an interpretative-integration approach. The thesis ultimately proves that, within the existing scope of investment law, investment rules can be interpreted in a way that is compatible with human rights norms.

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Chapter I
Introduction

I. General Overview

'England's water can be renationalised without compensation, activists say.'[1]

That is the frontpage of the Guardian, the day I first drafted this introduction. The article continues:

> Parliament could renationalise the water industry in England without being obliged to compensate shareholders, according to previous UK court judgments cited by campaigners. Activists are putting mounting pressure on the government and opposition parties to look again at the privatised water system after criticism that the industry is not acting in the public interest. The Guardian revealed this week that more than 70% of the privatised waterindustry is owned by foreign investment firms, private equity, pension funds and, in some cases, businesses based in tax havens. […] Supporters of nationalisation cite rulings from the high court, court of appeal and European court of human rights (ECHR) on shareholders' general rights to compensationin a nationalisation. The rulings were made in cases involving Northern Rock shareholders, who were paid zero compensation when the bank was taken intopublic ownership during the 2008 financial crisis.[2]

The article, and the activists it references, do not mention international investment law once. The Abu Dhabi Investment Authority owns 9.9% of the shares in Thames Water, the article alleges, but the article does not indicate that the laws regulating the rights and activities of this investor—and others like it—are not limited to UK laws and the European Convention of Human Rights. Why is international investment law relevant to this situation? The answer lies in the content of investment law and its interpretation.

[1] Sandra Laville, '*England's Water Can Be Renationalised Without Compensation, Activists Say*,' The Guardian, (2 December 2022) Available at http://www.theguardian.com/environment/2022/dec/02/water-renationalised-without-compensation-activists-shareholders-england <accessed 2 December 2022>

[2] Ibid

In 1992, the United Kingdom and the United Arab Emirates signed a bilateral investment agreement which then came into force in 1993.[3] The treaty contains a series of protections in favour of foreign investors, including protection against expropriation[4] and fair and equitable treatment.[5] Some of these protections are broad and open-ended, they are found in most international investment agreements, and they have been interpreted in various ways, often in detriment of the host state's ability to regulate and make necessary changes for public purpose reasons.[6] The renationalisation of water provision in England, including Thames Water, could potentially lead the Abu Dhabi Investment Authority to raise an investment arbitration claim against the UK, alleging a breach of the protection against expropriation based on shares and infrastructure) and the fair and equitable treatment standard.[7] The claim that the UK could renationalise water provision in England, without the need to compensate investors, demonstrates the low levels of public awareness of the impacts that the international investment regime – particularly the current interpretation afforded by investment arbitration practice – has on the right of states to regulateto protect fundamental human rights, such as the right to water.

The article also demonstrates the low levels of public awareness over the international human rights framework, beyond the European Convention of Human Rights. The article, for example,

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[3] Agreement between the Government of the United Arab Emirates and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (1993). Full text available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2367/download

[4] Article 4 reads: Investments of investors of either Contracting Party shall not be nationalised, expropriated or subject to measures having the effect of dispossession, direct or indirect, or having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except for public purposes related to the internal needs of that Party on a non-discriminatory basis, under due process of law […] and against prompt, adequate and effective compensation.

[5] Article 2 reads: 'Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the manner consistent with international law.'

[6] See for example: Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic) Award rendered on 20 August 2007, paragraph 3.3.5; or Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, Decision on Liability 30 July 2010, at 222

[7] Article 2, see Full text available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2367/download

fails to mention that water is a fundamental human right protected under the International Covenant of Economic, Social and Cultural Rights (ICESCR), among other international treaties. It fails to mention that social rights (such as water, education, health, housing, food, clothing) have specific legal obligations, which require states to improve their accessibility, their affordability, and their quality over time. Most importantly, it fails to mention that states cannot remain inactive when fundamental human rights services, such as water provision, are in the hands of private providers.

The previously mentioned scenario is neither speculative nor hypothetical. The UK is not the only country in the world which has both privatised social rights services and has also ratified various international investment treaties. Some countries that have done so, and later implemented new regulation to ensure the realisation of social rights, have found themselves in lengthy and expensive litigation, often having to compensate investors for breaches of investment law protections.

Argentina is one of the best examples of this issue. In the 1990s, Argentina privatised the supply of water services, making various foreign investors responsible for providing water to a large portion of the Argentinian population, including the inhabitants of the city of Buenos Aires.[8] Between 1998–2002, Argentina experienced a dramatic financial crisis, which forced the state to implement a wide range of emergency measures aimed at stabilising the economy.[9] The emergency measures implemented ultimately impacted the profitability of water provision services, which led investors to attempt to raise the tariffs for water distribution.

[8] Yulia Levashova, The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaser and Beyond, Utrecht Law Review (2020) at 111

[9] V. Beker, 'Argentina's Debt Crisis' in B. Moro and V. Beker (eds), *Modern Financial Crises* (Springer, 2016) 31–42; José E. Alvarez and Gustavo Topalian, 'The Paradoxical Argentina Cases' (2012) 4 World Arbitration and Mediation Review 491–544

Given the financial crisis, the state refused the increase of tariffs, arguing that it had an obligation to ensure affordable water to its general population.[10] At least 8 international investment disputes were raised in relation to water services,[11] and none were decided in favour of Argentina. Many others were raised in relation to services such as electricity and gas, which, while not necessarily considered social rights per se, are intrinsically related to the enjoyment of all human rights.[12] Although the facts of each case were relatively similar – the measures enacted by the state were mostly the same, and impacted investors in similar ways – and although Argentina ultimately lost all of them, the specifics of the decisions produced by the arbitral panels are very different. For example, the *AWG* and *Impregilo* tribunals determined that a state's goal to secure access to water was a legitimate objective, but they placed a very limited weight on a state's choice to select the measures it can implement to pursue such

[10] Yulia Levashova, The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaser and Beyond, Utrecht Law Review (2020) At 114

[11] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic); Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17; Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12; Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Re; AWG Group Ltd. v. The Argentine Republic, UNCITRAL; Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (ICSID Case No. ARB/03/18); SAUR International v. Argentine Republic (ICSID Case No. ARB/04/4); and Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB/07/26)

[12] Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Award rendered on 22 May 2007; CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8), Award rendered on 12 May 2005; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award rendered on 28 September 2007; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability rendered on 3 October 2006; Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic (ICSID Case No. ARB/03/13), Decision on Preliminary Objections rendered on 27 July 2006; Gas Natural SDG, S.A. v. Argentine Republic (ICSID Case No. ARB/03/10), Decision of the Tribunal on Preliminary Questions on Jurisdiction rendered on 17 June 2005; Chilectra S.A., Elesur S.A., Empresa Nacional de Electrecidad S.A., and Enersis S.A. v. Argentine Republic (ICSID Case No. ARB/03/21), Order Taking Note of the Discontinuance of the Proceeding Pursuant to ICSID Arbitration Rule 44 rendered on 28 March 2017; Camuzzi International S.A. v. Argentine Republic (I) (ICSID Case No. ARB/03/2), Decision on Jurisdiction rendered on 11 May 2005; Wintershall Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/04/14), Award rendered on 8 December 2008; Total SA v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award rendered on 22 May 2007

objective without running afoul of its commitments to investors.[13] On the other hand, the *Urbaser* tribunal afforded a much 'greater deference to state's actions to pursue a state's objective.'[14] Whereas the *AWG* tribunal determined that Argentina's human rights obligations and its investment treaty obligations were not inconsistent, contradictory, or mutually exclusive and therefore, the state could respect both obligations (although it did not explain how);[15] the *Urbaser* tribunal determined that some investment law protections – such as investor's legitimate expectations – are to be framed or shaped by the state's human rights obligations, given the context of privatised water services.[16] Effectively, the *AWG* tribunal avoids having to analyse human rights law in the context of investment law, while the *Urbaser* tribunal attempts to systemically integrate human rights law with investment law.

The privatisation of services creates a complex context for the fulfilment of a state's human rights obligations, as it leaves the provision of a service in the hands of private actor but does not delegate the human rights obligations that the state has in relation to such service. In this sense, the state is ultimately responsible for the right that is being enjoyed through a service (the provision of water, health services, housing, among others), but does not control the day-to-day operationalisation of the service delivery. As argued by Mouyal, privatisation can be considered to be a special case when dealing with the intersection of international investment law and international human rights law.[17] Particularly, Mouyal argues, privatisation could 'sometimes constitute a threat to the public interest and negatively impact human rights, but in other instances privatizations may be beneficial to human rights where foreign investors are

[13] Yulia Levashova, The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaserand Beyond, Utrecht Law Review (2020) at 122
[14] Ibid
[15] AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Liability (30 July 2010) paragraph 262
[16] Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. ArgentineRepublic (ICSID Case No. ARB/07/26), Award rendered on 8 December 2016, paragraph 622
[17] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective*, Routledge (2016) At 138

instrumental to ensure development and fundamental societal services.'[18] A privatised service might not correspond to the minimum level of human rights protection, for example the obligation to ensure access to at least a minimum quantity of water for survival, because the population is not able to afford the prices that the private supplier has imposed.[19] Given the domestic and international human rights obligations of the host state, privatisation might require the state to intervene and further regulate, which could then lead to an investor claiming that, for example, its legitimate expectations were breached. As detailed in this thesis, the protection of legitimate expectations has been the result of investment practice interpretation. These interpretations have construed the fair and equitable treatment standard (FET) found in investment treaties to protect legitimate expectations. This protection has been often used to favour the interests of the investor to the detriment of the state's regulatory powers.

An investor that decides to invest within the context of a privatised social rights service – the provision of water, health, education, food, among others – enters into an environment which is different to other forms of investment. Two key reasons demonstrate this: i) there is a unique relationship between the investor, the state, and the general population, which differs tremendously to other forms of investments; and most importantly ii) an investor enters into an investment on services that are conditioned under international human rights law to a set of unique obligations – progressive realisation, non-retrogression, adequacy, non-discrimination, among others – which are not found in other services such as banking or transportation. While other services, such as transportation, may play an important role in the realisation and enjoyment of social rights (being able to use transport to access health services for example), they do not constitute *per se* social rights.

[18] Ibid
[19] Ibid, at 139

This thesis is centred on this unique and complex relationship. The thesis explores the relationship between international investment law and international human rights law, with the aim of reconciling both areas of law though a systemic integration approach. The research looks at the unique case of the privatisation of social rights services, and the consequences that international investment law has had on the ability of the host state to ensure that privatised social services can ensure the satisfaction of its fundamental human rights obligations. Under such premise, the thesis analyses the protection of legitimate expectations, as a broad and open-ended protection afforded in international investment law, which has had important consequences for the state's ability to regulate in favour of human rights. By using legitimate expectations as an example, the thesis proves how the systemic integration of human rights norms and investment norms can be done, in a way that does not undermine the host state's human rights obligations. The thesis sets out a detailed method that can be used by investment tribunals to integrate these two areas of law, using what the author calls an interpretative-integration approach. The thesis ultimately proves that where investment tribunals are willing to exercise their interpretive powers in this way, within the existing scope of international investment law, investment rules can be interpreted in a way that is compatible with international human rights norms.

II. Investment and human rights: common ground

In order to provide a theoretical background for this research, it is important to briefly highlight the history of international investment law and international human rights law, and their potential overlaps. Despite some arbitrators and academics arguing that international investment law and international human rights law are essentially two conflicting or opposed

areas of international law,[20] some have acknowledged that they actually share 'more common ground than differences.'[21]

Nelson for example, indicates his surprise about the claim of inconsistencies between investment law and human rights, particularly given that they both derive from the customary international law related to treatment of aliens.[22] He further argues that 'many human rights treaties expressly provide for the protection of property, in terms similar to the customary international law standard. This convergence, in turn, means that case law from one area of law is potentially useful in the other - indeed, in some cases, it is interchangeable.'[23] Nelson exemplifies his main argument by providing further analysis on the protection against expropriation and the fair and equitable treatment standards, arguing how both areas of law can be mutually reinforcing.[24]

In similar ways, Peterson has argued that, although distant, these two areas of international law share a common origin in what can be conceived as an effort to limit state sovereignty.[25] Peterson indicates that this common origin goes way beyond the idea of limiting state power, as the protection offered to foreign investors under investment treaties has a 'certain proximity' to the protection found in human rights treaties.[26] In particular, the regulation and the protection of the right to property under human rights treaties can substantially overlap to that which is found in the regulations against direct and indirect expropriation in investment treaties.[27]

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[20] Dorothea Endres, The human side of protecting foreign investment, Transnational Legal Theory (2021) at 250
[21] Timothy G Nelson, Human Rights Law and BIT Protection: Areas of Convergence, Journal of World Investment and Trade (2011) at 28
[22] Ibid
[23] Ibid
[24] Ibid, at 33-41
[25] Luke Eric Peterson, 'Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration', Rights and Democracy (2009) at 9
[26] Eric De Brabandere, 'Human Rights and International Investment Law', Grotius Centre Working Paper Series (2018) at 1
[27] Ibid

This overlap of regulation on property is essential, as according to Pierre-Marie Dupuy, the legal concept of property is at 'the core of any international investment, and this concept was recognized as a fundamental right as the 1789 French Declaration of the Rights of the Man and of the Citizen.'[28] Consequently, some have argued that it is not surprising that both areas of international law share such common roots within the customary rules of international law protecting the rights of aliens (foreigners) and that – prior to the establishment of international human rights treaties and bilateral investment treaties – the protection of property was 'widely considered to be part of human rights protection.'[29]

Under such premise, Shelton has even argued that the Law of State Responsibility for Injuries to Aliens 'can be viewed as a precursor to international human rights law' given that a vast amount of cases of the nineteenth century that dealt with injuries to aliens by states actually 'concern what [today] would constitute violations of international human rights law'.[30] In addition, as Crawford had argued, international investment law and international human rights law is 'about the state and not just about corporations or individuals[;] it is about the way in which we bring the state under some measure of control, which is the main aspiration of general international law'.[31]

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[28] Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in *Human Rights in International Investment Law and Arbitration* editedby Edited by Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni, Oxford University Press (2009) at 45

[29] Nicolas Klein, 'Human Rights and International Investment Law: Investment Protection as Human Right?', Goettingen Journal of International Law 4 (2012) at 201

[30] Dinah Shelton, *Remedies in International Human Rights Law,* Oxford University Press (2005) at 59-62

[31] James Crawford, 'International Protection of Foreign Direct Investment: Between Clinical Isolation and Systematic Integration' in *International Investment Law and General International Law: From Clinical Isolationto Systematic Integration?* edited by Rainer Hofmann and Christian J. Tams, Nomos (2011) at 22

Regardless of certain differences, international investment law and international human rights law share this common goal: to limit the power of states in favour of individuals or group of individuals. As Simma highlights: '[a]s a matter of policy, international investment law protection and human rights are not "separate worlds". They are not as foreign to each other as some make it appear. […] After all, the ultimate concern at the basis of both areas of international law is one and the same: the protection of the individual against the power of the State.'[32]

The protection of the individual, or group of individuals, from the vast powers of states is where a simple common ground can be found between these areas of law. It is not difficult to conceive a situation where there would be a need to limit the power of a state to ensure both the rights enshrined in international human rights law and those that might arise from an international investment agreement. If a state were to enter into an agreement with a foreign investor to construct a gas pipeline over a period of 10 years, for example, human rights law would ensure that the local population is not forcibly removed during such construction. On the other side, investment law would provide a level of protection to ensure that, if the government were to change during those 10 years, the investor's property would not be unlawfully expropriated without compensation.

This simple example might help to give us a general overview of why there might be need for both areas of law to exist simultaneously and harmoniously. However, the relationship between these areas is much more complex on issues such as the privatisation of public services related to social rights, where foreign investors are allowed to supply public services such as drinkable

[32] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', International and Comparative Law Quarterly (2011) at 576

water or health. [33] Under this scenario, human rights concerns are no longer in the periphery of the investment, but rather central to the investment itself, as the state might be required to act and intervene in the investment to protect the public. This thesis focuses its attention on this issue and the reconciliation of the state's obligations under investment law and human rights law.

III. Investment and human rights: two colliding forces?

Many have acknowledged that there seems to be a growing awareness by states, international organisations, and civil society in general that the investment agreements regime can pose a serious threat to the enjoyment of human rights.[34] Some have expressed dissatisfaction with existing international investment law's impact on human rights protections, given the impact that it currently has on the power and sovereignty of a state to pursue public interest, protect human rights, and purpose sustainable development.[35] This is evident in the various investment arbitrations in which states have been held liable to compensate investors for measures that were implemented in order to protect the fundamental rights of their populations.[36]

[33] Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in *Human Rights in International Investment Law and Arbitration* editedby Edited by Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni, Oxford University Press (2009) at 45

[34] Report of the Independent Expert on the promotion of a democratic and equitable international order. Alfred-Maurice de Zayas (5 August 2015) paragraph 6

[35] Yilmaz Vastardis, A. and Van Harten, G., Critiques of Investment Arbitration Reform: An Introduction. Journalof World Investment and Trade (2023); Van Ho, T. and Deva, S., Addressing (In)equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism. Journal of World Investment and Trade(2023); Bueno, N., Yilmaz Vastardis, A. and Ngueuleu Djeuga, I., Investor Human Rights and Environmental Obligations: The need to redesign corporate social responsibility clauses. Journal of World Investment and Trade.(2023); Daria Davitti, Proportionality and human rights protection in international investment arbitration: What's Left Hanging in the Balance?, in *Revisiting Proportionality in International and European Law: Interests and Interest-Holders*, Linderfalk, U. & Gill-Pedro, E. (eds.). Bril (2021); Van Ho, T., Angels, Virgins, Demons, Whores: Moving Towards an Antiracist Praxis by Confronting Modern Investment Law Scholarship. Journal of World Investment and Trade (2022); Yilmaz Vastardis, A., Investment Treaty Arbitration as Justice Bubbles. In: *The Oxford Handbook of International Arbitration*, Editors: Schultz, T. and Ortino, F., Oxford University Press (2020); Nikhil Teggi, 'Legitimate Expectations in Investment Arbitration: At the End of its Life-cycle?', Indian Journal of Arbitration Law, Vol.5, Issue 1 (2016) at 78

[36] See Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Re; AWG Group Ltd. v. The Argentine Republic, UNCITRAL

Although states might want to ensure that they are able to attract foreign investment for further economic development, modern investment agreements present what can be called 'asymmetries'. These are seen in the rights they accord to investors versus the burdens they impose on governments,[37] particularly, the limitations they can cause to states to further develop and implement international human rights standards.

These limitations, however, are not necessary caused by the rules enshrined in international law per se, but rather by the interpretation provided by the investment arbitral practice. As demonstrated in this thesis, actual normative clashes – contradictory obligations – between investment law and human rights law might not exist, but rather it has been in the way that such rules have been interpreted that they might create conflicting results. Although the two norms might seem to point in diverging directions, after some adjustment, it is still possible toapply or understand them in such way that no conflict will remain. This is demonstrated in Chapters II and VI of this thesis.

UN mandate holders, such as Olivier De Schutter, have called for investment treaties to be interpreted as to be compatible with customary international law and any treaty ratified by the concerned state that is applicable in a specific situation.[38] The possible effects of the interpretive role of arbitrators must not be underestimated,[39] particularly in cases related to the privatisation of social rights, where investment rules and human rights rules might interact more closely.

[37] Emma Saunders-Hastings. The Asymmetrical Legalization of Investment Regimes in Africa: Lessons from Water Privatization. In Sustainable Development in World Investment Law. Edited by Marie-Claire Cordonier Segger et al. Wolters Kluwer (2011) at 465.
[38] Olivier De Schutter, A Human Rights Approach to Trade and Investment Policies, Confronting the Global Food Challenge (2008) at 19
[39] Anne van Aaken, Fragmentation of International Law: The Case of International Investment Protection, University of St. Gallen Law School – Law and Economics Research Paper *Series* (2008) at 33.

In its report on the issue of fragmentation of international law, the International Law Commission ends by stating that:

> [T]he very effort to canvass a coherent legal-professional technique on a fragmented world expresses the conviction that conflicts between specialized regimes may be overcome by law, even as the law may not go much further than require a willingness to listen to others, take their points of view into account and to find a reasoned resolution at the end. Yet this may simply express the very point for which international law has always existed. The move from a world fragmented into sovereign States to a world fragmented into specialized 'regimes' may in fact not at all require a fundamental transformation of public international law - though it may call for imaginative uses of its traditional techniques.[40]

This thesis is centred on this final point. It provides an imaginative use of a traditional technique, which is that of systemic integration, as contemplated in the Vienna Convention of the Law of Treaties. It expands on what the author calls an interpretative-integration approach, which interprets international investment norms through the lens of international human rights law. The approach seeks to find which interpretation of an investment rule is also compatible with human rights law. The author does this by using the protection of investor's legitimate expectations to exemplify how such interpretative-integration is possible. By doing this, the author not only fills an important gap in the literature but provides an innovative 7-step method of interpretation which can be used by investment tribunals to systemically integrate human rights and investment norms.

[40] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, paragraph 487

IV. The need for radical change

Many have called for radical reforms of the investment law regime, even calling for the system to be 'burned down,'[41] given its perceived lack of legitimacy and coherence. As indicated by Langford, Potestà, Kaufmann-Kohler, and Behn, for at least a decade, the investment legal regime has suffered a public legitimacy crisis, with the criticism centred on the arguments that it is 'afflicted by pro-investor bias, undue secrecy, conflicting jurisprudence and high levels of compensation, which is compounded by concerns that developing countries are burdened with excessive legal costs and frequently lose cases against foreign investors.'[42]

As argued by Zarra, the lack of coherence is one of the factors of the backlash against investment arbitration, which is confirmed by his analysis on the investment cases involving Argentina in which 'the necessity defence has been raised and in which very different approaches have been applied by arbitrators, often without any explanation of the reasons that have generated such a divergence.'[43] This lack of coherence is demonstrated in this thesis, particularly in relation to legitimate expectations, where different and contradictory approaches are presented by investment tribunals, with no or very little justification.

The thesis does not deny the need for radical changes in the international investment regime. The author himself has written with others on proposed investment treaty provisions, which, if incorporated into new investment treaties, could give specific human rights obligations to

[41] Comments delivered by Tara Van Ho, at the UN Forum on Business and Human Rights' session 'Crowd- drafting: Designing a human rights-compatible international investment agreement', 27 November 2018
[42] Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler, and Daniel Behn. "Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions", *The Journal of World Investment & Trade* 21, (2020) at 168
[43] Giovanni Zarra, The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?, Chinese Journal of International Law, Volume 17, Issue 1, (2018) at 184

investors, and limit their investment protections.[44] However, the thesis focuses its attention on what can be done now within the current existing rules of investment law. This is of particular relevance, as it intends to demonstrate that even if the investment regime is not reformed, human rights law and investment law could still be systemically integrated within current rules, if investment arbitrators apply the method outlined in this thesis. As argued by Pauwelyn, reform may be blocked for several reasons, including the interests of current arbitrators who benefit from the status quo of the investment regime and have a greater influence in the system than advocates of reform; or network-related costs, such as investment agreements being difficult to change.[45] If such reforms are indeed blocked, then ensuring methods to systemically integrate human rights and investment rules – as proposed in this thesis – is of fundamental importance.

V. Methodology

The research is centred on theoretical and doctrinal approaches, involving desk-based research into the relevant legal literature and case-law. The theoretical underpinnings of the research are based on the general principles of public international law, which have continuously guided the approach taken in this thesis, particularly the principles of *pacta sunt servanda* and systemic integration. The literature reviewed for this thesis consisted of the following: i) literature regarding sources of international law, hierarchy, and fragmentation of international law; ii) literature on the notion of conflict of laws in public international law; iii) literature on the obligations of states regarding the protection and fulfilment of social in international human rights law; iv) literature on the origins of investment law and its relationship with human rights

[44] Tara Van Ho, Anil Yilmaz Vastardis, and Luis Felipe Yanes, Proposed Investment Treaty Provisions, Essex Business and Human Rights Project, (2018) available at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Forum2018Submission5.pdf

[45] Joost Pauwelyn, At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed, ICSID Review - Foreign Investment Law Journal, Volume 29, Issue 2, (2014), At 417-418

law; v) literature on the privatisation of social rights; vi) literature on the fair and equitable treatment standard, and more specifically, legitimate expectations.

Given the limited literature on the subject of the protection of legitimate expectations in investment law, Chapter V is based on a case content analysis methodology. For such purposes, the content of all publicly available international investment law decisions in English between January 2003 and January 2023 were analysed. The decision to start the analysis in 2003 was based on the fact that the first case to contemplate the protection of legitimate expectation was *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (Tecmed)* in May 2003.[46] From this analysis, the research identified 225 decisions that expressly mention legitimate expectations. Out of these, 71 decisions do not contain any analysis, while 154 decisions contain substantial analysis.

Using the above research methodology, this thesis aims at exploring the relationship between human rights and investment law, and to determine their reconcilability or irreconcilability. It attempts to determine if international investment rules can be interpreted in a way which are deemed to be also compatible with international human rights norms. In order to so, the thesis focuses on addressing the following main research question:

> To what extent can the protection of legitimate expectations of an investor under international investment law be made compatible with the inherent obligations of socialrights? In particular, how can it align with the obligations of progressive realisation, maximum available resources, minimum core obligation, non-retrogression, and the normative content of rights?

[46] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award rendered on 29 May 2003

To holistically answer this question, the thesis also explores the following sub-questions:

1) Do international human rights norms and international investment norms collide?
    a. If they do, which one prevails?
    b. If they do not, how to apply them simultaneously?

2) Does international human rights law limit or create specific expectations for an investor when it is investing in the provision of social rights services?

3) What is the exact meaning, scope, and content of the protection of legitimate expectations afforded in international investment law?

4) Should core states duties inherent to the realisation of social rights, such as progressive realisation, use of maximum available resources, minimum core obligation, non-retrogression, and the normative content of rights, be considered when determining the legitimate expectations of an investor?

VI. Structure of the analysis

This thesis in divided in 7 chapters, including the present introductory chapter.

a) Chapter II. From Fragmentation to Unification

This Chapter provides the theoretical foundations of this research, which is centred on the principle of systemic integration, as enshrined in the Vienna Convention on the Law of Treaties. From theory to practice, it looks at how the relationship and interactions between international human rights law and other areas (particularly international investment law) has been assessed, and the overarching issue of fragmentation of international law. It determines that both the theory and practice suggest that adjudicative mechanisms have approached the relationship in three ways: i) isolationist or self-contained approach, in which the applicable law is only limited to each sub-field; ii) displacement or hierarchical approach, in which human rights law is to be applied as a matter of priority; and iii) systemic integration approach, by which an adjudicative mechanism will find a way to harmoniously apply both areas of international law.

The Chapter responds to the first research question of this thesis by demonstrating that human rights norms and investment norms do not collide in theory, but rather in the way they are interpreted by adjudicative mechanisms. The Chapter demonstrates that the integration of human rights and investment law is permissible under current rules and has already been done by some tribunals. The research and analysis demonstrate that investment tribunals can take an approach more similar to the one human rights courts have taken to interpreting international human rights within the context of humanitarian law. This is, by applying what can be called an interpretative-integration approach, in which rules of one field are interpreted by using the 'lens' of the other field. This is, the meaning of 'legitimate expectation' in investment law, for example, is interpreted by using human rights law to provide content to the meaning of 'stability' or 'conduct'.

b) Chapter III. Social Rights Obligations: Nature and State Duties

This Chapter is centred in providing clarity on the exact nature and scope of a state's obligations in relation to social rights, as contained within the International Covenant on Economic, Social, and Cultural Rights. It demonstrates that social rights are fundamental to secure all members of our society a basic quality of life. In order to do so, social rights involve certain specific obligations, which civil and political rights do not. The Chapter explores in detail the obligations of progressive realisation, maximum available resources, non-retrogression, minimum core obligations, and the conditions of adequacy in the delivery of social rights services (normative content).

The Chapter demonstrates that social rights require continuous state intervention and regulation. Although termed in investment law as a right to regulate, this is best translated as a duty to regulate and to ensure the enjoyment of social rights, under international human rights law. In particular, the Chapter demonstrates that the cornerstone of social rights obligations is centred on the notion that states cannot remain static to the fulfilment of rights. Progressive realisation always requires the state to continue to implement efforts to achieve the full enjoyment of social rights, including ensuring that others are maintaining an adequate level of a service delivery.

The Chapter concludes by explaining how the adequacy of social rights services are defined by certain parameters. These parameters, called the normative content of the right, provide the necessary guidance to determine if a service is being delivered correctly. Conditions such as affordability, quality, physical accessibility, cultural acceptably, among others, are important conditions of the adequacy of a social rights service. Such conditions are important even if a service is being provided by a private actor.

c) Chapter IV. The Privatisation of Social Rights in the Era of International Investment Law

The aim of this Chapter is to explore the phenomenon of privatisation in the context of social rights services, and the consequences that the investment regime has had for the provision of these services.

It begins by explaining the legal consequences of outsourcing the provision of social rights to private entities. It demonstrates how international law is clear: the privatisation of social rights does not mean a state has delegated its responsibilities, but only the provision of the service itself. Privatisation only changes the role a state might have to one that is more focused on regulation and supervision than direct provision. The Chapter further reflects on the debates about the permissibility of privatising social rights and the necessary safeguards that a state is required to put in place in such circumstances. It concludes that, for privatisation to be lawful, the interpretation of investment law cannot limit or undermine the obligations a state has under human rights law.

Based on the above, the Chapter also demonstrates how the current interpretation afforded by investment arbitral panels has created more complexities for the realisation of social rights, particularly by restricting the ability of host states to: i) change the way the provision of a service is being performed by a private actor; ii) enact new regulation to protect social rights, and iii) reduce the profit of investors in order to ensure vulnerable populations have access to essential social rights services. The Chapter identifies legitimate expectations as one of the protections afforded in investment law that has been particularly problematic when states attempt to implement measures to protect social rights.

d) Chapter V. Legitimate Expectations in International Investment Law

This Chapter centres its attention on legitimate expectations, as a standard of protection afforded to investors within international investment law. The research demonstrates that there is no exact formula as to what is the precise meaning, scope, and content of legitimate expectations in investment law. This Chapter therefore focuses in determining the content, conditions, conceptions, and limitations of the protection of legitimate expectations in international investment law. In doing so, the author believes, one could systemically integrate investment law obligations with international human rights obligations, and therefore, create a human rights baseline for the privatisation of social rights services in the hands of foreign investors. The analysis performed in the Chapter, after reviewing all publicly available case law, demonstrates that legitimate expectations has been given three distinct meanings: i) Investors are entitled to expect the host state to conduct itself in a specific manner (conduct approach); ii) Investors are entitled to expect the stability of the environment in which they operate (stability approach); and iii) Investors are entitled to expect whatever they have been promised by the host state (promise approach).

Although the vast majority of the cases that are explored in this Chapter are not related to the privatisation of social rights services, they do demonstrate some of the concerning developments in investment law in limiting the legitimate right and duty of states to regulate in the interest of its population. A development that is of course problematic if one takes into account that social rights obligations have various inherent obligations, such as the obligation of progressive realisation.

The Chapter also determines that there is a trend within the arbitral practice to place certain conditions on the legitimacy of an expectation. Is any expectation that an investor might have protected under international investment law? The answer provided by a detailed analysis of the case law is no. Particularly relevant for the integration of human rights and investment law is the condition of knowledge. The research demonstrates that there is a trend to view the knowledge the investor had or should have had of the environment it was operating, including the legal framework, as essential to determining the legitimacy of an expectation. Expectations based on the investor's hope that a host state will fail to fulfil its legal obligations are not protected under investment law. Conditioning the legitimacy of investors' expectations on their knowledge of the legal environment is fundamental if one is to attempt to systemically integrate human rights and investment law.

e) Chapter VI. The Integration of Social Rights in Investors' Legitimate Expectations

The final substantive Chapter is centred on demonstrating how an interpretative-integration approach can be done. It explores how each conception of legitimate expectations (conduct, stability, and promise) should be applied if they were to be interpreted through the lens of international human rights law. Overall, the Chapter responds to the following three questions:

- What conduct can the investor legitimately expect from a host state when providing social rights services, taking into account both investment and human rights obligations of the state, which the investor should have known when entering into the investment?

- What type of stability can the investor legitimately expect when providing social rights services, taking into account both the investment and human rights obligations of the state, which the investor should have known when entering into the investment?

- What promise from a host state can an investor legitimately expect when providing social rights services, taking into account both the investment and human rights obligations of the state, which the investor should have known when entering into the investment?

The Chapter proposes a method for systemic integration and demonstrates that it is possible to integrate human rights rules with some of the various meanings of legitimate expectations. The author proposes a 7-step method of interpretation, which can be used by investment tribunals to systemically integrate human rights and investment norms.

The Chapter responds affirmatively to the other two remaining research questions: human rights law limits the legitimate expectations of an investor when investing in the provision of social rights services; and rules such as progressive realisation should be used as interpretative tools to determine the scope and content of an investor legitimate expectations.

The Chapter ends with an acknowledgment of the limitations that, given the current practice of investment arbitral tribunal, the proposal for an interpretative-integration approach can have. For such purposes, the Chapter provides four examples of different types of new treaty clauses that could be incorporated into investment treaties to ensure that a more harmonious interpretation of investment and human rights law is achieved.

f) Chapter VII. Conclusions

The conclusion of this thesis is clear: there is no inherent normative conflict between investment law and human rights law. Rather, there is a lack of willingness and effective methods of ensuring investment is interpreted in a way that takes human rights norms into account. If social rights services are to be privatised and placed in the hands of foreign investors, then investment tribunals necessarily need to take into account that such services are also regulated by international human rights law, under which the state has clear obligations to act.

The concluding Chapter reiterates the findings of this thesis. This is, that legitimate expectations can indeed be made compatible with the inherent obligations attached to social rights. Through an interpretative-integration approach, investment rules can be read through the lens of human rights norms, allowing for a more effective and coherent mechanism of interpretation.

Chapter II
From fragmentation to integration

I. Introduction

International law is made up of diverse norms, regulating a large range of subjects such as the environment, trade, financial markets, armed conflict, airspace, the sea, human rights, and so on. Such diverse regulation has created special or distinct fields within international law, which has been a response to the complexification of our global society.[47] For years, academics from around the world have addressed the question: is international law a system?[48] Or is it just a set of distinct and self-contained rules? An international investment tribunal, for example, might have to take into account international human rights law – or not – depending on how you answer such question. The answer to this question is fundamental for the general scope of this research.

[47] Anne Peters, The refinement of international: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law Vol.15 issue 3 (2017) At 702.

[48] Musa Njabulo Shongwe, The Fragmentation of International Law: Contemporary Debates and Responses, The Palestine yearbook of international law 19.1 (2020); Mads Andenas and Eirik Bjorge, *A Farewell to Fragmentation: Reassertion and Convergence in International Law*, Cambridge University Press (2015); Pierre- Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International InvestmentLaw and Human Rights Law' in *Human Rights in International Investment Law and Arbitration* edited by Editedby Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni, Oxford University Press (2009); Harlan Grant Cohen, From International Law to International Conflict of Law: The fragmentation of Legitimacy,Proceedings of the Annual Meeting (American Society of Internal Law) Vol.104, International Law in a Time ofChange, (2010); Gerhard Hafner, Pros and Cons Ensuing from Fragmentation of International Law, Mich. J.Int'l L. (2004); Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', Leiden Journal of International Law, 22 (2009); Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', Michigan Journal of International Law Vol25 (2004); Anne Peters, The refinement of international: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law Vol.15 issue 3 (2017); Adamantia Rachovitsa, Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights, Leiden Journal of International Law (2015); Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization*, Oxford University Press (2012); Anne van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection', University of St. Gallen Law School – Law and Economics Research Paper Series (2008); Siobhán McInerney-Lankford, "Fragmentationof International Law Redux: The Case of Strasbourg." Oxford Journal of Legal Studies 32.3 (2012).

The diversity within international law, the distinct fields, has had an effect in the way we perceive international law today. The phenomenon of fragmentation is arguably one of the greatest consequence; a phenomenon with a negative connotation, of 'something [that] is splitting up, falling apart.'[49]

Fragmentation is commonly used to refer to the division or 'slicing up' of international law 'into regional or functional regimes that cater for special audiences with special interests and special ethos'[50] We no longer refer to international law in general, but also to subfields such as international investment law, international humanitarian law, international trade law, international environmental law, international criminal law, international human rights law, and so on. The regulations and interactions – or lack of interactions – between these different subsystems, regimes, or areas of international law creates this phenomenon of fragmentation. Where did it come from? Is it a problem? And if so, is there a solution?

The concern over the fragmentation of international law arises from the 'horizontal' nature of the international legal system.[51] This is, the lack of a hierarchical relationship between norms in international law – trade, human rights, investment – and of their different sources (treaty, custom, general principles of law). Fragmentation, hence, is the result of a 'conscious challenge to the unacceptable features of that general law and the powers of the institutions that apply it.'[52] A clear result is the creation of regional human rights treaties and institutions,[53] (the

[49] Bruno Simma, Universality of International Law from the Perspective of a Practitioner, EJIL (2009) At 270.
[50] M. Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) I European Journal of Legal Studies, at 4.
[51] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August2006 Paragraph 24.
[52] Martti Koskenniemi, The Fate of Public International Law: Between Technique and Politics, The Modern Law Review, Vol.70 (2007) At 19.
[53] The European Convention on Human Rights, which created and enables the European Court of Human Rights;the American Convention on Human Rights, which created the Inter-American Court of Human Rights and enables part of the work of the Inter-American Commission on Human Rights; and the African Charter on Human and Peoples' Rights, which created and enables the African Commission and Court of Human and Peoples' Rights.

European Court of Human Rights, the Inter-American Court of Human Rights, for example) as the international framework did not originally guarantee a single human rights adjudicative body.

There are different taxonomies of fragmentation, such as: a) functional fragmentation; b) regional (geographical) fragmentation; c) institutional fragmentation (different objectives, organisations, bodies, courts); and d) ideational fragmentation (different objectives and values).[54] It is within such functional fragmentation that we find special regimes such as international investment law and international human rights law. As I develop further below, some have argued that these distinct areas of international law are isolated from one another, as they have created autonomous rules and institutions with specific characteristics. These are the so-called self-contained regimes.[55] Their real autonomous nature, however, is contested.

Fragmentation can be perceived as a threat to coherence of international law. The use of special rules and institutions can deepen such fragmentation.[56] International law, however, also provides some of the answers to ensure a degree of coherence, most importantly through the principle of systemic integration, codified in article 31(3)(c) of the Vienna Convention of the Law of Treaties.[57]

[54] Anne Peters, The refinement of international: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law Vol.15 issue 3 (2017) At 675.
[55] Bruno Simma and Dirk Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law,The European Journal of International Law Vol 17 no3 (2006).
[56] Anne-Charlotte Martineau, The Rhetoric of Fragmentation: Fear and Faith in International Law, Leiden Journal of International Law, 22 (2009) At 8-9.
[57] See International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006.

All this discussion is fundamental in order to understand the potential convergence or contradictions between international investment law and international human rights law. Understanding the phenomenon of fragmentation, the notion of self-contained regimes, and the principles of *pacta sunt servanda* and systemic integration are key to responding the overall research question of this thesis.

To achieve this, the Chapter starts (Section II) with an explanation of the concept of conflict of laws in public international law, which is best exemplified when a state has to breach its obligations in treaty X to comply with obligations in treaty Y. The section demonstrates how there is a presumption against normative conflict in international law, fundamentally centred on the principle of *pacta sunt servanda*. This presumption against normative conflict is fundamental to understanding the relationship between international investment law and international human rights law. This section provides some of the core theoretical foundations that underpin the model of systemic integration of international investment law and international human rights law in this thesis. In other words, if *pacta sunt servanda* requires a presumption against conflict, it is argued here that investment rules in the context of privatised social rights services need to be interpreted in a way that do not undermine international human rights rules.

Section III discusses further the fragmentation of international law, and specifically, the notion of self-contained regimes. It therefore explores how different areas of international law are to be understood as either completely autonomous or as part of a coherent body of law. For such purposes, it focuses part of its attention on how the principle of systemic integration ultimately provides the overarching legal tool to ensure how to avoid any conflict of law and isolation within the sub-fields of international law. The final part of Section III briefly elaborates on the

idea of fragmented communities. This is, an understanding than when we talk about international law and its different areas, we are also talking about the community of people (lawyers, arbitrators, judges, academics) that make, interpret, decide, or research the law. Based on all the considerations explained in the conflict of laws and fragmentation Sections, this sub-section attempts to shed light into how the issue of alleged normative clash between investment and human rights is – at least partially –a consequence of the way the community of professionals who operate in these fields (in particular investment arbitrators) interpret the law.

The final Section (IV) analyses some of the ways in which different areas of international law have interacted. By analysing the relationship of international investment law and international human rights law, the Chapter categorises three different approaches to such interactions: i) the isolationist approach (laws of other fields should not be taken into account in the determination); ii) the hierarchical approach (human rights always taken precedence); iii) the systemic integration approach (laws between different fields need to be read harmoniously). This Section is supplemented by a brief analysis of the relationship between international human rights law and international humanitarian law, and the approximation to systemic integration that human rights courts have had to such interaction. While this is not the focus of this research, the analysis presented provides some insight into how to improve the mechanisms and mythologies of systemic integration between investment law and human rights law.

Overall, the Chapter concludes that systemic integration is an important tool for the integration of human rights rules within international investment law, but it is also an incomplete tool. What is needed is a more advanced and refined methodology to ensure that protections afforded in international investment law do not impede states from fulfilling their human rights obligations. As will be demonstrated in the rest of the research, this thesis aims to add to that

methodological toolbox by developing a framework to integrate social rights into the framing of investors legitimate expectations.

II. Conflicts and promise

Are international investment law and international human rights law inherently contradictory or in conflict? Are they two distinct and self-contained regimes or do they form part of the overall structure of international law? Answers to these questions are of essential importance if one is to argue for the potential systemic integration of investment and human rights law. The theoretical underpinnings of international law, in particular the notion of 'conflict of laws' and the principle of *pacta sunt servanda*, provide mechanisms for addressing the relationship between these distinct fields of international law.

This notion of conflict between norms has traditionally been understood as arising only when a party to two treaties 'cannot simultaneously comply with its obligations under both treaties.'[58] A modern definition of conflict of law in international law could be understood as: '[t]here is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated.'[59] This is critical when reflecting on the relationship between investment and human rights law. A conflict of norms would exist if a state cannot, for example, satisfy a specific norm of international investment law (such as fair and equitable treatment) without breaching a norm of international human rights law (the obligation to progressively realise economic, social, and cultural rights, for example).

[58] C Wilfred Jenk, 'The Conflict of Law-Making Treaties', The British Yearbook of International Law (1953)
[59] Erich Vranes, The Definition of 'Norm Conflict' in International Law and Legal Theory, The European Journalof International Law (2006) at 418.

The International Law Commission (ILC) has indicated – in what it calls a situation of incompatibility – that 'conflict exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule. An obligation may be fulfilled only by failing to fulfil another obligation.'[60] Hence, the incompatibility of contents is an essential condition for there to be conflict.[61] There is no conflict – Jenks argues – if there is a possibility of complying with an obligation set forth in one treaty by 'refraining from exercising a privilege or discretion accorded by another.'[62] This notion is reinforced in the cases where different treaties are agreed between the same parties, as one could assume that they are meant to be consistent with each other.[63]

Simma has argued that states are the main creators of rules in the international legal order, so they must be aware of the 'need for coherence of the international legal system as a whole.'[64] Although treaties might be ratified by states, the process of negotiation and drafting might be led by different persons within a state – investment agreements being negotiated by members of the Ministry for Economic Growth vs human rights treaties being negotiated by the members of the Ministry of Foreign Affairs, for example. However, the state is only one; therefore, in the event of tension between treaties, there must be a presumption against conflict.[65] The ILC builds further on this presumption, stated that '[t]reaty interpretation is diplomacy, and it is the

[60] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, paragraph 24.
[61] Wolfram Karl, Conflicts Between Treaties, in R. Bernhardt (ed) *Encyclopaedia of Public International Law*, vol.7 (1984) At 468.
[62] Jenks, 'The conflict of Law-Making Treaties', 29 British Yearbook of International Law (1953) at 425
[63] Gabrielle Marceau, WTO Dispute Settlement and Human Rights, EJIL (2002) At 792.
[64] Bruno Simma, Universality of International Law from the Perspective of a Practitioner, EJIL (2009) At 271.
[65] Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', Michigan Journal of International Law Vol25 (2004) At 907.

business of diplomacy to avoid or mitigate conflict. [Hence,] there is a strong presumption against normative conflict.'[66]

Not all agree in the presumption against conflict, as some have argued that, given the way international norms are created, it is possible for states to make contradictory commitments.[67] Hence, to 'presume coherence in the intent of the state [,] would fly in the face of reality. Therefore, in international law it is conceptually entirely possible for norms conflicts to exist that are both unavoidable and unresolvable.'[68]

However, conflict of norms can be the result of interpretation, not because of the wording a treaty but because of the practice of interpretation. Such conflict might not be evident, as a tribunal or a court might not directly indicate that there is a conflict or contradiction, but the results of its findings might result in a conflict. For example, arbitral tribunals have concluded in the past that 'human rights obligations and investment treaty obligations are not inconsistent, contradictory, or mutually exclusive' and therefore states need to 'respect both type of obligations.'[69] While tribunals such as *Suez* have articulated such positions, however, they have also interpreted the fair and equitable treatment standard (and the legitimate expectations of the investors) in a way that impacts the human rights obligations of a state.[70] So while the tribunal

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[66] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, paragraph 37.

[67] See for example, Luis Eslava and Sundhya Pahuja, Between Resistance and Reform: TWAIL and the Universality of International Law, Trade, Law and Development, (2011), At 108.

[68] Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', Duke Journal of Comparative and International Law (2009) at 75.

[69] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine, Decision on Liability 30 July 2010, paragraph 262.

[70] The tribunal indicated that "Argentina and the *amicus curiae* submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either inthe BITs or international law. Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.Thus, as discussed above, Argentina could have respected both types of obligations. Viewing each treaty as a whole, the Tribunal does not find that any of them excluded the defence of necessity. Therefore Argentina must be deemed to

indicated that the state could have found a way in which it complied with its investment obligations and its right to water obligations, it read these two areas of law as if they were entirely isolated from each other.

The above is important to emphasise as a presumption against conflict does not mean that there cannot exist contradictory commitments. Presuming against conflict rather implies that the decision-maker must interpret that the will of the state was actually not intended to create contradictory obligations and results. This is grounded in the principle of *pacta sunt servanda*. Acting within the overarching framework of international law requires arbitrators to pay attention to the principle of *pacta sunt servanda*, particularly as this is the main basis of the presumption against normative conflict.

Pacta sunt servanda has constituted 'since times immemorial the axiom, postulate and categorical imperative of the science of international law.'[71] The norm is a corner stone of international law, and the International Law Commission has very clearly stated, 'states cannot contract out from the *pacta sunt servanda* principle.'[72] This is based on the reasoning that norms that are legitimately created must be kept, and they must be obeyed. *Pacta sunt servanda*

have satisfied the third condition for the defence of necessity. paragraph 262.

[71] Josef L. Kunz, The Meaning and the Range of the Norm Pacta Sunt Servanda, The American Journal of International Law' (1945) at 180

[72] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, par.176

admits no exceptions.[73] Without the rule of *pacta sunt servanda* '[i]nternational law […] would be a mere mockery.'[74]

So, what does the principle imply? *Pacta sunt servanda* translates to the idea that states seriously intend to 'keep their word' in a particular policy area.[75] In simple terms, if states ratify treaties in good faith, then they must be presumed to intend to comply with them. The rule of *pacta sunt servanda* is prominently codified in article 26 of the VCLT, which stipulates that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.' To comply with one's obligations has also been historically understood as a mechanism to ensure stability in the legal relations between states, as Grotius recognised the importance '[t]o respect scrupulously the faith given in the foundation of States and of the grand community of nations.'[76]

The implication of the principle is that states would not commit themselves to contradictory obligations. In other words, by accepting one obligation a state is not expressly rejecting another that continues to be valid (without denunciation this is). The principle is critical when interpreting broad and vague protections, as they are susceptible to different interpretations. One interpretation could lead to the norms found in different treaties becoming contradictory; a different interpretation could avoid such contradictions. *Pacta sunt servanda* calls for this latter type of interpretation, one that aims to avoid normative clashes.

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[73] Josef L. Kunz, 'The Meaning and the Range of the Norm Pact Sunt Servanda', The American Journal of International Law' (1945) At 181, 197

[74] Mixed Claims Commission United States-Venezuela, 17 February 1903, at 255

[75] Beth A. Simmons and Daniel J. Hopkins, The Constraining Power of International Treaties: Theory and Methods, American Political Science Review (2005) At 623

[76] As quoted in Andreas R. Ziegler and Jorum Baumgartner, 'Good Faith as a General Principles of (International) Law' in Good Faith and International Economic Law, edited by Andrew D Mitchell, M. Sornarajah and Tania Voon, Oxford University Press (2015) At 18

To further these arguments, Poulsen argues that contradictory commitments might be irrelevant as a matter of law as '[w]hen adjudicating disputes in the investment regime or elsewhere, international dispute resolution bodies will have to assume that governments knew the implications of their actions when signing up to international obligations. In the absence of outright imposition, ratified treaties are binding upon states whether they like it or not.'[77] However, he further argues that one should be less forceful in one's assumptions about the intent of very vague and broad provisions, such as the fair and equitable treatment standard.[78] This is critical for norm conflict, as vague definitions can indeed be subject to interpretations that lead to normative clashes or contradictions, which would not have necessarily been predicted when the treaty was ratified. This is particularly important for treaties that were ratified before protections such as legitimate expectations were developed by arbitral interpretation, and not found in the text of investment treaties.

Conflicting commitments normally only arise in concrete cases, mostly in international dispute resolution.[79] As such, the ILC has indicated that it 'may often be possible to deal with potential conflicts by simply ignoring them. It is still possible to reach the conclusion that although the two norms seemed to point in diverging directions, after some adjustment, it is still possible to apply or understand them in such way that no overlap or conflict will remain.'[80] Such adjustment is possible, if the interpreter (an investment tribunal for example) consciously attempts to interpret vague and broad norms in a way that does not directly contradict another norm of international law.

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[77] Skovgaard Poulsen LN, *Bounded Rationality and Economic Diplomacy: The Politicsof Investment Treaties in Developing Countries*, Cambridge University Press (2015) at 192-193.
[78] Ibid, at 193
[79] Anne Peters, The refinement of international: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law Vol.15 issue 3 (2017) At 676.
[80] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August2006, paragraph 43.

Given that the conflict of laws is normally a conflict of interpretation – and potentially implementation – Peters has argued that what is needed is 'a continuous improvement of the strategies of coordination of different legal fields and levels of law, a refinement of the techniques for the avoidance of conflict.'[81]

The coordination of such rules is imperative if we want to conceive international law as a coherent system. States – as the major actors of international law – must be aware of the need for coherence in the international realm, and tribunals must interpret and apply such rules bearing in mind that they are 'acting within an overarching framework of international law.'[82] As explained, this is arguably a natural consequence of the principle of *pacta sunt servanda*, as it must be presumed that states have committed to rules without the intention of contradicting them.

However, some are critical of *pacta sunt servanda*. Zhifeng, for example, argues that *pacta sunt servanda* could be employed as a seemingly neutral principal to secure the binding force of treaties but attention needs to be placed on the potential coercion or pressure a state might have had to enter a treaty.[83]

In relation to international investment law, Zhifeng argues that some coercive conditions existed, in which some developing states were pressured to agree to investment treaties as a condition to access loans from international financial institutions.[84] Further, the International

[81] Anne Peters, The refinement of international: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law Vol.15 issue 3 (2017) At 685.
[82] Bruno Simma, Universality of International Law from the Perspective of a Practitioner, EJIL (2009) At 271.
[83] Jiang Zhifeng, Pacta Sunt Servanda and Empire: A Critical Examination of the Evolution, Invocation, and Application of an International Law Axiom, Michigan Journal of International Law (2022), at 758.
[84] Ibid, at 782

Monetary Fund also conditioned aid on the existence of investment treaties, and the World Bank conditioned its loans on the assurances that investor-state dispute settlement mechanisms were put in place.[85] Under such premise, investment treaties were concluded under conditions characterised by 'subtle forms of coercion exercised not only by states, but also by a different international law subject, namely, international financial institutions.'[86]

Overall, Zhifeng argues that while *pacta sunt servanda* is necessary for the existence of an international legal order, it presumes a particular normative conception of the international community that is to some degree free from coercion.[87] In other words, *pacta sunt servanda* assumes that states were truly free when they committed themselves to follow a particular norm of international law. However, and of fundamental importance for this thesis, Zhifeng himself argues that despite such connotations, states should not abandon *pacta sunt servanda* as a primary rule of international law.[88] What is therefore required is a 'critical attentiveness and engagement with the normative underpinnings of the legal orders and economic regimes whose stability and legitimacy *pacta sunt servanda* is applied, employed, and invoked to secure [as the] purpose of international law is not merely to regulate relationships between states in the abstract, but also between the persons who belong to them.'[89]

Such critical reflection of the principle of *pacta sunt servanda* requires to understand the different international commitments as whole, not in isolation. This is, investment norms should not be read without taking into account all other international legal obligations of a state, particularly those related to human rights. Although the current rules of international law

[85] Ibid, at 783
[86] Ibid, at 786-787
[87] Ibid, at 800
[88] Ibid, at 801
[89] Ibid

do not accept these forms of coercion postulated by Zhifeng as an excuse for non-compliance, interpreters should pay careful attention of what other norms have a state committed itself to and for what reasons. A state that had committed itself to investment treaties – coerced or not – and had also freely committed to various human rights treaties, did not necessarily intend for investment norms to take priority over human rights. The axiom of *pacta sunt servanda* means that both are valid, and therefore, both required to be read in harmony and not in conflict. It might well be, however, that the international community might want to create in the future potential reforms to the Vienna Convention on the Law of Treaties to ensure that states that considered they were 'coerced' to agree on a treaty have new standards of necessity defence and effective mechanisms for short denunciations are put in place (this is, in contract to current long period of investment treaties denunciations). This, however, is not the scope of the current research, for which much more extensive research and reflection is required.

As will be demonstrated in this thesis, *pacta sunt servanda* should play a particularly critical role in the interpretation that is afforded to broad and open-ended protections. This is because some protections afforded in investment have not been articulated in treaties with any exact or precise meaning. What constitutes fair and equitable treatment and what constitutes legitimate expectations (as will be discussed in Chapter V), is incredibly comprehensive. However, the immense majority of investment treaties say nothing about legitimate expectations, and very little about what constitutes fair and equitable treatment. On the other hand, international human rights treaties are precise in their formulation that social rights, for example, are conditioned to be progressively realised and that states are demanded to take measures to continuously improve the enjoyment of such rights (as discussed further in Chapter III). Seeking coherence and avoiding normative clashes – in this context – demands tribunals to not

interpret broad and imprecise investment legal protections in direct contradiction with the well agreed and more precise obligations found in international human rights laws.[90]

III. The legal Frankenstein

International law is a complex web of rules, created at times for different purposes. As explained in the introduction of this Chapter, this leads to the phenomenon of fragmentation. If *pacta sunt servanda* requires a presumption against conflict, then mechanisms need to exist for these diverse areas of law to be read coherently without contradicting each other. This Section centres its focus on this issue, by looking first at the theoretical debates of self-contained regimes and later addressing the principle of systemic integration.

The issue of the fragmentation of international law has been at the 'forefront of academic debate and the practice of international courts and tribunals'[91] during the last two decades. Fragmentation is a framework often used to understand the transformation of the international world, suggesting that 'where once there was unity, there is now a splintered and fractured world.'[92] Hence, the term has had a predominantly and historically negative connotation, and is used in a pejorative manner, versus more positive terms – such as diversity, specialisation,

[90] As will be exemplified in Chapter III, not only are obligations such as progressive realisation more precise in the wording within human rights treaties – such as in the International Covenant on Economic, Social, and Cultural Rights – but the evidence from the *travaux preparatoires* clearly demonstrates the desire and rationale from statesto impose upon themselves obligations that required continuous state effort. See Chapter III, Section III.a

[91] Adamantia Rachovitsa, Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights, Leiden Journal of International Law (2015)At 863

[92] Martti Koskenniemi, Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, Harvard University, Keynote Speech, 05 March 2005. At 2

or pluralism.[93] To invoke fragmentation – under such negative connotation – is to evoke an 'image of chaos.'[94]

Koskenniemi – who has been at the forefront of the debate on the fragmentation of international law – has argued that fragmentation or unification is a matter of narrative and perspective, as what 'from one angle looks like a terribly distorted and chaotic image of something, may from another appear just as a finely nuanced and sophisticated reflection of a deeper unity.'[95] Hart, for example, quite famously argued that international law presented no unity whatsoever, as he saw international law as a set of rules which constitute not a system but a simple set. Hafner has argued, on the other hand, that although international law lacks 'comprehensive organization,' this does not mean it can be described as an 'unorganized system.'[96] For Crawford, it suffices to regard 'international law in the modern period as providing a formal structure, based on sovereignty, negotiation and consensus, on which we are building in a variety of ways.'[97] These different approximations and understandings of international law are critical for the integration of investment law and human rights law.

The following sections explore the debates about how different areas of international law are to be understood as either distinct and unrelated, or as part of a coherent body of law. It further argues how the principle of systemic integration, codified in the Vienna Convention on the Law of Treaties, provides the overarching legal tool to ensure how to avoid any conflict of law.

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[93] Anne Peters, The refinement of international: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law Vol.15 issue 3 (2017) At 672-673; See also Bruno Simma, Universality of International Law from the Perspective of a Practitioner, EJIL (2009) indicating how the term hasbeen used to describe a legal order that is 'falling apart.' At 270

[94] Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', Leiden Journal of International Law, 22 (2009) At 4

[95] Martti Koskenniemi, Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, Harvard University, Keynote Speech, 05 March 2005, At 4

[96] Gerhard Hafner, Risks Ensuing from the Fragmentation of International Law, at 321

[97] James Crawford, International Law as an Open System (2002) at 28

a) Self-Contained regimes

One way of conceiving this fragmented international legal order is as a set of self-contained regimes. Self-contained regimes are fields of functional specialisation – formed by norms, lawyers, diplomats and academic expertise – which have special rules and techniques of interpretation and administration.[98] Traditionally, these self-contained regimes operated in 'virtual isolation from each other.'[99] Some argue, that one of the major reasons for such isolation was how the post-World War II international legal framework and its institutions were conceived, with the Bretton Woods institutions (World Bank, IMF and GATT, now WTO) focused on the world's economic problems, and the United Nations institutions focusing on the world's political problems.[100]

However, as Simma and Pulkowski have argued, the 'notion of self-contained regimes has been misconceived as an argument in favour of entirely autonomous legal subsystems. This is mostly related to a lack of a uniform terminology, to which various levels of autonomy within the fields of international law have been associated with the term 'self-contained regime.'[101] Simma and Pulkowski further argue that '[s]ocial systems cannot exist in splendid isolation from their environment. Legal subsystems coexisting in isolation from the remaining bulk of international law are inconceivable. There will always be some degree of interaction, at least

[98] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August2006 Par.129
[99] Joost Pauwelyn, Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands, Michigan Journal of International Law Vol25 (2004) At 903
[100] Ibid
[101] Bruno Simma and Dirk Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law,The European Journal of International Law Vol 17 no3 (2006) At 491

at the level of interpretation.'[102] Hence, the term 'should not be used to circumscribe the hypothesis of fully autonomous legal subsystems.'[103]

Based on the above considerations, in a decision before the International Court of Justice Judge Greenwood highlighted that 'International Law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others. It is a single unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.'[104]

Trade, human rights, the environment, investment, are not areas of exclusive domain, as if they do not interact or overlap to a certain degree. This increased dependency between actors of international law and such 'issues-areas', make a strict separation between the fields of international law essentially artificial.[105] If a foreign investor's oil platform spills, in the middle of a forest, next to a tribal community, is this exclusively an international investment law issue? Is it an issue of environmental law? Is this a human rights law problem? It will be an issue for all three areas described above but within the parameters of such law. What will be essential, however, is that the conclusions of the specialised adjudicative mechanism of each field do not arrive to contradictory conclusions, as it can undermine the overall coherence of international law. To this issue we focus our attention next.

[102] Ibid, At 492
[103] Ibid
[104] ICJ, Ahmadou Sadio Diallo (Republic Guinea v Democratic Republic of Congo) (compensation owned by the Democratic Republic of Congo to the Republic of Guinea), Judgment, 2012 ICJ, Rep 324 (June 19, 2012), Declaration of Judge Greenwood, paragraph 8
[105] Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', Michigan Journal of International Law Vol25 (2004) At 903

However, it is important to emphasise that an understanding of self-contained regimes, as completely insulated or autonomous areas of international law, is *per se* inconceivable. While indeed there are various different specialised legal regimes, with their own specialised adjudicative mechanisms, this does not equate to completely autonomous systems. *Pacta sunt servanda*, once again, plays an important role is conceiving international law as a unitary system and not as autonomous areas. This is because the presumption against conflict that *pacta sunt servanda* implies should necessarily call for all specialised systems to take into account other areas of law, to ensure that states do not have contradictory commitments. Specialisation or fragmentation, *ergo*, should not be confused with absolute autonomy or isolation. As will become evident in remaining of this Section, the principle of systemic integration in international law, which calls for different areas of law to be interpreted harmoniously, ultimately denies the notion of specialised regimes as completely autonomous self-contained regimes. As specialised areas of international law cannot be considered 'self-contained,' as will be discussed across this thesis, the harmonious interpretation of investment law and human rights law is then an imperative.

b) Coherence

Fragmentation – or at least its results – is considered by Simma to be a challenge to the coherence of international law, undermining its global validity and applicability.[106] This is why Peters also argues that 'at the bottom of the fragmentation debate lies a concern for a loss of legitimacy of international law, a loss which will ultimately threaten that law's very existence.'[107]

[106] Bruno Simma, Universality of International Law from the Perspective of a Practitioner, EJIL (2009) at 269
[107] Anne Peters, The refinement of international: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law Vol.15 issue 3 (2017) At 680

For this research, as explained in the introductory Chapter of this thesis, it is important to highlight that the overall goal of international human rights law and international investment law is to set rules for how states are expected to behave with respect to private parties. This is partly why Simma argues that international investment law and international human rights law are truly 'not as foreign to each other as some make it appear.'[108] How to make them less foreign to each other in practice?

One of the main tools available in international law – although incomplete – is that of the principle of systemic integration. We have seen above that the principle of *pacta sunt servanda* implies that if contradictory norms exist, then an interpretation must be made to ensure that such norms do not contradict each other. Of course, the difficulty with the international legal order is that a tribunal might be asked to apply a rule – within its sub-system – that needs to take into account a rule from another sub-system. International tribunals have developed over time tools that cope with the 'undesirable aspects of fragmentation […] and [they] appear to employ [them] in full awareness of these challenges on a regular basis.'[109] Regardless of the negative consequences of the different regimes in international law, what is important to stress here is that 'the tools needed to secure the coherence and integration of the diverse international law of today are all at hand.'[110] This is where I now move our attention: to the principle of systemic integration.

[108] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', International and Comparative Law Quarterly (2011) at 576
[109] Bruno Simma, Universality of International Law from the Perspective of a Practitioner, EJIL (2009) At 297
[110] Mads Andenas and Eirik Bjorge, *A Farewell to Fragmentation: Reassertion and Convergence in International Law*, Cambridge University Press (2015), at 12

c) Systemic Integration

In 1957, the International Court of Justice stressed that '[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.'[111] As norms are created in good faith, and as they belong to the realm of international law as a system, then the system must provide a way to reconcile them.[112]

The principle of systemic integration is codified in article 31(3)(c) of the Vienna Convention of the Law of Treaties. The Convention reads that: '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose […] (3) There shall be taken into account, together with the context: […] (c) any relevant rules of international law applicable in the relations between the parties.'[113]

The principle thus implies that if an investment tribunal is to apply the rules set forth in an investment treaty, it must do so taking into account all the international legal obligations that a state has, regardless of whether or not they form part of what can be called the realm of international investment norms and principles; for example, international human rights norms. However, the principle does not expressly indicate how rules can be applied together, as it only recognises that the normative environment must be taken into account.[114] This is why some jurists have stated that the principle is 'far from being a panacea for fragmentation,'[115] as it

[111] ICJ, Right of Passage over Indian Territory (Portugal v India), Preliminary Objections, (1957) at 142
[112] Harlan Grant Cohen, From International Law to International Conflict of Law: The fragmentation ofLegitimacy, Proceedings of the Annual Meeting (American Society of Internal Law) Vol.104, International Lawin a Time of Change, (2010) At 49
[113] Vienna Convention of the Law of Treaties (1969) article 31(3)(c)
[114] Eric De Brabandere and Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in in Good Faith and International Economic Law, edited by Andrew D Mitchell, M. Sornarajah and Tania Voon, Oxford University Press (2015) At 52
[115] Bruno Simma, Universality of International Law from the Perspective of a Practitioner, EJIL (2009) At 277

does not provide a guidance on how different norms must be applied coherently and harmoniously together.

In its extensive report on fragmentation, the ILC expressed that '[t]he point is only - but it is a key point - that the normative environment cannot be ignored and that when interpreting the treaties, the principle of integration should be borne in mind. This is all that article 31 (3) (c) requires; the integration into the process of legal reasoning - including reasoning by courts and tribunals - of a sense of coherence and meaningfulness.'[116] The ILC, hence, categorises the principles as the 'master key of the house of international law,' given that if there is a 'systemic problem - an inconsistency, a conflict, an overlap between two or more norms - and no other interpretative means provides a resolution, then recourse may always be had to [such principle].'[117]

An important difference that the ILC highlighted in its report was the difference between the laws a tribunal has jurisdiction to apply – an investment arbitral tribunal which only has jurisdiction to determine breaches of an investment treaty, investment contract or a domestic foreign investment rule – and the law that it was able to interpret from. The ILC further elaborates by explaining that:

> […] all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may onlyhave jurisdiction in regard to a particular instrument, it must always interpret and applythat instrument in its relationship to its normative environment - that is to say 'other' international law.[118]

[116] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, Par.419
[117] Ibid, Par.420
[118] Ibid, Par. 423

The ILC is very clear on the above, further stressing that, '[a] limited jurisdiction does not [,] imply a limitation of the scope of the law applicable in the interpretation and application of those treaties.'[119]

The principle of systemic integration does not provide all the answers. As explained in the introduction of this thesis, further methodological tools to integrate areas such as international human rights law and international investment law need to be developed. As we will see later, and demonstrated in Chapter VI, by using what the author calls an interpretative-integration approach and a 7-step methodology of interpretation, international human rights law and international investment law could be read coherently.

To take us back to the title of this section, by the end of the 1990s, Georges Abi-Saab famously called the phenomenon of fragmentation of international law a 'legal Frankenstein.'[120] Although he did not provide with much explanation on the reasons that lead him to refer to fragmentation as a monster, a simple glimpse at the story written by Mary Shelley might give us some insight.[121] International law – as is the monster created by Dr. Frankenstein – is made up for a series of random parts, of different origins and backgrounds, which presumably don't truly match each other. However, like Frankenstein's monster, the body works, it moves forwards, and its different parts interact. To make this work well and harmoniously, further work – as the one presented in this thesis – is still needed.

[119] Ibid, Par. 45
[120] Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', International Law and Politics (1999) at 926
[121] Mary Shelley, *Frankenstein*, Lackington, Hughes, Harding, Mavor & Jones (1818)

d) A fragmented community

It is important to stress that that the history of fragmentation is also a story of professional specialisation.[122] This is based on the understanding that actually the issue of fragmentation of international law is a technical problem, a result of interpreting the rules within international human rights law, or international investment law, or international criminal law, in a way in which each legal community arrives to their own interpretation of the same set of norms.[123] We will see in some of the examples below how different institutions and tribunals have interpreted the rules of each sub-field of international law, and the relationship between them, in various different and even contradictory forms.

The International Law Commission stated that the 'widest of special regimes - denominations such as 'international criminal law,' 'humanitarian law,' 'trade law,' 'environmental law' and so on - emerge from the informal activity of lawyers, diplomats, pressure groups, more through shifts in legal culture and in response to practical needs of specialisation than as conscious acts of regime-creation. Such notions mirror the activities of particular caucuses seeking to articulate or strengthen preferences and orientations that seem not to have received sufficient attention under the general law.'[124]

These groups of lawyers, academics – communities – disagree on 'the very who and how of international law making, and as such, debated between these communities – between human rights and international humanitarian law, or between trade law and environmental law – often

[122] Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', Leiden Journal of International Law, 22 (2009) At 2
[123] Harlan Grant Cohen, From International Law to International Conflict of Law: The fragmentation ofLegitimacy, Proceedings of the Annual Meeting (American Society of Internal Law) Vol.104, International Lawin a Time of Change, (2010) At 49
[124] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, Par.158

represent debate over legitimacy'[125] and their international and domestic interpretation and their implementation, rather than actual norm contradictions.

After a detail and substantial research, Hirsh concluded that the socio-cultural distance of human rights and investment law can explain this fragmentation between the human rights and the investment regime. He indicates that factors such as different specialisation processes of human rights and investment lawyers result in dissimilar legal cultures and different views regarding the role of adjudicators. While human rights courts emerged out of a public paradigm, passionately protecting both individual rights and *erga omnes* obligations, investment tribunals have invariably operated under a private law framework and are established *ad hoc*.[126]

The problem with the fragmentation of international law has not been about the rules itself, as we have seen the meta-principles such as *pacta sunt servanda* and the rules of treaty interpretation in the Vienna Convention on the Law of Treaties are in place in order to ensure the coherence and unity of the legal system. It is then the interpreters of such rules, who have based their interpretations on their values and shared validity of knowledge. Each regime within international law spells out its own perspective of a vision of a global public interest,[127] but these visions might not be in harmony with the vision of another epistemic community. A further problem also lies in those who apply international rules at the domestic level, as given the complexity of the state apparatus, are reflected in different people working in different state

[125] Harlan Grant Cohen, From International Law to International Conflict of Law: The fragmentation ofLegitimacy, Proceedings of the Annual Meeting (American Society of Internal Law) Vol.104, International Lawin a Time of Change, (2010) At 49

[126] See Moshe Hirsh, Invitation to the Sociology of International Law, Oxford University Press (2015); Moshe Hirsh, The Sociology of International Law, in Z Douglas, J Pauwelyn and J.E. Vinoules (eds), The Foundations of International Investment Law: Binding Theory into Practice, Oxford University Press (2014)

[127] Gunther Teubner, Constitutional Fragments: Societal Constitutionalism in Globalization (2012) at 160

institutions, all working to satisfy the unique interest of their own area of law (trade, defence, human rights, environment, and so on). Here lies one of the problems.

This problem is critical to the practice of international investment law. As argued by Yackee, international investment law has been placed in the hands of:

> an exceedingly small pool of super-elite, like-minded international lawyers who operatelargely divorced from any municipal political process, who have shown a tendency to interpret the vague language of BITs expansively in favour of new customary international legal rights for investors, and who tend to view the current systems as butan intermediate stage in a process intended to lead, at their direction, to an eventual andcomplete global harmonisation of international economic law.[128]

The following Section of this Chapter demonstrates the reality and impact of this fragmentated community. Despite the overall rules of international law, very different interpretations as to how different areas of international law should interact have been produced. For example, proponents of an approach that would see human rights take priority over investment norms have been solely produced by human rights experts.[129] Proponents of an approach that considersthat human rights issues should not be considered within investment arbitration have been produced by investment arbitrators.[130] With no surprise, while some commentators have favouredsystemic integration, not much attention has been placed on how to make systemic integrationwork consistently for investment law and human rights law. The thesis attempts to demonstrate how, regardless of this fragmentated community, a systemic integration of investment and human rights is possible.

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[128] Jason Webb Yackee, Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality, Fordham International Law Journal (2008) at 1611

[129] As explained in further detail in Section IV.b of this Chapter, see Olivier De Schutter, A Human Rights Approach to Trade and Investment Policies, Confronting the Global Food Challenge (2008); Marko Milanovic, Norm Conflict in International Law: Wither Human Rights?, Duke Journal of Comparative& International Law, (2009)

[130] As detailed further in Section IV.a of this Chapter, see Arbitral decisions such as Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Submission of Non-Disputing Party Quechan Indian Nation, 16 October 2006. Further also commentators such as: Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?* (2005)

IV. Approaches to the interactions between areas of international law

As we have seen, international investment law and international human rights law forms part of the complex web of norms that public international law is made of. They cannot, and must not, be understood as completely isolated systems. However, different interpretations as to how they should interact have been produced.

This Section focuses its attention on these interactions. By exploring the way that human rights law and investment law, the author concludes that there are three different approaches:

a) The **isolationist approach**, developed by some investment tribunals, and which rejects the idea that human rights issues should be taken into account within the remit of investment law;

b) The **hierarchical approach**, developed mostly by human rights experts, and which argues that human rights should trump investment norms given their global hierarchical supremacy; and

c) The **systemic integration approach**, developed both in the context of investment law and human rights law, and human rights law and humanitarian law, and argues for the interpretation of one area of law while taking into account other areas of international law.

This Section will present each of these three approaches in turn. It will, ultimately, argue that systemic integration is the approach that is most consistent with the general rules of

international law, as detailed above. It also demonstrates that this approach, while still is need of further methodological development, provides the best way to ensure that both human rights norms and investment norms are respected.

The Section ends with a discussion with the approach to systemic integration developed within the context of international human rights law and international humanitarian law. While this relationship is not the focus of this thesis, the approach to systemic integration developed – particularly by the Inter-American Commission System of Human Rights protection – can provide some important learning on how to improve the systemic integration between investment law and human rights law.

a) The Isolationist approach

The first approach to dealing with situations in which different areas of international law overlap can be categorised as 'isolationist.' In relation to investment and human rights, this approach is grounded on the understanding that investment law and human rights law are two self-contained areas of international law and are not meant to interact or integrate in any way.[131] Therefore, as entirely autonomous legal subsystems, adjudicative bodies within each subsystem should only consider their own legal framework to determine complaints that have been raised.

As will be demonstrated in this Section, this first approach has been developed mostly by the practice of investment arbitration, rejecting the idea that human rights concerns might have any place within investment arbitration. As a means of justifying this approach, commentators argue that human rights treaties and investment treaties are different and unique, and although

[131] See for example Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?* (2005)

they might protect similar things, they are intended for different purposes. Using the right to property as an example, Paulsson argues that '[w]hile it is tempting to import notions from the international law of human rights dealing with deprivations of property and violations of due process, there can be no assumptions about the perfect correspondence between instruments devised for quite different purposes.'[132]

Based on a similar presumption, Nelson argues that there are also 'remarkable differences' in the protection of property under investment law and human rights law, including: i) different rules as to shareholder standing; ii) the protections available towards intangible property; and iii) the role played by domestic law in defining the concept of property.[133]

In addition to the arguments in relation to the mismatch of treaties, proponents of this approach also argue that the jurisdictional power or mandate of human rights courts and investment tribunals are separated very 'sharply.' In particular, the argument is that an investor-state tribunal might lack the power to determine an investor's claim that its human rights were breached.[134] However, as we will see in the systemic integration Section below, this argument fails to take into account that the lack of human rights jurisdiction of an investment tribunal does not limit its ability to interpret investment law taking into account international human rights law. As I will explain further below, a few tribunals have highlighted that although the jurisdiction of an investment tribunal might be limited, the applicable law – particularly the international investment treaty – must be read in line with all rules of public international law, including human rights law. This is also further incorporated in Article 42 of the Convention

[132] Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?* (2005)
[133] Timothy G Nelson, Human Rights Law and BIT Protection: Areas of Convergence, The Journal of World Investment and Trade, (2011) At 30
[134] Ibid

on Settlement of Investment Disputes between States and nationals of other States (ICSID Convention).[135] What is therefore important is to distinguish the jurisdiction of the tribunal and the law applicable to the dispute.[136]

The isolationist approach has been put into practice by several investment tribunals, which either reject that human rights obligations should be taken into account by the tribunal or avoid considering any human rights issue that has been raised.[137] For example, in the *Glamis Gold* case, an *amicus curiae* submission was filed by the Quechan Indian Nation which alleged that the tribunal was obliged to consider human rights given NAFTA's mandate that required the tribunal to consider 'applicable rules of international law' in deciding the dispute.[138] The Nation further argued that the tribunal was also required to apply article 31(3)(c) of the Vienna Convention of the Law of Treaties and, therefore, attempt to systemically integrate human rights into the investment law. However, the tribunal rejected the systemic integration approach, indicating that it was not for the tribunal to decide issues that were outside the scope of the dispute. The tribunal directly rejected the practice of other investment tribunals to take into account non-investment concerns as part of the dispute and 'argue[d] for it to confine its decision to the issues presented.'[139]

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[135] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington DC, USA, 14 October 1966, article 42

[136] See further analysis in Eric De Brabandere, 'Human Rights and International Investment Law', Grotius Centre Working Paper Series (2018) at 8

[137] SAUR International v. Argentine Republic (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability rendered on 6 June 2012; Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine, Decision on Liability 30 July 2010; Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008; Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Submission of Non-Disputing Party Quechan Indian Nation,16 October 2006

[138] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Submission of Non-Disputing Party Quechan Indian Nation, 16 October 2006

[139] Ibid

As argued by Karamanian, however, the case presents an interesting result. The overall conclusion of the tribunal – under purely investment terms – was that the regulatory measures implemented by the state to protect the rights of the Quechan Indian Nation did not breach any investment law protections, despite having rejected the human rights arguments presented in the amicus brief. Karamanian's argument is that the conclusion of the tribunal did indeed effectively protect the Nation's human rights, but the rationale for the result was based on investment principles and not human rights norms.[140] It seems that the tribunal might have been sensitive to the concerns raised but considered that it was not acceptable for an investment tribunal to a take human rights issues into consideration in its investment law analysis.

The *Biwater* tribunal, which related to the privatisation of water services in Tanzania, took a similar position to Glamis Gold, but it did not directly express that human rights norms should not be considered by the tribunal. The tribunal indicated that an *amicus curiae* had been submitted, which indicated that '[…] human rights and sustainable development issues are factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations as between the investor and the host State.'[141]

The tribunal indicated that it had found the third-party interventions 'useful' and that it would 'inform' its analysis in relation to the claims made.[142] However, no clear evidence of this is found in the Award. The tribunal's analysis of the acts and measures of the state are never analysed from the perspective of Tanzania's human rights obligations, particularly the right to water and the right to health. More surprisingly, beyond the quotes from the *amicus curiae* –

[140] Susan L. Karamanian, Human Rights Dimensions of Investment Law, in *Hierarchy in International Law,* edited by Erika De Wet and Jure de Vidmar, Oxford University Press (2012)
[141] Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008 para. 380
[142] Ibid, paragraph 392

and despite its content – the term 'human rights' is not found once in the Award. It is therefore not clear in which way the tribunal took into account the human rights argument and 'informed' its decision from that perspective. Although the Award did decide that the state had acted appropriately in some aspects, such determination was solely based in investment law rules and principles and not the wider *corpus iuris* of international law, including human rights.

The *Biwater* tribunal did, however, come to the conclusion that the fair and equitable treatment standard had been breached given that state authorities had publicly criticised the poor performance of the investor in the provision of water. This, the tribunal determined, had failed to 'manage the expectations of the public with regard to the speed of improvements to the [water] network.'[143] From a human rights perspective, the duty to protect (as I will explain in Chapters III and IV) requires state authorities to interfere when necessary, so public expressions of concern would be some of the bare minimum that a state can do.[144]

As critics of the isolationist approach have argued, the assumption that international investment law and international human rights law 'are wholly separate legal regimes is short-sighted and not well ground in fact.'[145] As we will see below, the relationship and overlap between these two areas of international law should not be ignored nor should they be read in isolation to each other. Decisions such as those by the *Suez* Tribunal, as described earlier in the Chapter (and discussed in extensive detail in Chapter IV), also approach the issue from an isolationist perspective, as it reaffirms that human rights law and investment law are not contradictory but

[143] Ibid, paragraphs 622-629

[144] On this aspect, the case is in general less controversial given that the tribunal concluded that despite the breaches to the bilateral investment treaty, none of such breaches had 'caused the loss and damaged for which [the investor] claim[ed] compensation, [and therefore] the only appropriate remedies for the Republic's conduct can be declaratory in nature." See Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008, paragraph 807

[145] Susan L. Karamanian, Human Rights Dimensions of Investment Law, in *Hierarchy in International Law,* edited by Erika De Wet and Jure de Vidmar, Oxford University Press (2012) At 250

rejects systemically integrating them within the context of the investment arbitration.[146] This is evident in other cases related to the privatisation of water, discussed as well in Chapter IV.

As argued by De Brabandere, the 'limited scope of jurisdiction of an arbitral tribunal does not imply that the tribunal cannot as a matter of principle consider human rights issues raised by either party as applicable law.'[147] As we will see in the Section on systemic integration below, what is essential here is to acknowledge that most investment treaties – if not all – would have recognised in their 'applicable law' clause of an investment agreement the applicability of the 'rules and general principles' of international law in a dispute between an investor and a host state.[148] One could argue, therefore, that the isolationist approach is ultimately flawed as there is no legitimate reason to 'exclude *ipso facto* human rights considerations *as a matter of applicable law*.'[149] Particularly, the isolationist approach does not seem to provide any justifications as to why, if all rules of international law are part of the applicable law of an investment dispute, should investment rules be read in isolation from human rights obligations. While those expressly subscribing to the isolationist approach are really in the minority, the problem lies in those who seem to accept the validity of systemic integration in principle, but in reality, fail to give effect to it in concrete examples (giving rise to a *de facto* situation of isolation). This is clear in the conclusions the *Suez* tribunal arrived at. While the tribunal did not deny that both areas of law are valid and do not contradict one another, the award resulted in an isolationist reading of investment law. In other words, the tribunal embraced the principle

[146] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona,S.A.and Vivendi Universal, S.A. v. Argentine, Decision on Liability 30 July 2010, paragraph 262

[147] Eric De Brabandere, Human Rights and International Investment Law, Grotius Centre Working Paper Series (2018) at 17

[148] See for example Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investment (1996) article X.7

[149] Eric De Brabandere, Human Rights and International Investment Law, Grotius Centre Working Paper Series (2018) at 17

of *pacta sunt servanda* (states are meant to comply with both areas of law) but adjudicated in a way that assessed investor rights in isolation from the state's human rights obligations.

b) The Hierarchical Approach

A second approach to the relationship of areas of international law is what the author categorises as a 'hierarchical' or 'human rights supremacy' approach. Developed mostly within the parameters of the relationship of investment and human rights, proponents of this approach consider that international human rights norms are uniquely placed within the international legal regime and should always take precedence.[150] Under this approach, if a tribunal is presented with the claim that a state conducted itself in a particular way in order to comply with its human rights obligations, and to do so it disregarded an investment protection, then the state should not be found responsible for breaching the investment protection.

This approach can be exemplified by Argentina's arguments in the *AWG* case related to the provision of water services. Argentina claimed that its human rights obligation to assure its population the right to water trumped its obligations under the applicable investment treaty and that, the existence of its obligations in relation to the right to water, gave the state the authority to take actions that could disregard its investment legal obligations.[151] The tribunal, however, rejected this claim, indicating that 'Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally [and] [u]nder the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.'[152]

[150] See Olivier De Schutter, A Human Rights Approach to Trade and Investment Policies, Confronting the Global Food Challenge (2008)
[151] AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Liability (30 July 2010) paragraph262
[152] Ibid

As briefly discussed previously, international law is considered to be horizontal and, therefore, does not have a 'centralized system with a developed hierarchy, and a hierarchy based on the sources of norms.'[153] However, some argue that the lack of formal hierarchy in international law does not mean that 'some rules are not created for – that is, their purpose or *raison d'etre* is – the protection of certain interest and ideal that are thought to be of higher value, that is, more important that other ones.'[154]

Under such premise, the UN special rapporteur on globalisation and its impact on the full enjoyment of human rights, for example, stated that 'the primacy of human rights law over all other regimes of international law is a basic and fundamental principal that should not be departed from.'[155]

Based on the above considerations, proponents of this approach argue that human rights occupy a hierarchically superior position among norms of international law. This is because:

1) One of the purposes of the UN Charter is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without discrimination, and this, read in accordance with the provision set forth in article 103 of the UN Charter,[156] means that any international obligation that

[153] Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', Duke Journal of Comparative and International Law (2009) at 74
[154] Vassilis P. Tzevelekos, 'Revisiting the Humanisation of International Law: Limits and Potential', Erasmus Law Review (2013) at 67
[155] UN Sub-Commission on the Promotion and Protection of Human Rights, Globalization and Its Impacts on theFull Enjoyment of Human Rights, preliminary report submitted by J.Oloka-Onyango and Deepika Udagama, E/CN.4/Sub.2/2000/13 paragraph 63
[156] Article 103 of the UN Charter reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

undermines the duty to protect and promote human rights must be set aside,[157] as Article 103 has elevated the UN Charter to the 'status of a superior international treaty;'[158] and

2) Under the Vienna Convention on the Law of Treaties, any treaty which, at the time of its culmination, violates a peremptory norm of international law (*ius coges*), is to be considered null.[159] *Ius Coges* are those norms within international law that are considered to be so fundamental that they bind all states and do not allow any exceptions.[160] Given their importance, they are considered to be hierarchically superior to other rules of international law.[161]

Furthermore, some have expressed the view that, if human rights law is considered essential to the international public order – given the interpretation of the UN Charter that sets an international constitutional order[162] – then an investment established in breach of human rights law is arguably not a protected investment under international investment law.[163] This relates to the type of cases in which, from the moment of the initial investment, human rights were breached. An example of this can be seen in the *Aguas del Tunari* case. In 1999, the Bolivian Government awarded a 40 year concession contract to Aguas del Tunari S.A for the exclusive provision of water services in the city of Cochabamba. The new company dramatically increased water rates for all customers, and limited traditional ways of collecting water (used by indigenous and farming communities), charging these communities for collection systems

[157] Olivier De Schutter, A Human Rights Approach to Trade and Investment Policies, Confronting the Global Food Challenge (2008) Page 4
[158] Jure Vidmar, Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System? in *Hierarchy in International Law* edited by Erika De Wet and Jure Vidmar, Oxford University Press (2012) at 18
[159] Olivier De Schutter, A Human Rights Approach to Trade and Investment Policies, Confronting the Global Food Challenge (2008) Page 4
[160] UN, International Law Commission, Draft Conclusions on Identification and legal consequences of peremptory norms of general international law (jus cogens), A/77/10 (2022), conclusion 3
[161] Ibid, conclusion 2
[162] Marko Milanovic, 'Norm Conflict in International Law: Wither Human Rights?', *Duke Journal of Comparative & International Law,* (2009) page 77
[163] Marco A. Orellana, 'International Decisions: Saramaka v. Suriname', *AJIL* (2008) page 847

they had built and paid for themselves.[164] In this sense, the initial investment began with a prohibition towards local and indigenous people to collect water directly from the water sources, which they had traditionally done before.[165] This was done indirect contradiction to international human rights standards given that – as will be discussed in Chapter III – the right to water requires the state to provide direct resources for indigenous peoples to design, deliver and control their access to water.[166]

The hierarchical approach, however, has been criticised by those who affirm that given that international law is a horizontal system of legal norms, 'no legal obligation is prima facie capable of trumping another obligation,[167] with the exception of *ius cogens* (which constitute only a very small portion of all human rights norms). Critics would respond to an approach which places human rights at a higher level than other areas of international law by arguing that on the basis of the statute of the International Court of Justice and the principle of sovereign equality of states: 'there is no hierarchy and logically there can be none: international rules are equivalent, sources are equivalent, and procedures are equivalent, all deriving from the will of states.'[168]

Although attractive from a human rights perspective, the approach not only lacks general support among academics and investment tribunals, it also does not provide a sufficiently strong argument as to why international law should no longer be considered horizontal. Some further complexities arise: do all human rights claims immediately trump investment rules or

[164] See more at Sarah Hines, How Bolivians Fought For — and Won — Water Access for All, University of California Press Blog (2022). See also, William Finnegan, Leasing the Rain, The New Yorker (2002) <accessed on 12 June 2024>

[165] Sauras; Lill; Bertelli, La Guerra Interminable: 15 Años de Lucha por el Agua en Bolivia, EL País (2015) <accessed on 10 November 2023>

[166] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, paragraph 16.d

[167] Jure Vidmar, Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System? in *Hierarchy in International Law* edited by Erika De Wet and Jure Vidmar, Oxford University Press (2012) at 13

[168] Dinah Shelton, Normative Hierarchy in International Law, The American Journal of International Law (2006) at 291 referencing Pierre-Marie Dupuy, *Droit International Public*, (1995) at 14-16

is it only those claims related *ius coges* rules? Are arbitrators in a position to make legitimate decisions on the scope and interpretation of human rights law? Both the horizontality of international law and the specific nature of investment arbitration panels makes this approach questionable.

Most importantly, the arguments presented do not seem to demonstrate, for example, a consistent state practice in which states have demonstrated their acknowledgment of human rights laws as of higher hierarchical value. An argument could be constructed in relation to the privatised water cases in Argentina, in which the state argued it had not complied with its investment obligations in order to fulfil its human rights obligations, therefore demonstrating a state's preference over what it considered as obligations that should take precedence (as exemplified above with the *AWG* case). However, the case-law analysis done through this thesis has demonstrated that it is only in the Argentinian cases where the state has directly made such arguments, which by no means could be indicative of an overall state practice that recognises all human rights norms as of higher hierarchy value within international law.[169] Furthermore, in such cases, investment tribunals have rejected the state's argument, emphasising that human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.

[169] Out of 255 of cases reviewed, in only 9 occasions did a state (Argentina) advance human rights as a defence to measures implemented. In the Phillip Morris case, Uruguay also advance arguments related to the right to health, but these were mostly based on the WHO Convention on Tobacco Control. See: CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award rendered on 12 May 2005; Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award rendered on 5 September 2008; EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award rendered on 8 October 2009; Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award rendered on 21 June 2011; NationalGrid plc v. The Argentine Republic, UNCITRAL, Award rendered on 3 November 2008; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award rendered on 28 September 2007; Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award rendered on 17 January 2007; Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic, ICSID Case No. ARB/09/1, Award rendered on 21 July 2017; Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB/07/26), Award rendered on 8 December 2016. See also Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016.

c) The Systemic Integration Approach

Given the theoretical and practical challenges of the isolationist and the hierarchical approach, most commentators agree that the relationship between the different areas of international law should be one which is based on the principle of systemic integration.[170]

This Section will demonstrate how systemic integration has been approached within the relationship of investment and human rights. The Section will show some of the important progress toward using systemic integration within the practice of investment tribunals. However, it will also demonstrate some of its important shortcomings, proving that further clarification and methodological tools are needed to ensure systemic integration works in practice.

The Section will end with some reflections on the relationship between international human rights law and international humanitarian law. While it is clear that this is not within the scope of this thesis, the way that both areas of law have been integrated can shed some light into how better systemically integrate human rights law and investment law. Particularly, since the late 1990s the Inter-American Human Rights System has been adjudicating human rights cases in a way that systemically integrates international humanitarian law (when relevant to the case). The type of integration used in this relationship shows a far more sophisticated way of systemic

[170] James Crawford, 'International Protection of Foreign Direct Investment: Between Clinical Isolation and Systematic Integration' in *International Investment Law and General International Law: From Clinical Isolationto Systematic Integration?* edited by Rainer Hofmann and Christian J. Tams, Nomos (2011); Eric De Brabandere, 'Human Rights and International Investment Law', Grotius Centre Working Paper Series (2018); Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', International and Comparative Law Quarterly (2011); Fabio Giuseppe Santacroce, The Applicability of Human Rights Law in International Investment Disputes, ICSID Review (2019); Monica Feria-Tinta, Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris v Uruguay, Journal of International Arbitration (2017); Jason Webb Yackee, Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality, Fordham International Law Journal (2008)

integration, which can be used to improve the methodological mechanisms in which investment law and human rights law is integrated.

i. Investment and human rights

In relation to the systemic integration of investment law and human rights law, one of the starting points is to understand the nature of investment arbitration, particularly how it differs from commercial arbitration. As argued by former ICJ Judge Christopher Greenwood, '[i]n marked contrast to ordinary commercial arbitration, in which the legal basis for the arbitrators' jurisdiction is usually an agreement between the two parties to the arbitration, in investment treaty arbitration that jurisdiction is derived from a treaty between two states to which the investor is not party.'[171] It is based on this essential premise that Greenwood then argues that 'investment arbitration is essentially grounded in a treaty and the interpretation of the extent of the arbitrator's jurisdiction and the rules which the treaty enjoins them to apply, requires recourse to the public international law rules on treaty interpretation rather than the contractual principles with which many arbitrators will be more familiar with.'[172]

The wording of most international investment agreements also demonstrates the previous point, as the rules of international law are deemed applicable in a dispute between the host state and the investor. For example:

[171] C. Greenwood, Rethinking the Substantive Standards of Protection Under Investment Treaties (Response to the Report), in Flaws and Presumptions Rethinking Arbitration Law and Practice in a New Arbitral Seat, The Mauritius International Arbitration Conference (2010) at 373
[172] Ibid, at 374

- The Canada/Venezuela BIT indicates: 'A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.'[173]

- The China/Russia BIT indicates: 'The arbitration award shall be based on: the provisions of this agreement; the laws and other regulations of the Contracting Party in whose territory the investment has been made including rules relative to conflict of laws; and the rules and universally accepted principles of international law.'[174]

- The Korea/Lebanon BIT indicates: 'The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of International Law.'[175]

- The Rwanda/United States BIT indicates that '[…] the tribunal shall decide the issue in dispute in accordance with this Treaty and applicable rules of international law.'[176]

Commentators also argue that even when an investment treaty makes no reference to international law, the 'weight of case law and scholarly opinions suggest that international law nevertheless governs the merits of the dispute.'[177] This has led some to conclude that there is now a clear consensus that that 'international law governs the merits of investment treaty

[173] Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investment (1996) article X.7
[174] Agreement Between the Government of the Russian Federation and the Government of the People's Republicof China on the Promotion and Reciprocal Protection of Investments (2006) Article 9.4
[175] Agreement Between the Lebanese Republic and the Republic of Korea on the Promotion and Reciprocal Protection of Investments (2006), Article 8.3
[176] Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (2008), Article 30.1
[177] Fabio Giuseppe Santacroce, The Applicability of Human Rights Law in International Investment Disputes, ICSID Review (2019) At 141

disputes.'[178] This is, that international law is part of the sources of law that are applicable to decide an investment dispute. As indicated previously, this is also codified in Article 42 of the ICSID Convention.

Based on this analysis, Santacroce argues that if investment tribunals are to resolve disputes under international law as a coherent legal system, then any relevant rule of international law that is binding on the states in question should be able to directly inform and shape the interpretation a tribunal affords to an investment treaty.[179] As we have seen above, this would therefore clearly allow for a systemic integration approach within investment disputes, where investment tribunals are able to use international human rights laws to analyse the merits of a claim. As argued by Santacroce, in the context of investment disputes, the principle of systemic integration gives rise to two interpretative presumptions:

1) If an issue is not expressly resolved by the investment agreement, the parties are presumed to have wanted international law or general principles of law to apply as gap-filling mechanism; and

2) When entering into a treaty, the parties may not have intended to act inconsistently with rules and obligations that arise under other sources of international law and that are binding upon them, as expected by the fundamental principle of *pacta sunt servanda*.[180]

A study conducted by Steininger, in which she analysed all investment disputes that contained mentions of human rights, discredits the alleged 'myth' that human rights law and investment

[178] Ibid
[179] Ibid, At 144
[180] Ibid, At 148

law are inherently in conflict with each other.[181] The result of the research suggest 'that human rights and investment concerns should not be pigeonholed, but have the potential to complement each other in the practice of investment arbitration,'[182] as it is clear from the positive advancements of some specific cases. This is particularly relevant as Steininger concludes that such advancements signal the possibility to balance and harmonise both investment and human rights laws, and therefore should not be read in isolation from each other.[183]

Among the most relevant cases in which a systemic integration approach between investment law and human rights law has been attempted are the *Tulip* ,[184] *Phillip Morris*,[185] and *Urbaser* cases.[186]

Some have considered that one of the first cases to adopt a systemic integration approach was the *Tulip* case.[187] While the case is not related to social rights, but rather related to a real estate development project, it is important to highlight it as the tribunal concluded that, based on the principle of systemic integration, international human rights norms applicable to both parties were relevant to the interpretation of the notion of 'fundamental rule of procedure'. Specifically, the tribunal indicated that:

[181] Silvia Steininger, What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration, Leiden Journal of International Law (2018) At 55
[182] Ibid
[183] Ibid
[184] Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Annulment Decision, rendered on 30 August 2005
[185] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016
[186] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016
[187] See Eric De Brabandere, Human Rights and International Investment Law, Grotius Centre Working PaperSeries (2018)

> Provisions in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention. This is not to add obligations extraneous to the ICSID Convention. Rather, resort to authorities stemming from the field of human rights for this purpose is a legitimate method of treaty interpretation.[188]

A few years before, the *Tecmed* tribunal had used the interpretations afforded by the European Court of Human Rights (EHRC) in relation the right to property. The tribunal used the reasoning of the ECHR in relation to the proportionality of depriving someone's property with the legitimate aim of satisfying a public purpose to analyse the measures done by Mexico in the case in question.[189] While the tribunal did not provide any legal justification as to why it had relied in the interpretations afforded by the ECHR on the European Convention of Human Rights (an instruments that did not bind any of the parties in question); nor did it invoke the principle of systemic integration; it still performed a type of systemic integration that is not too dissimilar to the one used by the *Tulip* Tribunal.

Both of these approaches to systemic integration are considered to favour the interests of investors. As Steininger concludes in her detailed study, most investment tribunals only take human rights into account when the rights invoked could serve investment concerns,[190] and it is evident that the use of human rights in the form of references in investment cases is mainly motivated by 'procedural-interpretative and rational-strategic motives.'[191] However, this also demonstrates that investors themselves are willing to use arguments based on human rights instruments, with cases in which investors have raised from a human rights perspectives issues

[188] Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Annulment Decision, rendered on 30 August 205, paragraph 92
[189] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award rendered on 29 May 2003, paragraph 122
[190] Silvia Steininger, What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration, Leiden Journal of International Law (2018) At 42
[191] Ibid, At 52

in relation to the right to property, procedural safeguards, right to fair trial and the right to be heard.[192] This willingness from investors to use human rights rules in the context of an investment dispute demonstrates some degree of rejection from investors to the 'self-contained' or 'isolationist' approach and an acceptance to a systemic integration approach. It would lead to the logical conclusion that, if human rights rules can legitimately be used to interpret investment rules and protect the interests of investors, then human rights rules can also be used to interpret the actions of a host state that were intended to protect the interest of its population. This has been the approach taken by a limited number of investment tribunals, as we will see below.

In the *Phillip Morris* case, the tribunal considered if the measures implemented by Uruguay in order to protect public health amounted to various investment law breaches, including the protection against indirect expropriation and the protection of legitimate expectations. More concretely, through 'Ley 18256' Uruguay implemented its commitments under the WHO Framework Convention on Tobacco Control in order to protect the country's population against the 'health, social, environmental and economic consequences of tobacco use and exposure to tobacco smoke.'[193] The investor argued, among other things, that the regulation requiring single presentation (or simple packaging) constituted an indirect expropriation of its brand assets, including intellectual property.[194]

In its analysis, the tribunal indicated that given that the Framework Convention on Tobacco Control is one of the binding international instruments in which Uruguay is a party and which

[192] Ibid, At 42
[193] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016, paragraph 304
[194] Ibid, paragraph 180

guarantees the human right to health, the treaty was of particular relevance for the case, as it specifically related to tobacco control.[195] In direct recognition to the principle of systemic integration, the tribunal concluded that:

> […] As pointed out by the Respondent, Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of '[a]ny relevant rules of international law applicable to the relations between the parties', a reference 'which includes ... customary international law'. This directs the Tribunal to refer to the rules of customary international law as they have evolved.
>
> Protecting public health has since long been recognized as an essential manifestation ofthe State's police power, as indicated also by Article 2(1) of the BIT which permits contracting States to refuse to admit investments for reasons of public security and order, public health and morality.[196]

Using the case-law of past investment awards, the tribunal also indicated that 'in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions [particularly] that[:] [1] the action must be taken bona fide for the purpose of protecting the public welfare, [2] must be non-discriminatory and [3] proportionate.'[197] The tribunal was of the view that the regulations implemented by Uruguay satisfied these conditions.[198]

In its reasoning, the tribunal concluded that the measures were taken by Uruguay in order to protect public health in fulfilment of its national and international obligations. In particular, the tribunal stated that:

> […] in the Tribunal's view the Challenged Measures were both adopted in good faith and were non- discriminatory. They were proportionate to the objective they meant to achieve, quite apart from their limited adverse impact on [the investor's] business. Contrary to the Claimants' contention, the Challenged Measures were not arbitrary andunnecessary but rather were potentially "effective means to protecting public health," a conclusion endorsed also by the WHO/PAHO submissions. It is true that it is difficult and may be impossible to demonstrate the individual impact

[195] Ibid, paragraph 304
[196] Ibid, paragraph 290-291
[197] Ibid, paragraph 305
[198] Ibid, paragraph 305

> of measures such as [thoseimplemented] in isolation. Motivational research in relation to tobacco consumption isdifficult to carry out (as recognized by the expert witnesses on both sides). Moreover, the Challenged Measures were introduced as part of a larger scheme of tobacco control,the different components of which it is difficult to disentangle. But the fact remains thatthe incidence of smoking in Uruguay has declined, notably among young smokers, andthat these were public health measures which were directed to this end and were capableof contributing to its achievement. In the Tribunal's view, that is sufficient for the purposes of defeating a claim under Article 5(1) of the BIT.[199]

Based on the above considerations, the tribunal concluded that the measures implemented were a 'valid exercise by Uruguay of its police powers for the protection of public health [and therefore] cannot constitute an expropriation of the Claimants' investment.'[200] The tribunal therefore concluded that the protection against indirect expropriation had not been breached.

The investor also claimed that its legitimate expectations had been breached given that it had expected that the state would 'refrain from imposing restrictive regulations without a well-reasoned legitimate purpose.'[201] The tribunal indicated the dispute concerned the formulation of general regulations for the protection of public health and that manufacturers and distributors of harmful products such as cigarettes can have 'no expectation that new and more onerous regulations will not be imposed.'[202] Yet more, the tribunal concluded that

> […] in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringentregulation of the sale and use of tobacco products. Nor is it a valid objection to a regulation that it breaks new ground. Provisions such as Article 3(2) of the BIT do notpreclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are notdiscriminatory. Article 3(2) does not guarantee that nothing should be done by the hostState for the first time.[203]

[199] Ibid, paragraph 306
[200] Ibid, paragraph 307
[201] Ibid, paragraph 428
[202] Ibid, paragraph 429
[203] Ibid, paragraph 429

The *Philip Morris* case represents an important advancement in relation to the systemic integration of investment law and human rights. However, the decision has some shortcomings. Perrone, for example, indicates that the tribunal was less deferential to Uruguay when it departed from the direct advice of the WHO and the Pan-American Health Organisation (PAHO).[204] Although the majority of the tribunal agreed that the single presentation policy was a justified measure, it did so after having reflected that this was however not required by the WHO or PAHO. Perrone expresses concern that this seems to demonstrate a reluctance on the part of investment tribunals to justify public measures or legal changes legitimately implemented by states if they divert from global standards.[205]

Perrone's critique is relevant for the systemic integration of human rights and investment law for two main reasons. First, some standards could derive from regional instruments or from the interpretation afforded by their relevant bodies (the American Convention on Human Rights and its Inter-American Commission on Human Rights, for example). Rejecting non-global standards could itself reject the notion that important binding human rights standards are produced by regional mechanisms, which at times are more progressive or advanced than those agreed at the global level. If the UN Committee on Economic, Social and Cultural Rights were to require from states less stringent action than the Inter-American Commission, which would be the standard that an investment tribunal would have to take into account? Such an approach would disregard the totality of a state's international obligations. Second, and most importantly, the tribunal's approach leads to a critical question regarding less concrete or well-articulated standards. In other words, what happens with standards that per se give a margin of discretion

[204] Nicolás M Perrone., 'ISDS in Action', *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules*, Oxford University Press (2021) At 66
[205] Ibid, at 72

to the state and are less precise in nature? Would states be able to implement their own measures when guided by general standards of human rights law or would they only be able to implement measures that are a result of very concrete recommendations? The analysis of the *Philip Morris* tribunal seems to leave such questions unresolved.

Furthermore, as Feria-Tinta argues, the tribunal made some general references to other human rights treaties to which Uruguay is a party, but it did not elaborate any further on the specific obligations that such treaties require in relation to the right to health.[206] As we will see in further Chapters, the right to the highest attainable standard of health – as protected by the International Covenant on Economic, Social and Cultural Rights and other instruments such as the Protocol of San Salvador – contains unique obligations, such as progressive realisation. It requires states to take steps, as effectively and expeditiously as possible, to respect, protect and fulfil the rights contained in such instruments. Given the subject of the investment dispute, the tribunal could have engaged in a more detailed analysis of what these obligations inherent to the right to health required from Uruguay and how they related to investment protections, providing therefore a more sophisticated analysis of how systemic integration requires arbitrators to read the protections afforded in investment agreements through the lens of these other fundamental obligations. In particular, the tribunal could have provided a more detailed analysis on how the expectation of stability of a legal framework – as argued by the investor – should be read in harmony with the obligation of progressive realisation attached to the right to health.

As argued by Santacroce, international human rights norms can operate as an interpretative aid, assisting investment tribunals in construing the standards of protection set out in the investment

[206] Monica Feria-Tinta, Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morrisv Uruguay, Journal of International Arbitration (2017) at 623-624

agreements in a way that is consistent with the human rights obligations of the host state.[207] This is part of what the Phillip Morris tribunal fails to do effectively, as it does not use the full range of human rights norms to correctly interpret the measures taken by Uruguay. What is missing in the *Phillip Morris* analysis is what Santrocroce calls an 'interpretative approach.' This approach is exemplified by Santrococe in the following way:

> '[…] if a given provision "A" in an international treaty can be taken to mean "x," "y,""z," and the meanings "x," "y" and "z" can be placed in a scale where 'x' is the meaningthat is most consistent with a relevant human rights norm 'B', the tribunal should takethe provision 'A' to mean 'x', rather than "y" or "z".'[208]

As seen above, if the *Philips Morris* tribunal had taken what I will now call an interpretative-integration approach, the legal reasoning in relation to legitimate expectations would have ensured a harmonious interpretation of different international legal obligations.

The result of the *Philip Morris* tribunal's analysis indirectly ensured that the obligation to progressively realise the right to health, as it recognised that the investor should have expected further regulation for harmful products. The tribunal however did not engage with international human rights law. Not framing such measures as part of the obligation of progressive realisation could have led the tribunal to arrive to a different conclusion, one that could have potentially penalised the host state for protecting of human rights. In other words, while the tribunal might have indeed made an adjudication with a positive human rights outcome, this was not because it used human rights law to reach any of such outcomes. An interpretative-integration approach

[207] Fabio Giuseppe Santacroce, The Applicability of Human Rights Law in International Investment Disputes, ICSID Review (2019) at 142
[208] Ibid

is missing from the current practice, which is essential if systemic integration is to have any meaningful, coherent, and consistent application.

What we have seen of the systemic integration approach, most importantly, is that integration between international investment law and international human rights law is permissible and has been practiced by investment tribunals in two distinct ways: 1) to enhance investment law standards in order to afford greater protection to investors (*Tulip* Tribunal and *Tecmed* Tribunal, for example); and 2) to limit the rights of investors, providing greater regulatory discretion to the host state and, ultimately, ensuring greater protection of human rights (*Philip Morris* Tribunal, for example). While it has not yet been widely adopted in practice, however, the systematic interpretation approach is the one that is currently more dominant in the literature. Further, investment tribunals in the last few years have showed some degree of willingness to take into account other sets of norms not related to investment law, in particular human rights norms.[209] This practice is clearly grounded on the understanding that the current wording of investment agreements and human rights treaties does not imply, *per se*, a normative clash of obligations. Hence, there are potential ways of interpreting both set of rules that can result in a harmonious relationship. However, the practice of systemic integration within investment tribunals is far from perfect. Better methodological tools need to be developed to be able to integrate human rights and investment rules more effectively and coherently. This thesis provides such methodological tools. As we will see in the following Chapters, by using an interpretative-integration approach, investment law and human rights law can be interpreted harmoniously.

[209] See Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016; and Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB/07/26), Award rendered on 8 December 2016

ii. International Human Rights and International Humanitarian Law

Before concluding this Chapter, it is worth considering the developments of the systemic integration approach within the context of international human rights law and international humanitarian law. The systemic integration approach between these two fields most closely relates to the interpretative-integration approach described above, but to which there are no examples in the investment arbitration practice. By using examples from the Inter-American System of Human Rights protection, the section demonstrates that interpretative-integration can be used effectively to coherently integrate two areas of public international law. In particular, as will be explained, it shows a method of using one area of public international law (relevant to the case in question) to interpret broad and open-ended concept/protections found in the area of law to which the tribunal has jurisdiction. As will be discussed, this is what systemic integration in investment law has been missing.

The discussions about the systemic integration between international humanitarian law (IHL) and international human rights law (IHRL) have been grounded on the idea that such relationship requires 'complex cross-fertilisation that might need to combine a number of elements and rules from both fields at the same time.'[210] As will be argued further in this thesis, this is true as well for human rights law and investment law in the context of the privatising of social rights services (water, health, education, housing, food, among others).

Several human rights bodies have used this approach to interpret the human rights obligations of states in the context of international and non-international armed conflicts, in particular, the

[210] Noam Lubell and Nancie Prud'homme, 'Impact of human rights law' in Routledge Handbook of the Law of Armed Conflict edited Liivoja, Rain, McCormack, Timothy, Routledge (2016) At 118

Inter-American System of Human Rights (Commission and Court) and the European Court of Human Rights.

The Inter-American System has adopted an approach to the interpretation of IHL and IHRL, which relies on referencing IHL, but does not apply it directly.[211] This method of integration 'allows tribunals to walk a delicate balance: they avoid directly finding states in violation of norms of IHL while simultaneously incorporating IHL into their analysis of HRL norms.'[212] This is what a interpretative-integration approach to investment and human rights could look like.

The Inter-American Court has on several occasions indicated that given a number of reasons rooted in the competence *rationae materiae* of the judicial organs of the regional system, it could not conclude that violations of IHL had been committed by states members of the American Convention of Human Rights, but that it was obliged to interpret the obligations set forth in the American Convention in light of the principles and norms of International Humanitarian Law.[213] This is not dissimilar to the discussion of applicable law within investment law tribunals. While the tribunal might not have jurisdiction to determine compliance with a different area of international law, it can however apply it to interpret its own relevant rules.

To exemplify this better, the approach taken by the Inter-American System since 1997 in the Case of 'La Tablada' against Argentina,[214] could be explained as wearing a pair of glasses with

[211] Shana Tabak, Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals,Michigan Journal of International Law (2016) At 666
[212] Ibid
[213] Shana Tabak, Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals,Michigan Journal of International Law (2016) At 701
[214] IACHR, Report Nº 55/97 ([1]) Case 11.137 Juan Carlos Abella v Argentina, 18 November 1997

red lenses, as once you put them on everything you see will have a red perspective. When the IASHR says that it will interpret the American Convention through the lens of IHL it is stating that every fact present in the case will be looked at taking into account the principles and norms that this area of law provides. In particular, in the case of 'La Tablada,' the Commission expressed:

> […] both Common Article 3 and Article 4 of the American Convention protect the rightto life and, thus, prohibit, *inter alia,* summary executions in all circumstances. Claimsalleging arbitrary deprivations of the right to life attributable to State agents are clearlywithin the Commission's jurisdiction. But the Commission's ability to resolve claimedviolations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define ordistinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian lawtreaties.[215]

Thus, the Commission considered that the meaning of 'arbitrary' in the prohibition of 'arbitrary deprivation of life' was to be shaped by IHL, as the situation in question took place during an armed conflict. By using the 'IHL lens' the Commission determined that 'when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. […] Thus, by virtue of their hostile acts, the Tablada attackers lost the benefits of the

[215] Ibid, paragraph 161

above-mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable civilians.'[216]

The Commission therefore created an effective form of systemic integration, by interpreting abstract and open-ended obligations (which can be interpreted in various forms) in a way that ensures compatibility with both IHL and IHRL. The American Convention prohibits the arbitrary deprivation of life but does not define what arbitrary means. Such abstract concept has been therefore interpreted by the Inter-American Commission and Inter-American Court to give sufficient content to such human rights. What systemic integration therefore requiresis to use the rules of IHL to give meaning to 'arbitrariness' when the situation in question is within an armed conflict.

This approach of systemic integration is one that has not been considered carefully within the context of investment tribunals. It relates more closely to the proposed interpretative-integration approach that I have argued for above and provides more guidance particularly in relation to the privatisation of social rights. As discussed in the introduction, and further elaborated in Chapter IV, the provision of social rights creates a specific context which is unique to other types of investments. This requires investment rules to be read within that context. As we will see in further Chapters, investment tribunals should consider that, when a dispute arises in the context of a privatised social right's provision, then investment law should always be applied using human rights law as an interpretative tool. Similarly, as to how human rights tribunals have determine the meaning of 'arbitrary' using IHL as an interpretative tool, investment tribunals should use human rights to interpretative the meaning of 'stability,' 'promise,' 'conduct' within the protection of legitimate expectations. By using this mechanism

[216] Ibid 178

of systemic integration (reading one protection in line with other areas of law) one could arrive to a better more holistic integration.

V. Conclusions

In the Introductory Chapter, I indicated that, to respond to the main research question of this thesis, it was important to also answer the sub-questions: do international human rights norms and international investment norms collide? And if they do not, how to apply them simultaneously? The analysis in this Chapter has responded to both sub-questions. First, there is no contradiction or conflict between the norms found in international investment law and international human rights law. To apply them simultaneously, we need to properly use the principle of systemic integration codified in article 31(3)(c) of the Vienna Convention of the Law of Treaties.

The lack of formal contradictions between investment law and human rights is grounded in the principle of *pacta sunt servanda*, the cornerstone of international law. As demonstrated in detail, the principle implies that states have ratified international treaties with the full intention of complying with them. Therefore, an interpreter is required to always consider that it was not the intention of the state to commit itself to contradictory obligations. If states assumed their legal obligations in good faith; and they intend to comply with them; then states never intended to create contradictory norms. This is what can be categorised as a presumption against conflict.

Based on this presumption again conflict, we can arrive to the conclusion that actual normative clashes – contradictory obligations – between investment law and human rights law might not exist. Rather, it has been in the way that such rules have been interpreted that they might create conflicting results. These contradictory results are evident in some cases that take an isolationist

approach to the relationship between investment and human rights law. This Chapter has provided some examples. However, in Chapter IV, I will provide further details of specific cases related to the privatisation of social rights services, which proves how tribunals have created contradictory or conflicting results given their interpretation to investment law.

The above point demonstrates the importance of the role that lawyers, academic, arbitrators, and judges play in the day-to-day of international law. As was discussed, this fragmented community of international law (each epistemic community with their values and own understanding of the law) is partly to blame for the clashes that have resulted between investment and human rights law. As discussed, and will further proved throughout this thesis, it has been through the interpretations that investment tribunals have afforded to the broad and open-ended protections found in investment law, that clashes or contradictions with the state's human rights obligations have risen.

The presumption against conflict rather calls to, if at any given point two rules from different areas of law result in presumably contradictory interpretations, to interpret then in a harmonious way. In other words, while there might be two norms which seem to point in diverging directions, after some adjustment, it is still possible to apply or understand them in such way that no conflict will remain. This is what systematic integration proposes at its core, to be able to move from fragmentation of international law into a set of coherent rules at the international realm.

It is based on the above considerations that one must deny the notion that fully autonomous self-contained regimes exist in international law. *Pacta sunt servanda* and systemic integration demands that investment and human rights law is read harmoniously.

There is precedent of investment tribunals taking a systemic integration approach between human rights and investment law, demonstrating some degree of willingness. Investment tribunals, such as the *Phillip Morris* case, demonstrate that human rights and investment law do not have to be dramatically opposed, but could potentially be read coherently without raising normative clashes. As was discussed, however, more is needed to more adequately integrate human rights and investment.

The 'master key' of international law – the principle of systemic integration – requires further development. Guided by this principle of good faith interpretation mutually supportive way of integrating the different regimes of international law, such as investment and human rights, is imperative. Imaginative uses of the traditional techniques available in international law imply overcoming the traditional bias of the epistemic communities that integrated it. Can we overcome such structural biases and make investment law and human rights law mutually supportive?

By learning from the practice of the Inter-American Human Rights System in relation to its approach to systemic integration between human rights law and humanitarian law, investment tribunals could take a different approach to interpretative-integration. This would mean interpreting broad and ambiguous investment protections (such as fair and equitable treatment) by ensuring consistency with the rules of international human rights law. This approach, which uses one area of law as a lens to look into the area of law that it has jurisdiction over (an investment tribunal using human rights law as a lens to interpret investment protections) can potentially provide a substantially better form of systemic integration, as will be demonstrated in Chapter VI.

Chapter III
Social Rights Obligations: Nature and State Duties

I. Introduction

As explained in the introductory Chapter, this thesis is centred in the unique and complex relationship between international investment law and international human rights law, particularly in the context of privatised social rights services. The previous Chapter demonstrated that investment and human rights law are not incompatible, and that the principle of systemic integration can be used to interpret both bodies of law in way that ensures coherence. The Chapter emphasised that for systemic integration to be possible, however, further attention would be needed to ensure that the appropriate methodological tools were available.

Chapter IV will look carefully at the issue of privatised rights, the specific obligations that the state has when such services are in the hands of private providers, and particularly, the complexities that international investment law creates for the protection and enjoyment of human rights. Before that, however, in order to interpret investment law through the lens of human rights, one needs to pay careful attention at the specific obligations that are attached or inherent to economic, social, and cultural rights. This Chapter explains these obligations, such as progressive realisation, that were mentioned in passing in the previous Chapter. As Chapter II argued, one of the shortcomings of investment arbitration awards such the one produced by the *Phillip Morris* tribunal was the lack of analysis of how the obligation to progressively

realise the right to health should have also framed the expectations of the investors.[217] To demonstrate how an integrative-integration approach can be achieved, this Chapter centres its attention on social rights and the obligations that are inherent to them.

This Chapter explains how social rights are fundamental to securing all members of our society a basic quality of life, and that in order to do so, social rights are conditioned to certain specific obligations that civil and political rights are not. After this introduction, Section II is focused on this first issue, the nature of social rights themselves. It provides a general overview of the theory of social rights, their legal foundation, their sources, and their relevance.

Section III analyses, in detail, the obligations that are inherent to social rights under the International Covenant of Economic, Social and Cultural Rights (ICESCR). In particular, the Section explains the main aspects and the relevance of the obligations of progressive realisation, maximum available resources, minimum core obligations, non-discrimination, non-retrogression, and the prohibition of derogations. In doing so, the author attempts to provide clarity on the obligations that a state is expected to comply with when fulfilling social rights, and in particular how these obligations are associated with the provision of related services such as housing, health, water, education, food, among others.

Section IV discusses what is often called the tripartite typology of duties. This typology, composed by the duties to respect, protect, and fulfil human rights, is intended to help clarify what type of actions are expected from states in order to satisfy their social rights obligations. The section builds on the interpretations developed by the UN Committee on Economic, Social

[217] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016, paragraph 429

and Cultural Rights (UN Committee) and explains how each duty relates to the provision of services such as water, health, education, food, among other social rights.

Before concluding, the Chapter turns to the normative content of social rights. Section V clarifies what is expected from states when they provide social services, expanding on notions such as accessibility, availability, and quality. Centred in the notion of adequacy, this section on the normative content of rights provides an overview of how to assess if a social rights service is being provided in a way that meets the overall obligations enshrined in ICESCR.

II. Social Rights

Although we recognise today that all human rights are indivisible, interdependent, and interrelated,[218] historically there has been a clear division between the so-called civil and political rights (CP rights) on one side, and economic, social, and cultural rights (ESC rights) on the other. The division was sustained by a belief that ESC rights were programmatic, of gradual realisation through social policies, and therefore, not real rights.[219] Often perceived as deeply ideological, as they require an alleged 'unacceptable' degree of intervention of the state, which is incompatible with a free market economy.[220] They also express a different relationship between the individual and the state, as ESC rights require viewing the state as essential to the maintenance of 'liberty.'[221] This led to the development of a human rights regime in which ESC rights were considered to have a second-class status,[222] and not particularly because of

[218] UN, World Conference on Human Rights, Vienna Declaration and Program of Action (1993) paragraph 5
[219] E.W. Vierdag, The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights, Netherlands Journal of International Law, (1975) at 103
[220] Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly (1987) at 160
[221] Sandra Fredman, *Comparative Human Rights Law*, Oxford University Press (2018) at 60
[222] This is not to be confused with second generations rights – as ESC rights are usually referred as – as this nameis in reference to the fact that the international binding instrument that recognises ESC rights came into force afterthe International Covenant on Civil and Political Rights. Nonetheless, the language itself of second generations rights have led to see ESC rights as of less importance, as they came 'after' the 'initial' rights.

the rights themselves, but because of the ideological opposition of some states wishing to protect powerful economic interests.[223]

Within this set of rights, one category is considered to be even more marginalised: social rights. They have been marginalised both at the national and international level and still represent one of the greatest challenges for the human rights community,[224] even today. It goes without saying that – given the nature of interdependency of human rights – classifying rights should be treated with caution,[225] as certain rights may not be able to be fulfilled without the others. Nonetheless, we will see in this Chapter that social rights are based and legally constructed under specific conditions and obligations, and given their marginalisation, it is important to study them separately.

So, what exactly are social rights? Paul Hunt beautifully describes them as 'emancipatory, empowering, and transformative [rights that] can help ensure dignity, well-being, and equality. [They] position us all as rights holders, not clients, service users, or supplicants.'[226] Social rights are concerned with 'the substance of human life, with the very basics necessary for human well-being.'[227]

Social rights are those rights which aim to ensure that all members of our society have a basic quality of life.[228] They are, above all, concerned with social justice, as they intend to remove

[223] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, Routledge (2012) at 30
[224] Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, Dartmouth (1996) at 1
[225] Asbjørn Eide, Economic, Social and Cultural Rights as Human Rights in *Economic, Social and Cultural Rights:A Textbook*, edited by Asbjørn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers (1995) at 22
[226] Paul Hunt, Social Rights are Human Rights: But the UK System is Rigged, Centre for Welfare Reform (2017) at 10
[227] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, Routledge (2012) at 4
[228] Gerhard Erasmus, Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments, International Journal of Legal Information (2004) at 243

barriers that hinder the access of communities and individuals to fully participate in civil society.[229] Therefore, they imply a commitment to 'social integration, solidarity and equality […] tackling the issue of income distribution [which] are indispensable for an individual's dignity and the free development of their personality'[230] They can be understood as essential to the concept of 'citizenship', meaning the full membership of an individual to a community.[231] Without social rights, individuals – particularly the marginalised and those in conditions of vulnerability – become in practice second-class citizens.[232]

Social rights are considered to be of a 'humanitarian' nature, as they are fundamentally aimed at ensuring that individuals and communities are entitled to 'those basic subsistence needs that make life liveable in dignity, because no dignity can be said to be inherent in a hungry, sick, homeless, illiterate, and impoverished human being.'[233]

Social rights are intrinsically grounded in the idea that society and its collective powers have a moral obligation to protect the social welfare and wellbeing of individuals, and therefore, they represent legally enforceable individual entitlements to public welfare provision.[234] This moral philosophical foundation can be traced back to the work of Thomas Paine, in which he considered that certain rights, which today we categorise as social rights, were not an issue of 'charity but a right, not bounty but justice.'[235]

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[229] Keith Ewing, Social Rights and Constitutional Law, Public Law (1999) at 105-106
[230] H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1979) at 24-25
[231] Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, Dartmouth (1996) at 179-181
[232] Ibid at 183
[233] Mashood A. Baderin and Robert McCorquadale, The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development in *Economic, Social and Cultural Rights in Action*, edited by Mashood A. Baderin and Robert McCorquadale, Oxford University Press (2007) At 9
[234] Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart (2007) at 9
[235] See Eric Fosner, Introduction to Paine, Rights of Man (1984)

Generally speaking, when we talk about social rights, we are referring to the right to an adequate standard of living which includes the rights to food, water, clothing, housing; the right to the enjoyment of the highest attainable standard of physical and mental health; and the right to education. They are contained in several international and regional binding instruments, as will be developed in detail below.

The most important binding instrument is the International Covenant on Economic, Social and Cultural Rights, as it represents the most universal treaty to recognise social rights, with 171 ratifications.[236] Given its universality, for the purpose of analysing the nature of social rights obligations, I shall focus on this treaty. However, there are other international treaties that also recognise specific social rights for specific groups: the International Convention on the Elimination of All Forms of Racial Discrimination;[237] the Convention on the Elimination of All Forms of Discrimination against Women;[238] the Convention on the Rights of the Child;[239] and the Convention on the Rights of Persons with Disabilities.[240]

[236] As of 7 May 2023. Further information can be found in https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en

[237] Article 5(e) recognises the right to housing, to public health, the right to education among others. International Convention on the Elimination of All Forms of Racial Discrimination, adopted by UN General Assembly resolution 2106 (XX), 21 December 1965.

[238] The Convention recognises the right to equal access to education (article 10); equal access to healthcare (article12); the right to enjoy adequate living conditions, including housing, sanitation, electricity, and water supply (article 14.2(h)). The Convention on the Elimination of All Forms of Discrimination against Women, United Nations General Assembly, New York, 18 December 1979.

[239] The Convention recognises the right to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (article 24), the obligation of states to provide clean drinking-water (article 24.2(c)); the right to a standard of living standard of living that is adequate for a child's physical, mental,spiritual, moral and social development, including through the provision of housing, nutrition and clothing (article27); the rights of children to education, including free primary education (article 28). Convention on the Rights of the Child, General Assembly Resolution 44/25, 20 November 1989.

[240] The Convention recognises the rights of persons with disabilities to education (article 24); the right to health without disclination on the basis of disability (article 25); the right of persons with disabilities to an adequate standard of living, including adequate food, clothing, and housing (article 28); the right to equal access by persons with disabilities to clean water services (article 28.2.a). Convention on the Rights of Persons with Disabilities, General Assembly by resolution A/RES/61/106, 13 December 2006.

Other regional binding instruments exist, which also recognise the legal protection of social rights. Such instruments include: the European Social Charter;[241] the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador);[242] and the African Charter on Human and Peoples' Rights.[243] It is important to mention that there is a wealth of interpretations afforded to social rights by the European Committee of Social Rights, the Inter-American Commission and Court of Human Rights, and the African Commission and Court of Human and Peoples' Rights. The Inter-American Court, for example, has arrived at the determination that the obligation of progressive realisation is itself justiciable, and that therefore states can be held legally accountable if they cannot demonstrate progress on the improvement of social rights.[244] However, for the purposes of this thesis and in consideration ofspace constraints, I will focus on the obligations found in ICESCR and the interpretations afforded by the UN Committee. Nonetheless, it is important to stress that investment tribunals would have to take into account the authoritative interpretations afforded to regional human rights instruments, to ensure proper systemic integration is achieved.

III. The inherent obligations of social rights

As indicated in the introduction, social rights have a set of inherent obligations that are quite unique compared to civil and political rights. To ensure an effective systemic integration of

[241] The Charter recognises the right to vocational guidance (article 9) and vocational training (article 10); the rightto the protection of health (article 11); the right of anyone without adequate resources to social and medical assistance (article 13). European Social Charter, Council of Europe, Turin, 18 October 1961

[242] The Convention recognises the right to health (article 10); the right to a healthy environment (article 11); the right to food (article 12); the right to education (article 13). Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador), General Assembly of the Organisation of American States, adopted inSan Salvador, El Salvador, 17 November 1988

[243] The Charter recognises the right to enjoy the best attainable state of physical and mental health (article 16); the right to education (article 17); the right of everyone to have their economic, social, and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind (article 22). African Charter on Human and Peoples' Rights, Organisation of African Unity (now the African Union), Nairobi, 27 June 1981

[244] Inter-American Court of Human Rights, Case of Cuscul Pivaral et al v Guatemala, Preliminary Objections, merits, reparations and cots, Judgment of 23 August 2018

human rights and investment law, careful attention needs to be placed on understanding the full scope of responsibilities that a state has when providing social rights services.

Compared to civil and political rights, social rights can be considered to have a conditional nature.[245] Such conditional nature is evident in the wording of Article 2 of the International Covenant on Economic, Social and Cultural Rights. Article 2, considered to be an 'umbrella article', imposes general obligations that apply to all economic, social, and cultural rights.[246] These overall obligations define the very nature of such rights, which all come with the following conditions: progressive realisation; availability of resources; a prohibition of discrimination; a set of minimum irreducible obligations; prohibition of retrogressive measures; and the non-derogability of the obligations enshrined in the treaty.

a. Progressive realisation

Chapter II explained that although the *Phillip Morris* tribunal concluded that the investor should have expected further regulatory measures to protect public health in Uruguay, the tribunal was silent in relation to the host state's obligation to progressively realise the right to health. Progressive realisation is considered as one of the fundamental obligations of the state in relation social rights, and despite the numerous investment claims related to social rights (particularly water), no investment tribunal has recognised or mentioned this state obligation within its analysis. The following section provides a brief description of the obligation, with the aim of providing clarity for an interpretative-integration approach between investment and human rights in the context of privatised social rights services.

[245] See in-depth discussion on conditional rights at David Bilchitz, Poverty and Fundamental Rights: The Justification and Enforcement of *Socio-Economic Rights*, Oxford University Press (2007) at 81
[246] Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly (1987) at 223 (annex)

The ICESCR states in Article 2(1) that each state party to the Covenant 'undertakes to take steps' with 'a view to achieving progressively the full realisation of the rights recognized.'[247] This concept of progressive realisation is considered to be the cornerstone of the whole Covenant, as the concept 'mirrors the inevitably contingent nature of state obligations.'[248] It is a 'means to an end,'[249] which acknowledges that the enjoyment of social rights 'will not come in a day, but demands that, every day, it comes a little closer.'[250]

The UN Committee on Economic, Social and Cultural Rights has expressed:

> The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. […] The fact that realization over time, or in other words progressively, is foreseen under the Covenant should notbe misinterpreted as depriving the obligation of all meaningful content. It is onthe one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization ofeconomic, social and cultural rights. On the other hand, the phrase must be readin the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[251]

The concept, therefore, introduces the element of gradual achievement, reflecting the inherent difficulties of achieving immediate and full realisation of the rights.[252] Nonetheless, neither the

[247] CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) 14 December 1990, paragraph 9
[248] Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly (1987) at 172
[249] Aoife Nolan and Mira Dutschke, 'Article 2(1) ICESCR and states parties' obligations: whither the budget? (2013) EHRLR, at 280, 282
[250] Radhika Balakrishnan, Diane Elson and Raj Patel, Rethinking Macro Economic Strategies from a Human Rights Perspective (Why MES with Human Rights II), Marymount Manhattan College (2009) At 7
[251] CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) 14 December 1990, paragraph 9
[252] Audrey R. Chapman, The Status of Efforts to Monitor Economic, Social, and Cultural Rights in *Economic Rights: Conceptual, Measurement, and Policy Issues*, edited by Shareen Hertel and Lanse Minkler, Cambridge University Press (2009) at 144

Covenant nor the UN Committee has specified what actually would constitute full realisation of any of the rights enshrined the instrument.[253] An explanation for this can be traced back to the *travaux preparatoires*, in which progressive realisation was understood as a 'dynamic element, indicating that no final fixed goal had been set in the implementation of economic, social and cultural rights, since the essence of progress was continuity.'[254] In this sense, Alston and Quinn acknowledge that – in the discussions over the text of ICESCR – the Australian representative expressed that the term progressive achievement ensures that the realisation of such rights does not stop at a given level.[255] This is reflected in the practice of the UN Committee, as it considers that progressive realisation imposes 'specific and continuing'[256] or 'constant and continuing duties.'[257] This is central to this thesis. Social rights obligations need to be understood as always having continuous responsibilities of improvement. As will be explored further in the following Chapters, the interpretation afforded to protections such as legitimate expectation necessarily need to take this into account. Expecting legal stability in the context of privatised services, for example, might be inconsistent with human rights protections. This will be discussed in Chapter VI.

With regards to the right to education, for example, even if a state has effectively ensured that everyone has access to free primary education, the obligation of progressive realisation calls on the state to continue to improve the level of education. That is, the state will have to improve the quality of educational facilities, ensuring new and better technology is put in place; it will have to ensure that the quality of the teaching constantly improves, providing for example,

[253] Ibid
[254] See intervention by Mr Sørenson (Denmark) UN Doc E/CN.4/SR.236
[255] Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly (1987) at 172
[256] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, paragraph 44
[257] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 18

better methodological tools for teachers to accomplish this. In this sense, there is no set goal in the fulfilment of the right, as even when satisfaction is ensured, progressive realisation imposes an obligation that can only be described as everlasting.

To further exemplify with the right to water, the UN Committee has indicated that states have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas.[258] This recognises that progressive realisation calls on the state to implement measures that are more 'long-term in their character.'[259] In other words, the state is obliged to continuously ensure that more and more people are able to access safe water, improving the accessibility of water services over time.

The above is critical to the provision of services related to social rights (health care, water provision, food supply, social housing, among others). The obligation of progressive realisation implies two main things:

1) States need to take concrete and targeted steps, as expeditiously and effectively as possible, to secure the provision of social rights services. If at the moment of ratification, a state is not providing such services, it needs to implement measures to create/provide such services over time; and

2) When services are being provided, they need to be improved over time. A state is not discharged of its obligation if a service to provide social rights services has been

[258] Ibid, paragraph 29
[259] In relation to the right to food, the Committee has indicated that progressively realisation requires states to take immediate actions as well as measures of a 'long-term character'. See CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999,paragraph 16

secured, as it needs to be able to improve such service over time. States, therefore, cannot remain static when services are being delivered.

As the fulfilment of social rights does not stop at any given level, states are therefore called to always and perpetually seek to improve the enjoyment of social rights. This unavoidably means that regressive measures – in which the enjoyment or protection of a right is diminished – are prohibited. Hence, once a particular level of enjoyment or protection of a right has been achieved, it must be maintained.[260] I will discuss this further in Section III.c below.

As progressive realisation in considered the cornerstone of ESC rights protection, the obligation will have an impact on all other subsets of obligations that the state is required to comply with. In other words, what we will see further below in relation to the tripartite typology of obligations and the normative content of rights, will be also affected by the overarching obligation of progressive realisation.

The obligation of progressive realisation, therefore, does not mean that states can 'drag their feet,'[261] but that it is a 'necessary accommodation to the vagaries of economic circumstances.'[262] In this sense, progressive realisation is not an obligation that stands on its own, but one that is 'inextricably linked' to the obligation that a state must employ the maximum available resources to the improvement of rights, as it is recognised in the wording itself of article 2.1 of ICESCR.[263] The following section centres its attention in this obligation.

[260] Radhika Balakrishnan, Diane Elson and Raj Patel, Rethinking Macro Economic Strategies from a Human Rights Perspective (Why MES with Human Rights II), Marymount Manhattan College (2009) At 8
[261] Lilian Chenwi, Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance, De Jure (2013) At 744
[262] Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly (1987) at 175
[263] Ibid at 173

b. Maximum Available Resources

The obligation of progressive realisation is further constrained by an essential element, which is the availability of resources. In this regard, article 2(1) of ICESCR stipulates that a state's obligation of progressive realisation must be achieved to the maximum of its available resources, individually and through international assistance and co-operation. However, as this standard is quite vague and imprecise, the key question of how to calculate and determine the maximum available resources, or what constitutes the appropriate level of investment from the totality of its resources, is left unanswered.[264]

Conditioning the realisation of social rights on the availability of resources is clearly a recognition that states may have a scarcity of resources to spend on their various policy goals, and that this may impact the provision of social services. Determining the availability of resources is not a fixed parameter, as the scarcity of resources is 'in many instances a result not of natural facts but of human institutions and decisions.'[265] This is evident, for example, in the case of health services and goods, where some life-saving drugs are extremely expensive due to the operation of intellectual property laws enacted by the state.[266] The state's inability to afford that specific medication is, in such a case, not only a consequence of its lack of resources, but also of its choice to provide strong patent protections for the pharmaceutical industry. It is important, however, to note that this might not be completely up to an individual state, as

[264] Audrey R. Chapman, The Status of Efforts to Monitor Economic, Social, and Cultural Rights in *Economic Rights: Conceptual, Measurement, and Policy Issues,* edited by Shareen Hertel and Lanse Minkler, Cambridge University Press (2009) at 148

[265] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford University Press (2007) at 230

[266] For in depth discussing, see Lee, J. and Hunt, PH., Human rights responsibilities of pharmaceutical companiesin relation to access to medicines, Journal of Law, Medicine and Ethics (2012); as well as Amy Kapczynski, Realizing the Right to Health in the Context of Intellectual Property Submission for the United Nations Secretary- General's High Level Panel on Access to Medicines, Global Health Justice Partnership, Yale Law School and Yale School of Public Health (2016)

international legal frameworks such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) impact how far the pharma industry are protected in this respect.

Another important question, which arises from the obligations imposed by ICESCR, is how exactly do we define resources? It is difficult to compile a definitive list of all the resources available to state. However, many argue that in addition to financial resources, 'natural resources such as land, seeds, water, and animals; human resources; and technological resources,' must be taken into account.[267] This seems to be evident in the *travaux préparatoires* for ICESCR, as the Lebanese representative argued that 'it must be made clear that the reference [to resources] was to the real resources of the country and not to budgetary appropriations.'[268]

Furthermore, economists seem to agree that when we talk about resource availability, we are not just talking about expenditure, aid, and taxation, but also on the possibility of borrowing and running a budget deficit.[269] This acknowledges that there are many ways in which a state can access financial resources, therefore the possibility of debt financing, monetary policy, and financial reform must be taken into account as part of obligation of progressive realisation.[270] This is the reason why some have argued that, when analysing the compliance of states with their social rights obligations, a key element will be on how the state has mobilised resources

[267] Audrey R. Chapman, The Status of Efforts to Monitor Economic, Social, and Cultural Rights in *Economic Rights: Conceptual, Measurement, and Policy Issues,* edited by Shareen Hertel and Lanse Minkler, Cambridge University Press (2009) at 149
[268] Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly (1987) at 178
[269] Radhika Balakrishnan, Diane Elson and Raj Patel, Rethinking Macro Economic Strategies from a Human Rights Perspective (Why MES with Human Rights II), Marymount Manhattan College (2008) at 4
[270] Ibid, at 21

(also called wealth creation) for people living in their jurisdiction, not just the level of growth and output of an economy.[271]

Some might argue that economic policy is closely related to national sovereignty, as the Inter-American Commission on Human Rights has considered,[272] and that therefore the state has a high level of discretion as to how to allocate and use its available resources in order to satisfy social rights.[273] Such discretion, however, is not immune to scrutiny, as the international body charged with supervising the compliance with the Covenant's obligations will have the authority to review the performance of any given state.[274] The state must then demonstrate that, even in times of severe resource constrains, it has acted diligently to ensure the progressive realisation of social rights.[275]

For states to comply with their obligation to use the maximum available resources to realise social rights, certain fundamental conditions need to be met in relation to resource mobilisation, resource allocation, and resource expenditure.[276] Given the potential impacts on social rights services and to investment law protections, it is important to briefly clarify what these conditions mean.

[271] Balakrishnan and Diane Elson, Auditing Economic Policy in the Light of the Obligations on Economic and Social Rights, Essex Human Rights Review (2008) at 5
[272] IACHR, Annual Report 1979-1980, (1980) at 151
[273] Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly (1987) at 177
[274] Ibid
[275] Magdalena Sepulveda Carmona, Alternatives to austerity: a human rights framework for economic recovery in *Economic and Social Rights After the Global Financial Crisis*, edited by Aoife Nolan, Cambridge University Press (2014) at 25
[276] Allison Corkery and Ignacio Saiz, Progressive Realisation using maximum available resources: the accountability challenge, in *Research Handbook on Economic, Social and Cultural Rights as Human Rights* edited by Jackie Dugard, Bruce Porter, Daniela Ikawa, and Lilian Chenwi, Edward Elgar (2020)

Resource mobilisation is the process through which a state raises resources to provide for its population. Corkery and Saiz argue that taxation is of critical importance in resource mobilisation, as it represents a sustainable source of public revenue, and can be a powerful redistributive tool.[277] In order to ensure the compliance of the obligation of maximum available resources, taxations should ensure adequate and sufficient revenue is guaranteed.[278] The need to secure resources might require the state to impose measures to mobilise resources from the private sector (including from foreign investors). As we will see in the following Chapter, this could lead to investors claiming breaches of various investment protections, including fair and equitable treatment and protection against expropriation.

A final element must be taken into account: the way in which resources are allocated has a severe impact upon the most fundamental interests of individuals. As resources are needed to provide shelter, food, and water to those who are not able to ensure it by themselves, equality must be guaranteed. This is critical given that the incorrect allocation of resources could lead to the essential needs of certain marginalised groups being affected. This will be reflected further below when I discuss equality and non-discrimination.[279]

c. Non-retrogression

In broad terms, as a consequence of the obligation of progressive realisation, retrogressive measures – in which the enjoyment or protection of a right is diminished – are prohibited by ICESCR. Therefore, if a particular level of enjoyment or protection of a right has been

[277] Allison Corkery and Ignacio Saiz, Progressive Realisation using maximum available resources: the accountability challenge, in *Research Handbook on Economic, Social and Cultural Rights as Human Rights* edited by Jackie Dugard, Bruce Porter, Daniela Ikawa, and Lilian Chenwi, Edward Elgar (2020)
[278] Ibid
[279] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford University Press (2007) at 131

achieved, there is a clear and unequivocal obligation to maintain it.[280] If any retrogressive measure is adopted, states are obliged to 'demonstrate that this was done with caution, having evaluated all possible alternatives.'[281]

The international standards developed by the UN Committee indicate that there is a strong presumption that retrogressive measures taken in relation to the ESC rights are prohibited. If any deliberately retrogressive measures are taken, a state has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the state.[282]

Retrogressive measures can be *de jure* (entitlements guaranteed in laws are revoked) or *de facto* (backsliding the actual rights enjoyment).[283] Overall, the UN Committee's practice has been to, firstly, strongly prohibit retrogression (effectively underscoring the principal obligation upon states to progressively improve their realisation of rights), with only the second stage contemplating what exceptional circumstances might permit in terms of backwards steps.[284] For the state to lawfully implement retrogressive measures, it must demonstrate the following concurring elements:

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[280] Radhika Balakrishnan, Diane Elson and Raj Patel, Rethinking Macro Economic Strategies from a Human Rights Perspective (Why MES with Human Rights II), Marymount Manhattan College (2009) At 8

[281] Magdalena Sepulveda Carmona, Alternatives to austerity: a human rights framework for economic recovery in *Economic and Social Rights After the Global Financial Crisis*, edited by Aoife Nolan, Cambridge University Press (2014) at 27

[282] CESCR, *General Comment 3: Nature of Obligations*, 1990, paragraph 9; CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 32; CESCR, Statement on the evaluation of the obligation to take steps to the 'Maximum of Available Resources', 2007, paragraphs 9-10; CESCR, General Comment 19: Right to Social Security (article 9 of the Covenant), 2009, paragraph 42; CESCR, Statement on public debt, austerity and ICESCR, 2016, paragraph 4. UN Mandate holders have also made pronouncements on the obligations attached to non-retrogression, see Independent Expert on Foreign Debt and Human Rights, Guiding Principles on Human Rights Impact Assessments of Economic Reforms, 2018, Principle 10.

[283] Ben T. C. Warwick, Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights, Human Rights Law Review (2019), at 471

[284] Ibid, at 487

1) the maximum available resources were not sufficient, including those found within the private sphere;
2) the most careful consideration was made, including holding a participatory process to hear the views of those to which the measures would have affected;
3) a proportionality analysis was made, ensuring that when different options were available, the state took the one that was least negatively impactful for human rights;
4) the measures were not directly or indirectly discriminatory; and
5) those most at risk were prioritised.[285]

What this means for service provision is that once a level of enjoyment of a right has been achieved, it should not be diminished except under the limited circumstances described. Diminishing a service could come in various forms, for example, by reducing the quality, dramatically increasing the price, reducing the availability, or even cutting the service altogether. When a state wishes to implement such measures, a clear set of concurring elements need to be satisfied. In other words, a state cannot reduce the level of enjoyment of right (through a specific service), without very careful consideration of the impacts of its measure and without a clear justification as to why the measure was needed. As we will see in the next Chapter, this level of scrutiny will exist regardless of whether the state is directly providing the service or if the service is provided by a private provider. This is particularly important as retrogressive measures can come directly from a private provider (e.g. the provider ceases to offer the essential service or doubles the original price). In such circumstances, states should intervene to either supplement the service provision or correct or sanction the private provider. However, in the context of international investment law, such state measures may lead to

[285] CESCR, General Comment No. 19: The right to social security (Art. 9 of the Covenant), E/C.12/GC/19, 4 February 2008, paragraph 42

investment disputes alleging that protections such as the fair and equitable treatment standard or legitimate expectations were breached.

d. Equality and Non-Discrimination

ICESCR establishes in its Article 2(2) that 'the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[286] As the UN Committee has highlighted, non-discrimination and equality are essential to the exercise and enjoyment of social rights.[287]

Unlike other specific social rights obligations, which require an analysis of the availability of resources, non-discrimination issues are less 'resource-related and usually only require governmental will to apply the obligations undertaken by ratifying the Covenant.'[288] In this sense, the UN Committee has emphasized that non-discrimination is an 'immediate and cross-cutting obligation in the Covenant,'[289] which is not subject to progressive realisation standards or limited by the availability of resources. It has, nonetheless, recognised that in order to eliminate systemic discrimination, the state must take positive measures, and that this will require devoting greater resources.'[290] This is based on the fact that, as some groups are subject to greater conditions of vulnerability or have traditionally been subject to discriminatory

[286] ICESCR article 2(2)
[287] CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, paragraph2
[288] Eibe Riedel, Gilles Giacca, and Christophe Golay, The Development of Economic, Social, and Cultural Rightsin International Law in *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*, edited by Eibe Riedel, Gilles Giacca, and Christophe Golay, Oxford University Press (2014) at 16
[289] CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para.2, of the International Covenant on Economic, Social and Cultural Rights*)*, 2 July 2009, E/C.12/GC/20, paragraph7
[290] Ibid, paragraph 39

practices, affirmative measures might need to be implemented.[291] Furthermore, in times of limited resources due to economic crises, persons in situations of vulnerability and disadvantaged groups must be protected as a matter of priority.[292]

Finally, it is important to emphasise ICESCR establishes that 'property' is among the grounds on which discrimination is prohibited. This is particularly relevant, as it has been understood that by property the Covenant intends to protect those in a situation of poverty or insufficient wealth,[293] for which the access to social rights is of particular importance. As some marginalised individuals lack the very basics to ensure a decent standard of living, the fulfilment of social rights can guarantee such pressing needs being addressed.[294]

Non-discrimination is, therefore, a fundamental obligation in relation to service provision. If a state is providing a service, even on a limited basis, it needs to ensure that such service is not provided in a discriminatory manner. Although the state might not be able to guarantee that a service is provided to all the population at a given time, it needs to ensure that whatever it does provide is distributed as equally and non-discriminatorily as possible. This is also further exemplified in the section below on minimum core obligations and the normative content of rights. As discussed in the next Chapter, further complexities on ensuring equal provision of services exist when a service is privatised. Privatised services in the hands of investors, for

[291] Eibe Riedel, Gilles Giacca, and Christophe Golay, The Development of Economic, Social, and Cultural Rights in International Law in *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*, edited by Eibe Riedel, Gilles Giacca, and Christophe Golay, Oxford University Press (2014) at 33
[292] Magdalena Sepulveda Carmona, Alternatives to austerity: a human rights framework for economic recoveryin *Economic and Social Rights After the Global Financial Crisis*, edited by Aoife Nolan, Cambridge University Press (2014) at 27
[293] Balakrishnan and Diane Elson, Auditing Economic Policy in the Light of the Obligations on Economic and Social Rights, Essex Human Rights Review (2008) at 7
[294] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences,* Routledge (2012) at 5

example, might create further structural barriers that make access to a service challenging or even impossible for some communities.

e. Minimum Core Obligations

At the beginning of this Chapter, we saw how social rights were usually described as 'humanitarian', providing entitlements to basic services and goods needed to live. At the very minimum, they respond to the 'urgent interest [of] being free from general threats to one's survival.'[295] Based on this fundamental idea, the UN Committee has indicated that theCovenant entails certain minimal obligations which are of such importance that they cannot besubject to the constrains of progressive realisation and availability of resources. In its GeneralComment 3, the UN Committee expressed that:

> On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[296]

[295] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford University Press (2007) at 187

[296] CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)14 December 1990, paragraph 10

Tracing back the discussion to progressive realisation and availability of resources, the purpose of the minimum core obligations is to recognise that although the implementation of social rights requires resources that are not available in certain states, there are certain obligations that are of such importance that the state must act diligently to ensure them. Therefore, it affirms that 'even in highly strained circumstances, a state has irreducible obligations that it isassumed to be able to meet […] irrespective of the availability of resources or any other factorsand difficulties.'[297]

Based on the above considerations, the author has defined elsewhere minimum core obligations as the obligations related to ESC rights which a country needs to comply with, at all times and in all circumstances, regardless of the resources or the overall conditions of a country.[298] As some of them are related to the provision of essential services or goods, they require careful attention when attempting to systemically integrate investment and human rights, as they will need to be considered as matter of priority.

Through various general comments, the UN Committee has clarified what are the minimum core obligations attached to the rights enshrined in ICESCR. Those that relate to the provision of services are:

1) ensure access to health facilities, goods, and services on a non-discriminatory basis, especially for vulnerable or marginalised groups; [299]

[297] Audrey R. Chapman, The Status of Efforts to Monitor Economic, Social, and Cultural Rights in *Economic Rights: Conceptual, Measurement, and Policy Issues,* edited by Shareen Hertel and Lanse Minkler, Cambridge UniversityPress (2009) at 154
[298] Luis Felipe Yanes, Minimum Core Obligations in Scotland, Scottish Human Rights Commission (2023) at 1-2
[299] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 43

2) take the necessary action to mitigate and alleviate hunger,[300] which includes ensuring access to minimum essential food, which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;[301]
3) ensure access to basic shelter, housing, and sanitation;[302]
4) ensure access to public educational institutions and programmes on a non-discriminatory basis;[303]
5) provide primary education for all;[304]
6) ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;[305]
7) ensure access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalised groups;[306]
8) ensure physical access to water facilities or services that provide sufficient, safe, and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;[307]
9) ensure equitable distribution of all available water facilities and services.[308]

While there is a flexibility afforded to states in relation to the fulfilment of social rights in general (through the obligations of progressive realisation and maximum available resources), minimum core obligations restrict that flexibility and the ability to fulfil social rights over time.

[300] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, paragraph 6
[301] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 43
[302] Ibid
[303] CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December1999, E/C.12/1999/10, paragraph 57
[304] Ibid
[305] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, paragraph 37.a
[306] Ibid, paragraph.37.b
[307] Ibid, paragraph 37.c
[308] Ibid, paragraph 37.e

While a state is still required to improve services over time, there are certain services deemed of such importance that they need to be provided immediately after a state ratifies a treaty. As demonstrated previously, this includes the provision of free primary education, and the provision of minimum essentials amount of water, among others. As I will discuss in Chapter IV, however, legal questions arise regarding the satisfaction of these minimum core obligations when services are being provided by private actors, and in particular by foreign investors.

f. Limitations and derogations

The final element to reflect on in relation to the nature and inherent obligations of social rights is that of derogations. As explained by McGoldrick, a derogation of a right or an aspect of a right is its complete or partial elimination as an international obligation.[309] Some international human rights treaties allow states to unilaterally derogate temporarily from (suspend) certain human rights guarantees in times when an emergency 'threatens the life of the nation', but only to the extent strictly required by the situation.[310] Derogation from a particular right must be necessary in light of the prevailing exceptional threat to protect or restore a democratic public order essential for the protection of human rights.[311]

ICESCR is silent on derogations. However, two important provisions should be taken into account. Article 5 of the Covenant enshrines that:

> Nothing in the present Covenant may be interpreted as implying for any State, groupor person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitationto a greater extent than is provided for in the present Covenant.

[309] D. McGoldrick, 'The Interface Between Public Emergency Powers and International Law', International Journal of Constitutional Law 2 (2004) at 383.
[310] Manisuli Ssenyonjo, Reflections on state obligations with respect to economic, social and cultural rights in international human rights law, The International Journal of Human Rights (2011)
[311] Ibid

> No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognizesuch rights or that it recognizes them to a lesser extent.'[312]

The interpretation afforded to such clause, and to the treaty in general, is that the rights contained in the treaty are not subject to derogations.[313] Further, the Covenant also established the specific conditions in which economic, social, and cultural rights can be limited. The Covenant enshrines in Article 4 that:

> […]in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.[314]

As argued by Müller, Article 4 ICESCR reflects the desire to give states flexibility in the necessary balancing of individual rights with public interests. However, a significant difference of ICESCR from other treaties is that it establishes that there is 'solely' one legitimate reason for which economic, social and cultural rights can be limited, which is 'for the purpose of promoting general welfare.'[315] As noted by Alston and Quinn, 'general welfare' is to be interpreted restrictively in the context of Article 4.[316] As further elaborated by Müller, the meaning of 'general welfare' is not elaborated on in the *travaux préparatoires*, and the fact that permitting limitations for reasons of maintaining public order, public morality and the respect for rights and freedoms of others were explicitly rejected during the drafting process, makes

[312] ICESCR, Article 5
[313] Elizabeth Mottershaw, 'Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law', The International Journal of Human Rights 12, no. 3 (2008): 449–70.
[314] ICESCR, Article 4
[315] Amrei Müller, Limitations to and Derogations from Economic, Social and Cultural Rights, Human Rights Law Review, Volume 9, Issue 4, (2009) at 570
[316] Alston and Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, (1987) 9 Human Rights Quarterly 156 at 201-202

clear that the term 'general welfare' does not implicitly include these terms.[317] Under such terms, Müller indicates that in the context of ICESCR, 'general welfare' should be understood as referring primarily to the economic and social well-being of the people and the community.[318]

This is particularly relevant when analysing the obligations of the state in the provision of social rights services. What is discussed above makes it clear that while limiting services mightbe possible, this can only be done to ensure the general welfare of the population. In other words, limiting the provision of education, or water, or housing, can only be done if such limitation is justified by the social wellbeing of the population. This is most easily exemplifiedwith the measures implemented during the global Covid-19 pandemic, where states restricted the enjoyment of various services (educational, cultural, recreational, among others) to ensurethat the life and health of the population was guaranteed.

As will be discussed further in this thesis, economic crisis might lead to different actors calling for limitations on the enjoyment of certain services, including when such services are in the hands of foreign investors. This can be illustrated in situations where a private service provider asks for the price of the service (such as health services or water) to increase dramatically, while the general population is then left unable to afford such services. In the next Chapter this is most perfectly exemplified in the financial crisis that was lived in Argentina between 1998–2002.

[317] Amrei Müller, Limitations to and Derogations from Economic, Social and Cultural Rights, *Human Rights Law Review*, Volume 9, Issue 4, (2009) at 573
[318] Ibid

IV. The tripartite typology of duties

In addition to the obligations that emanate from the nature of social rights, a typology of state duties, or a multi-layered obligations structure,[319] exist in terms of human rights law. This tripartite typology, traditionally conceived as 'respect, protect, and fulfil' is considered to be a set of systematic and interdependent duties, affirming the idea that human rights cannot be fully realised by performing only one of them and neglecting the others.[320]

This typology helps to clarify the state action needed to satisfy the full range of human rights obligations contained in ICESCR. In simple terms, the duty to respect requires states to refrain from any action which would impede or harm the enjoyment of rights. The duty to protect requires states to actively prevent others, including businesses, in limiting or breaching human rights. Finally, the duty to fulfil requires states to create the necessary conditions for rights to be fully enjoyed and realised. The following sections elaborate on all three duties, providing further clarity as to how such duties relate as well to the provision of social rights services.

a. The duty to Respect

The first duty is that of respect. It translates into an obligation which requires a state to 'not take any measures that result in denying or limiting access to the enjoyment of the Covenant's rights. It includes abstaining from enforcing discriminatory practices as a state policy. The actions or policies that contravene this level include the adoption of laws or policies manifestly incompatible with the standards set forth in the Covenant or other international legal obligations or in pre-existing domestic law and the repeal or suspension of legislation necessary for the continued enjoyment of the Covenant's rights.'[321] Some have argued that as the

[319] Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, Dartmouth (1996) at 31

[320] Magdalena Sepúlveda Carmona, *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia (2003) at 170

[321] Ibid, at 197

obligation to respect is cost-free – as it imposes a negative obligation to the state to abstain from a certain conduct – it could also be considered to be a minimum state obligation.[322]

The UN Committee has further developed what the duty to respect duty entails for each social right protected under the Covenant, clarifying through various General Comments what such conditions mean when providing social rights. In particular, the UN Committee has indicated that the duty to respect imply:

1) Refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; [323]
2) Refraining from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments;[324]
3) Refraining from limiting access to health services as a punitive measure.[325]
4) Refraining from taking any measures that result in preventing access to food;[326]
5) Avoid measures that hinder or prevent the enjoyment of the right to education;[327]
6) Refraining from closing private schools;[328]

[322] Audrey Chapman and Sage Russel, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia (2002) at 11
[323] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 33
[324] Ibid
[325] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 33
[326] Ibid, paragraph 36
[327] CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December1999, E/C.12/1999/10, paragraph 47
[328] Ibid, paragraph 50

7) Refraining from engaging in any practice or activity that denies or limits equal access to adequate water;[329]
8) Refraining from arbitrarily interfering with customary or traditional arrangements for water allocation;[330]
9) Unlawfully diminishing or polluting water;[331] and
10) Limiting access to, or destroying, water services and infrastructure as a punitive measure.[332]

Overall, the duty to respect demands that the state ensure that it is not actively impeding persons or communities from accessing social rights services. It demands that states operate in a way that freely allows anyone to access services intended to satisfy their social rights, such as provision of water, health services, public or private education.

b. The duty to Protect

The second obligation is the duty to protect social rights, which means that the state is required to 'take all necessary measures to ensure that individuals under their jurisdiction are protected from infringements of the Covenant's rights by third parties (individuals, groups, or corporations).'[333] The duty to protect requires the state to adequately regulate the action of other entities, preventing them from denying or limiting the enjoyment of these rights. In addition, States are to protect individuals under their jurisdiction when third parties engage in practices which are harmful to the enjoyment of these rights.'[334]

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[329] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, paragraph 21
[330] Ibid
[331] Ibid
[332] Ibid
[333] Magdalena Sepúlveda Carmona, *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia (2003) at 197
[334] Ibid

In its General Comment 24 (in relation to state obligations in the context of business activities), the UN Committee clarified further that the duty to protect meant that states were required to 'adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against [ICESCR] rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies.'[335]

The UN Committee further indicated that the obligation to protect also required states to bring forward direct regulation and intervention in business activities, when it was necessary.[336] The UN Committee indicated that measures that should be considered, including but not limited to, restricting marketing and advertising of certain goods and services in order to protect public health; exercising rent control in the private housing market as required for the protection of everyone's right to adequate housing; and regulating other business activities concerning the rights to education, employment and reproductive health; among others.[337]

In Chapter IV, I will explore in more detail what happens when social rights services are privatised. However, it is important here to highlight that the UN Committee has been clear on what the duty to protect implies when social rights services are in the hands of private actors. The UN Committee has stressed that states have an obligation to 'regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs.'[338] In particular, the UN Committee has indicated that the state should bring forward strict regulations

[335] CESCR, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, paragraph 14
[336] Ibid, paragraph 19
[337] Ibid
[338] Ibid, paragraph 22

that impose on private actors 'public service obligations', such as requirements that ensure the universality of coverage and continuity of service, pricing policies, quality requirements, and user participation.[339] Further, in relation to health services, the UN Committee has also indicated that private health-care providers should be prohibited from denying access to affordable and adequate services, treatments or information.[340]

To further exemplify with specific rights, in relation to the right to food, the UN Committee has expressed that the obligation to protect requires the state to ensure that enterprises or individuals do not deprive individuals of access to adequate food;[341] and take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.[342]

Concerning the right to education, the UN Committee has provided that the obligation to protect requires states to take measures that prevent third parties from interfering with the enjoyment of the right to education;[343] and ensure that third parties, including parents and employers, do not stop girls from going to school.[344]

With regards to the right to water, the UN Committee has detailed that states are obliged to prevent third parties from interfering in any way with the enjoyment of the right to water (including individuals, groups, corporations and other entities, as well as agents acting under their authority); and to adopt the necessary and effective legislative and other measures to

[339] Ibid, paragraph 21
[340] Ibid
[341] CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, paragraph 15
[342] Ibid, paragraph 27
[343] CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December1999, E/C.12/1999/10, paragraph 47
[344] Ibid, paragraph 50

restrain third parties from denying equal access to adequate water and/or polluting and inequitably extracting water resources, including natural sources, wells and other water distribution systems.[345]

Overall, the duty to protect clearly implies that the state is required to regulate private actors to ensure that the provision of services can satisfy the rights contained in ICESCR. What is considered to be the state's right to regulate in international investment law terms (as we will see later in this thesis) in more is more accurately characterised as a duty to regulate, under international human rights (social rights) law terms. Understanding that the state is obliged under ICESCR to take positive action to regulate private services is essential for the systemic integration of international investment law and international human rights law.

c. The duty to Fulfil

Although traditionally understood as one single duty, the actual practice of the UN Committee on Economic, Social and Cultural Rights seems to indicate that the duty to fulfil implies three different obligations: an obligation to facilitate, an obligation to provide, and an obligation to promote.

1. Facilitate

The obligation to facilitate requires the state to 'pro-actively engage in activities intended to enable and assist individuals and communities to enjoy the Covenant's rights.'[346]

[345] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 23
[346] Magdalena Sepúlveda Carmona, *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia (2003) at 198

The UN Committee has indicated that, in relation to the right to health, this implies that the state must take positive measures that enable and assist individuals and communities to enjoy the right to health.[347] With respect to the right to food, the UN Committee has indicated that the state must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security.[348] In terms of the right to education, the UN Committee has expressed that states are required to take positive measures that enable and assist individuals and communities to enjoy the right to education;[349] and ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all.[350] With regards to the right to water, the UN Committee only specifies that states must take positive measures to assist individuals and communities to enjoy the right.[351]

2. Provide

The obligation to provide requires the state to directly deliver a specific right enshrined in the Covenant 'when individuals or groups are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal.'[352] However, this will depend of the right of the Covenant, as the state might have an obligation to provide a right even when persons have the means to satisfy such right by their own, such as primary education.[353]

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[347] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 37
[348] CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, paragraph 15
[349] CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December1999, E/C.12/1999/10, paragraph 47
[350] Ibid, 50
[351] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 25
[352] Magdalena Sepúlveda Carmona, *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia (2003) at 198
[353] In this sense, the Covenant enshrines in its article 13.1.a that '[p]rimary education shall be compulsory and available free to all'.

With the exception of the right to education, where the UN Committee has expressed that the obligation to provide is limited only to primary education, the UN Committee has expressed that the nature of the obligation to facilitate is exactly the same for food, water, and health. In this sense, the UN Committee has emphasised in the General Comments related to such rights that states have a duty to provide the right when individuals or a group are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal.[354]

When services are in the hands of the state, measures to ensure that those who cannot afford food, water, and health services might be easier to implement. The state might be able to plan within its national budget that resources need to be allocated to provide free services for certain people. However, this duty continues to apply in cases where the state has chosen to privatise services and, as we will see in Chapter IV, also applies regardless of the additional challenges that are raised in this context.

3. Promote

The obligation to promote requires states to undertake a variety of different actions, such as: i) to perform research on the Covenant's rights; ii) to provide information to individuals under their jurisdiction; iii) to provide training; iv) to ensure the dissemination of appropriate information relating to the Covenant's rights; v) to support people in making informed choices about their enjoyment of social rights; and vi) to ensure that the rights enshrined in the Covenant are given due attention in international agreements, including by considering the

[354] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4; CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, paragraph 15; CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 25

development of further legal instruments (ensuring that such agreements do not adversely impact the rights established in the Covenant).[355]

This final element brings attention to the development of the international investment regime in general. As we will see in Chapter VI of this thesis, the duty to fulfil-promote might call on states to develop more sophisticated investment treaties that unequivocally recognise that they must be read in line with the state's international human rights obligations.

V. The normative content of rights

In addition to respecting, protecting, and fulfilling social rights, states are required to provide services in a way that respects their 'normative content.' This means that states are also constrained by certain conditions that must guide them in the realisation of social rights. The UN Committee on Economic, Social and Cultural Rights has called them 'elements,'[356] 'features,'[357] factors,'[358] and/or 'aspects,'[359] which are not only essential for the correct implementation and satisfaction of a right but are also interrelated.

The normative content of each right is fundamentally related to the idea of adequacy. It recognises that in order for the implementation of social rights to be adequate or satisfactory, they must follow certain parameters. These parameters provide a guide to social service provision, which is why they are often also called 'frameworks' for provision (such as the

[355] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 37
[356] Ibid, paragraph 12
[357] CESCR, General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December1999, E/C.12/1999/10, paragraph 6
[358] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11
[359] CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, paragraph 8

AAAQ framework of the right to health).[360] They limit the discretion of the state to interpret how adequately it has fulfilled its social rights obligations, requiring that a minimum criteria be met.

The normative content will be different for each social right, and therefore the assessment of their adequate provision will differ. However, in general terms:

1) For services related to the right to health to be adequate, they need to available, accessible, acceptable, and of good quality (AAAQ);[361]
2) For services related to right to water to be adequate, they need to available, of good quality, and accessible (AQA);[362]
3) For services related to the right to food to be adequate, they need to available (in quantity and good quality) and accessible (AA);[363]
4) For services related to education to be adequate, they need to be available, accessible, acceptable, and adaptable (AAAA);[364] and
5) For services related to the right to housing to be adequate, they need to ensure legal security of tenure, ensure availability or services and facilities, be affordable, habitable, accessible, be in a location that allows access to employment, healthcare, and education, and be culturally adequate.[365]

[360] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 12
[361] Ibid
[362] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 12
[363] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, paragraph 8
[364] CESCR, General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December1999, E/C.12/1999/10, paragraph 6
[365] CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, paragraph 8

The explanation of all aspects of the normative content of each right can be a lengthy process. Therefore, this Section will focus the attention on two rights as way of exemplifying how the normative content has been developed by the UN Committee. First, in relation to the right to water, as mentioned above, for services to be adequate, they need to available, of good quality, and accessible. This means:

1) For water services to be available, water supply for each person must be sufficient and continuous for personal and domestic uses (including drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene). The UN Committee has indicated that the quantity of water available for each person should correspond to what is determined by the World Health Organization.[366]
2) For water services to be of quality, the water required for personal or domestic use must be safe (free from micro-organisms, chemical substances, and radiological hazards) and should be of an acceptable colour, odour, and taste.[367]
3) For water to be accessible, it needs to be physically accessible (facilities and services, must be within safe physical reach for all sections of the population, and within, or in the immediate vicinity, of each household, educational institution and workplace);[368] economically accessible (must be affordable for all, including all direct and indirect costs and charges associated with securing water);[369] provided in a non-discriminatory manner (services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact);[370] and accessible in terms

[366] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, paragraph 12.a
[367] Ibid, paragraph 12.b
[368] Ibid, paragraph 12.c(i)
[369] Ibid, paragraph 12.c(ii)
[370] Ibid, paragraph 12.c(iii)

of information (must include the ability to seek, receive and impart information concerning water issues).[371]

Second, in relation to the right to education, the UN Committee has indicated that it needs to be available, accessible, acceptable, and adaptable. This entails:

1) Availability. Functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State.[372]
2) Accessibility. Educational institutions and programmes have to be accessible to everyone. This requires that education has to be within safe physical reach by attendance at some reasonably convenient geographic location (physically accessible); and education has to be affordable to all (economically accessible).[373]
3) Acceptability. The education itself (the curricula and teaching methods, for example) have to be acceptable. This means it has to be relevant, culturally appropriate and of good quality.[374]
4) Adaptability. Education has to be flexible so it can adapt to the needs of changing societies and the needs of students.[375]

The normative content of the rights is also intrinsically related to the tripartite typology of obligations. When providing services, the state needs to ensure that such services are adequate. To do so, it must also take into account its duty to respect, protect, and fulfil social rights. For

[371] Ibid, paragraph 12.c(iv)
[372] CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December1999, E/C.12/1999/10, paragraph 6.a
[373] Ibid, paragraph 6.b
[374] Ibid, paragraph 6.d
[375] Ibid

example, Commans developed the following schema to demonstrate the normative content of the right to education:[376]

	Accessibility	Availability	Acceptability	Adaptability
To respect	Respect free access to public education both in legislation, policy and practice without discrimination	Respect existing public education in minority languages	Respect religious and philosophical convictions. Respect freedom of school choice. Respect teaching in minority languages.	Respect free establishment of private schools. Respect (cultural) diversity in education.
To protect	Apply and uphold equal access to education in legislation, policy, and practice against violations by third persons. Adopt and implement legislation against child labour.	Regulate recognition of private educational institutions and diplomas.	Combat indoctrination or coercion by others. Protect legally freedom to choose. Combat discrimination in the admission of students to private institutions. Guarantee pluralism in the curriculum.	Apply and uphold the principle of equality of treatment. Protect legally private teachers' training institutions and diplomas.
To fulfil	Provide special educations facilities for persons with an educational back-log. Eliminate passive discrimination. Introduce progressively free secondary and higher education. Promote scholarship system.	Secure compulsory and free primary education. Train Teachers. Make transportation facilities and teaching materials available. Combat illiteracy. Promote adult education. Guarantee quality of education.	Promote pluralism in the curriculum. Promote intercultural education.	Provide financial and material support to institutions for private education on a non-discriminatory basis.

Ensuring that social rights services are provided adequately might be more challenging when they are being provided by private actors. As will discussed in the next Chapter, the duty of the state to protect social rights will necessary also have to take into account the normative content of each right, as the state will have to ensure that a private provider is delivering its services in an accessible, acceptable manner, that guarantees good quality.

[376] Fons Coomans, 'Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches', 50 Persona & Derecho (2004)

VI. Conclusions

Overall, this Chapter has demonstrated that social rights have unique obligations, distinct from civil and political rights, which require careful consideration. In particular, the cornerstone of social rights protection is centred in the notion that states cannot remain static to the fulfilment of rights. Progressive realisation, therefore, always requires the state to continue to implement efforts to achieve the full enjoyment of social rights. As will be discussed further in the thesis, an interpretation of investment law that requires a host state to virtually freeze its regulatory regime, and not demand improvements over time, will be inherently contradictory to progressive realisation.

In this sense, social rights require state intervention and regulation, on a continuous basis. This means that social rights not only demand the state to act at times; it also demands the state to continually monitor the enjoyment of rights and to intervene when appropriate. Although termed in investment law as a right to regulate, this is best translated as a duty to regulate under human rights terms.

The Chapter has also demonstrated that, despite progressive realisation, some obligations need to be met at all times and in all circumstances. Some of these minimum core obligations are related to the provision of essential services, such as minimum amounts of water or food. This becomes of critical concern when the service is in the hands of a private actor, as the state is called to take all necessary measures, as a matter of priority, to ensure that minimum core obligations are met (regardless of who delivers the service). As will be demonstrated in the following Chapter, this might result challenging in the context of privatisation.

Furthermore, the Chapter has also demonstrated how the provision of services to satisfy social rights are conditioned to a series of elements to ensure their adequacy. This normative content requires the state to guarantee that services are accessible, affordable, acceptable, of good quality. It also requires the state to guarantee that such adequacy is improved over time. This means that a state is not dismissed of its duty if it manages to reach a good level of quality, for example. Rather, it demands that the state continues to make efforts to improve the quality. This will remain a state responsibility regardless of who provides the service. The question that one could immediately ask is: how would the state ensure all of these conditions of adequacy and improvement if the service is not in its hands, but rather in the hands of a private provider? This will be discussed in detail in the next Chapter, which will demonstrate not only the complexities to fulfil human rights when a service is privatised, but the further difficulties that investment law can bring to the ability of the host state to discharge its social rights obligations.

Ultimately, this Chapter has aimed at providing an in-depth discussion on the nature and exact obligations that are inherent to social rights. To achieve an effective Interpretative-integration of investment and human rights law, understanding these obligations are of paramount importance. This will be demonstrated further in Chapter VI, when these obligations are used to prove how interpretative-integration can be used when analysing the legitimate expectations of investors.

Chapter IV
The Privatisation of Social Rights in the Era of International Investment Law

I. Introduction

When human rights obligations were formulated, they envisioned a clear role of the state, which included the provision of certain services considered to be fundamental to the functioning of society, such as health and education services, employment services, and waterand power utilities.[377] The nature of social rights and the obligations that are attached to them was explored in detail in the previous Chapter. It explained that social rights are conditioned tospecific and unique obligations, including having to improve the quality, access, affordability of a social rights service over time.

Since the creation of the international human rights' legal regime, states began to delegate the provision of some services needed to fulfil social rights to private actors. While outsourcing or delegating the provision of social rights services has arguably had positive and negative effects on the enjoyment of human rights, there has been increasing concern in the last two decades on the many challenges that privatisation creates to the full enjoyment of social rights. Among the existing concerns are the consequences of the protection that international investment law has given to those providers that are foreign investors.

[377] Adam McBeth, Privatising Human Rights: What Happens to the State's Human Rights Duties When Services are Privatised?, Melbourne Journal of International Law (2004) at 2

The aim of this Chapter is to explore the phenomenon of the privatisation of social rights services, and the consequences that the international investment regime has had for the provision of services, particularly considering the interpretation of investment protection standards by investment tribunals. In order to achieve an effective systemic integration between international human rights law and international investment law, it is of great importance that we understand what exactly the human rights challenges are when a service is provided by a private actor and the obligations that the state is still bound by. As will be discussed below, while the state may delegate the delivery of a service, it is not absolved from its obligations under international human rights law. If a foreign investor provides a service that is relevant for the satisfaction of social rights, it is important for an investment tribunal to contextualise investment law within the parameters of, not only of the applicable investment rules (the bilateral investment agreement for example), but also the international human rights rules to which the state continues to be bound.

This Chapter demonstrates how the current interpretation of the rights of investors afforded in international investment law adopted by most investment arbitral panels has created complexities for the realisation of social rights, particularly by: i) restricting the ability of host states to change the way the provision of a service is being performed by a private actor; ii) restricting the ability of host states to enact new regulations to protect social rights, and iii) restricting the ability of host states to reduce the profit of investors in order to ensure vulnerable populations have access to essential social rights services. The Chapter identifies legitimate expectations as one of the protections afforded in investment law that has been particularly problematic when states attempt to implement measures to protect social rights, especially given the broad nature of the concept.

II. Outsourcing social rights provisions

While the state is the primary duty bearer for social rights obligations, it is common for some social rights provision services to be delegated or outsourced to private actors. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, an authoritative document produced by a group of human rights experts and used by the UN Committee to guide its own interpretative work, highlights that:

> Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many states. It is no longer taken for granted that the realisation of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law,the state remains ultimately responsible for guaranteeing the realization of theserights.[378]

What we have seen in the last thirty years has been a shift to a state with fewer functions, and the delegation of traditional state functions to private actors through the process of privatisation.[379] This privatisation process is believed to have been so profound that the distinctions between what is public and what is private have disappeared from view.[380]

Today, you might receive clean drinking water in your house, but you might not be aware of whether the provider is an entity controlled and administrated by the state, or a private company. We might receive health care services without knowing whether this is through a private provider. We might even enjoy our Sunday afternoon in a park, not knowing that it is owned and managed by a private entity. One of the common modalities of privatisation is when

[378] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 January 1997), paragraph 2
[379] Aoife Nolan, Privatisation and Economic and Social Rights, Human Rights Quarterly, (2018) at 817
[380] Mike Raco, State-led Privatisation and the Demise of the Democratic State: Welfare Reform and Localism inAn Era of Regulatory Capitalism, Ashgate (2013) at 2

an privatise entity holds a contractual agreement to deliver a service on behalf of the state. These are particularly common in the provision of services such as water, health, and education. Through concession agreements or private-public partnerships (PPPs)[381] the state directly delegates a service provision that was previously in the hands of the state.[382] In some forms of PPPs, often the user does not even realise the service is now being provided by a private entity, as access to the service itself is done through some public form. For the user that is accessing the service there is presumption that this is something provided by the state. This is exemplified in medical services that are being provided by private actors inside a public hospital, which is owned by the state but managed by the private actor. In this example, the user is not aware that the service is provided by a business on behalf of the state. Why is any of this important for human rights? And does it have any relevance for international investment law? As will be detailed below, the process of privatisation, complex as it is, is not only profoundly intertwined with human rights and investment protection, but its consequences – specially the negative ones – are dealt through the bodies of law that regulates these two fields.

This section starts by defining privatisation. It further explores in detail the permissibility within international human rights law for services to be privatised, and particularly, the limitations to such permissibility. It ends by explaining that, while services may be subject to privatisation, the state remains ultimately responsible for fulfilling, protecting, and respecting human rights. This means that the state is required to have a fundamental role in the supervision

[381] Public-private partnerships is an umbrella term describing different types of contractual relationships between public and private actors that are usually long-term and where the parties share risks. See Olga Martin-Ortega and Laura Traviño-Lozano, Sustainable Public Procurement of Infrastructure and Human Rights: Beyond Building Green, Edward Elgar (2023)

[382] There are various forms of PPPs currently in place across the world, which make the realisation of rights contractually and legal complex. Some PPP contracts are through a Build-Operate-Transfer (BOT) agreement, in which the private providers owns the project's infrastructure, until they are transferred at the end of the contract back to the state. Other PPP contracts are through a Rehabilitate-Operate-Transfer (ROT) contract, in which the provider is required to improve existing infrastructure, operate it through a certain among of time and return ownership back to the state. See further World Bank, PPP Contract Types and Terminology, Public-Private Partnership Legal Resource Centre (2022).

and regulation of privatised social right services.

a) Defining privatisation

The privatisation of public services is something that has been dealt with extensively in the economics,[383] politics,[384] and other social science literature,[385] but very little from a human rights perspective.[386]

There are many definitions on privatisation in general, which tend to focus on the process of transferring public services to private actors. Privatisation is understood to be 'the sale of public assets to private providers and thus to a change of public ownership to partial or full private ownership. Accordantly, the privatisation of public services means the 'divestment of state assets in public service providers and public service infrastructure.'[387] It is believed that 'governments could no longer rely on the traditional model to keep pace with population growth and the demand for modernisation; nor could the decaying infrastructure bear the strains placed upon it.'[388] As an inevitable consequence, governments turned to the private sector in

[383] Maxim Boycko, Andrei Shleifer, and Robert W. Vishny, A Theory of Privatisation, The Economic Journal (1996); Conor M O'Toole., Edgar L.W. Morgenroth, and Thuy T. Ha, Investment Efficiency, State-Owned Enterprises and Privatisation: Evidence from Viet Nam in Transition, Journal of corporate finance (Amsterdam, Netherlands) (2016); Noemí Peña-Miguel and Beatriz Cuadrado-Ballesteros. The Role of Governance in Privatisation Reforms: A European Analysis, Scottish Journal of Political Economy (2018); Palcic, Dónal., and Eoin. Reeves. *Privatisation in Ireland: Lessons from a European Economy*. Basingstoke: Palgrave Macmillan (2011)

[384] Germà Bel, Robert Hebdon, and Mildred Warner, Beyond Privatisation and Cost Savings: Alternatives for Local Government Reform, Local government studies (2018); Liam Clegg, and Chris Rogers, Privileging Privatisation: Accounting Practices and State Transformation in the UK, British politics (2022); Ming Guo, and Sam Willner. Swedish Politicians Preferences Regarding the Privatisation of Elderly Care, *Local government studies* (2017); Beatriz Cuadrado-Ballesteros and Noemí Peña-Miguel, Does Privatisation Reduce Public Deficits?, Policy and politics (2019)

[385] Saeed Zaki and A. T. M. Nurul Amin, Does Basic Services Privatisation Benefit the Urban Poor? Some Evidence from Water Supply Privatisation in Thailand, Urban studies (Edinburgh, Scotland) 46.11 (2009); Kramer, Xandra, Jos Hoevenaars, and Betül Kas, *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation*, Edward Elgar Publishing, (2022); John Puntis, The Slow March of Privatisation Makes Hospitals Less Sensitive to People's Needs, BMJ (2021); Giulia Romano and Lucio Masserini, Factors Affecting Customers' Satisfaction with Tap Water Quality: Does Privatisation Matter in Italy?, Journal of cleaner production (2020)

[386] See more at: Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatisation*, University of Pennsylvania Press (2017) at 47

[387] Christoph Hermann and Jörg Flecker, *Privatization of Public Services: Impacts for Employment, Working Conditions, and Service Quality in Europe*, Routledge (2012) At 8

[388] Andrew Hill, Foreign Infrastructure Investment in Chile: The Success of Public-Private Partnerships through Concessions Contracts, Northwestern Journal of Internal Law and Business (2011) at 166

order to receive investment that could provide the technical support to effectively satisfy these obligations.

One form of privatisation can be understood as a process in which a private actor becomes responsible of an activity that is designed to ensure the fulfilment of a human rights obligation. In his report on privatisation and human rights, the then Special Rapporteur on extreme poverty and human rights (Philip Alston) indicated that '[p]rivatisation is a process through which the private sector becomes increasingly, or entirely, responsible for activities traditionally performed by government, including many explicitly designed to ensure the realization of human rights. It can take many forms, ranging from the complete divestiture of government assets and responsibilities to arrangements such as public-private partnerships.'[389]

'Devolution', 'displacement' or the 'downsizing' of the state has also been used to characterise the process of privatisation. From this angle, what privatisation represents is a 'broader process of devolution of responsibility for social provisions and refers to a shift from publicly to privately produced goods and services.'[390] It is characterised by the ability of the private sector to 'displace the public sector in various ways, including through ownership, financing, management, and service and/or product delivery.'[391]

It is important to highlight that the idea of privatisation covers not just the full transfer of a previously public service to the private sector, but also 'any private sector involvement in public service provision.'[392] Hence, when we speak about privatisation, we are not only

[389] UN, Report of the Special Rapporteur on extreme poverty and human rights Philip Alston to the General Assembly (2018) A/73/396, par.1
[390] Joseph Zajda, *Decentralisation and Privatisation in Education: The Role of the State*, Springer (2006) at 7
[391] UN, Report of the Special Rapporteur on extreme poverty and human rights Philip Alston to the General Assembly (2018) A/73/396, par.5
[392] Ibid

speaking about the process in which a state outsources the delivery of a service to a private actor, but also about the continuous (and often long) involvement of such private actor in the service delivery. In other words, for human rights specifically, privatisation does not only refer to a process, but to any private involvement in the satisfaction of services demanded by human rights obligations, such as those discussed in Chapter III.

One of the main arguments in favour of privatisation is efficiency, as in many cases public services are believed to be an 'anachronistic; blunt, inefficient and restrictive,' and if what really matters is the outcomes of service provision, not the service delivery, then this can be better done by the private sector.[393] This supports the idea of a 'market-oriented' provision of services that is concerned with ensuring that services are provided in efficient way, regardless of the mechanisms.[394]

Based on this idea of efficiency, the proponents of privatisation argue that the private sector is more capable of mobilising finance, is more innovative, and better minimises running costs, 'claim[ing] that, as a result, it can generate strong profits, ensure better quality, provide enhanced maintenance, be more flexible and avoid the rigidities and inefficiencies of government-type bureaucracy.'[395] In principle, this would then guarantee that the normative content of social rights (the adequacy framework discussed in Chapter III) would be satisfied fully. Further, as private services are then supposed to be more efficient and cost-effective, the assumption is then that the state would still be able to comply with its obligation to maximise the available resources in order to satisfy the realisation of social rights.

[393] Institute for Public Policy Research, Building Better Partnerships: the final Report from the Commission on Public Private Partnerships (2001) at 15
[394] Kieron Walsh, Public Services and Market Mechanisms: Competition, Contracting and the New Public Management, Macmillan Press (1995) at xv
[395] UN, Report of the Special Rapporteur on extreme poverty and human rights Philip Alston to the General Assembly (2018) A/73/396, par.22

Raco refutes this claim of efficiency, arguing that in reality it matters very little how inefficient a private provider can be or how perverse the outcomes of their involvement might be in the provision of services, as in reality privatisation is based on powerful ideologies.[396] Although it is not the scope of this research, it is important to briefly mention that indeed the reasons for the privatisation of public services are often the result of ideological understandings of the role of the state in our contemporary society, rather than detailed analyses of the efficiency of provision in a particular sector. This is well articulated by Nowak in his monograph on privatisation and human rights, where he argues that neoliberal policies and ideologies are responsible for diminishing these set of 'inherent government functions' through privatisation, which enables the private sector to get involved and make profits,[397] out of services that respond to essential human needs and fundamental rights. As Alston indicated in his seminal report, neoliberal policies are unequivocally aimed at shrinking the state through privatisation.[398] This is demonstrated, to some degree, in some of the following sections of this Chapter. Despite the continuous pervasive impact that privatisation has had on human rights, states have continued to outsource the provision of social rights services – sometimes as a consequence of pressures from financial institutions such as the World Bank and the International Monetary Fund (IMF).

The spread of privatisation around the globe has been substantially influenced by the work of the World Bank and the IMF.[399] In certain areas, such as the provision of water and sanitation management, the World Bank has been particularly influential with its Water Resources Sector

[396] Mike Raco, State-led Privatisation and the Demise of the Democratic State: Welfare Reform and Localism inAn Era of Regulatory Capitalism, Ashgate (2013) at 170
[397] Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatisation,* University of Pennsylvania Press (2017) at 166
[398] UN, Report of the Special Rapporteur on extreme poverty and human rights Philip Alston to the General Assembly (2018) A/73/396, par.81
[399] Joseph Zajda, *Decentralisation and Privatisation in Education: The Role of the State*, Springer (2006) at 4

Strategy.[400] This success was not only due to reshaping the public discourse of the costs and benefits of privatisation, but by a very powerful weapon: the use of conditionalities through its debt relief programmes and concessional finance and grants for the water sector, which were conditioned on privatisation.[401] A clear example of the privatisation of water services as a result of World Bank loan conditionalities can be seen in the case of the City of Dar es Salaam (Tanzania),[402] which ultimately resulted in an investment arbitration between Biwater and the Tanzania (discussed previously in Chapter II).[403]

The IMF is also believed to have had privatisation as a key part of its agenda, and regardless of some of the claims by the Fund, it continues to emphasise the privatisation of public services in the advice it provides to governments and in the conditions it attaches to its loans.[404] In this sense, Alston affirms in his report that a 'review of the 10 most recent article IV staff reports dealing with countries in Africa shows that IMF was actively advocating privatization in six cases, while in virtually all of the others the Governments themselves noted their commitment to public-private partnerships and related projects.'[405] Furthermore, a clear example of the persistence of conditionalities can be seen with the recent developments with Greece, which was forced to privatise its water services in order to gain financial relief from the IMF , the European Commission, and the European Central Bank, following the 2015 Greek financial crisis.[406]

[400] World Bank, Water Resources Sector Strategy: Strategic Directions for World Bank Engagement (1993)
[401] Malcolm Langford, Privatisation and the right to water in The Human Right to Water Theory, Practice and Prospects, edited by Malcolm Langford and Anna F. S. Russell, Cambridge University Press (2017) at 466-467
[402] See more at WaterAid, Why did City Water fail? The rise and fall of private sector participation in Dar es Salaam's water supply (2008)
[403] See Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008
[404] UN, Report of the Special Rapporteur on extreme poverty and human rights Philip Alston to the General Assembly (2018) A/73/396, paragraph 18
[405] Ibid, paragraph 19
[406] See more in IMF, Country Report No. 18/248 (2018)

These pressures by the World Bank and the IMF to privatise social rights services are important to take into account, as often the complexities that privatisation creates – particularly between international human rights law and international investment law – have not necessarily been taken into careful consideration by the host state. As discussed in Chapter II, commentators such as Zhifeng have argued that that some coercive conditions existed, in which some developing states were pressured to agree to investment treaties as a condition to access loans from international financial institutions.[407] Analysing Zhifeng's writings, I have argued that a state that had committed itself to investment treaties – coerced or not – and had also freely committed to various human rights treaties, did not necessarily intend for investment norms to take priority over human rights. This would be the same case for those states to which have been to some degree coerced into privatising social rights services. What is fundamental to stress here is that the axiom of *pacta sunt servanda*, as discussed in detail in Chapter II, recognises that both areas of law are valid, and therefore, both required to be read in harmony and not in conflict.

Before concluding this sub-section, it is important to highlight that a further line of thought in favour of privatisation is directly motivated on human rights concerns. Some of those arguments are still intrinsically related to the arguments explained before about efficiency and quality. Privatisation, the argument goes, will effetely increase competition, which will then lead to lower prices and better quality of services.[408] This would then, presumably, lead to a better enjoyment of social rights.[409] A second line of argument, within the same line of thought, is that privatisation will reduce fiscal deficit, as the state will not have to use great amount of

[407] Jiang Zhifeng, Pacta Sunt Servanda and Empire: A Critical Examination of the Evolution, Invocation, and Application of an International Law Axiom, Michigan Journal of International Law (2022), at 782
[408] DJ Gayle and JN Goodrich, Exploring the implications of privatisation and deregulation, in DJ Gayle & JN Goodrich (eds) *Privatisation and deregulation in global perspective* (1990)
[409] Ibid

resources in providing these services, therefore being able to directly invest in other fundamental human rights priorities, such as education.[410] A final argument is that, by outsourcing these services, the state apparatus is able to focus on better monitoring and regulation, with increased resources for the judiciary, regulatory bodies, national human rights institutions, and others.[411] This would, consequently, result in an efficient and effective human rights regime, the argument goes.[412] A final argument is that the privatisation of social rights services will help the state to, either directly raise the necessary resources to satisfy other areas of human rights, or create the service in which it did not have the means to provide it in the first place.[413]

The previous argument ultimately aims to justify the privatisation of social rights services as a natural consequence of the obligations that are attached to these rights. This is, as the state is required to fulfil social rights; progressively; to the maximum of its available resources; when it does not have the necessary resources to create the facilities or infrastructure, then privatisation can be a mechanism to provide the population with such services. Either for the purposes of efficiency (to provide a better service) or for the purposes of actually having a service in the first place (as it did not have the money to provide the service), the overall argument is that privatisation can be motivated directly by human rights concerns. As will be detailed below, however, these arguments are somewhat misleading, as they do not take into account the complexities that privatisation can create, and most concerningly, the dramatic negative impacts that privatisation can have to people's social rights.

[410] Kate Bayliss 'Privatisation and poverty: The distributional impact of utility privatisation' Centre on Regulation and Competition, Working Paper Series No 16 (2002)
[411] Yair Aharoni 'On measuring the success of privatisation' in R Ramamurti & R Vernon (eds) *Privatisation and control of state-owned enterprises,* Economic Development Institute of The World Bank (1991)
[412] Ibid
[413] Ramaswamy R. Iyer, The Privatisation Argument, *Economic and Political Weekly* 23 (1988)

b) Permissibility of privatisation

It is usually stated that international law is 'neutral' regarding the delegation, outsourcing, or privatisation of social rights services, as the state is allowed to determine its own political and economic policies.[414] This notion of neutrality has resulted from interpretation provided by the UN Committee's General Comment 3, stating that the realisation of the obligations of the Covenant could be achieved through different means, as the Convent was 'neutral' on the type of political or economic mechanism a state employed to fulfil its obligations. In this sense, the Committee stated that:

> […] in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the needfor, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned,or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflectedin the system in question.[415]

Nowak and Nolan, however, disagree. Nowak argues that careful analysis of General Comment 3 does not really support the argument that ICESCR is 'neutral' on privatisation.[416] He indicates that privatisation is not a particular type of economic system, it is rather 'a measure deliberately taken by governments in a socialist, a capitalist, a mixed, or any other economic system in order to transfer ownership from the public to the private sector.'[417] Furthermore, in Nowak's view, privatising state functions that are considered essential for the progressive realisation of human rights actually constitute a violation of the obligations to respect, protected and fulfil

[414] Antenor Hallo de Wolf, *Reconciling Privatisation with Human Rights*, Intersentia (2012) at 59
[415] CESCR, General Comment 3 (1990) paragraph 8
[416] Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatisation,* University of Pennsylvania Press (2017) at 50
[417] Ibid

human rights unless one condition is met.[418] This condition is that the state can actually guarantee that the private service provider respects, protects and fulfils the human rights concerned at least to the same extent as the public service provider, and can also be held accountable for human rights violations in the same manner as the government.[419]

Nolan agrees, to some degree, with Nowak. She indicates that human rights treaties are not truly 'neutral' on privatisation as an effective means of implementing economic, social and cultural rights, because the ICESCR requires the state to develop, maintain, and progressively improve a certain level of public infrastructure in order to guarantee that all persons can enjoy their human rights.[420] Nolan further argues that privatisation cannot truly occur without some degree of consent from the state, as the state always takes some degree of action in delegating or divesting itself of services generally understood as public.[421] Therefore, the state is expected to clearly understand the potential consequences – both positive and negative – of the privatisation of social rights services.

Mégret, on the other hand, further argues that international human rights law might in some cases mandate the public ownership of certain functions, instead only seeking to mitigate the consequences of privatisation (as traditionally conceptualised by others).[422] He further argues that international law seems to require that that privatisation should only occur under the most demanding conditions, for example, 'on the basis of a compelling case that rights will not be sacrificed, the state will maintain a strong supervisory role, and private actors will be kept on a tight regulatory leash.'[423] This, of course, is relatedly in line with on Nowak's argument that,

[418] Ibid, at 54
[419] Ibid
[420] Aoife Nolan, Privatisation and Economic and Social Rights, Human Rights Quarterly, (2018) at 823
[421] Ibid, at 825
[422] Frédéric Mégret, Are There "Inherently Sovereign Functions" in International Law? American Journal of International Law, (2021) at 454
[423] Ibid, at 491

privatisation is only permissible if it can ensure the progressive realisation of human rights.

A further critique is advanced by Cordelli, which not only expresses concern over the commodification (and, in her words, corruption) of certain goods that are essential to society, but its ultimate wrong is the creation of an institutional arrangement which she calls the 'privatised state.'[424] This institutional arrangement denies to the population equal freedom, because it makes making the 'definition and enforcement of individuals' rights and duties, as well as the determination of their respective spheres of freedom, systematically dependent on the merely unilateral will of private actors.'[425] In other words, the 'privatised state' makes rights-holders mere consumers to which there is little accountability for their fundamental rights.

A different approach is presented by Walsh, who argues that in reality the issue is not really whether social rights services can be privatised legally, but rather whether is it legitimate or ideal for the state to delegate certain essential activities.[426] The UN Committee itself has further indicated that 'Privatisation is not per se prohibited by the Covenant, even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong, but '[t]he increased role and impact of private actors in traditionally public sectors, such as the health or education sector, pose new challenges for States parties in complying with their obligations under the Covenant.'[427]

All these points are particularly critical to understand, as they relate to the relationship between international investment law and international human rights law, and the complexities that are

[424] Chiara Cordelli, *The Privatized State*, Princeton University Press (2020), at 8-10
[425] Ibid, at 8
[426] Kieron Walsh, Public Services and Market Mechanisms: Competition, Contracting and the New Public Management, Macmillan Press (1995) at 6
[427] CESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, paragraph 21

demonstrated in the case of privatised social rights services. In particular, if investment law – or rather the interpretation afforded to investment law – reduces or contradicts the obligations that are inherent to social rights, then privatisation indeed becomes impermissible under international human rights law. In other words, for privatisation to be allowed under human rights law it requires that other areas of law – including international investment law – are not contradictory to the obligations of progressive realisation, minimum core obligations, non-retrogression, normative content, among others. Systemic integration is critical to ensuring the permissibility of privatised services, by securing an interpretation of international investment law that takes very careful consideration of the obligations attached to social rights. To put it simply, if the protections afforded by investment law such as fair and equitable treatment can be read in a way that hinders the obligation that states have to progressively realise rights, then privatisation can breach state obligations under international human rights law. For privatisation to comply with international human rights law, international investment law standards should not be interpreted in a way that undermines state duties to fulfil, protect and, respect social rights. Section III of this Chapter will focus on some of the challenges that international investment law poses for the satisfaction of human rights and why systemic integration, and the purpose of this thesis itself, is so fundamental.

c) Continuous responsibility

It is important to emphasise that the permissibility of privatisation does not mean the derogation of state responsibility. The state outsources the service, not the obligations under international human rights laws that pertain to service delivery. This was elaborated by Amnesty International in a seminal report on privatisation. In its report, Amnesty International indicates that '[p]rivatising the delivery of essential services has often led to the false assumption that the state is no longer responsible for the realisation of rights, and that the responsibility has been subcontracted to the private sector provided. While the private sector provider remains responsible for its legal responsibility [the provision of the service], the state continues to be primarily accountable for the human rights responsibility.'[428] This is reaffirmed in the Maastricht Guidelines, which indicates that 'the state remains ultimately responsible for guaranteeing the realization of these rights.'[429]

This is particularly relevant for the forms of privatisation where a private entity holds a contractual agreement to deliver a service on behalf of the state. These are particularly common in the provision of services such as water, health, and education. Through concession agreements or private-public partnerships (PPPs)[430] the state directly delegates a service provision that was previously in the hands of the state. In some forms of PPPs, often the user does not even realise the service is now being provided by a private entity, as access to the service itself is done through some public form. For the user that is accessing the service there is presumption that this is something provided by the state. This is exemplified in medical services that are being provided by private actors inside a public hospital, which is owned by

[428] Amnesty International, Human Rights and Privatisation (2005) at 2
[429] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 January 1997), paragraph 2
[430] Public-private partnerships is an umbrella term describing different types of contractual relationships between public and private actors that are usually long-term and where the parties share risks. See Olga Martin-Ortega and Laura Traviño-Lozano, Sustainable Public Procurement of Infrastructure and Human Rights: Beyond Building Green, Edward Elgar (2023)

the state but managed by the private actor. In this example, the user is not aware that the service is provided by a business on behalf of the state.

Why is any of this relevant for the scope of this research? An investment tribunal needs to acknowledge that the behaviour of an investor that has been contracted to provide social rights services has a direct impact on the satisfaction of a state's international human rights legal obligations. A state might then need to act in a specific way to ensure the private actor is not undermining state's human rights obligations. Privatisation shifts, to some degree, the type of action that is required from the state, with less focus on service provision and more focus on monitoring and regulation. If privatisation is indeed permissible under international law, then regulation to ensure private actors are complying with the state's human rights obligations is *ipso facto* required. As I will elaborate further, investment tribunals need to take this into consideration in interpreting investment treaty standards.

De Freyter and Gomez Isa further elaborate on some of these points, indicating that although the state cannot absolve itself of its international human rights obligations by delegating service delivery to private actors, the actions the state needs to focus on do change once a service is privatised.[431] In particular, they argue that once a service is in private hands, the state needs to focus on its duty to provide protection against abuses by the private actor, specifically by developing instruments that can oversee the human rights impact of service delivery by the private actor, and stepping in when human rights are abused.[432] This is important, as the outsourcing of the service delivery does not in any way change the content of the right

[431] De Freyter and Gomez Isa, *Privatisation and Human Rights in the Age of Globalisation*, Intersentia (2005) at 7
[432] Ibid

associated with the service (the obligations or the normative content of the rights explained in Chapter III, Section V).

This point is exemplified perfectly by McBeth, who indicates that change in the entity running a prison does not alter a prisoner's right to be treated humanely.[433] In social rights terms, the change in the delivery of public health services, for example, does not change the requirement that the service should continue to be available, accessible, acceptable, and of good quality, as required by the normative content of the right to health (discussed in the previous chapter). While the content of the rights does not change, given that the state is continuously bound by such duties, the type of activities the state is expected to perform might defer. This is the focus of the next section.

d) State duties on privatised services

A final and important element to analyse, in relation to outsourcing social rights services, is the exact type of duties the state has (or activities it is expected to perform) when services are being delivered by private actors. As argued by Raco, with privatisation the very nature of what we have traditionally understood the state to be is being transformed, from a provider of services to a procurer and regulator.[434]

As explained in Chapter III, the UN Committee has stressed that states have an obligation to 'regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are

[433] Adam McBeth, Privatising Human Rights: What Happens to the State's Human Rights Duties When Servicesare Privatised?, Melbourne Journal of International Law (2004) at 2
[434] Mike Raco, State-led Privatisation and the Demise of the Democratic State: Welfare Reform and Localism inAn Era of Regulatory Capitalism, Ashgate (2013) at 170

adapted to those needs.'[435] In particular, the UN Committee has indicated that state should adopt strict regulations that impose on private actors 'public service obligations', such requirements that ensure the universality of coverage and continuity of service, fair pricing policies, quality requirements, and assurances of user participation.[436] This series of actions emerged from the state's duty to protect rights. While the service might be in the hands of a private provider, the state continues to have important obligations, in this case, related to ensuring that the private provider does not infringe the human rights of the population it is serving.

Moyo and Liebenberg argue that a critical concern that is raised by the privatisation of social rights services (in particular water and sanitation) is the true effectiveness of regulation and monitoring mechanisms that ensure the realisation of rights notwithstanding the privatisation of the service delivery.[437] Moyo and Liebenberg indicate that there are a number of reasons why the state's duty to protect is insufficient as a form of accountability for human rights violations by non-state actors; particularly given that the regulatory duty of the state as a component of the duty to protect against human rights violations requires both financial and human rights resources, which then creates challenges for developing states that face both resource and capacity constraints.[438]

The concerns over the limitations of the duty to protect in cases of privatisation are also well articulated by other commentators. For example, Hallo de Wolf argues that – in contrast to the duty to protect – under the duty to fulfil, it is expected that the state will 'go the extra mile in

[435] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 22
[436] Ibid, paragraph 21
[437] Khulekani Moyo and Sandra Liebenberg, The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability, Human Rights Quarterly (2015) at 698
[438] Ibid, at 700

guaranteeing that rights are actually realised [as] the state is expected to lay down the conditions and guarantees under which specific rights are fulfilled and fully enjoyed by individuals.'[439] Hallo de Wolf further indicates that if social rights services are privatised then the state is required to ensure that all potential policies that are implemented as a consequence of privatisation are consistent with the overall enjoyment of human rights.[440]

McBeth makes a similar argument, indicating that one of the biggest concerns related to the privatisation of social rights services is that there is a danger that it will create a 'glass ceiling, whereby the continuation of progressive improvement in realisation of the right in question will cease in the absence of an economic incentive for the private operator to fulfil this objective.'[441] The question therefore is, does the duty to protect rights allows for the progressively realisation of rights when services are privatised? His concerns are centred on the fact that it is not clear – in his view – whether private entities have an independent obligation to promote human rights, or particularly, if they should be obliged to improve social rights services in the absence of economic incentives from the state.[442] Therefore, McBeth argues that the 'fact that some of these rights depend upon the adequate and equitable delivery of social services, which in some cases are delivered by private providers, suggests that the expectation of their progressive realisation will be frustrated if the privatisation of those services is not accompanied by an obligation on the part of the service provider to promote human rights affected by that service.'[443] These arguments are similar to those expressed by Nowak and Nolan, which are essentially centred on the notion that privatisation is only then permissibly if obligations such as progressive realisation can be guaranteed.

[439] Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights*, Intersentia (2012) at 147
[440] Ibid
[441] Adam McBeth, Privatising Human Rights: What Happens to the State's Human Rights Duties When Servicesare Privatised?, Melbourne Journal of International Law (2004) at 16
[442] Ibid
[443] Ibid, at 16-17

Given the above, Nolan has been critical of the work of the UN Committee in relation to privatisation, as it has focused too narrowly on the duty to protect rights while not engaging on the duty to fulfil, or the modalities by which the obligations of progressive realisation, minimum core obligation, and normative content, among others can be satisfied.[444] How does the state ensure a service is improving over time, made more accessible for people, more respectful of their cultural beliefs, more affordable, more reliable, and so on, when it is in the hands of a private provider? The Committee in silent on these questions, which is part of Nolan's criticism. Is it that the duty to protect requires the state to create a regulatory framework that ensures all these elements are required from the private provider and that the state intervenes (through incentives or sanctions) when this is not the case? That seems to be implied by the UN Committee's analysis when it concludes that states need to adopt strict regulations that impose 'public service obligations' on private actors to ensure that services respect human rights.

While I have argued elsewhere that better contractual arrangements are needed to ensure that PPPs and concession contracts guarantee the social rights obligations of a state,[445] it is important to emphasise that states must regulate private social rights providers. This is a consequence of both the duties to protect and to fulfil. In the context of international investment law, as I will argue further, it creates a clear and unequivocal expectation for the investor: a social rights service cannot be left unattended, and the investor should expect that there will be regulation to ensure that the service is being delivered in compliance with international human rights standards.

[444] Aoife Nolan, Privatisation and Economic and Social Rights, Human Rights Quarterly, (2018).
[445] Johanna Hoekstra and Luis Felipe Yanes, The mismatch of public–private partnerships and the right to health, in *Sustainable Public Procurement of Infrastructure and Human Rights: Beyond Building Green*, edited by Olga Martin-Ortega and Laura Traviño-Lozano, Edward Elgar (2023).

III. The impacts of privatisation and international investment law

As might be apparent by now, the story of privatisation is not always a happy one. There are many examples of catastrophic results, such as the one in the city of Dar es Salaam, where the privatisation led to fewer people having access to water, the service becoming more expensive, and the quality of the water being poorer than before. To make things slightly more complicated, the supplier of that water service was not just a private actor, but a foreign investor. The case was discussed in the Chapter II, which demonstrated the lack of the tribunal's engagement with international human rights law. As Daza-Clark argues, the ultimate Award was not favourable to the investor, despite the tribunal's finding that Tanzania breached the applicable treaty, as compensation was not ordered by the tribunal. However, it cannot be concluded that the decision favoured Tanzania either.[446] In particular, Daza-Clark argues, the tribunal's analysis was problematic as it concentrated on the investment obligations of the host state under the BIT, without considering in any way the vital importance of water services for the population of the host country.[447]

The challenges for a successful privatisation, therefore, do not only lie in the existence of a set of norms that regulate the conduct of states to ensure the human rights of its inhabitants, but often also in the set of norms that regulate the treatment of foreign investors. In the last two decades we have been made more aware of the intrinsic and complex relationship between the privatisation of social rights services and international investment law. A set of international investment disputes – many related to the privatisation of water in Argentina – have

[446] Ana Maria Daza-Clark, Protection of Foreign Investment and the Implications for Regulation of Water Servicesand Resources: Challenges for Investment Arbitration, Water Law (2009) At 111
[447] Ibid

demonstrated some of challenges that international investment law poses for the protection of social rights when services are privatised.

Guaranteeing strict and appropriate regulation might be a difficult, lengthy, and resource-intensive task.[448] Given its complexities, often the state might not have been able to implement the necessary regulation before having signed a concession agreement. This could happen in situations, as mentioned above, where a state might have been required by an international financial institution to privatise a service as a condition of financial assistance, while due to a financial crisis – or the need for immediate aid – it did not have the time to implement strict domestic legislation regarding the protection of social rights in private social service provision.

The difficulties posed by this situation are exacerbated by the current provisions that can be found in investment treaties and investment contracts, and particularly, the interpretation of these provisions by international investment tribunals. Provisions such 'stabilisation clauses' or 'legitimate expectations' can impede states in making positive changes to protect human rights.

This section focuses on the particular challenges that international investment law poses for the effective protection of social rights when essential services are being provided by foreign investors. By analysing key arbitral awards, as well as academic scholarship, this section argues that international investment law places three different types of limitations on a state's ability to protect social rights when services are in the hands of private providers:

[448] Mike Raco, State-led Privatisation and the Demise of the Democratic State: Welfare Reform and Localism inAn Era of Regulatory Capitalism, Ashgate (2013) at 172

1) Limitations on the state's ability to modify the way a service is being provided to ensure the state is guaranteeing an essential human right service;
2) Limitations on the state's ability to modify the rules or laws a service is subject to; and
3) Limitations on the state's ability to secure affordability of a fundamental human rights service for the population of a host state.

All three limitations demonstrate the complexities of the relationship between human rights law and investment law in the context of privatised social rights services. This is the focus of the next few sections.

a) Limitations on the state's ability to modify the provision of the service

The need for the state to step in and modify the conditions of service provision, to ensure the protection of social rights by private providers, is well exemplified in the case of Vivendi against Argentina. In 1995 Vivendi Universal, a French investor, signed a 30-year contract with the Argentinian Province of Tucuman for the provision of water and sanitation services.

The provider was required to improve the quality of the service. Given that this required a high level of investment, Vivendi increased the water tariff. The new local government in Tucuman expressed concerns over the affordability of the water services, asking Vivendi on various occasions to reduce the tariff. This was followed by calls from various other governmental institutions. Various attempts to renegotiate the concession contract, in order to make water more affordable to the population of Tucuman, was unsuccessful. On various occasions the local government called the population to not pay their water bills, not only given the high level of prices, but because on a few occasions the water had been apparently contaminated (or at

the very least the quality had been dramatically reduced). The investor unilaterally terminated the contract 1997 – claiming the economic value of the investment had been lost given the acts of the Government – but the Government required it to provide services for almost a year given that it consider it was abandoning the service.

The investor initiated an investment claim against Argentina as a result, with a first decision being annulled.[449] In the second investment arbitration, the investor alleged that the state acted wrongfully given that the provincial authorities: i) unilaterally modified tariffs contrary to the Concession Contract; ii) used the media to generate local hostility toward them; iii) made numerous, unjustified accusations against the concessionaire while themselves acting in flagrant violation of the agreement; iv) incited customers not to pay their bills; and v) used their law-making powers to reject or undermine proposals that could have resolved issues with the concession and saved it from failure.[450]

Argentina, on the other hand, alleged that: i) after the concession had initiated, the investor doubled the water bills to an impoverished population without warning and without noticeably improving service; ii) the investor destroyed the confidence of the population by negligently delivering black, undrinkable and potentially unhealthy water over a period of many weeks, which caused consumers to revolt and, in some cases, to refuse to pay vastly inflated bills; iii) investment agreements were never intended to protect investors from the consequences of their own mistakes nor to provide them with an insurance policy against the due exercise of the state's regulatory activity; and iv) the provincial authorities had the right and the duty to take

[449] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), Decision on Annulment rendered on 3 July 2002

[450] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic) Award rendered on 20 August 2007, Award rendered on 20 August 2007

steps to ensure the availability of safe drinking water for its population on an affordable and accessible basis.[451]

The tribunal sided with the investor and determined that Argentina had directly undermined the Claimants' legitimate expectations. This was based on its conclusion that the measures enacted by the authorities in Tucuman could 'only be seen as a vindictive exercise of sovereign power aimed at punishing [the investor] and its shareholders for seeking to terminate the Concession Agreement and for exercising their rights to arbitrate under the BIT.'[452] The tribunal, however, did not consider whether the measures that Argentina enacted were valid given the host state's right to regulate, as had been claimed by Argentina. The tribunal did not consider in any way the necessary margin of discretion needed for a state to regulate in favour of the general population, nor did it consider Argentina's claim that it had acted in order to 'ensure the availability of safe drinking water for its population on an affordable and accessible basis.'[453]

To recapitulate from the previous Chapter, for services related to the right to water to be considered adequate under international human rights law, they need to be available, of good quality, and accessible.[454] This means that its provision must be sufficient and continuous for personal and domestic uses;[455] that it is free from micro-organisms, chemical substances, and radiological hazards, and should be of an acceptable colour, odour, and taste;[456] and that the service is affordable for all, including all direct and indirect costs and charges associated with securing water.[457] The state is also required to ensure, at all times and with no exceptions, that

[451] Ibid, paragraph 3.3.5
[452] Ibid, paragraph 7.4.45
[453] Ibid, paragraph 3.3.5
[454] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 12
[455] Ibid, paragraph 12.a
[456] Ibid, paragraph 12.b
[457] Ibid, paragraph 12.c(ii)

everyone has access to the minimum essential amount of water which are sufficient and safe for personal and domestic uses to prevent diseases.[458] The facts in the Vivendi case clearly demonstrate that the provision of water was not being delivered adequately, under human rights law. The service was unaffordable for a considerable part of the population, and even worse, there was concerns over the quality of the service provision. Clearly, the service needed to change.

While there might have been impropriety in the behaviour of state officials, there are several aspects of the case that demonstrate the difficulty the state had in trying to change the delivery of the service. First, there was critical concern on the overall adequacy of the service, which led to the local government to try to renegotiate the concession agreement. Vivendi reject all offers. The state continued to try to renegotiate, with no success. Eventually, the investor unilaterally cancelled the contract and attempted to abandon the service, alleging that state authorities had undermined the investment given their public representations. Vivendi was required to continue to run the service for 10 months given that the situation had put at risk the right to water and health to the population of Tucuman.

The tribunal does not seem to take much of this into account. While it focuses on the improprieties of state agents, it pays little attention to the acts from Vivendi that put at risk the right to water of the population. It provides virtually no explanation as to what exactly should have been expected from an investor when providing an essential social rights service, and particularly, what state measures would have been truly legitimate to expect in order to regulate and protect the right to water. If the state had cancelled the contract, it would have been likely that Vivendi would have raised a claim against Argentina. I could speculate, given previous

[458] Ibid, paragraph 37.a

precedents in the case law,[459] that Argentina would have been found in breach of the investor's legitimate expectations under the fair and equitable treatment standard. The tribunal would have likely agreed with the claim that Vivendi had a protected expectation to operate the service for the duration of the contract, and that failure to respect that, it was due compensation. How exactly should have Argentina protected the right to water of its population? How could it have acted in a way that respected the investor's rights? The tribunal is silent on this issue. Such silence is characteristic of investment tribunals that take an isolationist approach to human rights law (as described in Chapter II, Section IV.a). This, unfortunately, not only compromises the ability of the state to effetely change and regulate services in order to protect social rights, but provides no way to coherently read international investment law and international human rights law together, without contradictions. The reflections provided in Chapter VI of this thesis aim to demonstrate how tribunals such as *Vivendi* should have interpreted the investor's legitimate expectation, if it had taken an interpretative-integration approach.

b) Limitations on the state's ability to modify the rules to which a service is subject

A second limitation to the state's ability to regulate in favour of social rights protections is the general ability to implement new measures or laws in order to change a service, either to improve its quality, make it more accessible, or more affordable. Hogan has argued that states are called to implement measures that guarantee the adaptability of a concession contract, in order to ensure that 'governments are not binding themselves and future generations to terms and conditions that are not in the public's long-term interest,' regardless of whether 'social, economic, or technological circumstances change radically.'[460] However, in reality, most

[459] Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID CaseNo. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, Decision on Liability 30 July 2010

[460] Kelsey Hogan, Protecting the Public in Public-Private Partnerships: Strategies for Ensuring Adaptability in Concession Contracts, Columbia Business Law Review (2014) at 450-451

concession contracts are of a long-term nature, which can substantially limit the ability of the state to make changes to the terms under which an investor provides a social service, as we will see below. From a social science perspective, Raco has indicated that these long-term contracts involve 'signing away of the state's power to affect future change' and undermines the legitimacy of democratic systems as this depends on 'the ability of elected representatives to change the direction of policy and to respond to public demands.'[461] These limitations to change is clear in the restraints that investment law can impose, particularly in terms of stabilisation clauses found in investment contracts.

Stabilisation clauses can be defined as 'provisions in investment contracts that accommodate the risk of regulatory changes for investors.'[462] They can require the state not to alter its general legal regime for the area addressed in the clause of the contract, or that changes in the law of the state will not apply to the service being supplied by the investor, and that compensation will be due to the investor in the event that such changes are made.[463] According to many empirical studies,[464] stabilisation clauses do not seem to have any direct or essential effect in attracting foreign investment into a country, nonetheless, they continue to be very common in concession contracts signed by developing countries when privatising social services.

The existence of these stabilisation clauses in concession agreements directly, and quite dramatically, hinders the ability of the state to ensure adequate domestic legislation that protects social rights. As discussed in the previous Chapter, social rights have an obligation of

[461] Mike Raco, State-led Privatisation and the Demise of the Democratic State: Welfare Reform and Localism inAn Era of Regulatory Capitalism, Ashgate (2013) at 20
[462] Katja Gehne and Romulo Brillo, Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment, Beitrage zum Transnationalen Wirtschaftsrecht (2017) at 5
[463] Rudolf Dolzer and Christoph Schreur, *Principles of International Investment Law*, Oxford University Press (2012) at 83
[464] As an example, see Sotonye Frank, Stabilisation Clauses and Foreign Direct Investment: Presumptions versus Realities, The Journal of World Investment and Trade (2015)

progressive realisation, which implies that the state must take steps over time to ensure that the level of protection of such rights is adequate. How is it able to comply with its obligation if itis bound not to change the regulatory framework that could have an impact in the activities ofthe investor? Some tribunals have indicated that as the state – exercising its sovereignty – was freely able to conclude such clause with the investor, it must compensate if the change in the legislation amounts to indirect expropriation,[465] or to breaches to the fair and equitable treatment standard. The state, therefore, retains its right to expropriate – through nationalisation for example – but this does not exempt it from full compensation.[466]

In the absence of a stabilisation clause, changes of the regulatory framework of a state, as will be further discussed in the next Chapter, can also potentially breach the protection of the legitimate expectations of investors under the fair and equitable treatment standard. If it is assumed that the investor is entitled to expect the same regulatory environment to be in place within the host state throughout duration of its concession contract, changes to the rules or regulations that apply to the investment could give rise to an investment treaty claim. What exactly should the investor expect in situations where it is involved in the privatisation of social rights? This is part of the focus of the following Chapter. Nonetheless, for the purpose of this Section, it is important to highlight that a considerable stream of the arbitral case-law has found that legitimate expectations protect investors against modifications of the legal framework.[467] This has included cases related to the privatising of social rights services, such as the SAUR

[465] Agip v. Congo, AGIP S.p.A. v. People's Republic of the Congo, ICSID Case No. ARB/77/1, Award renderedon 30 November 1979, paragraph 86

[466] The American Independent Oil Company v. The Government of the State of Kuwait, Final Award rendered on24 March 1982

[467] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award rendered on 21 June 2011, paragraph 290-291; EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award rendered on 8 October 2009, paragraph 218; RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principlesof Quantum rendered on 30 November 2018, paragraph 262

case, in which the tribunal concluded that investors are protected from modifications to the legal framework in which it is operating in.[468]

c) Limitations on the state's ability to make the service affordable

Investors, if anything, expect a considerable profit when investing in the privatisation of social rights services.[469] When a state provides social services it is in theory capable of implementing pricing policies that take account of the needs of persons without the financial means. When private providers do so, however, they are expected to maximize profits ahead of other considerations.[470] This makes the profitability of these types of services particularly relevant given the human rights implications that very expensive services might have. Regardless of the moral argument that can be made concerning the possibility – or not – of charging for certain services,[471] human rights obligations demand that states implement adequate mechanisms to ensure the economic accessibility of these services for all, regardless of the financial conditions a person or a community might have. This is even more critical with some minimum core obligations, as discussed in the Chapter III, where for example minimum levels of free drinking water are required to be provided by the state.[472] How can the state ensure that prices are not inaccessible for its citizens without possibly restricting the investment of the private actor?

[468] SAUR International v. Argentine Republic (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability rendered on 6 June 2012, paragraphs 495-498
[469] Christoph Hermann and Jörg Flecker, Privatization of Public Services: Impacts for Employment, Working Conditions, and Service Quality in Europe, Routledge (2012) At 9
[470] C. Shapiro, R. Willig, Economic rationales for the scope of privatization in The political economy of public sector reform and privatization, edited by B.N. Suleiman, J. Waterbury, Westview Press, London (1990), at 78
[471] Some of the moral arguments against charging for essential services is mostly centre on the issues of socio-economic inequality, leaving potentially many people unable to afford services that are essential for a dignifiedlife. See for example: Debra Satz, Some (Largely) Ignored Problems with Privatization, Nomos (2019)
[472] See explanation on minimum core obligations in Section III.e in Chapter III

In the desire to ensure profit, investors might increase their user fees or tariffs in accordance with the market and inflation.[473] At a given time, however, this increase might make the service unaffordable to some or to large portions of the population, restricting the direct access to a service that is intended to satisfy a human right.

The state, however, might seek to limit the profit of an investor to ensure certain fundamental rights. As discussed by Hogan, one of the biggest concerns of concession agreements (for privatised social rights services) is that the interests of the public and private sectors are not always aligned – that is, protection of the public interest is often not conducive to private profit.[474] This is well exemplified with the provision of water and sanitation, where - according to the Blue Planet project – profit-making and the often necessary increase in prices are incompatible with the need for water to be safe, affordable, and accessible to everyone – not just those who can afford to pay.[475]

As McBeth argues, the driving motivation for private providers is necessarily profit, and therefore, they will seek to concentrate on areas and mechanisms that provide the most lucrative financial return.[476] The priorities of the state to realise fundamental human rights, McBeth further argues, will not necessarily coincide with the economic reality or drivers of the private provider.[477] If they are to coincide, they most likely will not include the delivery of the service to the most marginalised groups as a matter of priority, unless there is direct state intervention through either funding or contractual requirements on the concession agreement.[478] It can be

[473] Kelsey Hogan, Protecting the Public in Public-Private Partnerships: Strategies for Ensuring Adaptability in Concession Contracts, Columbia Business Law Review (2014) at 432
[474] Ibid
[475] Malcolm Langford, Privatisation and the right to water in The Human Right to Water Theory, Practice and Prospects, edited by Malcolm Langford and Anna F. S. Russell, Cambridge University Press (2017) at 471
[476] Adam McBeth, Privatising Human Rights: What Happens to the State's Human Rights Duties When Servicesare Privatised?, Melbourne Journal of International Law (2004) at 5
[477] Ibid
[478] Ibid

more acute, as will be discussed below, when the state is required to make interventions in the market or in a service to ensure its affordability, particularly when the overall economic conditions of the country have left some people unable to afford basic service by their own means.

The state might, indeed, be able to intervene in other ways, but this might be costly or even impossible in certain economic circumstances. As explained in the previous Chapter (Section III.b) social rights entail an obligation from the state to realise them to the maximum of their available resources. The UN Committee has stressed that privatisation of social rights services should never lead to the enjoyment of fundamental human rights to be conditioned to the ability to pay.[479] Therefore, the UN Committee adds, the state is called to always regulate and intervene to ensure that the services they provide are accessible to all at all times.[480]

The above requires state to find the necessary resources available, including within the private sector. It is up to the state, however, to decide such means. As the Inter-American Commission on Human Rights has stressed, the state has a high level of discretion as to how to allocate and use its available resources in order to satisfy social rights given the sovereignty of the state to decide its economic policy and make other regulatory decisions.[481] Overall, the state is required to demonstrate that even in times of severe resource constrains, it has acted diligently to ensure the progressive realisation of social rights.[482] It is not, however, required to act in a specific way to achieve such goal (beyond the parameters found in international human rights law).

[479] CESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, paragraph 22
[480] Ibid
[481] IACHR, Annual Report 1979-1980, (1980) at 151
[482] Magdalena Sepulveda Carmona, Alternatives to austerity: a human rights framework for economic recovery in *Economic and Social Rights After the Global Financial Crisis*, edited by Aoife Nolan, Cambridge University Press (2014) at 25

While there might have been several ways in which human rights could have been protected, the question is: should it be open to an investment tribunal to decide what specific measures the state should have adopted? We will return to this question at the end of this Section.

All these theoretical tensions are evident in the actual practice of privatised social rights service providers, and even more apparent in some investment arbitration awards. In the *Suez* case, for example, the tribunal analysed the legality of the actions of the Argentinian state when it cancelled a concession contract due to deficiencies in the provision of the service by the investor and the request by the investor to increase water tariffs during the economic crisis that was affecting Argentina at the time. The tribunal held that the state had violated the fair and equitable treatment standard, in particular by frustrating the legitimate expectations of the investor. The tribunal held that '[w]here a government through its actions subsequently frustrates or thwarts those legitimate expectations, arbitral tribunals have found that such host government has failed to accord the investments of that investor fair and equitable treatment,'[483] given that the government had not attempted to negotiate the contract under the rules provided in the concession agreement itself. However, in its analysis on legitimate expectations, the arbitration panel did not assess what exactly was the regulatory framework that existed in Argentina for the provision of water, a framework which arguably would be directly related to the activities that Suez carried out.

In particular, the tribunal indicated that 'when an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the

[483] Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, Decision on Liability 30 July 2010, at 222-223

host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed.'[484] The tribunal then emphasised that the expectations of the investor did not suddenly 'appear to their minds' but was rather the result of the Argentinian laws, treaties, government statements, and the 'legal framework which it designed and enacted, deliberately and actively sought to create those expectations in order to obtain the capital and technology that it needed to revitalize and expand the Buenos Aires water and sewage system.'[485] The tribunal further indicated that the investor attached great importance to the tariff regime stipulated in the concession contract and the regulatory framework that was in place, as their ability to make a profit was crucially dependent on it.[486] While the tribunal indicated that the treaties Argentina had ratified played an important role in creating the legitimate expectations of the investor, it did not indicate to what degree non-investment treaties (such as the ICESCR or the Protocol of San Salvador) were to also shape the expectations of the investor. The *Suez* tribunals' approach on the relevance of Argentina's IHRL obligations differs from that of the *Urbaser* tribunal on the same legal question.[487]

The tribunal further indicated that the investor's expectations that Argentina would respect the Concession Contract throughout the thirty-year life of the Concession was 'legitimate, reasonable, and justified [as it was] in reliance on that legal framework that the Claimants invested substantial funds in Argentina.'[488] The tribunal also refuted the argument – presented by Argentina – that the investor could not reasonably expect that in the context of an economic and financial crisis Argentina would have had to act in the way it did, particularly given in the

[484] Ibid, paragraph 222
[485] Ibid, paragraph 227
[486] Ibid, paragraph 231
[487] The *Urbaser* tribunals' findings are discussed in detail in Chapter V and VI.
[488] Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID CaseNo. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, Decision on Liability 30 July 2010, paragraph 231

history of economic instability of the country.[489] The tribunal further indicated that if Argentina's concern was 'to protect the poor from increased tariffs' then it might have, for example, allowed 'tariff increases for other consumers while applying a social tariff or a subsidy to the poorer households.'[490] The tribunal then concludes that Argentina's 'persistent refusal to revise the tariff in accordance with the legal framework and the Concession Contract frustrated the expectations of the [investor].'[491]

Finally, with respect to the human rights obligations that Argentina had, after a series of *amicus curie* submissions, the tribunal analysed the possible tension that in these types of privatisations investment law and human rights law could have. It concluded that:

> […] Argentina's human rights obligations to assure its population the right to water somehowtrumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive Thus, as discussed above, Argentina could have respected both types of obligations. Viewing each treaty as a whole, the Tribunal doesnot find that any of them excluded the defence of necessity.[492]

How exactly could the state have complied with its human rights obligations and its investment law obligations? The majority of the tribunal only indicates that the state should have adopted other measures, such as applying a social tariff or a subsidy to the poorer households.[493] One of the arbitrators disagreed with the majority's conclusion. His reasoning is of a particular importance for this thesis. In his dissenting opinion, Professor Nikken stresses that 'it is not for

[489] Ibid, paragraph 234
[490] Ibid, paragraph 235
[491] Ibid, paragraph 232
[492] Ibid, paragraph 262
[493] Ibid, paragraph 235

the Tribunal to determine the alternative measures that could have been adopted, because it cannot ex post facto substitute itself for the Argentine Government when it had to address the serious crisis that hit the country.'[494] Nikken explains that the role of the tribunal is to verify whether the measures of the government in question conform to the 'canons of a modern and well-organized State,' which means determining if the measures of the state are discriminatory or arbitrary.[495]

Further, Nikken criticises the Tribunal's reasoning, indicating that, in relation to its analysis on the regulatory powers of the state, he found the decision contradictory. Nikken says that 'while [the tribunal] assert[s] that Argentina retained its legitimate regulatory power, [it] also affirms that such power could not be exercised it in any way to change the regulatory framework, not even to address the requirements of the common good in an emergency situation in a way that was or could be timely, consistent, reasonable, proportionate, even-handed, and non-discriminatory.'[496] Nikken affirms that effectively the tribunal came to the contradictory conclusion that 'the regulatory power [of the state] exists, but does not exist at the same time.'[497] This is because, the state cannot have full regulatory power while at the same time it can be found in breach of its international investment obligations when its regulates in favour of the population, in a way that was not arbitrary or discriminatory.

Previously in this Section I posed the question: should it be open to an investment tribunal to decide what specific measures the state should have adopted to comply with its human rights obligations? Nikken answers negatively to this question. The role of the tribunal is to determine if measures adopted are arbitrary or discriminatory, not to find other type of solutions that

[494] Ibid, paragraph 37
[495] Ibid, paragraph 36
[496] Ibid, paragraph 40
[497] Ibid

would have been more beneficial to the investor. I agree with Nikken. The state is obliged to fulfil, progressively, and to the maximum of its available resources, the social rights of its population. In the *Suez* case, Argentina decided that it was necessary to freeze the tariffs in order to ensure that everyone had access to water. Argentina was going through a financial crisis, so the overall available resources that the state had were limited. The freezing of the tariffs was not an arbitrary measure that was imposed only to Suez, it was imposed nationally to all water providers. It is true that different measures could have been implemented but, to determine its feasibility, this would require a forensic examination of the resources available to the state in order to conclude if it truly had all the necessary resources to continue operating in an effective way and also be able to implement the measures proposed. One would have to ask: did Argentina have the financial resources to provide subsidies for the poor (as suggested by the tribunal), in times of financial crisis, while it was also being imposed various economic measures from the World Bank and the IMF, and comply with all its other obligations? Regardless, this is not (and should not) be the role of an investment tribunal.

In more general terms, the above-mentioned points demonstrate how the interpretations of investment law afforded by investment tribunals have limited or made more complex the ability of states to make services more affordable, when they are being provided by foreign investors. Tribunals have relied on protection such as legitimate expectations, which have been created out of interpretation (as will be discussed in the next Chapter), ultimately limiting the right and duty of states to regulate in order to protect human rights.

Furthermore, what was described above in relation to the *Suez* case demonstrates how the majority of the tribunal essentially rejected analysing the human rights arguments raised by the state. The tribunal only provides alternative solutions to the measures that Argentina enacted,

but none of those measures are analysed through the totality of the state's obligations. The tribunal did not consider the obligation to maximise the available resources that a state has, which required the state to ensure that it had guaranteed that its limited financial resources were being used to provide for all. The obligation also required that, given the crisis, the state would also use private resources to satisfy the rights. The tribunal also did not consider the prohibition against retrogression, which required the state to ensure that the level of enjoyment of a right was maintained to everyone (not only for those poorest or most marginalised). Further, the tribunal did not consider that the provision of basic levels of water constitutes a minimum core obligation, to which the state is obliged to comply with, at all times and in all circumstances. That it was, therefore, required under human rights law to take all measures necessary to ensure access to water for its population as a matter of priority. The tribunal seems to demand that, in times of an economic crisis, the state should have used more resources (which is not clear if it had) to support those most vulnerable in Argentina, in order to ensure that the legitimate expectations of the investor were protected. Rather, why was it not the tribunal's view that the investor – as a provider of a fundamental social rights service – should have had an expectation that measures to limit its profits were possible, or even more, predictable?

This is part of the main issue that was discussed in Chapter II. The approach taken by the *Suez* Tribunal can essentially be categorised within the isolationist approach: while not denying the relevance of both areas of law, there is a lack of willingness to engage with human rights laws within the context of the investment arbitration. If treaties can shape or create legitimate expectations for investors, why are those treaties limited to investment treaties and not the totality of a state's international legal obligations? If a provider of a service is satisfying a basic human right need (such as water or health), why does the legal obligations attached to such service have no influence in the legitimate expectations of an investor? All these questions are

fundamental for the systemic integration of human rights and investment law and are better exemplified in the reasoning that the *Urbaser* tribunal provided. They are therefore part of the focus of Chapters V and VI.

IV. Conclusions

The present Chapter has demonstrated the complexities of privatising social rights. This complexity is exacerbated when a private provider is also a foreign investor. For the purpose of addressing the main research question, this Chapter was aimed as answering the sub-question: Does international human rights law limit or create specific expectations for an investor when it is investing in the provision of social rights services?

The Chapter has responded affirmatively to this question. In particular, I have demonstrated how under human rights law, for privatisation to be lawful, investment law needs to ensure that the overall obligations that are attached to social rights are guaranteed and not diminished through the practice of investment arbitration. This is because, when a service is privatised, the state continuous to be responsible for the adequate satisfaction of social rights, including ensuringthat they are progressively realised, meet all minimum core obligations, among other obligations. This leads to conclusion that, while investment law acknowledges the right to regulate of the state, international law rather places an unequivocal duty to regulate.

The Chapter has also demonstrated that the interpretation afforded by investment tribunals seems to present a mismatch of between human rights law and investment law. This has been the result of tribunals interpreting investment protections in a way that ultimately limits the ability of the state to act in favour of human rights. This is particularly clear with the interpretation afforded to legitimate expectations. Such tribunals have mostly taken an

isolationist approach to investment and human rights, as – while affirming that human rights are not contradictory to investment law – they do not engage with human rights obligations, reading investment protections in clinical isolation. This invertedly has led to results that undermine human rights.

Overall, this Chapter has demonstrated that, as social rights services cannot be left unattended (they demand state intervention and improvements over time), the investor must always expect that there will be regulation to ensure that the service is being delivered in compliance with international human rights standards. This is further elaborated in Chapter VI.

Chapter V
Legitimate expectations in international investment law

I. Introduction

In Chapter IV, I explored how investment law in general has created complexities for the realisation of social rights when essential services are privatised, particularly by restricting the ability of host states: i) to change the way the provision of a service is being performed by a private actor; ii) to enact new regulation to protect social rights, and iii) to reduce the profit of investors in order to ensure vulnerable populations have access to essential social rights services.

Chapter IV has also focused on how privatisation creates a complex relationship between a private entity (provider), a state, and rights-holders (the general population), with further complexities in cases where the private entity is an international investor. In those cases, a set of international human rights obligations, international investment law obligations, and contractual obligations are all intertwined. However, investment tribunals have largely overlooked the connection between these obligations. The research also demonstrated that a particularly problematic standard of protection afforded to foreign investors and developed through the practice of investor-state arbitration, has been the protection of investors' legitimate expectations. The problematic nature of the standard comes, partially, from the broad and often contradictory ways that arbitrators have interpreted this norm. In very broad terms, it means that foreign investors can claim and be compensated when certain of their expectations have

not been met. It is important to stress there is little clarity in the case law and the literature as to what exactly constitutes a legitimate expectation under investment treaty law. What constitutes a legitimate expectation for an investor in the context of an investment dispute seems to be different even in similar circumstances, making it difficult to predict or articulate a single definition of what the standard entails. The inconsistent – and at times contradictory – interpretations found in arbitral awards do not provide for a more exact formula as to which expectations deserve protection under investment law and which do not.

It is this lack of clarity that makes the systemic integration between investment law and human rights law increasingly necessary. If an investor has an expectation that the host state will protect its interests regardless of any international human rights obligations of the state, should that expectation be protected under investment law? The case-law has avoided expanding in detail how the protection of legitimate expectations and human rights obligations are compatible (or incompatible), with limited exceptions such as the *Urbaser* award. As discussed in Chapter IV, privatisation of social rights services is often motivated by the state's desire to fulfil its human rights obligations given its inability to provide services effectively because of the lack of sufficient financial resources (or to make services more efficient); as well as pressures by financial institutions such as the World Bank and the International Monetary Fund. In such cases, should an investor's legitimate expectations not be shaped by the state's human rights obligations, as it was clear at the moment it decided to invest that it was going to be providing an essential social rights service? The exact content of what an investor can legitimately expect from the host state when it invests in privatised social rights services needs further clarification. Particularly as the privatisation of social rights is a special category that has not been analysed satisfactorily in case law and academic literature.

This Chapter centres its attention on determining the content, conditions, conceptions, and limitations of the protection of legitimate expectations in international investment law. This discussion will help understand how to systemically integrate international investment law obligations with the international human rights obligations of host states that will be set out in Chapter VI, as it will provide with an understanding of each interpretation that has been afforded to legitimate expectations (to which then a human rights lens can be placed). In this sense, the Chapter analyses the publicly available case law and demonstrates that legitimate expectations has been given three distinct meanings by investment arbitrators:

1) Investors are entitled to expect the host state to conduct itself in a specific manner;
2) Investors are entitled to expect the stability of the environment in which they operate; and
3) Investors are entitled to expect whatever they have been promised by the host state.

Although the vast majority of the cases that are explored in this Chapter are not related to the privatisation of social rights services, they nonetheless provide an important insight into the three distinct ways in which investors' expectations have been protected. Particularly, it explores some of the concerning international investment law developments that undermine the legitimate right and duty of states to regulate in the interest of their population. Adevelopment that is of course problematic if one is to take into account that social rights obligations – as we have seen in previous Chapters – have an obligation of progressive realisation, which implies that states continuously need to improve their policies and measuresin order to achieve the full realisation of social rights.

Given the limited literature on the subject of the protection of legitimate expectations in investment law, this Chapter is primarily based on a case content analysis methodology. It

analyses the content of all publicly available international investment law decisions in English between January 2003 and January 2023. The analysis begins in 2003 because the first case to contemplate the protection of legitimate expectation was *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (Tecmed)*,[498] which was promulgated in May 2003. From this analysis, this research identified 225 decisions expressly mentioning legitimate expectations, of which 71 do not contain any analysis, and 155 decisions contain substantial analysis.

This Chapter begins with an overview of the conceptualisation of legitimate expectations in international investment law and the relationship it has with the fair and equitable treatment standard (FET). It demonstrates that the way legitimate expectations initially appeared as a standard of protection in international investment law was a result of the interpretation that investment tribunals gave to the fair and equitable treatment standard.[499] The Section also demonstrates that the lack of a single coherent definition within the arbitral practice can only be addressed by exploring all the case law available, so as to provide some clear parameters of what legitimate expectations protect.

Section III of this Chapter focuses its attention on the content of legitimate expectations. What type of expectations does investment law ultimately protect? As indicated earlier in this introduction, the case-law analysis demonstrates that there are three different approaches to this question. The first approach centres the protection of expectations on the conduct that the investor expects from the state, particularly in relation to arbitrariness, transparency, and

[498] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award rendered on 29 May 2003

[499] In some recent and limited cases, the protection of legitimate expectations has also been advanced through the protection against expropriation. See for example Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14, Awarded rendered on 23 August 2022.

consistency. The second approach centres the protection of expectations on the need to ensure stability as a means of providing the necessary conditions for investments to thrive. The third and last approach centres the protection of legitimate expectations on the concept of promise, i.e., the reliance of investors on explicit or implicit promises made by the host state. These three different interpretations will form the basis of the argument advanced in the next Chapter on systemically integrating investment law (legitimate expectations specifically) and social rights norms.

The final Section of this Chapter explores what some investment tribunals have determined are the conditions necessary for expectations to be considered legitimate, and therefore, protected under international investment law. This Section provides insight into one of the areas of the protection of legitimate expectations which the literature and investment tribunals have paid less attention to, providing an important contribution to this area of study. This is partly so, as not all investment tribunals have provided an analysis of what type of conditions an expectation needs to meet to be protected under investment law. By analysing the totality of the case law, the section identifies an emerging practice within a cluster of investment tribunals that consider that an expectation can be 'legitimate' under international investment law only if: i) the expectation was created at the time of the investment; ii) the expectation was based on the knowledge than an investor had or should have had in relation to the legal, political, socioeconomic, cultural, and historical conditions that were in place when the initial investment took place; and/or iii) a due diligence process was carried which assessed the legal and general conditions in which the investor was going to operate. These criteria of legitimacy developed by some investment tribunals can help to integrate human rights law and international investment law, as will be explored in detail in Chapter VI.

II. Legitimate expectations

There are disagreements – and effectively no clarity whatsoever – about the exact meaning of the concept of legitimate expectations in international investment law.[500] This is evident both in the literature[501] and – as we will see in this Chapter – in the vast arbitral practice of the last 20 years. Especially problematic is the fact that in most cases where the protection of legitimate expectations has been invoked and determined to have been breached, it was not defined by the tribunal.[502]

Legitimate expectations can be roughly defined as a standard of protection afforded in international investment law which safeguards investors from losses resulting from unpredictable or unreasonable behaviour from a host state. The unpredictability or unreasonableness of a state's behaviour may result either from a direct commitment that a host state made to an investor, or from the investor's objective conviction that the state is going to act in a certain way. Legitimate expectations are used to make claims regarding a very wide

[500] Teeratwat Wongkaew, *Protection of Legitimate Expectation in Investment Treaty Arbitration: A Theory of Detrimental Reliance*, Cambride University Press (2019), at 4; BH Kuklin, 'The Plausibility of Legally Protecting Reasonable Expectations' (2001) Hofstra L Review at 863, 865

[501] Felipe Mutis Téllez, 'Conditions and Criteria For the Protection of Legitimate Expectations Under International Investment Law', ICSID Review Vol.27, No.2 (2012); Michele Potesta, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, ICISID Review, Vol.28, No. 1 (2013); Christoph Schreur and Ursula Kriebaum, At What Time Must Legitimate Expectations Exist? in *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* edited by Jacques Werner and Arif Hyder Ali (2009); Nikhil Teggi, Legitimate Expectations in Investment Arbitration: At the End of its Life-cycle?, Indian Journal of Arbitration Law, Vol.5, Issue 1 (2016); Patrick Dumberry, The Protection of Investor's Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105, Journal of International Arbitration 31, no.1 (2014); E Snodgrass, Protecting Investors' Legitimate Expectations and Recognizing and Delimiting a General Principle, 21 ICSID Review 53 (2006); Trevor Zeyl, Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law, 49 Alberta Law Review 203 (2011); Teeratwat Wongkaew, *Protection of Legitimate Expectation in Investment Treaty Arbitration: A Theory of Detrimental Reliance*, Cambride University Press (2019)

[502] Emmanuel T. Laryea, Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application, in Handbook of International Investment Law and Policy edited by J. Chaisse et al (2020) at 3

range of issues, from arbitrary cancellations of operating licences,[503] to modifications of a country's regulatory regime.[504]

Out of 2897 existing International Investment Agreements[505] there are only a handful of recent treaties that expressly includes the protection of legitimate expectations as a standard of protection of investors.[506] If only found in a very few and very recent number of investment agreements, how did this concept come to be such a prominent standard of protection in international investment law?

Henckels argues that there is not a single theory that offers a complete justification for the introduction of the protection of legitimate expectations in international investment law.[507] Its incorporation comes from a series of interpretations based on the fair and equitable treatment standard set out in the majority of international investment treaties.

Fair and equitable treatment is a standard of protection included in the majority of international investment agreements and it is among the most litigated standards before investment tribunals. It is considered to be the standard with the highest practical relevance, as asubstantial portion of successful claims pursued in international arbitration are based on a violation of the FET

[503] See for example: Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, Decision on Liability 30 July 2010

[504] See for example: LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability rendered on 3 October 2006

[505] 2338 of these are currently in force. This data is as of 29 April 2020. For more information on existing investment agreements, see United Nations Conference on Trade and Development's Investment Policy Hub database at https://investmentpolicy.unctad.org/international-investment-agreements

[506] See for example EU Vietnam Investment protection agreement (2018) Article 2.5(4): 'When applying paragraphs 1 to 3, a dispute settlement body under Chapter 3 (Dispute Settlement) may take into account whethera Party made a specific representation to an investor of the other Party to induce a covered investment that created legitimate expectations, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated.'

[507] Caroline Henckels, Legitimate expectations and the rule of law, in Investment Protection Standards and the Rule of Law edited by August Reinisch and Stephen Schill (2020 forthcoming) At 5

standard.[508] This is possible due to the overall vagueness of the standard,as most international investment agreements do not provide any definition of FET. Forexample:

- The Belgium-Luxembourg Economic Union-Tajikistan BIT stipulates that 'All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party.'[509]

- The China-Switzerland BIT stipulates that 'Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.'[510]

- The Croatia-Oman BIT stipulates that 'Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement.'[511]

Given the way the standard has been enshrined in international investment agreements, its precise meaning and scope are not clear. However, in broad terms, the standard protects investors against serious instances of arbitrary, discriminatory or abusive conduct by host

[508] Rudolf Dolzer, Ursula Kriebaum, Christoph Schreuer, *Principles of International Investment Law (3rd Edition),* Oxford University Press (2022)
[509] Agreement Between Belgium-Luxembourg Economic Union on the one hand, and the Republic of Tajikistan on the other hand, on the Reciprocal Promotion and Protection of Investment, (2009) Article 3
[510] Agreement between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investment (2009) Article 4
[511] Agreement between the Government of the Republic of Croatia and the government of the Sultanate of Omanon the promotion and reciprocal protection of investments (2004) Article 3(2).2

States.[512] As indicated by UNCTAD, the original purpose and intent behind the FET standard was to protect investors in situations such as: i) arbitrary cancellation of licences, ii) harassmentof an investor through unjustified fines and penalties; iii) creation of other hurdles with a view to disrupting a business; among others.[513]

FET has been progressively interpreted to include various protections for investors. Some investment tribunals have continue to affirm that FET is to be understood as part of the minimum treatment standards protected under international customary law, providing investors with a right to a standard of treatment.[514] This is mostly common the interpretation afforded by arbitral tribunals constituted based on the North American Free Trade Agreement (NAFTA).[515] However, another jurisprudential view, as will be discussed below, considers that FET standards contains further protections than those to which the minimum treatment standard protect.[516]

FET is intended to cover a wide range of circumstances in which investors are treated unfairly. As argued by Kläger, it contains both procedural and substantive principles. The procedural principles of the fair and equitable treatment standard demand a basic standard of fairness in any judicial and/or administrative procedures, as well as a certain degree of transparency in thehost state's legal system.[517] The substantive principles of the standard demand that the state actin a non-arbitrary manner and ensure the protection of the investor's legitimate expectations.[518]

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[512] United Nations Conference on Trade and Development, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II (2012) at 1
[513] Ibid, at 6-7
[514] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award rendered on 11 October 2002, paragraph 125
[515] ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award rendered on 9 January 2003
[516] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award rendered on 22 August 2016, paragraph 520
[517] Roland Kläger, *Fair and Equitable Treatment' in International Investment Law* (Cambridge Studies in International and Comparative Law), Cambridge University Press (2011) At 213
[518] Ibid, At 180-190

Scholars have argued that the FET standard has been used by many tribunals as a type of "catch-all guarantee" to challenge a wide range of government measures, including laws and regulations adopted in the public interest, ranging from health and safety measures, to water and electricity measures.[519] This criticism also emphasises that tribunals have applied extensivediscretion in the interpretation of FET, arguably acting in an 'activist' manner in favour of investors.[520] The criticism extends to the protection of legitimate expectations, as part of the FET standard.

Investment tribunals have played a critical role in interpreting and effectively developing the protection of legitimate expectations. However, academics such as Henckels have criticised the sparse reasoning of arbitral decisions that do not rely rigorously on standard sources of international law to justify holding legitimate expectations to be an element of FET. Most tribunals have simply cited earlier decisions to establish the existence of the doctrine, without demarcating its rationales, its scope and its limits.[521] As such, their jurisprudence resembles what Anthea Roberts has called 'a house of cards', as the arguments are built largely by reference to other tribunal awards and academic opinions, with little consideration of the viewsand practices of states in general or any foundational theoretical justification.[522] This is particularly critical as the first tribunal to have developed the notion of legitimate expectationsdid so without providing any real substantive rationale other than an assertion that fair and equitable treatment had to be interpreted to afford protection to the investor's expectations.[523]

As Wongkaew argues, tribunals have never really provided any detailed explanation of why

[519] Nathalie Bernasconi-Osterwalder, Giving arbitrators carte blache – fair and equitable treatment in investment treaties, in *Alternative Visions of the International Law of Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* edited by C.L. Lim, Cambridge University Press (2016) at 324-325
[520] Ibid, at 325
[521] Caroline Henckels, Legitimate expectations and the rule of law, in Investment Protection Standards and the Rule of Law edited by August Reinisch and Stephen Schill (2020 forthcoming) At 5
[522] Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" 104:2 AJIL, (2010) at 179
[523] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award rendered on the30 August 2000, Paragraph 99

fair and equitable treatment should embrace the protection of the investor's legitimate expectation at all.[524] This is evident in the dissenting opinion of the late Professor Pedro Nikken, who argued in the *Suez* Case that 'the assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor […] does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable"'.[525] To the author's knowledge, however, Nikken has been the only arbitrator to have openly and expressly disagreed – through a dissenting opinion – with the premise that fair and equitable treatment implies the protection of legitimate expectations, a position he no longer publicly argued in later arbitral decisions in which he took part.[526]

Despite these uncertain origins, tribunals have virtually unanimously concluded that the protection of legitimate expectations is an important element of FET.[527] Different tribunals have indicated that:

1) fair and equitable treatment is intended to give protection to the investor's expectations;[528]
2) the basic touchstone of fair and equitable treatment is to be found in the legitimate expectations of the parties;[529]
3) protection of legitimate expectations is implied as part of the fair and equitabletreatment

[524] See Teeratwat Wongkaew, *Protection of Legitimate Expectation in Investment Treaty Arbitration: A Theory of Detrimental Reliance*, Cambride University Press (2019), at 8

[525] Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic, ICSID Case No ARB/03/17, Decision of Liability, Separate Opinion of Arbitrator Pedro Nikken (30 July 2010) paragraph 3.

[526] Professor Nikken was an arbitrator in several other cases after Suez, including the RREEF Infrastructure case in which the tribunal affirmed that legitimate expectations were protected under the FET standard. The approach taken by Professor Nikken, however, seems to be more restrictive that the one taken by other tribunals, as the reasoning of the REF tribunal does indicate, for example, that 'any expectation of the Claimants that the applicable legal regime was never subject to any change whatsoever was not legitimate.' RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum rendered on 30 November 2018, paragraph 337

[527] Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award rendered on 27 August 2019, paragraph 1372

[528] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award rendered on 21 June 2011, paragraph 285

[529] Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability rendered on 10 April 2013, Paragraph 932

standard;[530]

4) the purpose of the fair and equitable treatment standards is to protect the legitimate expectations of investors;[531]
5) legitimate expectations need to be complied with for fair and equitable treatment standard to be met;[532]
6) fair and equitable treatment includes an obligation not to upset investor's expectations;[533]
7) the focus of the fair and equitable treatment standard should be the protection of investors legitimate expectations;[534] and
8) the protection of legitimate expectations is the dominant element of the fair and equitable treatment standard.[535]

These different articulations of why investment tribunals consider legitimate expectations to be an intrinsic part of FET are alike in their vagueness. None of them explain how exactly the concept emerged or identify its legal basis. For the purposes of developing a model for the systemic integration of investment law and social rights obligations, the next Section focuses on the issue of the origins of the protection of legitimate expectations.

a) Origins

[530] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum rendered on 30 November 2018, paragraph 260
[531] Walter Bau AG (IN LIQUIDATION) v Kingdom of Thailand, Award rendered on 1 July 2009, paragraph 11.5and 11.7
[532] Rumeli Telekom A.S. and Telsim Mobil v. Kazakhstan, ICSID Case No. ARB/05/16, Award rendered on 29July 2008, Exh. CLA-60, paragraph 609.
[533] Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award rendered on 8 November 2010, paragraph 420
[534] EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award rendered on 8 October 2009, paragraph 176
[535] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award rendered on 17 March 2006, paragraph 302

As explored in Chapter II of this thesis, the potential conflicts between international investment law and international human rights law have been the result – at least to some degree – of interpretations made by adjudicative bodies such as investment tribunals. It demonstrated how, at least in formal legal terms, there are no inherent contradictions between these areas of law, but that conflicting norms can develop as the result of interpretations afforded to very broad and open-ended protections. This is particularly acute in relation to the interpretations of FET.

To understand to what degree legitimate expectations can be systemically integrated with the obligations of social rights (such as progressive realisation, non-retrogression, and normative content) it is important to understand the origins of legitimate expectations in investment law. If one is to challenge the current status quo and see how the international investment law can achieve a better synergy with human rights law, it is critical to better understand how the concept emerged and what where its theoretical justifications.

The very first case to analyse and establish a breach of legitimate expectations of investors was the tribunal in *Tecmed*.[536] The limited analysis of the tribunal on why legitimate expectations was to be protected referenced the preamble of the investment agreement in question.[537] As the preamble provided that the purpose of the investment agreement was to ensure favourable conditions for investing in a host state, the tribunal concluded that that it required the state to protect the expectations that an investor had in relation to the state's conduct.[538] As discussed later in this Chapter, such expectations were based on the notion that the host state would act in a consistent, transparent, and non-arbitrary manner, all of which would foster a positive environment for investment. No further justification was provided, and no analysis was given

[536] As mentioned previously, however, the Metalclad Tribunal is the first to mention the investor's protected expectations, but it does not the standard of protection any further. See: Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award rendered on the 30 August 2000, Paragraph 99
[537] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award rendered on 29 May 2003, paragraphs 146; 156
[538] Ibid

to ensure that this new protection (within FET) was consistent with the rest of the state's international obligations. In other words, no attempt to systemically integrate this notion of FET with the wider obligations of the state was done.

Other tribunals have used the same reasoning as in the *Tecmed* Tribunal's Award, but have further indicated that Article 31.1 of the Vienna Convention on the Law of Treaties provides that terms used in a treaty must be construed 'in their context,' and that therefore FET must be interpreted as including the protection of legitimate expectations.[539] However, not until much later (such as in the *Urbaser* and *Phillip Morris* cases) did a few investment tribunalsconsidered that such context also needed to include the wider international obligations of the state, such as those emerging from international human rights law.

Another interpretation has been that the sources of the protection of legitimate expectations are to be found in domestic legal protections across the world,[540] as the protection itself originates from domestic administrative law.[541] In this sense, the *Total* tribunal stated that a comparative analysis of the protection of legitimate expectations in domestic jurisdictions was not really needed, as the protection has been recognised as a principle both in civil law and in common law jurisdictions.[542] However, as argued by Ortino, although it is true that the concept of legitimate expectations may be found in many legal systems, the exact content and scope of the standard varies according to the specific legal system.[543] Ortino concludes that despite the

[539] Joseph Charles Lemire v Ukraine, ICSID Case NO. ARB/06/18, Award rendered on 22 March 2011, paragraph69; Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic,ICSID Case No. ARB/09/1, Award rendered on 21 July 2017, paragraph 667

[540] Gold Reserve Inc. v the Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award rendered on 22 September 2014, paragraph 576

[541] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award rendered on 4 April 2016, paragraph 546

[542] Total SA v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, Exh. CLA-81, paragraph 128

[543] Federico Ortino, The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?, in *By Peaceful Means: International Adjudication and Arbitration Essays in Honour of David D. Caron* edicted by C. Brower, J. Donoghue, C. Murphy, C. Payne & E. Shirlow, Oxford University Press, (2022) at 3

variety of definitions of legitimate expectations in domestic legal systems, one of the major concurring pillars found in all legal systems is that 'a legitimate expectation will receive protection if there is no overriding public interest that justifies the frustration of such expectation.'[544] Tribunals that have relied on the argument that legitimate expectations are to be protected in investment law given their existence in domestic law, however, do not seem to have also recognised that this principle is inherently limited by the general public's interest. This inconsistency is a consequence, Ortino explains, of the 'general unwillingness [of investment tribunals] to provide a robust framework for applying the doctrine of legitimate expectations'[545] in international investment disputes, resulting in 'serious shortcomings' in the interpretation of the FET standard.[546] This is even more acute when investment tribunals have reached decisions that have undermined the host state's ability to meet its human rights obligations, for example by requiring the state to compensate an investor for having introduced measures that protected the public but resulted in some financial harm to the investment.

Other tribunals have concluded that the protection of legitimate expectations is actually part of the contemporary principles of public international law.[547] These tribunals have determined that the minimum treatment standard under customary international law has developed in such a way that it now protects the investor's legitimate expectations. This is reinforced by the interpretation of some tribunals that the difference between the FET standard in investment law and the minimum treatment standard in customary international law is purely semantic, and that there is no substantive difference in the level of protection afforded by both standards.[548]

[544] Ibid, at 4
[545] Ibid, at 7
[546] Ibid, At 19
[547] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award rendered on 20 August 2007, paragraph 7.4.7; Anglo American PLC v The Bolivarian Republicof Venezuela, ICSID Case No. ARB(AF)/14/1, Award rendered on 18 January 2019, paragraph 441
[548] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award rendered on 22 August 2016, paragraph 520

This, however, is not supported by the either the interpretation of the International Court of Justice or by the most recent investment treaty practice. First, in a case between Bolivia and Chile before the International Court of Justice, Bolivia argued that Chile's representations through 'its multiple declarations and statements over the years gave rise to the expectation of restoring Bolivia's access to the sea' and that Chile had frustrated such legitimate expectations by refusing to engage in any negotiation with Bolivia. The Court held in 2018, however, that while 'references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment[, i]t does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.'[549]

Second, more recent investment agreements have been drafted to expressly limit the fair and equitable treatment standard as to not protect investors' legitimate expectations, demonstrating that states do not see legitimate expectations as a part of customary international law to which they are bound. For example, the recent New Zealand-UK trade and investment agreement expressly acknowledges that 'for greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article [minimum standard of treatment], even if there is loss or damage to the covered investment as a result.'[550]

Regardless of the precise origin of the protection of legitimate expectations within the fair and equitable treatment standard, it is clear from the virtually unanimous practice of arbitral

[549] ICJ, Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Merits, Judgment of 1 October 2018, paragraph 162
[550] New Zealand-United Kingdom FTA (2022) article 14.11(4)

tribunals that it is considered a protection afforded to foreign investors through international investment agreements. As a result, and for the objective of limiting investors' expectations based on the state's human rights obligations – particularly for investments related to the privatisation of social rights – careful attention needs to be paid to the way that investment arbitrators have constructed the protection of legitimate expectations. However, it is important to emphasise that this protection has been the result of interpretation, and therefore, systemic interpretation is possible if investment tribunals are willing to employ the correct tools. Further, as the concept has been developed by investment tribunals, states might consider looking at further limiting the protection – or eliminating it altogether – to ensure the interpretation afforded by investment tribunals do not undermine their human rights obligations (this is explored further in Chapter VI). Nonetheless, the protection of legitimate expectations is not the only standard of protection in international investment law that can undermine obligations found in international human rights law, as indirect expropriation and other aspects of the FET standard can produce the same effect. While the scope of this thesis is limited, some of these points are address in the next Chapter.

b) The circularity problem

The previous Section on the origins of the protection of legitimate expectations demonstrated how this standard of protection was developed by the interpretative practices of investment tribunals and that the International Court of Justice itself has denied that the standard forms part of customary international law. Investment tribunals have resisted providing a clear and simple definition of what legitimate expectations protects. This has led to an overall problem with understanding the true scope and limits of this norm. This Section demonstrates that investment tribunals have relied on ambiguous definitions that ultimately protect the investor, describing legitimate expectations as part of the fair and equitable treatment standard, while

also indicating that FET is to be defined based on an investor's legitimate expectations. How to then systemically integrate legitimate expectations with social rights obligations, if legitimate expectations is constructed as a broad and ambiguous standard? This section focuses on the so-called circularity problem of the definition of legitimate expectations, and how to address it if one is to attempt to integrate human rights law to investment norms.

The author has mentioned earlier in this Chapter (in the Introduction and Section II) that some tribunals have concluded that fair and equitable treatment – and legitimate expectations as part of such standard of protection – has resisted the formulation of any comprehensive definition, as it requires an inherently contextual determination.[551] This presents a problem that the *Crystallex* tribunal called the 'circularity argument.'[552] This is, the tribunal considered that arguments about the protection of legitimate expectations are often incapable of providing a basis for a breach of the fair and equitable treatment standard[553] because 'to state that one has a legitimate expectation under the fair and equitable treatment standard to be treated reasonably or proportionally […] is tantamount to saying that one has a legitimate expectation to be treated "fairly and equitably".'[554] This line of argument is also evident in the *Saluka* Award, which determined that 'an investor's decision to make an investment […] is based on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.'[555]

[551] British Caribbean Bank Limited v. The Government of Belize, PCA Case No. 2010-18, Award rendered on 19 December 2014, paragraph 281
[552] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award rendered on 4 April 2016, paragraph 551
[553] Ibid
[554] Ibid
[555] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award rendered on 17 March 2006, paragraph 301

This circularity argument represents a major obstacle to defining what exactly an investor can legitimately expect from a host state. If we are satisfied with the notion that investors are entitled to expect to be treated fairly and equitably; while at the same time saying that to be treated fairly and equitable means to respect the legitimate expectations of the investors; then we are not only failing to provide any clarity about the scope of these expectations, we are also leaving the fair and equitable treatment standard open to being used as a tool that could be used by investors to claim compensation for nearly any act of the state. This becomes a big challenge for the systemic integration of international investment law and international human rights law, as it leaves the door open for legitimate expectations to be interpreted in almost any way that can limit the protection of human rights.

To provide some substantive limits to the protection, some tribunals have emphasised that in order to determine whether there has been a breach of legitimate expectations, tribunals should use public international law and public domestic law as the benchmark.[556] This was stressed by the *MTD* annulment tribunal, which considered that the obligations of the host state towards foreign investors derive from the terms of the applicable investment treaty and public international law, and not from any set of expectations investors may have or claim to have.[557] This is of critical relevance for the systemic integration of human rights norms, as they form part of the public international law framework that has to be used as a benchmark to determine an investor's expectations. However, this approach is one that has only been used on by the *Urbaser* and *Phillip Morris* tribunals, as we will see later in this Chapter and in Chapter VI.

[556] Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award renderedon 7 June 2012, paragraph 166.
[557] MTD Equity Sdn Bhd & MTD Chile SA v Republic of Chile,] ICSID Case No ARB/01/7, Decision on Annulment rendered on 21 March 2007, paragraphs 66-67.

Under this premise, some tribunals have indicated that not every expectation of the investor is protected under the fair and equitable treatment standards, rather only those that are recognised and protected by international law.[558] What exactly are those expectations protected under international law? A single articulated answer to that question has not been provided by any investment tribunal. Through various cases, however, one can start to determine what expectations are and are not considered to be protected. Non-performance of a contract – for example – is considered by some tribunals as to be outside the scope of the FET standard as protected under international law.[559]

Some tribunals have considered that a breach of an investor's legitimate expectations does not imply *ipso facto* a breach of the fair and equitable treatment standard, at least not autonomously, as it is only one factor to take into account, among others.[560] These factors include: "'arbitrariness; gross unfairness; discrimination; complete lack of transparency and candour in an administrative process; lack of due process leading to an outcome which offends judicial propriety; and manifest failure of natural justice in judicial proceedings.'[561] Overall, this is based on the rationale that if fair and equitable treatment is indeed linked to the legitimate expectations of investors, then it has to be evaluated considering all circumstances and all procedural and substantive principles of FET.[562]

A minority of tribunals have considered that what is fair and equitable is not an absolute parameter, as what would be unfair and inequitable in normal circumstances may not be so in

[558] Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award rendered on 8 April 2013, paragraph 536.
[559] Ibid
[560] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award rendered on 24 March 2016, paragraph 502
[561] Ibid, see also *Waste Management* paragraph 96; and *Cargill* paragraph 296.
[562] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award rendered on 21 June 2011, paragraph 290

a situation of socio-economic crisis.[563] In order to resolve the circularity problem, and despite the need for a contextual situation analysis, the fair and equitable treatment standard – the *Urbaser* tribunal concludes – must be an objective standard or it would lead to arbitrary divergence in its interpretation.[564]

The *Urbaser* tribunal further elaborates by indicating that the objective standard must not be based on the 'personal opinions of the arbitrators' or the 'personal expectations of a party,' but should rather be based on a 'source of law of a normative content.'[565] Specifically, the objective standard should be framed by the 'entire legal, social and economic frame-work' of a state, and must pay particular attention to the international and constitutional legal obligations to which the host state is bound.[566] This is where international human rights law becomes of critical relevance, as the *Urbaser* tribunal concludes that it must be part of the wider framework against which an investor's expectations are analysed.

What exactly are the precise objective criteria for evaluating an investor's legitimate expectations? And, with no theoretical justifications, what is the precise substance of this protection afforded to foreign investors? The answer, as Tomáš Mach argues, lies in 'cases, and cases referring to cases, as a matter of casuistry.'[567] The solution, particularly in order to construct a human rights baseline for assessing legitimate expectations in the context of the privatised provision of social rights, is to explore all arbitral case law that applies and interprets legitimate expectations. As there has been no work that has defined the scope and limit of

[563] National Grid plc v. The Argentine Republic, UNCITRAL, Award rendered on 3 November 2008, paragraph180
[564] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 613
[565] Ibid
[566] Ibid, paragraph 621
[567] Tomáš Mach, Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims, Elite Law Journal (2018) at 118

legitimate expectations in the practice of investment arbitration, this Chapter therefore looks at the totality of the case law to see if there are certain patterns or arguments that can provide a better understanding of the protection of legitimate expectations (to which the systemic integration can be applied). This Chapter now turns its attention to such case law.

III. Content of expectations

Without any specific definition or clear parameters, what exactly is protected under legitimate expectations?

Based on a careful analysis of the decisions of investment tribunals in the last two decades, this thesis concludes that investment tribunals have approached the content of legitimate expectations in three different ways. At times, these approaches are conflicting and contradictory, although tribunals have largely avoided criticising one approach while choosing to argue for another (with the exception of the stability approach, as demonstrated further below). Often these approaches are used without much explanation or justification, either repeating what other tribunals have argued in the past, or by stating a specific interpretation without any substantial justification.

The three approaches to the content of legitimate expectations in investment law, as identified and categorised by this research, from the broadest to the narrowest:

1) **Conduct approach:** an investor is legitimately entitled to expect the host state to conduct itself in a specific manner, particularly, in a manner that satisfies the other elements of the FET standard (transparently, non-arbitrary, consistent, etc).

2) **Stability approach:** an investor is legitimately entitled to expect the stability of the environment in which it operates, so as to ensure that the investment can be successful. An investor may therefore expect the host state to ensure such stability (legal, financial, or other).

3) **Promise approach:** an investor is legitimately entitled to expect whatever it has been promised through some form of assurance that the host state provided.[568]

Developing these categories is essential, as they provide insight into what tribunals have determined are the actual content of expectations that are protected under international investment law. As tribunals continue to issue contradictory decisions about the exact meaning and limits of the protection of legitimate expectations, this Section explores in detail the decisions in the last twenty years and attempts to provide some clarity on what exactly legitimate expectations protects. Understanding how legitimate expectations has been envisioned under these different approaches is instrumental to systemically integrating human rights obligations into international investment law, as an effective integrative method would have to respond to each and every approach to defining legitimate expectations. As we will see in Chapter VI, once we have clarity of these three different approaches, we can then start reflecting on how international human rights law might limit or shape an expectation of conduct, an expectation of stability, and finally, an expectation of promise.

[568] The promise approach is the only approach that, on some occasions, has invoked other approaches. For example, tribunals have concluded that an investor is legitimately entitled to expect legal stability as this was promised directly to the investor by the state. See for example: Chevron Corporation (USA) and Texaco PetroleumCompany (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits rendered on 31 August 2011, paragraph 228

a) Conduct approach

The conduct approach was the first to have been developed in the case law. The overall premise is that investors are entitled to expect the host state to conduct itself in a way that is fair and equitable. This conduct approach is the one that most closely relates to the circularity problem, as identified at the beginning of this Chapter in Section II.b. As demonstrated by the *Saluka* Tribunal's reasoning: 'an investor's decision to make an investment […] is based on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.'[569]

This expectation is particularly important when no specific assurances have been made by the host state to the investor, as tribunals have indicated that the circumstances in which the investment developed and the way the state conducted itself must be analysed in order to determine legitimate expectations.[570] This analysis of the conduct must take account of the specific timeframe that the investment took place,[571] examining the acts of governmental officials in dealing with the investor's investment.[572]

The conduct approach was first developed by the *Tecmed* tribunal, which notoriously concluded that investors had their 'basic expectations' protected under the FET standard, as follows:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives,

[569] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award rendered on 17 March 2006, paragraph 301
[570] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award rendered on 11 September 2007, paragraph 331
[571] Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability rendered on 2 September 2009, paragraph 202; Parkerings-Compagniet ,1S v. Lithuania, ICSID Case No. ARB/OS/8, Award of September 11, 2007, paragraph 331.
[572] Invesmart v. Czech Republic, UNCITRAL, Award rendered on 26 June 2009, paragraph 252

> to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments aswell as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[573]

In summary, the *Tecmed* tribunal considered that legitimate expectations are composed by:

1) An expectation that the host state will act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor; and

2) An expectation that the host state will use the legal instruments that govern the actions of the investor within the functions to which the instruments was enacted for, and not to harm the investor.

As we can see, the conduct approach starts by the premise that the basic touchstone of fair and equitable treatment is to be found in the legitimate expectations of the parties.[574] The legal syllogism is that if FET is to ensure that investors are treated in a way that does not breach the legitimate expectations of investors, then the investor's legitimate expectations are grounded on the substantial and procedural elements of the FET standard. As explained by the *Urbaser* tribunal:

[573] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award rendered on 29 May 2003, paragraph 154

[574] Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability rendered on 10 April 2013, paragraph 932

> The interpretation of [the FET] standard is usually focusing on the legitimate expectations of the investor, covering all acts and omissions of the host State that are embraced by the fair and equitable treatment standard. The objective is twofold: On theone hand, the host State complies with its Treaty obligations as long as it operates withinthe range of events that the investor had to expect, and on the other hand, the investor relies on a BIT protection that events not to be expected will not occur, or, if they do, will trigger the host State's responsibility.[575]

Furthering this conduct approach, the *Saluka* tribunal concluded that investors' legitimate expectations are composed of the expectation that a state will not act in a way that is inconsistent with the FET standard.[576] In this sense, the tribunal determined that fair and equitable treatment standard requires a host state to 'treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations.'[577] An investor is therefore legitimately entitled to expect, the tribunal concluded, for a host state to act in a way that is not 'manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).'[578]

In its own analysis, the *Saluka* tribunal concluded that the way the Czech Republic had treated the investor had amounted to a breach of its legitimate expectations. Specifically, the tribunal indicated that Saluka was entitled to 'expect that the Czech Republic took seriously the various proposals that may have had the potential of solving the bank's problem and that these proposals were dealt with in an objective, transparent, unbiased and even-handed way;' but that the 'Czech Government's conduct [had] lacked even-handedness, consistency and transparency.'[579] Such conduct, the tribunal concluded, had 'frustrated Saluka's legitimate

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[575] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 615

[576] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award rendered on 17 March 2006, paragraph 309

[577] Ibid

[578] Saluka, paragraph 309; See also *Festorino Invest Limited and others v Poland*, SCC Case No. V2018/098, Award rendered on 30 June 2021; and *Air Canada v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/17/1, Awarded rendered on 13 September 2021

[579] Ibid, paragraph 499

expectations' as protected under the FET standard.[580]

The conduct approach is one way of understanding the FET standard. It places the protection of legitimate expectations at the centre of the standard, analysing the various elements of FET (transparency, consistency, arbitrariness) from the perspective of what investors are objectively entitled to expect. Under this interpretation, legitimate expectations is the legal tool to analyse a host state's conduct to determine if there were any breaches to the FET standard. The content of legitimate expectations, therefore, can only be within the remit of FET (e.g. expectations that the state act consistently, transparently, non-arbitrarily, non-discriminatorily) and nothing more. What is not clear from the analysis of tribunals that have taken this approach is if elements of FET can be found to have been breached outside of the scope of analysis of legitimate expectations.

As we will see in Chapter VI, the conduct approach fails to meaningfully engage with other areas of international law, particularly human rights law. The approach centres itself in the conduct that is expected from the host state from the perspective of investment law standards, but does little to take into account what conduct is expected from a state if we holistically take into account all of its international legal obligations. As I will propose in Chapter VI, an interpretative-integration approach to international human rights and international investment law requires tribunals to reflect on what type of conduct is required from the state to comply with human rights obligations. The state's duties to respect, protect and fulfil would need to be taken into account as part of the wider content of what an investor is entitled to legitimately expect from the conduct of the state.

[580] Ibid

b) Stability Approach

The second approach – stability – is by far the most controversial of them all. It is centred on the idea that the content of an investor's legitimate expectation is an entitlement to the stability of the environment in which it operates, so that the investment can be successful. It is based on the interpretation of the preambles of international investment agreements,[581] as most of them state that such agreements are intended to maintain a stable framework for investment.[582] As we will see bellow, this has been used to justify the right to a legitimate expectation of stability in two main areas: 1) legal framework; and 2) overall conditions and financial interests.

1. Legal Framework

Tribunals have concluded that the stability of the legal framework is directly linked to the investor's protected expectations.[583] Others have emphasised that not only is it linked, but stability is an essential element of the legitimate expectations of an investor,[584] and despite substantial criticism of this approach during the last two decades some tribunals in 2022 still considered that there were no compelling reasons to argue against the formulation that the

[581] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award rendered on 18 August 2008, 339-340

[582] In the case of the bilateral investment agreement between the United States of America and the Republic of Ecuador which the Duke Energy Tribunal analysed, for example, the fourth paragraph reads "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources". See Treaty between the United States of America andthe Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (1993) at https://www.italaw.com/sites/default/files/laws/italaw6088%283%29.pdf

[583] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award rendered on 18 August 2008, 339-340

[584] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability rendered on 3 October 2006, paragraph 125; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award rendered on 22 May 2007, paragraph 260-261

obligation to guarantee a stable and predictable investment framework forms part of the legitimate expectations of an investor, as part of the fair and equitable treatment standard of protection.[585]

According to this interpretation, investors have a right to expect a 'predictable, consistent, and stable legal framework', which must be safeguarded regardless of which authority or organ of the state reduced the level of stability.[586] What this obligation of stability implies, therefore, is that 'regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value.'[587] The investor's right to expect stability, some tribunals have indicated, is essential to facilitate rational planning and decision making.[588] This is to prevent what the *PSEG Global* tribunal called the 'roller coaster effect,' in which a state keeps changing its laws continuously and endlessly, as well as their interpretation and implementation.[589]

Arguing that what is protected is not any change to a legal framework but rather 'radical alterations,' tribunals have insisted that the expectation of stability does not – and cannot – equate to a stabilisation clause.[590] What investors have a legitimate right to expect is that host

[585] See RENERGY S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award rendered on 6 May 2022, paragraph 679. Further elaborations can be found in: Voltaic Network GmbH v. Czech Republic, PCA CaseNo. 2014-20, Award rendered on 15 May 2019, paragraph 487-488, 490; see also WA Investments Europa NovaLtd. v. Czech Republic, PCA Case No. 2014-19, Award rendered on 15 May 2019

[586] OAO Tatneft v. Ukraine, PCA Case No. 2008-8, Award on the Merits rendered on 19 July 2014, paragraph 407

[587] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 382

[588] Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award rendered on 12 November 2010, paragraph 285

[589] PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award rendered on 19 January 2007, paragraph 254

[590] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award rendered on 21 June 2011, paragraph 290-291; EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award rendered on 8 October 2009, paragraph 218; RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure TwoLux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principlesof Quantum rendered on 30 November 2018, paragraph 262

states will not dispense with the existing legal framework altogether,[591] or make any unpredictable and radical transformation to the legal framework.[592]

Tribunals, therefore, have indicated that host states can indeed modify the legal framework, as the main element of stability is refraining from eliminating essential features of the regulatory framework, particularly those that investor relied on when making a long-term investment,[593] especially when it undermines the certainty of the legal environment.[594] In this context, tribunals have also argued that this means states cannot arbitrarily change the rules of the game in a manner that undermines the legitimate expectations of an investor.[595]

The *Enron* tribunal, for example, determined that the legitimate expectations of the investor had been breached because the host state had 'dismantled' the tariff regime that was in place at the moment of the investment. This was related to the private provision of gas in the country. It considered that the tariff regime that had been in place enabled a long-term business outlook for the investment, and this certainty had been transformed into what it now described as a 'day-to-day discussion about what comes next.'[596] The tribunal considered that the essential feature of the regulatory framework was the certainty and stability of the tariff regime, and the breach of the expectation was not only in relation to the change of the framework but the fact

[591] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award rendered on 27 August 2008, paragraph 177; National Grid plc v. The Argentine Republic, UNCITRAL, Award rendered on 3 November 2008, paragraph 173; CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award rendered on 12 May 2005, paragraph 277

[592] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum rendered on 30 November 2018, paragraph 262

[593] Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award rendered on 15 June 2018, paragraph 531-532

[594] Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award rendered on 28 September 2007, paragraph 303

[595] Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award rendered on 8 November 2010, paragraph 420

[596] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award rendered on 22 May 2007, paragraph 266

that the renegotiation measures had not provided a definitive framework for the operation of the investment.[597] This was exacerbated by the fact, the tribunal considered, that foreign investors had been targeted with tariff regime as an encouragement to invest in the privatisation of public utilities in Argentina.[598] In other words, the Argentinian government eliminated the essential features of the framework that attracted the investors, and causing further harm by not providing the investor with any certainty as to what the tariff regime would be after the national economic crisis had passed.

Other tribunals have acknowledged that, although there is a right to expect stability and predictability, these are not absolute, as they have to be weighed against the right to regulate[599] and to enforce the law to protect the public interest.[600] Stability must include, therefore, a real possibility that the legal framework will change, within the limits of the law.[601] This is why the *Charanne* tribunal, for example, determined that an investor's expectation must be that whena state is modifying its regulation it will not act: i) unreasonably; ii) contrary to the public interest; or iii) in a disproportionate manner; and will v) ensure that any modifications to the legal framework are not random or unnecessary.[602] Legitimate expectation must therefore be measured using a balancing test that takes account the specific circumstances of the case.[603]

[597] Ibid, paragraphs 265-266
[598] Ibid, paragraph 264
[599] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Award rendered on 11 December 2013, paragraph 666
[600] UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award rendered on 22 December 2017, paragraph 836
[601] Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 2015/063, Award rendered on 15 February 2018, paragraphs 651, 654; Eiser InfrastructureLimited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Final Award,4 May 2017, paragraph 382; Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C.Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Award rendered on 11 December 2013, paragraph666
[602] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, SCC Case No. 062/2012, Award rendered on 21 January 2016, paragraphs 514, 517
[603] Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Final Award rendered on 23 April 2012, paragraphs 222, 224

Overall, the legal stability approach has been reflected in the case law in two distinct ways. First, the legitimate expectations principle protects investors from radical transformations to the legal framework which they relied on when they invested. Such radical transformations will have a direct negative impact on the investment, which the investor had not expected to be subject to. Second, the legitimate expectations principle protects investors from unjustified or unreasonable modifications to a legal framework. An investor would, therefore, not be able to expect that a host state does not modify its legal framework in pursuit of the public interest, in a proportionate and non-discriminatory manner.

2. Overall conditions and financial interests

A second type of stability-expectation that the case law has developed is in relation to the general conditions and the environment in which the investment takes place. As indicated by a handful of tribunals, the FET standard is not focused exclusively on expectations of a legal nature, as it also includes the 'actual social and economic environment of the host state, which is also part of the expectations the investor has.'[604]

This type of expectation, although not explored or analysed in much detail in the case law, is directly related to the stability of the legal framework, as most tribunals have stressed that there is both an expectation of legal stability and an expectation of a stable environment in which the investment can take place without any radical transformations of conditions.[605]

[604] Urbaser S.A.and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 623

[605] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum rendered on 30 November 2018, paragraph 262

In direct relation to the stability of a general or business environment, some tribunals have determined that investors are entitled to expect a certain stability of their financial interests, or in other words, the stability of a certain level of profitability of their investment. In this sense, tribunals have indicated that investors would not have entered into an agreement with the state without being confident they would receive a reasonable return.[606]

This approach is illustrated in the reasoning of the *RREEF* tribunal, which considered that the investor was entitled to 'legitimately expect a return for their investment at a reasonable rate which impl[ied] significantly above a mere absence of financial loss.'[607] The tribunal further concluded that investor's 'expectation did not include a guarantee to have the legal regime in place unchanged until the end of the operation of the plants, but it did include to have any modifications reasonable and equitable' and to be provided with compensation if the investor would no longer have 'reasonable returns.'[608]

3. Criticism of the approach

As mentioned at the beginning of this Section, the stability approach has been subject to heavy criticism from other arbitral tribunals, constituting the only approach to which other tribunals have criticised. The main criticism is that the fair and equitable treatment standard cannot be interpreted as serving the same purpose as a stabilisation clause, virtually freezing the legal framework, as some argue that this approach in reality does.[609] This criticism is important to understand, if one aims to systemically integrate human rights law and investment law. In

[606] Walter Bau AG v The Kingdom of Thailand, UNCITRAL, Award rendered on 1 July 2009, paragraphs 12.2.c, 12.3
[607] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum rendered on 30 November 2018, paragraph 387
[608] Ibid, paragraph 399
[609] EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award rendered on 8 October 2009, paragraph 217-218

particular, criticism demonstrate that there is a better and more nuanced understanding of legitimate expectations that is not limit to stability. The criticism also demonstrates that there is a good amount of investment tribunals that have disagreed with interpreting FET as toprotect stabilisation of the host state's legal or financial framework. The criticisms provided by investment tribunals offer a perspective as to how one can aim to integrate human rights norms with the protection of legitimate expectations.

The first tribunal to holistically criticise the stability approach was the *Saluka* tribunal in 2006. It emphasised that no investor could reasonably expect that the circumstances that prevailed at the time of the initial investment would remain unchanged, as the right of the host state to regulate in the public interest had to always be taken into consideration.[610] This analysis was based mostly on what the *Saluka* tribunal considered was the high level of deference that international law provided to domestic authorities to regulate.[611] The tribunal had also followed decisions such as the award rendered by the *EnCana* tribunal, in which it considered that in the absence of specific commitments from the host state an investor could have no expectation of stability.[612]

Based on the *Saluka* decision, tribunals have then expressed that if there is no express agreement of stability, investors must expect that the law will change.[613] This is, investors take a risk that changes in the legal regime can happen when they decide to make long-term investments.[614] Therefore, for an investor to have a legitimate expectation that ought to be

[610] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award rendered on 17 March 2006, paragraph 305
[611] Ibid
[612] EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006, paragraph 173
[613] Parkerings-Compagniet ,1S v. Lithuania, ICSID Case No. ARB/OS/8, Award of September 11, 2007,paragraph 330-331
[614] Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2, Award rendered on 15 March 2016, paragraph 6.61

insulated from the effects of normal legal and regulatory evolution requires the 'very clearest of commitments.'[615] This is under the theory that the fair and equitable treatment standard cannot protect an expectation of stability and predictability if it is not based in very clear representation, such as an stabilisation clause.[616]

The most critical decision towards the stability approach is the award rendered by the tribunal in *El Paso*, in which the tribunal highlighted that economic and legal life is by nature evolutionary.[617] The tribunal expressed that is was inconceivable that any state – because it entered into a bilateral investment agreement – could no longer modify legislation that can have a negative effect on foreign investors, particularly when it had to deal with modified economic conditions.[618] A bilateral investment agreement, therefore, cannot guarantee that legal and economic conditions will be maintained,[619] as the fair and equitable treatment standard has not been designed to ensure the immutability of the legal order, the economic world, and the social universe;[620] ergo, there can be no expectation from the investor of such stability. The *El Paso* tribunal further considered that regardless of other tribunals' interpretation of the preamble of investment agreements, the tribunal had to take into account the overarching goal of host states, which is to guarantee to their populations the maximum effective use of its economic resources.[621] This would imply attempting to ensure a balance between, for example, the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest.[622]

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[615] AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award rendered on 1 November 2013, paragraph 289
[616] Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador,UNCITRAL, PCA Case No. 34877, Partial Award on the Merits rendered on 31 August 2011, paragraph 228
[617] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award rendered on 31 October 2011, paragraph 352
[618] Ibid, paragraph 367
[619] Ibid, paragraphs 365-366
[620] Ibid, paragraph 368. Similarly, see: Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award rendered on 11 September 2007, paragraph 332
[621] El Paso Award, paragraph 369
[622] Ibid, paragraph 358

The *El Paso* tribunal further considered that if the material circumstances surrounding an investment were to change completely, any reasonable investor would have to expect that the law would also drastically change.[623] The tribunal emphasised that a BIT cannot imply in any way that the state has given 'any guarantee to foreigners concerning its economic health and the maintenance of the economic conditions for business prevailing at the time of the investment.'[624] In particular, the tribunal emphasised that:

1) economic stability cannot be a legitimate expectation of any economic actor;[625] and

2) it is inconceivable that any State would accept that, because of an international investment agreement, it can no longer modify pieces of legislation which might have a negative impact on foreign investors.[626] The question remains, however, what measures require compensation to the investor and which measures do not.

Consequently, the *El Paso* tribunal considered that a standard of behaviour that requires stability – if strictly applied – is not realistic, nor it is the treaty's actual purpose that host states guarantee that the conditions in which investments take place will remain unaltered 'ad

[623] Ibid, paragraph 363
[624] Ibid, paragraph 365
[625] The tribunal references a decision by the Permanent Court of International Justice from 1934 which demonstrates the general understanding in public international law that business enterprises cannot expect stable financial conditions. The quote reads "No enterprise – least of all a commercial or transport enterprise, the successof which is dependent on the fluctuating level of prices and rates – can escape from the changes and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period ofgeneral prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change." El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award render on 31 October 2011, paragraph366, citing PCIJ, Oscar Chinn (United Kingdom v. Belgium), Judgement of 12 December 1934, P.C.I.J. Rep., Serie A/B, No. 63, paragraph 88
[626] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award renderon 31 October 2011, paragraph 367

infinitum.'[627] However, the tribunal did consider two circumstances in which legitimate expectations under investment law would protect some form of stability. First, the tribunal considered that investors are protected from unreasonable modifications to the legal framework, this is, that an investor should be legitimately able to expect that the rules will not be changed without justification of an economic, social or other nature.[628] This is in line with the considerations that some other tribunals have put forward as a way of protecting some form of legal stability, even if in a limited way. Secondly, the tribunal considered that legitimate expectations will protect investors from modification to the legal framework if a specific commitment not to do so had been provided by the host state.[629] This second aspect will be analysed in detail in the next sub-section (the promise approach).

Based on similar justifications as those presented by *El Paso* tribunal, other tribunals have indicated that a host state does not breach the legitimate expectations of investors if it changes the law in a legitimate exercise of its regulatory authority.[630] This is based on the notion that the fair and equitable treatment standard does not entail relinquishing the host state's right to regulate in the public interest or the need to adapt its legislation to changes and emerging needs.[631] This would therefore imply that investors are only protected from unreasonable or arbitrary modifications of the legal framework, done without an economic or social justification. Additionally, some tribunals have concluded that legitimate regulatory changes made to respond to the public interest, even if they adversely affect an investment, do not

[627] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award rendered on 31 October 2011, paragraph 350. Also see: Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSIDCase No. ARB/14/4, Award rendered on 31 August 2018, paragraph 9.152
[628] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award rendered on 31 October 2011, paragraph 372
[629] Ibid, paragraph 364
[630] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic, ICSID Case No. ARB/09/1, Award rendered on 21 July 2017, paragraph 668
[631] South American Silver Limited v. Bolivia, PCA Case No. 2013-15, Award rendered on 22 November 2018, paragraph 649

amount to a breach of the fair and equitable treatment standard, as there can be no expectation of the state not to exercise its right to regulate.[632] This final point is reflected in new and emerging treaty practice, as indicated earlier, where treaties have now included specific wording that FET does not entail a right to be compensated if the legitimate expectations of an investor are breached.[633] The thesis will return to this point at the end of Chapter VI.

A final criticism of the stability approach is that provisions in general legislation cannot create an expectation of stability.[634] In this sense, tribunals have indicated that general legislation applicable to a plurality of persons cannot by any means create legitimate expectations that the regulatory framework will not change, as the interests of investors cannot be protected above all other considerations.[635] Additionally, clear commitments that are contemplated in a general piece of legislation cannot be considered specific commitments to foreign investors, as this would immobilise the legal order and prevent any adaptation to new circumstances.[636]

As we will see in Chapter VI, tribunals adopting a stability approach have also failed to engage with relevant obligations found in international human rights law. Specifically in cases related to the privatisation of social rights services, tribunals have not determined to what degree legitimate expectations can protect legal stability when states are also obliged to progressively realise economic, social, and cultural rights. Can an investor that goes into the business of providing social rights services ever legitimately expect that a host state will not modify its legal framework if international human rights law requires it to continuously improve its

[632] Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award rendered on 28 August 2019, paragraph 572
[633] New Zealand-United Kingdom FTA (2022) article 14.11(4)
[634] Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela, ICSID CaseNo. ARB/11/19, Award rendered on 30 October 2017, paragraph 8.74
[635] CEF Energia BV v. Italian Republic, SCC Case No. 158/2015, Award rendered on 16 January 2019, paragraph221
[636] Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability rendered on 10 April 2013, paragraph 969

legislation? The case law has made no attempt to answer this question. This is explored in detail in Chapter VI.

c) Promise Approach

The narrowest of all approaches, the promise approach, developed partially as a result of the criticism of the stability approach. A separate cluster of tribunals have concluded that the doctrine of legitimate expectations protects the substantive expectations of investors when – and only when – the state has made them particular promises.[637] These tribunals indicate that legitimate expectations by definition require a promise of the administration on which the investors rely to assert a right that needs to be observed.[638] Under this premise, expectations such as stability consequently have no protection under international investment law if they are not based on a specific promise afforded by the host state.[639]

Thus, the argument is that the protection of legitimate expectations occurs only within 'well-defined limits', particularly a promise from the host state to an investor in regards to a substantive benefit on which the investor relied in making its investment, and which later was frustrated by the conduct of the administration.[640] In this sense, the practice of the administration – even if constant or consistent – cannot imply an expectation that nothing will change without a clear promise.[641]

[637] Walter Bau AG v The Kingdom of Thailand, UNCITRAL, Award rendered on 1 July 2009, paragraph 11.11
[638] PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award rendered on 19 January 2007, paragraph 241
[639] Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL, Final Award rendered 12 June 2012, paragraph 249
[640] Anglo American PLC v The Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1, Award rendered on 18 January 2019, paragraph 467-468
[641] Ibid, paragraph 468

Under this approach expectations arise when a host state makes representations that provide assurances upon which the foreign investor – in the exercise of an objectively reasonable business judgment – relies, and the frustration occurs when the state thereafter changes its position against those expectations in a way that directly causes an injury to the investor.[642]

For it to be protected within investment law, a promise to an investor will require that certain conditions are met, specifically: i) it must be addressed to the investor; ii) it must be precise in its content; and iii) it must be clear as to its form.[643] For such purposes, the tribunal in *El Paso* detailed the specific conditions required for a promise to be protected: i) existence of specific commitments directly made to the investor – such as in a contract or in a letter of intent, or even through a specific promise in a person-to-person business meeting – and not simply general statements in treaties or legislation;[644] and ii) a commitment can be considered specific, if its precise object was to give a real guarantee of stability to the investor.[645]

Hence, tribunals consider that the proper – or only – way for an investor to protect itself from changes and other modifications is to ensure an agreement that covers such matters.[646] Under this approach, there can be no breach of legitimate expectations, if a promise by the host state was never made, or at least, if the evidence that the investor can produce does not prove a clear promise from the administration.[647]

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[642] Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award rendered on 27 August 2019, paragraph 1367

[643] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award rendered on 4 April 2016, paragraph 547

[644] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award renderon 31 October 2011, paragraph 376

[645] Ibid, paragraph 377

[646] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability rendered on 28 April 2011, paragraphs 370

[647] GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award rendered on 31 March 201, paragraphs 277-283

The exact scope of what can be considered a legitimate expectation under the promise approach is not clear, as it could apply to any form of promise the state makes. In other words, international investment law will protect the frustration of any expectation that was unequivocally promised to the investor, whatever that promise might be. In order to determine compliance, tribunals have therefore focused more on the origin of the promise rather than on the exact content of it. Overall, tribunals have concluded – although in some cases contradicted each other – that there are at least three ways in which a host state can provide a promise to an investor that can generate legitimate expectations: 1) statements; 2) government assurances; and 3) contracts.

1. Statements

Although several tribunals have held otherwise,[648] the *Antaris* tribunal concluded in 2018 that statements from governmental authorities can create a promise protected by legitimate expectations. The tribunal stated that promises or representations to investors may be inferred from domestic legislation, including official statements, as it is not essential that official statements have legal force in order to create legitimate expectations.[649]

The *Antaris* tribunal's position is unusual, as it comes after several other tribunals had expressly rejected that statements could amount to a promise protected under legitimate expectations. The *Continental* tribunal, for example, stressed that political statements can create no legal

[648] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award rendered on 5 September 2008, paragraph 261; Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award rendered on 12 November 2010, paragraph 468

[649] Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award rendered on 2 May 2018, paragraph 366

expectations.[650] Statements do not exhibit the level of specificity necessary to generate legitimate expectations, concludes as well the Tribunal in *Frontier Petroleum*.[651]

Two other cases can clearly exemplify how statements cannot create legitimate expectations. In *Crystallex v Venezuela,* the tribunal considered that political statements reported in the minutes of the National Assembly cannot create any expectations, as vague statements do not meet the level of specificity required to created legitimate expectations.[652] In *Peter A. Allard v Barbados*, the tribunal considered that no expectation could arise from political authorities when they were providing their own personal view or advice.[653]

2. Government Assurances

The promise approach has been mainly developed on the basis that legitimate expectations require governmental assurances. This approach has not been subject to criticism and is believed by some as the most theoretically grounded and consistent approach.[654] Under this approach, legitimate expectations depend solely on specific representations made by the host state government in order to induce an investor to make an investment.[655] *Ergo*, for an expectation to give rise to actionable rights it requires there to have been some form of representation by the state – explicitly or implicitly[656] – and reliance by an investor in making

[650] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award rendered on 5 September 2008, paragraph 261
[651] Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award rendered on 12 November 2010, paragraph 468
[652] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award rendered on 4 April 2016, paragraph 555
[653] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, Award rendered on 27 June 2016, paragraph 206-207
[654] See Teeratwat Wongkaew, *Protection of Legitimate Expectation in Investment Treaty Arbitration: A Theoryof Detrimental Reliance*, Cambridge University Press (2019)
[655] Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award rendered on 31 August 2018; Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 613
[656] Gold Reserve Inc. v the Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award rendered on 22 September 2014, paragraph 571

a business decision.[657] Therefore, unilateral expectations of an investor, even if reasonable under certain circumstances, do not satisfy the requirements of international investment law.[658]

No general definition of what constitutes specific commitments has been given by investment tribunals. However, tribunals have indicated that there are two types of conditions that can be considered to be sufficiently specific: i) if they are specific as to their addressee; and ii) if they are specific regarding their object and purpose.[659] In this sense, tribunals have concluded that there was no legitimate expectation when representation suffered from vagueness and generality, and therefore were not capable of giving rise to legitimate expectations protected under the fair and equitable treatment standard.[660]

As informal representations can present difficulties, tribunals have increasingly insisted on clarity, including information regarding the appropriateness of an authority that can issue an undertaking which may bind the state.[661] Therefore, assurances must not only be specific, but also formal,[662] and must be issued by a competent authority directly to the investor prior to or at the time of the making of the investment.[663] Targeted representations are consequently a key element,[664] but tribunals have considered this is not sufficient, as the investor must prove that

[657] Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award rendered on 31 March 2010, paragraph 150
[658] Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award rendered on 16 May 2012, paragraph 249-269
[659] Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability rendered on 10 April 2013, paragraph 957
[660] White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award rendered on 30 November 2011, paragraph 10.3.17
[661] Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Final Award rendered on 27 December 2017, paragraph 371
[662] Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award rendered on 9 October 2014, paragraph 256
[663] ECE Projektmanagement v. The Czech Republic, UNCITRAL, PCA Case No. 2010-5, Award rendered on 19 September 2013, paragraph 4.726
[664] Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award rendered on 12 January 2011, paragraph 140-141

it also relied on the targeted representation. If there was no reliance, the investor suffered no loss when the host state acts in inconsistently with its representations.[665]

Consequently, three cumulative factual conditions are needed for a government assurance to create a legitimate expectation:

1) there was a specific and targeted representation offered by the host state to the investor;
2) the investor relied on the representation (i.e. it was critical when deciding in making or not the investment); and
3) the investor's reliance was reasonable.[666]

Tribunals have expressed that the reliance criterion requires that the investor's decisions to invest was based on representations made to it by the state in its initial investment decision.[667] Hence, the reliance criterion means that the promise provided by the host state was instrumental in the investor's decision to invest or not in the host state.

In terms of reliance, tribunals have also indicated that the investor bears the burden of proof regarding the existence and content of the representations,[668] and it must clearly demonstrate to the tribunal how the representations were made, how they were relied on, and how they have been breached.[669]

[665] Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia, ICSID Case No. ARB/04/6, Award rendered on 19 November 2007, paragraph 247
[666] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, Award rendered on 27 June 2016, paragraph 194
[667] Ibid, paragraph 218
[668] Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award rendered on 16 May 2012, paragraph 249-269
[669] Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits rendered on 31 August 2011, paragraph 228

In terms of the reasonableness of the expectation, as we will see further below, the *Biwater* tribunal expressed that the question was not what the investor would have preferred to have happened, or even what the investor subjectively expected to happen, but what the investor was objectively entitled to expect.[670] For example, tribunals have considered that even if there are government assurances, a host states retains the sovereign right to amend its laws and therefore an investor may not legitimately expect that it will be compensated if the state violated assurances made to the investor in regards to the stability of such laws.[671]

In other cases, tribunals have considered the exact limits of the expectation given the assurance that was provided. In the case of *David Minnotte & Robert Lewis v Poland*, for example, the tribunal considered that although the investors might have a legitimate expectation that they would receive support from the state to operate the investment – in this case the provision of blood plasma – they did not prove that they had an expectation that such material would be provided on demand or at a specific time.[672] The tribunal further insisted that a 'competent' investor would have taken steps to have specific assurances that covered such needs.[673]

Overall, a cluster of tribunals have determined that the only expectations that are protected - whatever that might be – have to be based on specific representations (not ambiguous) made directly to the investor (not to the general population) and they have to have been relied on by the investor when deciding to invest in the host country. Now, what is not clear from the case law is to what degrees these tribunals consider the conditions of legitimacy (as will be discussed

[670] Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008, paragraph 556
[671] Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095, Final Award rendered on 23 December 2018, paragraph 452
[672] David Minnotte & Robert Lewis v. Republic of Poland, ICSID Case No. ARB (AF)/10/1, Award rendered on16 May 2014, paragraphs 193-194
[673] Ibid

in the next Section of this Chapter) relevant to determine if such promises are protected under investment law. To exemplify: a host state provides a direct representation to an investor thatit will be allowed to charge for the provision of water services whatever it might desire to. However, the constitution of such state clearly contemplates that water is a fundamental right and should always remain affordable. If due-diligence or knowledge of the legal framework are considered to shape and condition the legitimacy of an expectation: should the investor be able to rely on a promise in which it knew or should have known was clearly limited by the state's constitutional and/or international protections? The case law does not provide a consistent response to this question. For an effective integration of human rights and investment law, as we will see later in Chapter VI, promises need to be read consistently with the rest of a state's domestic and international obligations.

3. Contracts

Some tribunals have considered that the wording within a contract between the host state and an investor can create a reasonable promise, which will create legitimate expectations. Under this premise, tribunals have indicated that contracts between investors and states are indeed among the instruments which can generate representations, assurances, and commitments, as the 'essence of a contract is a reciprocal undertaking that each party will comply with the obligations therein.'[674]

A breach of contract, however, does not *ipso facto* mean that there is a breach of treaty protection. The *AES* tribunal, for example, determined that 'a contractual right constitutes a legitimate expectation protected by treaty only where there are factors other than the simple fact of the existence of the contract which justify giving the expectation of performance of the

[674] Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award rendered on 27 August 2019, paragraph 1374-1379

contract the status of a legitimate expectation protected by the treaty. In this regard, it is necessary to take into account the overall circumstances giving rise to the legitimate expectation and its frustration, such as the basis for the expectation, reliance upon it in practice, the reasons and context for its frustration, etc.'[675]

In cases in which the state enters into an agreement with an investor for the provision of a public utility or service, tribunals have therefore argued that an investor's legitimate expectations must be considered in light of the terms of the lease contract.[676] Consequently, the investor could have had no right to anything broader than that which was clearly contemplated in the lease agreement.[677] In particular, the *Biwater* tribunal considered the allegations by the investor that Tanzania had frustrated its legitimate expectations given its failure to deal with a request to adjust the terms of the lease contract as it was entitled to a 'review of the lease contract as a whole.'[678] The tribunal determined, however, that given the terms of the lease contract itself it was 'difficult to reconcile' with the notion that the investor was indeed entitled to expect such a review.[679] As the contract did not provide any guarantee for a review, then the investor was not protected from subjective expectation of such nature.

Similar to the reasoning in *Biwater*, other tribunals have used contracts to demonstrate that the investor had no legitimate expectation. In the *Ulysseas* case, for example, the tribunal considered that there was no expectation of legal regulatory stability as the licence contract clearly accepted that change might be introduced to the laws governing the service.[680] In the

[675] AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award renderedon 1 November 2013, paragraph 291
[676] Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008, paragraphs 566
[677] Ibid, paragraph 640
[678] Ibid, paragraph 637
[679] Ibid, paragraphs 638
[680] Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL, Interim Award rendered 28 September 2010,paragraph 257-259

Mamidoil case, a tribunal considered that an investor had no legitimate expectation to access certain state-owned facilities as this had not been part of the agreed contract.[681]

There has been, however, some criticism of relying on contracts to determine the content of legitimate expectations. Some tribunals have stressed that contractual rights and legitimate expectations are two separate issues, as is not sufficient to claim a violation of a contractual right for there to be a breach of the fair and equitable treatment standard protected under international investment law.[682] Therefore, for there to a breach of a legitimate expectation, the breach of contract requires a conduct of the state in the exercise of sovereign power,[683] by acting, for example, in an arbitrary or discriminatory way against the investor.[684]

The criticism is furthered by some who oppose the incorporation of any contractual rights within the protection of legitimate expectation in international investment law. In this sense, James Crawford considered that the doctrine of legitimate expectations should not be used as a substitute for the actual arrangement agreed between the parties or as supervening and overriding sources of the applicable law.[685] Contractual rights and interest should be protected in the framework of the contract, and not pursuant to the protection of legitimate expectations in international investment law.

[681] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award rendered on 30 March 2015, paragraphs 725-728
[682] Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No. ARB/07/24, Award rendered on 18 June 2010, paragraphs 335,337
[683] UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award rendered on 22 December 2017, paragraph 838; Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award rendered on 21 June 2011, paragraphs 292-294
[684] UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award rendered on 22 December 2017, paragraph 841
[685] James Crawford, 'Treaty and Contract in Investment Arbitration', Arbitration International, Volume 24, Issue 3, (2008), at 351–374

The *Urbaser* tribunal adopts a similar line of criticism. The tribunal considered that the 'host State's commitments and, conversely, the investor's expectations, are not exclusively related to the investor's rights under the contract,'[686] as there are other important elements that must be taken into account. It held, 'contractual rights should not be considered in isolation [as they] are placed in a legal framework embracing the rights and obligations of the host State and of its authorities, subject to the protections provided in the BIT.'[687] The tribunal's main objection of using the contract as the sole source of the content of legitimate expectations is that the wider regulatory framework of a host state needs to be able to frame and limit such expectations. In this sense, the tribunal concluded that an investor 'may not invoke the protection of its own interests as a prevailing objective, because these interests were part of a legal environment also covering core interests of the host State, as protected by sources of law prevailing over the Contract, based on international or on constitutional law.'[688] As we will see further in the next Chapter, the tribunal emphasised that, given the particularities of the investment (water provision), the protection of the 'universal basic human right' to water constituted the framework within which the investor should have to frame its expectations,[689] and therefore the contractual undertaking would have be read in relation to the constitutional and international obligations attached to such right.[690]

[686] Urbaser S.A.and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 618
[687] Ibid, paragraph 619
[688] Ibid, paragraph 622
[689] Ibid, paragraph 624
[690] Ibid

IV. Conditions of legitimacy

An emerging practice within investment arbitration has been to also analyse the legitimacy of an expectation, to determine if it can be protected under investment law. While this cluster of investment tribunals remain in the minority, it does demonstrate further attempts to place some degree of limitations to the broad protection of legitimate expectations. These limitations, as will be explored further in the next Chapter, can be used to integrate international human rights and international investment law more holistically.

These tribunals have stressed that there are certain conditions that are necessary in order to consider an expectation reasonable or legitimate (both terms used interchangeably). An expectation that does not comply with such criteria, would therefore not be protected under international investment law. What these tribunals have done is to perform a two-stage analysis: i) what is the exact content of the expectations that is being alleged by an investor under an arbitral tribunal (as discussed in the previous Section); and then ii) are there certain conditions met for an expectation to be considered legitimate and therefore protected under international investment law. In other words, these tribunals have placed a second condition to determine if expectations are protected, indicating, for example, that while promise/stability/conduct may indeed be protected, they are only protected if the investor has had a due diligence process in place. Other tribunals have developed different conditions.

Different tribunals have provided different criteria to determine the legitimacy of an expectation. Nonetheless, this Section attempts to provide the overall criteria of legitimacy that has been emerging within the case law, which together can provide certain answers not only for the overall application of the protection of legitimate expectations in investment law, but might also be used to provide certain essential parameters to perform an effective systemic

integration between human rights law and investment law. As we will see below, these conditions are:

1) an expectation needs to have been created at the time of the investment;

2) there should have been a due diligence process which can demonstrate that the investor had done an assessment of the legal and general conditions in which it was going to operate in; and/or

3) an expectation needs to have been based on the knowledge than an investor had or should have had in relation to the legal, political, socioeconomic, cultural, and historical conditions that were in place when the initial investment took place.

a) The legitimate moment

An instrumental question with regards to the legitimacy of an investor's expectation is related to the moment of creation of such expectation itself. An expectation requires a 'date of birth' in order to be legitimate or reasonable, given that expectations cannot arise at random points in the investment. This is to ensure that the investor cannot claim any expectation created at any time of the project. The overall case-law in investment arbitration indicates that there are three lines of thought:

i) reasonableness or legitimacy of an expectation can only be determined at the time that the investment was made;[691]

[691] Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award renderedon 25 July 2018, paragraph 956

ii) expectations that are protected are only those that the investor took into account and relied on at the moment of making the decision to invest in the host country in question;[692] and

iii) more exceptionally, only a few tribunals have indicated that expectations can be created after the moment of investment if the state has encouraged further investment to take place, therefore expectations can be created years after the initial investment.

Several tribunals have established that expectations can only be created at the time of the investment, however, the interpretation of 'time of the investment' has been quite broad,[693] and often not even defined or analysed at all. In most cases, the exact moment of investment or 'date of birth' is not determined by the tribunal in any way.

Nonetheless, in some cases, particularly those with the existence of a state-investor contract, the analysis has been more straightforward, as the moment of the investment was determined as the time the investor and the host state had signed an agreement.[694] In this scenario, an expectation will only be legitimate if it is based on circumstances that surrounded the moment in which such state-investor contract was concluded. This is particularly relevant for the privatisation of social rights services given that – as we have seen in previous Chapters – most privatised social service provisions are reflected in a form of a contractual agreement between a private entity and a state. However, what is not clear from the case-law is what happens when

[692] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award rendered on 18 August 2008, paragraph 365

[693] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Award rendered on 23 September of 2010, paragraph 9.3.12

[694] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award rendered on 11 September 2007, paragraph 330; Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability rendered on 20 March 2017, paragraph 900

privatisation agreements are renegotiated. As most investment disputes related to the privatisation of social rights (particularly related to water provision) have been brought due to the cancelation of the contract, tribunals have not been presented with such scenario. Nonetheless, one could argue that a renegotiated agreement would present a new 'moment of investment,' as the new investor would have decided to re-invest based on the conditions agreed at the renegotiation stage.

Despite the two jurisprudential approaches – moment of investment and moment investor decided to invest – as the *Mamidoil* tribunal stressed, most tribunals are actually not preoccupied with distinguishing between the time when the investor decides to invest and the time it actually effects the investment.[695] This is particularly relevant, as such tribunal concluded, because in 'most investments it is difficult to fix a precise point in time as there is a long process of decision-making and implementation.'[696] Therefore, if a state and investor have come to some general agreement about the future of a particular investment, then expectations are properly defined and created at this time.[697] What exactly constitutes a general agreement is not clear however. Further, this might be particularly challenging in some types of investments, such as in the extractive industry. In projects related to mining, for example, there will be different phases of invest such as exploration, discovery, development, production, and reclamation.[698] Which exactly is the moment in which the investor and the host state agreed about the investment? Would it be before the exploration phase for example? Would there be different expectations created in each phase of the project? In addition, some investors decide to invest without directly engaging with public authorities or the government itself. Using such

[695] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award rendered on 30 March 2015, paragraph 697
[696] Ibid, paragraph 707
[697] Ibid, paragraph 705
[698] See more on the mining cycle of the Government of Nova Scotia (Canada) at https://novascotia.ca/natr/meb/education/mining-cycle.asp

broad standards such as the one described above (moment of agreement) might not necessarilybe useful for circumstances like these.

As investors base their plans on the circumstances and conditions[699] that exist at the moment of the investment, tribunals have indicated that subsequent developments (legal, social, political) are 'speculative' in nature, and therefore, are to be left out of this consideration.[700] For example, in the case of *Voltaic Network*, the tribunal determined that despite a set of statements that were released by public officials, the fact that they were made after the investor had invested in the Czech Republic implied that such promises could not have reasonably generated expectations protected under international investment law.[701] In particular, the Tribunal stressed that a letter sent to the investor by the Czech Energy Regulator's office, explaining how the Czech Incentive Regime worked, could not constitute in any way the basis for legitimate expectations as the letter was sent a year and a half after the investor had initiated its investment in the country.[702]

The logic behind this type of reasoning, and particularly showcased in the previous examples, is that expectations can only be legitimate if they are based on the conditions that were present or offered by the state when making the investment and in which the investor relied on.[703] This is even more evident in the *Guaracachi America* case, in which the tribunal determined that

[699] Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award rendered on 12 November 2010, paragraph 285; Voltaic Network GmbH v. Czech Republic, PCA Case No. 2014-20, Award rendered on 15 May 2019, paragraph 287

[700] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award rendered on 30 March 2015, paragraph 695

[701] Voltaic Network GmbH v. Czech Republic, PCA Case No. 2014-20, Award rendered on 15 May 2019, paragraphs 511-517

[702] Ibid, paragraph 512

[703] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award rendered on 27 August 2008, paragraph 176; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award rendered on 22 May 2007, paragraph 261; Orazul International España Holdings S.L. v. Argentine Republic, ICSID Case No. ARB/19/25, Award rendered on 14 December 2023

there could be no protection of legitimate expectations as the bilateral investment agreements – between the UK and Bolivia, and the US and Bolivia – had only come into force after the investor had made the investment, and therefore, the standards of protection offered by such investment agreements played no role in the decision to invest.[704]

These examples demonstrate a different approach by investment tribunals to place limitations to expectations, by reasoning that not all expectations are legitimate in investment law. While the investor might have an expectation that arises from a promise – as discussed in detailed previously – what other tribunals such as *Voltaic Network* have determined is that a promise (through statements) cannot create expectations that are legitimate because they were done after the moment of the investment. Similarly, while an investor may have their expectations of stability, promise or conduct protected in investment law, what *Guaracachi America* tribunal highlights is that they are not legitimate (and therefore legally protected) if they arise from a treaty that did not exist before the investment initiated.

Some tribunals have also considered that there are some investments in which a 'cut off' date is not possible, as they constitute a process of investment, and ergo, expectations are created in different moments. In this sense, although the *Tethyan Copper Company* tribunal determined that '[a]n investor's legitimate expectations have to be determined as of the date of the investment decision,' it indicated that other factors should also be taken into account. In particular, the tribunal determined that the state through various means continued to encourage the investor to invest in the Reko Diq project, and given that the investor incurred in major expenditures in the exploratory phase of the project, the investor had therefore 'repeatedly

[704] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award rendered on 31 January 2014, paragraph 380; Similarly see Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award of 18 August 2008, paragraph 365

confirm[ed] its investment decision'.[705] In the *Cystalex* case, the tribunal concluded that given that the Office of Permission of the Ministry of Environment provided a letter to the investor in May 2007 – after the investor had already invested in Venezuela – and that the investor had continued to invest financial resources in the country, then legitimate expectations were also created in May 2007.[706]

This last point is however problematic, particularly in investments related to the privatisation of social rights services. Given the nature of most investments in the realm of social rights provisions, and particularly given their long duration, an investor will always have to re-invest at the very least a small degree of financial resources. This is in the very nature of the provision of the service itself, and if such activities are perceived as a new decision to invest, and not a natural continuation of the invest (or compliance with a concession contract) then the consequence is that new expectations are created based on conditions that do not match those that existed at the time of the original investment. This is not only important in terms of determining the legitimacy of an expectation, but also because determining the time of the investment is particularly important because of other conditions for the protection of legitimate expectations, such as due-diligence and knowledge (as we will see below). This line of argument also contradicts the vast majority of investment cases, many related to services that require constant re-investment and updates, such as in the energy or technology sector, in which the protection has been afforded from the moment the investor originally decided to invest.[707] The standard also needs to accept the logic that some conditions might change, as the life of a nation is not static or frozen in time. However, the protection of expectations cannot be so that

[705] Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decisionon Jurisdiction and Liability rendered on 10 November 2017, paragraph 901

[706] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award rendered on 4 April 2016, paragraph 556-557

[707] See for example: Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award rendered on 18 August 2008, paragraph 365

it only protects the conditions that were favourable to the investor, as investors need to shape their expectations with an understanding that conditions can also deteriorate.

Overall, the condition of moment of investment – as advanced by a few investment tribunals – is intended to limit investor's legitimate expectations, as to ensure that investor cannot argue that their expectations were based when they might consider the best possible moment or environment, which favours their own interests. As we have seen from various cases, it is intended to ensure that investors cannot allege breaches from expectations that did not induce the investment in the first place. It also can play an important role in ensuring social rights obligations can correctly shape an investor's expectations, as it will be necessary to understand the conditions that existed around the provision of a social rights service and the obligations that the state had towards such right (such as health, water, among others) to determine what investor could have expected when investing in the service.

b) Knowledge

The second condition that has emerged from some investment tribunals, as detailed below, is knowledge of the circumstances around the investment, at the time the investment was made. This is used by some investment tribunals as a negative condition, this is, that an expectation cannot be legitimate if the investor had or should have known about specific relevant information that surrounded the investment and which should have shaped the investment. While this condition continues within a minority of Awards, it represents an important jurisprudential development that can be critical in the systemic integration of investment law and human rights law, as explored in detail in the next Chapter.

The condition of knowledge is based on the understanding that reasonableness or legitimacy of an investor's expectation must always be shaped or constrained by the context[708] and circumstances[709] in which the investment took place.[710] Some tribunals have therefore advanced their reasoning that this assessment of the context and circumstances, must take into account all of the political, socioeconomic, cultural, and historical conditions prevailing in the host state at the moment of the investment.[711]

These tribunals have concluded that due diligence processes are not required, but nonetheless, the legitimacy is limited by the knowledge that the investor should have had. In other words, the tribunal will take careful consideration at the information that the investor would have or should have used to create or shape its expectations. Although often used by tribunals as a negative condition, knowledge, as a condition of legitimacy, has both a positive and a negative dimension:

- **Positive dimension:** it was legitimate for the investor to expect X to happen, as it was clear when it invested that X was possible, legal, and acceptable.

- **Negative dimension:** It was not legitimate for the investor to expect X to happen, as it was clear from the moment of investing that X was not possible, legal, or feasible.

To exemplify in simple terms what we will see below, and elaborate further in Chapter IV:

[708] National Grid plc v. The Argentine Republic, UNCITRAL, Award rendered on 3 November 2008, paragraph175
[709] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award rendered on 17 March 2006
[710] Voltaic Network GmbH v. Czech Republic, PCA Case No. 2014-20, Award rendered on 15 May 2019, paragraph 499
[711] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award rendered on 18 August 2008, paragraph 340

	Knowledge
Positive dimension	Legitimate for investor to expect to be able to provide water as domestic and international law allows for private actors (if certain conditions were met) to provide such services, and investor was complying with all required conditions.
Negative dimension	Not legitimate for investor to have expected that water provision would have no further regulations, as the investor knew or should have known that host state's constitution and international obligations regulated water provision as a basic human right which is subject to progressive realisation.

As will be discussed below, those tribunals that have advanced this as a condition forlegitimacy have mostly focus on the negative dimension. But the positive dimension has also been used by tribunals, when for example analysing if an investor was entitled to expect something specific, given an assurance issued by a government agency.

Overall, one can divide this condition into two streams:

1) Knowledge of general circumstances, such as political, socioeconomic, cultural, and historical conditions of a host state; and
2) Knowledge of the legal framework of a host state.

1. Knowledge of general circumstances

The first condition is that an expectation to be legitimate it needs to be based on the real political, socioeconomic, cultural, and historical conditions that were prevailing in the host state at the moment of the investment.

In relation to political and historical conditions, in the *Toto Construzioni* case, for example, the tribunal determined that any expectation the investor could have would have to take into consideration that the Lebanon was in a post-civil war situation, with substantial economic challenges, and it required colossal reconstruction efforts.[712] The tribunal concluded that, therefore, the investor had taken an informed risk when investing in the country and could not have expected that Lebanon would not introduce various measures – in this case increase of taxes and custom duties – in order to address the historical economic challenges that it was facing.

Furthermore, with regards to a political context, the *Bayindir* tribunal, considered that the investor could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time,[713] and therefore, its expectations had to be framed taking into account such political considerations. Particularly, the tribunal stressed that the investor had acknowledged the potentially adverse impact of a change in government, and therefore, the investor could not ignore that the future of the Project was linked to the shifts then affecting Pakistan's politics.[714] The tribunal also took into account that the investor also decided to continue its activities despite political volatility of which it was fully aware.[715] Consequently, the tribunal concluded that there had been no breach to the legitimate expectations of the investor.[716]

[712] Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award renderedon 7 June 2012, paragraph 245
[713] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award rendered on 27 August 2009, paragraph 193
[714] Ibid, paragraph 194
[715] Ibid, paragraph 195
[716] Ibid, paragraph 199

In relation to knowledge of a country's economic conditions, the *SolES Badajoz* tribunal determined that economic circumstances are an essential fact that shape the expectation of an investor.[717] In this case, the tribunal considered that any investor in the renewable energy sector was or should have been aware of the tariff deficit in Spain and the prospect that the state would address it.[718] Therefore, an expectation that did not consider these 'warning signs' cannot be protected as legitimate expectations under international investment law.[719]

In relation to social and cultural knowledge, the *South American Silver* tribunal determined that the fact the investor was operating in an area inhabited by indigenous peoples, required the investor to know or to have known that there were specific political, social, cultural, and economic conditions that were different from other parts of the country, which therefore, framed the scope and content of their legitimate expectations.[720] The investor could not have legitimately expected the same conditions and outcome if it had been operating in an area not inhabited by indigenous peoples. The tribunal also took into account that the investor's own advisors had warned the investor of the situation in which it was operating and recommended certain measures be taken to ensure the project was developed appropriately.[721] Such advice was ignored, and the tribunal determined that the investor's conduct had inadvertently contributed to a social conflict within the community it was operating, at the very least by generating divisiveness and escalating the clashes within the indigenous communities.[722] The tribunal, therefore, decided that the measures enacted by the state where done to restore public order and protect the life and integrity of the population, as a direct consequence of the conduct

[717] SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award rendered on 31 July 2019, paragraph 434
[718] Ibid, paragraphs 435-438
[719] Ibid, paragraph 439
[720] South American Silver Limited v. Bolivia, PCA Case No. 2013-15, Award rendered on 22 November 2018, paragraph 655
[721] Ibid
[722] Ibid, paragraph 656

of the investor.[723] The tribunal concluded that the state had acted accordingly, in the interest of the public, with due process, and therefore no expectations had been breached (nor any other principles of the fair and equitable treatment standard).[724]

Overall, what this emerging criteria set forth by some investment tribunal demonstrates is that expectations need to be shaped by the reality in which an investor comes into, not but what they wish the circumstances would have been. Investors cannot be protected or isolated from the reality that a country lives/experiences. Not only cannot it not be isolated from them, it must take those general conditions into account to shape its own expectations of the investment. This will necessarily take into account the real possibility of change, as the conditions of a host state will never be static.

2. Knowledge of legal framework

A second condition of legitimacy is knowledge of the legal framework. This is particularly relevant as tribunals have made clear that expectations can only be legitimate if they are clearly based on the legal framework at place at the moment of the investment. In other words, an expectation based in an illegality or on the assumption that a state will relinquish its legal obligations deserves no protection.[725] In this sense, tribunals have stressed that an investor cannot have a general expectation of the non-enforcement of a host state's own law (valid at the time of the initial investment), and therefore, an expectation that is based on the assumption that the state will abdicate its responsibilities and relinquish the exercise of its duty to prevent unlawful business practices deserve no protection.[726]

[723] Ibid, paragraph 655
[724] South American Silver Limited v. Bolivia, PCA Case No. 2013-15, Award rendered on 22 November 2018, paragraphs 657-674
[725] RosInvest Co UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Final Award rendered on 12 September 2010, paragraph 648
[726] Ibid

Under the premise of this condition of legitimacy advance by some tribunals, the knowledge of the legal framework necessarily shapes the expectation of an investor. The position of these tribunals is that an expectation that is not grounded in, or ignores, such legal framework is therefore not legitimate under investment law.

The *Rusoro* tribunal, for example, considered that the investor should have been clearly aware of the power that certain public bodies had to impose restrictions on the free sale of gold, as well as the power of the Central Bank.[727] In particular, the tribunal indicated that when the investor made the decision to invest in Venezuela it was – or should have been – aware that the Venezuelan Central Bank (BCV) had the power to impose restrictions on the free sale of gold by mining companies and that the relevant applicable rules provided that companies could be forced to sell 90% of their foreign currency earned at the country's 'Official Exchange Rate'. The tribunal therefore concluded that; as the measures imposed by the BCV were in accordance with its statuary powers the bank had before the investor decided to invest (as above); it complied with appropriate administrative procedures; and there was no evidence of measures being discriminatory; the legitimate expectations of the investor had not been breached.[728]

In *Plama Consortium*, the tribunal dismissed the investor's criticism over the inadequacy of the environmental laws of Bulgaria, as it stated that the investor was aware, or should have been aware, of the state of Bulgarian law the moment it did its investment.[729] In particular, the tribunal indicated that Bulgaria's environmental law could not provide any assurance that the investor would be exempt from liability for cleaning up past environmental damage, especially

[727] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award renderedon 22 August 2016, paragraph 532
[728] Ibid, paragraph 536
[729] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award rendered on 27 August 2008, paragraph 220

as the law was at best unclear on this matter. The investor was clearly aware of this, as it unsuccessfully tried to get such exception agreed in the contract.[730] Under such circumstances, the tribunal concluded that there was no breach to the fair and equitable treatment standard as investor 'failed fully to appreciate the scope and specificities of Bulgarian legislation.'[731]

In relation to legal stability and knowledge, the *Parkerings* tribunal considered that the investor had to take into account – when making the investment – that Lithuania was a country in transition acceding to the European Union, and therefore, clear legislative changes were likely to happen.[732] Under such circumstances, the investor took a business risk, and this risk – aware of the legal transition of the country – conditioned its legitimate expectations.[733]

The *Oostergetel and Laurentius* tribunal stressed that the expectation that tax debts would not be enforced is neither reasonable nor justifiable, particularly as there was no sudden change of policy of the Finance Ministry or the Tax Authority concerning the enforcement of the tax debt. It this sense, the tribunal considered that it did not appear reasonable or legitimate for a taxpayer to expect to be relieved from tax liabilities, particularly as every taxpayer should expect that her dues will be collected. The tribunal even considered the fact that the administration had not been consistent in the tax collection over a period of time, could not create a right in favour of the investor.[734] This final point is particularly relevant, as it means that an investor cannot create

[730] Ibid
[731] Ibid, paragraph 222
[732] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award rendered on 11 September 2007, paragraphs 330,333-336
[733] Ibid
[734] Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Final Award rendered on 23 April 2012, paragraphs 209-201, 236, 270

any expectation based on a state conduct if such conduct is clearly in violation of its own legal duties (even if it was acting in such manner before).

Similarly, with regards to tax avoidance, the tribunals in the *Yukos* and *Hulley* cases, considered that the investor had no right or legitimate expectation to operate in violation of Russian Law, and there was no right or expectation that the investor would be exempt from tax enforcement and collection measures. The tribunal also considered that – despite the view that positions taken by tax authorities on issues of tax liability often considered to be exigent, erratic and unpredictable – the investor's tax evasion scheme was illegal under Russian law when it made its investment, and therefore, the expectation may have been, and certainly should have been, that its tax avoidance operations risked adverse reactions from Russian authorities.[735] The tribunal did, however, conclude that the legitimate expectations of the investor had been breached because it considered that 'the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets.' The tribunal determined that 'if the true objective were no more than tax collection' then the investor 'would not have been treated, and mistreated' in the way that it was.[736] Therefore, by analysing some of the other principles of fair and equitable treatment (as discussed in section II), the tribunal concluded that legitimate expectations had been breached (this would constitute what we have seen above in section III.a as an expectation based on conduct).

The *Mamidoil* tribunal considered that the investor could not claim a violation of legitimate expectations with respect to the illegal operation of a tank farm, and therefore had no right to

[735] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award rendered on 18 July 2014, paragraph 1578
[736] Ibid

rely on the perpetuation of its activities in illegal circumstances.[737] Particularly, the tribunal determined that the illegality of the investment under Albanian law was determined by the complete absence of application for the construction site permit and the incomplete application for the exploitation permit, permits that concerned important economic, social and environmental objectives and could not be dismissed lightly.[738]

Finally, the *Urbaser* tribunal, as we will see in detail in Chapter VI, concluded that the expectations of the investor needed to be shaped by the legal environment in which it operated. In particular, the investor knew or should have known that the purpose of its investment was to provide water and sanitation to fulfil the fundamental human right to water, as enshrined in Argentina's constitution and international legal obligations.[739] With the exception of the *Phillip Morris* tribunal (as seen in Chapter II on the systemic integration of the obligations found in the Convention of Tobacco Control), the *Urbaser* tribunal was the first to indicate that knowledge of a host state's human rights obligations, as the very least when related to an investment set up to provide a social rights service, conditions the legitimacy of an investor's expectations. This interpretation is fundamental for an effective systemic integration between investment law and human rights. Overall, it presents the question: can international investment law protect an expectation which is based on a state not complying with its international human rights obligations? As will be discussed in Chapter VI, if international investment law is not to be read in clinical isolation, an investor that has an expectation that a host state will not comply with all its human rights obligations should not be considered legitimate under international investment law.

[737] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award rendered on 30 March 2015, paragraphs 712-716
[738] Ibid
[739] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 622

What is consistent within the reasoning of this minority of investment tribunals is thatinvestors' expectations are to be conditioned by the information they knew or should have known about – at the very least – the host country's regulatory framework. This is particularlyrelevant, given what the *Urbaser* tribunal identifies as the 'encompassing' elements of legitimate expectations. In particular, the tribunal concluded that to determine legitimate expectations, the 'investor's interest are not to be identified as separate and distinct from the legal framework into which they have been placed upon entering into the investment.'[740] If thisis indeed the case, then what is the process to determine that an investor took careful consideration of the host state's regulatory framework to shape its expectations? As I discuss in the next Section, the answer that other tribunals provide for this question is an independent assessment through a 'due diligence' process.

If this had been required by the *Urbaser* tribunal as a condition – which it did not – the tribunal would have most likely determined that the investor would've been made clearly aware of the domestic and international obligations that Argentina had in relation to the human right to water. However, the tribunal took a different approach. Without requiring due diligence, the tribunal simply concluded that the investor's expectations are to be framed or limited by the regulatory framework that existed. The investor accepted such framework when decided to invest, the tribunal adds, and such legal framework protected – as a matter of priority – the human right to water, which the investor should have been well-aware of.[741] This leads us to the final emerging condition of legitimacy, which is the need for a due diligence assessment.

[740] Ibid
[741] Ibid

c) Due Diligence

A final condition that has emerged in some recent investment arbitration awards has been the need for a due diligence review performed by the investor before it undertook the investment. While it is only reasoned by a limited number of tribunals, these have indicated that due diligence would require, in general terms, an independent assessment of the regulations, and the social or economic conditions of the host state. Without it, an expectation would not be considered legitimate under investment law.

This position is not widely held by investment tribunals and has only emerged in the last few years. However, around a dozen tribunals have concluded that the legitimacy of an expectation requires at least one of the following:

1) the existence of an independent, objective, and rigorous examination of a host state's general conditions that was available to the investor before investing;
2) the existence of an examination of the host state's regulatory regime, including in certain cases the country's case-law, that was available to the investor before the investment; or
3) the existence of independent and objective legal advice on the host country's regulatory regime that was offered to the investor before the investment.

Tribunals that prescribed this condition have indicated that due diligence requires an investor to determine the conditions (political, cultural, historical, financial, social, legal and/or environmental) that surround the investment, which is a prerequisite for a legitimate expectation to be protected under international investment law.[742] This duty, some tribunals

[742] Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Final Award rendered on 23 April 2012, paragraphs 222, 224

stress, requires an appropriate pre-investment due diligence review.[743] The review would then ensure that the investor conduct itself properly, before and during the duration of the investment.[744] This is essential, other tribunals emphasise, as it informs the risks an investor is taking when investing in a particular environment, limiting its expectations on such risk analysis.[745]

Under this premise, an investor has the right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances.[746] However, the exact scope of a 'pre-investment due diligence review' is not clear, as tribunals have shied away from providing any definition or parameters. How to improve this condition, as well as ensure that it can effectively take human rights considerations into account, is discussed in detail in the next Chapter (Section II.a).

The *Stadtwerke* tribunal held that an expectation to be reasonable or legitimate, it must arise from a 'rigorous due diligence process carried out by the investor.'[747] This is particularly relevant, the tribunal indicates, if the expectation is rooted in the host state's regulatory framework. To exemplify the lack of due diligence, the tribunals indicates that it is clear that an investor 'cannot reasonably rely on PowerPoint presentations' by agents of the host state

[743] Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award rendered on 27 August 2019, paragraph 1311; Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Damages rendered on 14 September 2022, paragraph 191
[744] Ibid
[745] Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008, paragraph 382
[746] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award rendered on 11 September 2007, paragraph 330
[747] Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award rendered on 2 December 2019, paragraph 264

because legitimate expectations needed to be 'grounded in grounded in the law and not based upon promotional literature about what the law says.'[748]

The *Masdar Solar* tribunal determined that if the investor is to have any expectation that is based in the regulatory framework of the host state in which it is operating, then it has to demonstrate that it had exercised an appropriate due diligence and that it had familiarised itself with the existing laws.[749] What exactly can be considered to be an appropriate due diligence? No tribunal has explained in detail, with tribunals limiting themselves to determine if due diligence had been performed, based in the facts of the case. In the sense, for example, the *Masdar Solar* tribunal considered that the investor undertook substantial due diligence given that: i) it had commissioned external reports; ii) it engaged in multiple discussions with co-investor; iii) it held extensive discussions with national banks; and iv) it consulted with two law firms in respect to regulatory issues and there were no concerns.[750] The tribunal, however, did not explain if there were any parameters for a due diligence exercise to be satisfy the requirement.

A less strict approach was adopted by the *NextERA* tribunal, as it determined that there had been due diligence given the investor had received a report regarding legal opinions on Spanish law from a consulting firm, despite that such report was not disclosed to the tribunal in the process of the dispute.[751]

[748] Ibid, paragraph 287
[749] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award rendered on16 May 2018, paragraph 494
[750] Ibid, paragraph 497
[751] NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles rendered on 12 March 2019, paragraphs 595

With regard to an investment in a country acceding to the European Union, the tribunal in *Invesmart* considered that the due diligence performed at the moment of the investment plays an important role in evaluating its expectations.[752] A putative investor, the tribunal stressed, has the burden of performing its own due diligence in vetting the investment within the context of the operative legal regime.[753] The tribunal therefore considered that Invesmart should have sought legal advice on the EU and Czech law so that it understood precisely what the requirements of state aid procedure was.[754] This lack of due diligence, and the fact that the investor was clearly not fully aware of the legal background in the Czech Republic, was instrumental for the tribunal in deciding that Invesmart had no legitimate expectations worth protection under the fair and equitable treatment standard.

An exception of the obligation to perform a due diligence is evident in the *RREEF* case, as the tribunal considered that there was no need for an exhaustive due diligence as the host state had informed the investor on the possibilities of changes in the legal framework.[755] Under this circumstance, the exception is quite straight forward, an investor might not need to research what are the specificities of the legal environment, if the host state itself has directly and unambiguously informed the investor about it. This, however, leaves out information about the prevailing political, socio-economic, cultural, and other conditions which might be relevant for the investor.

Furthermore, some tribunals have indicated that there are some conditions which are impossible to predict even by undertaking due diligence. In this sense, the *Saluka* tribunal

[752] Invesmart v. Czech Republic, UNCITRAL, Award rendered on 26 June 2009, paragraph 254
[753] Ibid, paragraphs 272-275
[754] Ibid
[755] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum rendered on 30 November 2018, paragraph 398

emphasised that despite the investor having gone through an extensive due diligence, it could have not predicted – given the circumstances determined at the moment of its investment – the policies the state would adopt when the problem of sovereign debt in the country exacerbate.[756] It is clear, therefore, that there are limits to what an investor can know on the circumstances that surround its investment, but it does nonetheless have a duty to determine as much as possible the relevant information that is available.

However, three tribunals have disagreed with the need for a formal due diligence review for legitimate expectations to be protected. The *Isolux* tribunal, for example, insisted that a less strict requirement was needed, one that focused on what a 'prudent investor' knew or should have known.[757] Further, the *SolEs Badajoz* tribunal considered that although a formal due diligence process is not a condition for the protection of legitimate expectations, an investor cannot benefit from gaps in its subjective knowledge of the regulatory environment because, under an objective standard, the investor's legitimate expectations are measured with reference to the knowledge that a 'hypothetical prudent investor is deemed to have had as of the date of the investment.'[758] Similarly, the *Belenergia* tribunal concluded that a full and extensive due diligence was not required to consider an expectation reasonable or legitimate, but rather legitimacy is conditioned by the information that a 'prudent' investor had to know.[759] Related to the particular facts of the case, the tribunal indicated that an investor cannot 'legitimately expect that the legal and regulatory framework will not change when any prudent investor

[756] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award rendered on 17 March 2006, paragraph 330-332
[757] Isolux Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153, Award rendered on 17 July 2016 (only available in Spanish); SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award renderedon 31 July 2019; Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award rendered on 28 August2019
[758] SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award rendered on 31 July 2019, paragraph 331.
[759] Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award rendered on 28 August 2019, paragraph 584

could have anticipated this change before making its investment.'[760] Overall, these three tribunals reject 'due diligence' assessment as a condition, emphasising that it is rather the condition of 'knowledge' (as discussed previously) that must be used to assess the legitimacy of an expectation.

As seen further above, and also argued by Burgstaller and Risso, the arbitral awards discussed fall shorts of 'providing conclusive indications as to the minimum requirements and extent of an investor's due diligence.'[761] Burgstaller and Risso argue that this is consistent with the general purpose of due diligence as a 'business process' as it is intended to 'confirm data and representations associated with a transaction to determine the value and risk of such transactions [and therefore] the contents and extent of the due diligence process vary according to the specific circumstances surrounding the relevant transaction.'[762] However, if due diligence is to be considered an essential condition in the determination of legitimacy of an expectation, then clearer parameters are needed. As discussed, some tribunals consider that for there to be evidence of due diligence an 'independent' assessment needs to exist. Others consider that the assessment – independent or not – should be rigorous. Others consider it should be about the legal framework, while others consider it should take all conditions of a host state, such as political, historical, social, financial, and legal. Which is the correct assessment? Part of this will be discussed in Chapter VI, looking at how due diligence can be used as a way to better integrate human rights norms and investment law.

In general terms, it is important to emphasise that the three conditions described above (moment of creation, knowledge, and due diligence) is part of an emerging practice, and there does not seem to be consensus if expectations should be conditioned by any of these three

[760] Ibid
[761] Markus Burgstaller, Giorgio Risso, Due Diligence in International Investment Law, Journal ofInternational Arbitration, Issue 6 (2021) at 717
[762] Ibid

criteria. However, as will be further advance in Chapter VI, these conditions of legitimacy help to better systemically integrate social rights into investment law. Particularly, they demonstrate a willingness from investment tribunals to consider that the protection of legitimate expectations is not absolute, and some clear criteria needs to be developed that takes into account a broad spectrum of issues, including the domestic and international legal obligations that a state has in relation to human rights law.

V. Conclusions

To determine if legitimate expectations can be made compatible with social rights, it was important to explore in detail what exactly is covered by this standard of protection within international investment law. For such purposes, this Chapter was centred in responding the research sub-question: What is the exact meaning, scope, and content of the protection of legitimate expectations afforded in international investment law?

The Chapter has demonstrated the inconsistencies and contradictions among investment tribunals in determining the scope and content of legitimate expectations. It has also demonstrated that there is no comprehensive definition of what legitimate expectations actually is or what it intends to protect.

Given the lack of definition, I have defined legitimate expectations in this Chapter as a standard of protection afforded in international investment law which safeguards investors from losses resulting from unpredictable or unreasonable behaviour from a host state. The unpredictability or unreasonableness of a state's behaviour may result either from a direct commitment that a host state made to an investor, or from the investor's objective conviction that the state is going to act in a certain way.

After reviewing all publicly available awards between 2003 and 2023, the research has demonstrated that the practice of investment arbitration has approached the content of investors legitimate expectations in three ways:

1) investor is entitled to expect the host state will conduct itself in a specific manner, particularly, in a manner that satisfies the other elements of the FET standard (transparently, non-arbitrary, consistent, etc); or
2) investor is entitled to expect the stability of the environment in which it operates, as to ensure that the investment can be successful. Investor therefore expects the host state to ensure such stability (legal or financial); or
3) investor is entitled to expect whatever it has been promised through some form of assurance that the host state provided.

The research also demonstrates that investment tribunals continue to contradict themselves on which of the three above approaches constitute the correct content of an investor's protected expectation under investment law. Despite various criticism, for example, the stability approach continues to be prominent within investment tribunals, with tribunals taking this approach as recent as May 2022. Given the very different articulations to legitimate expectations, systemically integrating human rights law will have to take into account all three different approaches. This will be demonstrated in the following Chapter.

This Chapter has also provided insight into the emerging practice, advance by some tribunals, which places some specific conditions for expectations to be protected under investment law. These conditions of legitimacy have been very limitedly addressed in the literature and are often not well addressed by tribunals. Three conditions have emerged from the arbitral practice: 1) moment of creation; 2) knowledge; and 3) due diligence. As will be demonstrated in the next

Chapter, all three of these conditions can be instrumental in framing or shaping the legitimate expectation of an investor in the context of privatised social rights service. In particular, they can be used to better systemically integrate human rights and investment law, to which investment tribunals have played little attention to.

The knowledge the investor had or should have had of the environment it was operating, including the legal framework, is essential to determine the legitimacy of an expectation. Expectations that are based on the investors hope that a host state will relinquish or limit compliance with its legal obligations is not protected under investment law. Further, a due diligence assessment can play a pivotal role in shaping an investor's expectation, providing it with clarity and certainty as to what objectively it can expect from its investment.

Overall, what this Chapter has demonstrated is that legitimate expectations has appeared as a standard of protection within investment law purely as a result of the interpretation of investment tribunals. Some of the forms of interpretation (the approaches to legitimate expectations) have created clashes or contradictions with human rights protections. However, as was discussed in Chapter II, these conflicts are not the result of investment treaties, but rather the result of interpretation. For such reasons, arbitrators should rather ensure that through their adjudication they are giving meaning to legitimate expectations in a way that is compatible with human rights, as demanded by *pacta sunt servanda* and systemic integration. How do to that? That is the focus of the next Chapter.

Chapter VI
Legitimate expectations and social rights

I. Introduction

This Chapter is centred in demonstrating how the interpretative-integration of international human rights law and international investment law can be done. It explores how each conception of legitimate expectations identified in Chapter V (conduct, stability, and promise) should be applied if it were to be interpreted through the lens of international human rights law.

Chapter II demonstrated that a systemic integration approach between investment law and human rights law is permissible and has been practiced by a few – although limited – investment tribunals. As detailed in Chapter II, the practice of systemic integration is grounded on the understanding that the current wording of investment agreements and human rights treaties does not imply, per se, a normative clash of obligations, and therefore, they can potentially be interpreted in a way that that can produce a harmonious relationship. The research in this thesis has also demonstrated that the practice of systemic integration by investment tribunals is far from perfect and better methodological tools need to be developed to be able to more effectively and coherently integrate international human rights and international investment rules.

This Chapter proposes a method for systemic integration and demonstrates that it is possible to integrate international human rights rules with some of the various meanings of legitimate expectations. The author proposes a 7-step method of interpretation, which can be used by

investment tribunals to systemically integrate international human rights and international investment norms.

International human rights norms can operate as an interpretative aid, assisting investment tribunals in construing the standards of protection set out in the investment agreements in a way that is consistent with the human rights obligations of the host state.[763] To recap Santrococe:

> […] if a given provision "A" in an international treaty can be taken to mean "x," "y," "z," and the meanings "x," "y" and "z" can be placed in a scale where 'x' is the meaningthat is most consistent with a relevant human rights norm 'B', the tribunal should takethe provision 'A' to mean 'x', rather than "y" or "z".[764]

This Chapter uses the various meanings that have been afforded to legitimate expectations (conduct, stability, and promise) and demonstrates how they can be interpreted in a way that also complies with international human rights law. This is fundamental for cases related to the privatisation of social rights, as expectations should be shaped by the normative framework in which an investor is operating, including human rights norms.

The Chapter will demonstrate how the emerging practice of those few investment tribunals that have interpreted the conditions attached to the legitimacy of expectations (due diligence, knowledge, and moment of creation) can be of instrumental value in reshaping how legitimate expectations should be read alongside the international human rights obligations of the host state. If these conditions are to be used consistently when interpreting the legitimate expectations of investors providing social rights services, then there should in principle be a more harmonious interpretation of investment law and human rights.

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[763] Fabio Giuseppe Santacroce, The Applicability of Human Rights Law in International Investment Disputes, ICSID Review (2019) at 142
[764] Ibid

This Chapter ends by reflecting why more can be done beyond the proposed interpretative-integration approach. Acknowledging that there might be limitations of how the approach I have suggested would be put in practice, the Chapter concludes with examples of four different types of new treaty clauses that could be incorporated into investment agreements to ensure that a more harmonious interpretation of investment and human rights law is achieved.

II. Conditions of legitimacy

Chapter V explained how there is an emerging practice within investment arbitration of placing conditions on the protection of investors' legitimate expectations.[765] These tribunals have concluded that some conditions need to be met for an expectation to be considered legitimate under investment law. An expectation that does not meet the criteria would therefore not be protected under international investment law. Reading the case law together, Chapter V found that there are at least three conditions that emerge from these decisions:

1) In order for an investor's expectations to be found legitimate, they must have conducted a due diligence assessment which can demonstrate that the investor made itself aware of the legal and general conditions in which it was going to operate;

2) If no due diligence process was done, then an investor's expectation can only be legitimate if it was based on the knowledge that an investor had or should

[765] See discussion on conditions of legitimacy of expectations in Section IV Chapter V.

have had in relation to the legal, political, socioeconomic, cultural, and historical conditions that were in place when the initial investment took place;

3) In all cases, an expectation needs to have been created at the time of the investment in order to be legitimate.

Most cases in the investment arbitral practice do not engage with these conditions at all. Furthermore, in those cases related to human rights (particularly privatisation of water) investment tribunals have not engaged with human rights norms. Two limited exceptions are the *Urbaser* tribunal and the *Philip Morris* tribunal, although the latter mostly in relation to the obligations enshrined in the Framework Convention on Tobacco Control (as demonstrated in Chapter II).[766]

This Section will demonstrate how these conditions can be used to integrate international human rights law and international investment law. As will be argued, an interpretative-integration approach requires tribunals to interpret the conditions of due diligence assessment, knowledge, and moment of creation in a way that ensures compatibility with international human rights norms. This Section will demonstrate that there are clear compatibilities in the way that investment tribunals have approached the conditions of legitimacy with international human rights law. What is mostly missing is an express recognition that human rights norms should be part of the conditions of legitimacy of an expectation. The criteria developed in this

[766] See Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016; and Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB/07/26), Award rendered on 8 December 2016

section will be then used to determine the legitimacy of conduct, stability, and promise, which are the three approaches to expectations developed by the arbitral practice.

a) Due Diligence Assessment

As discussed previously in Chapter V (Section IV.c), around a dozen tribunals have indicated that for an expectation to be considered legitimate under international investment law, the investor must have performed a due diligence review before it undertook the investment. Due diligence requires, in general terms, an assessment of the regulations and the social and economic conditions of the host state. Tribunals that have taken this approach have indicated that, to meet these conditions, there would have to be:

1) An independent, objective, and rigorous examination of a host state's general conditions insofar as they were capable of being assessed by the investor before investing; or

2) An examination of the host state's regulatory regime (does not need to be independent) insofar as this was available to the investor; or

3) An independent and objective legal analysis of the host country's regulatory legal and regulatory regime that was offered to the investor before the investment.

Whichever approach is required, what is clear and consistent is that there should be some assessment – whether independent or not – at the very least of the regulatory regime of a host state, before an investment takes place. The assessment would then constitute some form of

proof that the expectation claimed by the investor was legitimate 'in light of the circumstances' (or given the laws) of the host state.[767]

The examples that we find in the case law do not relate to human rights issues. None of the tribunals assessing cases related to privatisation of social rights[768] have required a due diligence assessment as a condition of legitimacy of an investor's expectation. There has been no consideration, therefore, of the international human rights obligations of the host state as part of a due diligence assessment. However, tribunals have not limited their demands that the investor conduct an assessment to domestic legislation. One relevant example is that of the *Investmart* tribunal, which concluded that the investor should have undertaken an assessment of EU Law and its implications for its investment, as the investor knew the Czech Republic was in the process of acceding to the EU.[769] The example is relevant as it demonstrates some – although limited – willingness to require an assessment that goes beyond the current host state's domestic legislation, therefore, opening the door for international human rights law to be used in the same way.

There seem to be no legal reasons why requiring arbitrators to examine the international law obligations of a host state would be inconsistent or impermissible under international

[767] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award rendered on 11 September 2007, paragraph 330

[768] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic); Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17; Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12; Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Re; AWG Group Ltd. v.The Argentine Republic, UNCITRAL; Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic (ICSID Case No. ARB/03/18); SAUR International v. Argentine Republic (ICSID Case No. ARB/04/4); and Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB/07/26); Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008

[769] Invesmart v. Czech Republic, UNCITRAL, Award rendered on 26 June 2009, paragraphs 272-275

investment law. As the *Urbaser* tribunal determined, the investor's legitimate expectations must be framed or limited by the host state's domestic and international human rights obligations (in such case related to water and health).[770] The *Philip Morris* tribunal takes a similar approach, concluding that the legitimate expectations of the investor were limited by Uruguay's obligations under the Framework Convention on Tobacco Control.[771] If legitimate expectations are to be 'framed', 'shaped,' or 'limited' by the host state's domestic and international obligations, then the investor's assessment of the relevant rules of a host state necessarily needs to take into consideration the human rights norms by which it is bound as well. In other words, if an investor's expectations are legitimate only where it has undertaken an assessment of the relevant rules that are applicable to the investment, and expectations are to be limited or shaped by the host state's domestic and international obligations, then, in the author's view, a due diligence assessment necessarily requires that the investor is made aware of the international obligations of the host state.

This analysis is consistent with Simma's proposals for a 'human rights audit.'[772] Before some tribunals had concluded that a due diligence assessment should be a condition for the legitimacy of investors, Simma had argued investors should be required to assess in detail the domestic and international human rights obligations so as to be able to determine the scope and limits oftheir legitimate expectations.[773] Simma argues that this is to ensure there is a systemic integration between human rights and investment law.[774]

[770] Urbaser S.A.and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 622
[771] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016, para 428
[772] Bruno Simma, Foreign Investment Arbitration: A Place for Human Rights?, International and ComparativeLaw Quarterly (2011)
[773] Ibid
[774] Ibid, at 591-595

Simma argues that the host state's economic and social rights obligations should not be considered unknown to the investor, or alien to the contractual relationship between the investor and the host state, and therefore the investor should conduct a proper assessment of the host state's full domestic and international obligations.[775] In this process, the investor would be able to develop a legal analysis regarding the host state's regulatory powers within its constitutional and international framework and determine its subject-matter coverage and limitations.[776]

Overall, Simma argues that the ultimate result of requiring a 'human rights audit' would be:

> […] a better definition of the landscape of the foreign investor's 'legitimate expectations' in a way that would not leave excessive ex post discretion to arbitrators, should investor–host State disputes arise in the future. On the one hand, foreign investors would be able to better estimate and prepare for alternative scenarios of regulatory measures which the host State might take to vindicate its economic and social human rights obligations, and on the other, host States would not be unduly constrained fromdefining their public policy agenda as a result of investment protection guarantees within foreign investment contracts and their corresponding treaties.[777]

The author agrees with Simma's approach on the need to ensure appropriate due diligence assessments that take into account international human rights obligations in order to frame the legitimate expectation of an investor. As described above, some tribunals have already determined that due diligence assessments are a necessary condition for an expectation to be considered legitimate. In the case of privatised social rights services, given the nature of the service itself – particularly the positive and negative impacts that the service can have on the enjoyment of rights – investment tribunals should require the due diligence assessment to also

[775] Ibid, at 594
[776] Ibid
[777] Ibid, 595

carefully take into consideration the full range of domestic and international human rights obligations of the host state, as they form part of the full regulatory regime of a state.

Despite all of this, some questions remain unresolved in relation to the exact content of a due diligence assessment. As discussed in Chapter V, the case law so far has not really provided an answer to any of the following questions:

1) Does the due diligence assessment necessarily need to be independently performed and then provided to the investor?
2) Does it need to include an assessment of all the conditions of a host state, including economic, social, political, cultural, and legal conditions? Or rather, is the assessment only related to the legal framework that is in place in the host state?
3) If the assessment is to be rigorous, how is that to be determined by the tribunal? What type of proof would a tribunal require for the 'rigorous' criteria to be satisfied?

Let me unpack these questions one at a time. First, the question of independence of the assessment: does it have to be done by someone who is not the investor itself? This was the approach taken by *NextERA* tribunal, which considered that the existence of a report regarding legal opinions on Spanish law from a consulting firm satisfied the condition.[778] For the *NextERA* tribunal, what was essential was that the investor had obtained independent legal advice, which was enough to meet the condition of a due diligence assessment. However, the report (the legal assessment) was never disclosed to the investment tribunal, so the exact content was never clear to the tribunal.[779] This demonstrates, to some degree, one of the

[778] NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles rendered on 12 March 2019, paragraphs 595
[779] Ibid

shortcomings on emphasising too much the need for the due diligence assessment to be independent. While an independent assessment might be preferable, as it could provide some reassurances that a team of domestic experts have provided the necessary knowledge to a foreign investor, without a more exact criteria of what should the assessment contain, the exercise can be meaningless. What if the independent assessment did not indicate to the investor that there were certain human rights obligations attached to the service they are investing in? Should the tribunal be satisfied that the investor did indeed have an expectation as the assessment did not conclude that?

Let me clarify this point with a hypothetical example: An investor is to take over the running of 3 hospitals in Ecuador. It seeks an independent assessment from a local law firm. The law firm provides a detailed report which explains the relevant medical law and administrative law applicable to any health service provider. The report however does not contain details about the constitutional protections afforded to the right to health, nor the international legal obligations to which the country is subject (including ICESCR and the Protocol of San Salvador). The report also does not contain any information regarding the concerns expressed by the UN Committee on Economic, Social, and Cultural Rights in its concluding observations which indicated that Ecuador needs to implement measures to make medical services more affordable to the general population, including limiting how much service providers can charge for urgent life-threatening procedures. The report also fails to inform the investor about the conditions of adequacy of health services developed by the UN Committee in its General Comment 14, nor the duties to intervene and regulate private health services contained in General Comment 24. The report also leaves out that Ecuador has been found in breach of its human rights obligations by the Inter-American Court of Human Rights, in relation to health services for disabled people.

Why does the above exemplify the shortcomings of relying solely on independent advice? In short, an independent assessment, that is not required to fulfil certain parameters, will not necessarily provide the investor with all the necessary information it requires to frame its expectations. If a due diligence assessment is a fundamental condition of the legitimacy of an investor's expectations, then the lack of information related to human rights norms will potentially create expectations that do not reflect the wider international legal obligations of the state. This is, of course, if the assessment is considered as the mechanism in which the expectations of the investor are formulated. Here then lies a fundamental problem for the systemic integration of human rights and investment law. In the case of privatised services, this lack of information could raise expectations of the type of stability of the legal framework or the expected conduct of the state that might be misplaced given the obligations of progressive realisation or the normative content of social rights. In the example above, one should rather expect that, given the overall conditions of the country in relation to health services (highlighted by the UN Committee and the Inter-American Court), Ecuador would be taking measures to ensure that health services are affordable to the general population. If we expect a harmonious interpretation of investment and human rights, then a due diligence assessment in the context of privatised social rights services needs to be more than just independent. This is the focus of the following two points.

Closely related to this is the second unresolved question: should the assessment include all the conditions of a host state, such as economic, social, political, cultural, and legal conditions, or only the legal ones? Most of the tribunals that have taken the view that a due diligence assessment is a condition for the legitimacy of an expectation have focused on the legal

regulatory framework. This is, they have found that the assessment should inform the investor of the legal context in which it is going to invest.

Focusing solely on the regulatory framework, however, misses the whole picture. As discussed below, in relation to knowledge as a condition, tribunals have emphasised that the general conditions of a country should play a fundamental role in shaping investors' expectations. The investor does not operate in a vacuum, it is not isolated from the context in which it operates, so context necessarily needs to be taken into account. For privatised services this is even more fundamental. As discussed in Chapter IV, privatisation might be the result of the state's lack of financial resources to deliver a fundamental social rights service, or the condition imposed by an international development agency. In some of these circumstances, privatisation might have been motivated by the desire to make a service of better quality, more accessible, more reliable, and more affordable to the population. Using the hypothetical example described above, the fact Ecuador had been assessed as not having sufficient medical services that were affordable to the general population, and the calls from the UN Committee for it to limit how much service providers can charge for urgent life-threatening procedures, is part of the context of the country which the due diligence assessment should include in order to properly guide the expectations of an investor. The investor would then know that Ecuador has been called by a UN treaty body to implement measures to ensure that medical services were affordable to everyone, and therefore expect that such measures could be implemented. The investor would have then made a conscious decision to take the risk under such expectation.

An examination of the legal framework, therefore, might not be enough. While the investor might be made aware of the duty to progressively realise rights and the condition of affordability to which the right to health is subject to, understanding the exact context in which

the rights are being experienced is important as well. Knowledge of such general conditions would give a more accurate picture of what exactly the investor should expect from the host state during its investment. As mentioned, the reasons for the privatisation of the service itself provide a good starting point to frame the expectations. Why was the service privatised in the first place? The *Urbaser* tribunal indicated that this is an important point to determine to frame the expectations of an investor. While it did not take a due diligence assessment approach, as will be discussed in detail below, it emphasised that the decision of privatisation was done in order to comply with the state's human rights obligations to 'ensure the population's health and access to water and to take all measures required to that effect.'[780] In other words, the state privatised the water services in order to ensure everyone had access to good quality drinking water. The legitimate expectations of an investor necessarily need to take this into account, the *Urbaser* tribunal concludes (as discussed further below). If there is to be a due diligence assessment as a condition of legitimacy, then information about the conditions before the service was privatised needs to be taken into account.

The third remaining question is, in my view, the most relevant: Does the assessment need to be rigorous, and if so, how is that to be determined by the tribunal? Little analysis is provided by tribunals, with only examples of why a tribunal determined that the assessment had been rigorous. For example, the *Masdar Solar* tribunal considered that the investor undertook a substantial and rigorous due diligence assessment given that: i) it had commissioned external reports; ii) it engaged in multiple discussions with co-investor; iii) it held extensive discussions with national banks; and iv) it consulted with two law firms in respect to regulatory issues and there were no concerns.[781] The *Stadtwerke* tribunal exemplified the lack of a rigorous

[780] Urbaser S.A.and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 622
[781] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award rendered on 16 May 2018, paragraph 497

assessment by the investor, indicating that the investor 'cannot reasonably rely on PowerPoint presentations' by agents of the host state because legitimate expectations needed to be 'grounded in the law and not based upon promotional literature about what the law says.'[782]

The criteria of rigorousness can respond to some of the concerns I have expressed in relation to relying solely in the criteria of 'independence' for the due diligence assessment. As discussed above, an assessment should take all the relevant conditions of a host state, including political, social, cultural, and economic, to provide the investor with comprehensive knowledge of what it can expect from the host state. In cases of privatised services, it should determine what the current conditions of the service in which it will be investing are. Understanding both the state of the service and the general obligations to which the state is subject in relation to social rights, will give the investor a more complete understanding of what type of measures it can expect from the host state. An investor might decide not to take the risk of investing under such conditions, which is why a due diligence assessment is needed.

In the author's view, and based on the considerations explained above, indicating that an assessment should be rigorous is still too broad and open-ended and might not provide the necessary guidance for an investor to be able to frame its expectations. The criteria might differ depending on the circumstances. For privatised social rights services, at least, I consider that a rigorous assessment would necessarily contain information regarding the following:

[782] Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award rendered on 2 December 2019, paragraph 287

- International Human Rights Treaties to which the host state is subject (for example, ICESCR, Protocol of San Salvador, European Social Charter) and the rights directly relevant to the context of the investment.

- Authoritative interpretations of the rights of such treaties. This includes interpretations afforded by the UN Committee on Economic, Social and Cultural Rights' in its General Comments; the Inter-American Court of Human Rights and the African Court of Human and People's Rights through their Advisory Opinions; Thematic Reports by the European Committee of Social Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and People's Rights; among others.

- The relevant binding decisions from International Human Rights Courts, such as the Inter-American Court of Human Rights or the African Court of Human and People's Rights, relevant to the right or to the host state in which the investor is considering investing.

- The concluding observations of the UN Committee of Economic, Social and Cultural Rights, among other UN treaty bodies; the Country Reports issued by Regional Human Rights Bodies such as the Inter-American Commission of Human Rights or the European Committee of Social Rights.

- Observations and reports issued by Thematic or Country Special Rapporteurs, or Independent Experts, from the UN Human Rights Council, relevant to the area of right or the country in which the investor is investing.

- The overall conditions of the service that the investor is investing in. In particular, information on whether the service is currently meeting the normative content of the social rights it impacts. For example, for a health service, whether the current service is accessible, acceptable, available, and of good quality, in accordance with the relevant human rights standards (see Chapter III).

While the amount of detailed information required might result in an onerous due diligence assessment, it represents all the information related to human rights that is necessary for an assessment to be considered 'rigorous.' To systemically integrate human rights and investment law, and to shape the legitimate expectations of an investor that is providing a social rights service, the detailed information described above is fundamental.

Overall, while conditioning the legitimacy of an investor's expectations on the performance of a due diligence assessment can be a tool for systemically integrating international human rights and international investment law, it is by no means a silver bullet. The current lack of uniformity among investment tribunals makes it difficult to be used consistently, and particularly, the ambiguity of the condition also makes it open to contradictory interpretations. Rigorous assessments are needed, which take into account the wide range of human rights obligations and their interpretations. But this requires the willingness of the tribunal to take this approach forward. To ensure that this is consistently conducted in the future, further holistic reforms might be needed to investment agreements, as will be explained at the end of this Chapter.

Further, the interpretation afforded so far by investment tribunals has not clarified how should the due diligence assessment be used in practical terms as a condition of legitimacy of investor's expectations. In particular, it is not clear so far if the purpose of the assessment is: 1) to help the investor know what it should expect in general terms; or 2) to help the tribunal use such assessment to determine what was reasonable for the investor to expect. If it is the latter, then there are clear problems (as discussed in the analysis on rigorousness) about relying on an assessment that can be flawed but to which the tribunal considers has satisfied a minimum standard. In other words, if the assessment truly is to be used by the tribunal to analyse what can or cannot be expected, then there is a degree of possibility that this can be abused, as very clear and precise guidelines would need to exist and be applicable to all investors. Rather, if the assessment is to help the investor know what it should expect in general terms, then it can be used to ensure the investor acts in a way that is compatible with human rights, but the assessment does not really play any critical role in the determination of the legitimacy of an expectation. This final point is intrinsically related to the next Section, this is, to the condition of knowledge.

At least three tribunals have rejected the requirement of a due diligence assessment todetermine the legitimacy of expectations.[783] These tribunals consider that such rigorous assessment is not needed, preferring to limit the expectation to what a 'prudent investor' knew or should have known.[784] In this sense, regardless of the due diligence performed, theexpectations need to be framed under a clear understanding that an investor cannot benefit from gaps in its knowledge of the relevant regulations,[785] or the overall conditions (political, socio-economic, cultural) present in the host state at the time of the investment. Under this understanding, while the due

[783] Isolux Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153, Award rendered on 17 July 2016 (only available in Spanish); SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award renderedon 31 July 2019; Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award rendered on 28 August2019
[784] Ibid
[785] SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award rendered on 31 July 2019, paragraph 331

diligence assessment can be useful, it plays no real role in determining the legitimacy of an expectation, because an investor cannot argue that, for example, the assessment did not provide information that a particular service was subject to human rights obligations. This leads us to the second condition of legitimacy, which is that ofknowledge of the conditions in a host state, which presents an alternate and even more useful tool to ensure that human rights obligations shape an investors legitimate expectations.

b) Knowledge

Even if due diligence is not required, or not performed, there is still a condition – as developed by a stream of the investment arbitral practice – that the legitimacy of an investor's expectations must be shaped by what they knew or should have known. As detailed in Chapter V, the condition of knowledge is based on the understanding that the legitimacy of an investor's expectations must always be shaped or constrained by the context[786] and circumstances[787] in which the investment took place.[788] Tribunals have indicated that this assessment must take into account all of the political, socioeconomic, cultural, historical, and legal conditions prevailing in the host state at the moment of the investment.[789]

[786] National Grid plc v. The Argentine Republic, UNCITRAL, Award rendered on 3 November 2008, paragraph175
[787] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award rendered on 17 March 2006
[788] Voltaic Network GmbH v. Czech Republic, PCA Case No. 2014-20, Award rendered on 15 May 2019, paragraph 499
[789] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award rendered on 18 August 2008, paragraph 340

In relation to the overall context (political, socioeconomic, cultural, historical), as seen in Chapter V, what this condition of knowledge demonstrates is that expectations need to be shaped by the reality in which an investor operates. Investors cannot be protected or isolated from the reality that a country experiences, and that reality must shape the investor's own expectations of the investment.

In relation to knowledge of the legal framework, tribunals have made clear that expectations can only be legitimate if they are clearly based on the legal framework that is in place.[790] This is particularly relevant as an expectation based on a presumption of illegality, or on the assumption that a state will relinquish its legal obligations, deserves no protection.[791] As discussed in Chapter V, and exemplified with the *Mamidoil,[792] the Yukos* and *Hulley,[793] and the Oostergetel and Laurentius[794]* cases, an investor cannot have a general expectation of the non-enforcement of a host state's own law. Therefore, an expectation that is based on the assumption that the state will abdicate its responsibilities and relinquish the exercise of its duty to prevent unlawful business practices deserves no protection.[795]

[790] Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award rendered on 7 June 2012, paragraph 245; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award rendered on 27 August 2009, paragraph 193; South American Silver Limited v. Bolivia, PCA Case No. 2013-15, Award rendered on 22 November 2018, paragraphs 657-674; Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award rendered on 22 August 2016,paragraph 532; Urbaser S.A.and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 622

[791] RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Final Award rendered on 12 September 2010, paragraph 648

[792] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award rendered on 30 March 2015, paragraphs 712-716

[793] Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award rendered on 18 July 2014, paragraphs 1578

[794] Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Final Award rendered on 23 April 2012, paragraphs 209-201, 236, 270

[795] RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Final Award rendered on 12 September 2010, paragraph 648

This final point is of particular importance for the systemic integration of investment law and human rights law in cases of privatised social rights services. If the law of a host state shapes or limits the protected expectations of an investor, and an investor is providing a service related to a fundamental human right, then a state's human rights norms (domestic or international) have to be considered as being capable of limiting such expectations. This is confirmed in the *Urbaser* tribunal's analysis.

First, the *Urbaser* tribunal concluded that the expectations of the investor needed to be shaped by the legal environment in which it operated. In particular, that the 'investor's interests are not to be identified as separate and distinct from the legal framework into which they have been placed upon entering into the investment.'[796]

The tribunal then considered that the objective of the privatisation of the water and sewage services in Argentina, including the investment that was undertaken by *Urbaser*, was done in order to comply with the state's human rights obligations to 'ensure the population's health and access to water and to take all measures required to that effect.'[797] In this sense, the tribunal emphasised that the investor knew or should have known that the purpose of its investment was to provide water and sanitation to fulfil the fundamental human right to water, as enshrinedin Argentina's constitution and its international legal obligations.[798] This led to the tribunal determining that the investor's expectations are to be framed or limited by the regulatory framework that existed – and to which the investor accepted – which protected as a matter of priority the human right to water, to which the investor should have been well-aware of. [799]

[796] Urbaser S.A.and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 622
[797] Ibid
[798] Ibid
[799] Ibid, paragraph 624

Consequently, two important conclusions from the *Urbaser* tribunal's reasoning need to be highlighted: i) the privatisation of social rights services creates a specific framework, which the investment needs to reflect, and the investor's expectations need to be framed in light of these specific conditions; and ii) given the specific framework of privatisation, knowledge of human rights norms must shape the legitimate expectations of investors.

A similar example can be drawn from the analysis provided by the *Philip Morris* tribunal. Although the case was not related to the privatisation of a social right, as explained in Chapter II, the tribunal did reflect on the consequences that tobacco products have on people's health, engaging on the human right to health. Overall, the tribunal concluded that the investor knew about the harmful effects of tobacco, given 'widely accepted articulations of international concern' over such products.[800] Such knowledge should have shaped the investor's expectations, as the investor could have only expected for 'progressively more stringent regulation of the sale and use of tobacco products.'[801] In this sense, knowledge of the investment's impact to human rights (in this case negative impact) also shapes the expectation on the investment, as the investor is to be aware of domestic and international regulations in relation to the protection of human rights to shape its legitimate expectations.

The standards developed by the *Urbaser* tribunal and the *Philip Morris* tribunal in relation to the condition of knowledge represent an important advancement, but there is one considerable shortcoming. Although both tribunals indicated that domestic and international human rights obligations shaped the legitimate expectations of an investor, they did not provide any detail

[800] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016, para 429
[801] Ibid

whatsoever as to what such obligations are. Particularly, the tribunals did not consider the very specific and inherent obligations attached to social rights, such as progressive realisation, minimum core obligations, non-retrogression, and the normative content of each right. They did not consider, for example, if the new regulatory measures enacted by the host states were not only an exercise of the sovereign right to regulate, but a direct consequence of the obligation to progressively realise social rights. Whereas the *Philip Morris* tribunal could have engaged in more detail on the duty to progressively realise the right to health, the *Urbaser* tribunal could have analysed Argentina's obligation to not implement retrogressive measures that would impact the current enjoyment of social rights. The author's research has demonstrated that various tribunals have concluded that an expectation that the host state will 'abdicate its responsibilities and relinquish the exercise of its duty to prevent unlawful business practices deserve no protection.'[802] Tribunals should reflect if an expectation that is based on the premise that the host state will not comply with its human rights obligations in favour of the interests of an investor – or to provide compensation to the investor when it enacts regulation to protect human rights, as discussed below – is legitimate under investment law. A systemic integration approach would unequivocally respond negatively to such questions. This unfortunately was not reflected in any way by the *Urbaser* and *Philip Morris* tribunals.

For cases related to the privatisation of social rights, not engaging with such obligations represents an important shortcoming when systemically integrating investment law and human rights. It is demonstrated in Chapter IV how the interpretation of investment law within arbitral practice has had an important impact in the state's ability to adequately realise human rights, such as limiting the ability of a host state to: i) change the way the provision of a service is

[802] RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Final Award rendered on 12 September 2010, paragraph 648

being performed by a private actor; ii) enact new regulation to protect social rights; and iii) reduce the profit of investors in order to ensure vulnerable populations have access to essential social rights. Most of these limitations have arisen by the lack of a thorough engagement with international human rights obligations, and the lack of willingness of arbitrators to systemically integrate both areas of law (as discussed in Chapter II).

Overall, a condition of knowledge to assess the legitimacy of an investor's expectation provides an important interpretative tool for systemic integration. However, as will be demonstrated below, in order to systemically integrate human rights norms within the content of investor's expectations (within the approaches of conduct, stability, and promise), the knowledge of the host state's human rights obligations that the investor had or should have had necessarily need to be taken into account. This is, in the context of privatised social services, an expectation of stability, for example, requires to be shaped by the state's obligation to progressively realise rights and to ensure that non-retrogressive measures are enacted.

The condition of knowledge might present fewer hurdles for systemic integration than the condition of due diligence. In the context of privatised social rights services, the condition of knowledge is indifferent to what the investor did before it invested. While the investor should have familiarised itself with the relevant rules and conditions, it matters not if the investor did indeed perform an assessment. What matters is the information that the investor should have known. For a private provider, that means that the service it is delivering satisfies a fundamental human rights and is therefore subject to very specific human rights obligations. Why does it then represent fewer hurdles for systemic integration? It does not require the tribunal to review or assess how rigorous an assessment was, and which piece of information was left out or not. In its current form at least, the due diligence criteria could potentially lead to an investor

claiming that the expectation is to be protected given the assessment did not conclude that the state would act in a certain way. The tribunal would then have to examine the assessment and indicate if such expectation is valid or not. On the contrary, if tribunals decided that knowledge of certain information is fundamental in shaping the investor's expectations – and therefore the investor cannot be protected if such information was not determined through the due diligence assessment – then the condition of due diligence is of little interpretative use.

Based on the above reflexions, I consider that the condition of knowledge is more straightforward, and the *Urbaser* tribunal is a good example of how useful the approach can be. Ultimately, what matters is that if an investor is investing in a social rights service it needs to know what the human rights obligations of the state attached to such service are, and then frame or shape its expectations based on such human rights obligations. This is fundamental given that, as discussed in Chapter IV, while a service might be outsourced to a private actor, the human rights obligations attached to such service are still in place. The investor always needs to know that the state will have to act to protect such rights.

c) Moment of creation

The third condition of legitimacy discussed in the previous Chapter was the moment of creation of an expectation. The underlying question is: when can an expectation materialise itself and then be subject to the protection of international investment law?

I explained in some level of detail before that those tribunals that have formulated this condition had in general terms indicated that:

1) reasonableness or legitimacy of an expectation can only be determined at the time that the investment was made;[803] or

2) expectations that are protected are only those that the investor took into account and relied on at the moment of making the decision to invest in the host country in question.[804]

It is important to reemphasise these points here again, as they represent an important element to systemically integrate human rights norms in investment arbitration. Two main reasons are explained below.

First, if due diligence assessments or knowledge is to be used as conditions for the legitimacy of an expectation, then of course there is an underlying question of timing. When should have such due diligence assessment been performed? In relation to the other condition, the expectation is framed by the information the investor knew or should have known exactly when? The condition of moment of creation facilitates answering such questions. Due diligence should be performed before the investment, preferably before the decision to invest. As I described above, it might well be that after understanding the various human rights obligations attached to a service, and the current conditions of the enjoyment of such right in a country, that the investor decides that the level of risk if too high or the potential limited profit is not worth the investment. If it does decide to invest, then it does so with an understanding of the full scope of obligations attached to the service and the potential measures that the state might

[803] Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award renderedon 25 July 2018, paragraph 956
[804] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award rendered on 18 August 2008, paragraph 365

need to implement to protect the fundamental rights of its population. With regard to knowledge, the condition of moment of creation makes clear that it is the information the investor should have known when making the initial investment, including the political, legal, economic, social, and cultural conditions that were present in the host country when it decided to invest.

The second reason why this condition of moment of creation is important is because it can ensure an investor is to shape its expectation by the reasons that lead a country to privatise a social rights services, and the real conditions that were affecting the population at such time. As mentioned a few times previously, this is well elaborated by the *Urbaser* tribunal that emphasises that the expectations of the investor needed to be shaped by the fact that Argentina had decided to privatise the water supply in order to satisfy its domestic and international human rights obligations in relation to the rights to health and water. Understanding this can then help ensure that social rights obligations can correctly shape an investor's expectations, as it will be necessary to understand the conditions that existed around the provision of a social rights service and the obligations that the state had towards such right (such as health, water, among others) to determine what investor could have expected when investing in the service.

Overall, all three conditions discussed above can play an important role in the systemic integration of human rights and investment law. The following three sections will focus on the approaches articulated by investment tribunals to the protection of legitimate expectations. The conditions detailed in this section can be used to assess the adequacy of all three different approaches and ask: is such conduct/stability/promise legitimate if the investor had performed a rigorous due diligence assessment? Can it be legitimate if it should have known the various international human rights obligations that the state had and the general conditions that were

affecting the population at the time? Can it be legitimate if it was aware of all of this when deciding to invest in the host country? Such criteria can help further shape the expectations, as will be demonstrated below.

III. The expected conduct

This Section centres its attention on the first approach to the content of legitimate expectations. As demonstrated in the previous Chapter, under this approach the investor is legitimately entitled to expect the host state to conduct itself in a specific manner, particularly, in a manner that satisfies the other elements of the fair and equitable treatment standard (transparent, non-arbitrary, consistent, etc). Overall, tribunals have determined three different type of conducts that investors are legitimately protected to expect:

1) An expectation that the host state will act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor.

2) An expectation that the host state will use the legal instruments that govern the actions of the investor within the functions to which the instruments were enacted for, and not to harm the investor.

3) An expectation that the host state will act in a way that is not manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).

To systemically integrate such expectation with human rights norms, one needs to reflect on what type of conduct is therefore also expected from the host state to be able to comply with its human rights obligations. Attention should therefore be given to the tripartite typology of

human rights obligations, as it constitutes one of the fundamental articulations of the state duties in relation to economic, social, and cultural rights.[805]

This tripartite typology is composed by the obligations to respect, protect, and fulfil human rights. As explained in Chapter III, they are considered a 'multi-layered obligation structure,'[806] which need to be applied as systematic and interdependent duties, affirming the idea that human rights cannot be fully realised by performing only one of the variety of these duties and neglecting the others.[807]

As discussed in detail in Chapter III, in addition to respecting, protecting, and fulfilling social rights, states are required to provide services in a way that respects their 'normative content.' This means that states are also constrained to certain conditions that must guide them in the realisation of social rights. To briefly recap the normative content on three different rights,

1) For services related to the right to health to be adequate, they need to available, accessible, acceptable, and of good quality (AAAQ);[808]

2) For services related to right to water to be adequate, they need to available, of good quality, and accessible (AQA);[809]

[805] Magdalena Sepúlveda Carmona, *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia (2003) at 170
[806] Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, Dartmouth (1996) at 31
[807] Magdalena Sepúlveda Carmona, *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia (2003) at 170
[808] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, paragraph 12
[809] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, paragraph 12

3) For services related to the right to food to be adequate, they need to available and accessible (AA).[810]

As explained in Chapters III and IV, when social rights services are privatised, the condition of adequacy is closely intertwined with the state's duty to protect human rights. As was exemplified with the right to water, water service provision should be of quality and accessible, which requires, among other things, that the water that is provided should be: i) safe, free from micro-organisms[811] and ii) affordable for all.[812] As was explained in Chapter IV, given that a privatised service is not in the hand of the state but rather being operated by a commercial enterprise, ensuring the quality and accessibility of water services might require constant monitoring and intervention from the state. The state is required to protect social rights, and in relation to the right to water, this requires preventing others from interfering in any way with the enjoyment of the right to water.[813]

In Chapter IV, I discussed in detail the issues arising from the *Vivendi* case. As I indicated previously, the case demonstrates that the conduct of the state was analysed purely from the perspective of investment law and did not take into account the state's human rights obligations nor its sovereign right to regulate. As discussed, it was clear that affordable water of good quality was not being provided to the citizens of Tucuman. Argentina had to intervene to ensure

[810] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, paragraph 8
[811] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 12.b
[812] Ibid, paragraph 12.c.ii
[813] Ibid, paragraph 12

the population was enjoy their right to water but was found in breach of its international investment obligations given the type of measures that it had implemented.[814]

The determination of the *Vivendi* tribunal is very different from that of the *Urbaser* tribunal. In contrast to the above consideration by the *Vivendi* tribunal, the *Urbaser* tribunal determined that when the question in case was related to the privatisation of a social rights service and measures had been taken in order to implement or protect fundamental human rights, such as the right to water, then such measures cannot 'hurt the fair and equitable treatment standard because their occurrence must have been deemed to be accepted by the investor when entering into the investment and the Concession Contract.'[815] The *Ubaser* tribunal also considered that the host state must conduct itself in way that respects the fair and equitable treatment standard, but the interests of the investor need to be read in line with the core interest of the state in relation to fundamental rights, as contained in domestic and international law.[816]

The conduct approach of legitimate expectation stipulates that investors should expect for the host state to not act arbitrarily, unlawfully, non-transparently or unreasonably. Using the condition of knowledge explained before, for an expectation to be considered legitimate, they need to be based on the knowledge the investor had or should have had on the regulatory framework of the host state. In the case of a privatised social rights service, such knowledge includes the domestic and international human rights obligations of the host state, as a host state has a duty to protect and ensure social rights services are being provided adequately (accessible, affordable, of good quality, etc). The meanings of arbitrarily, unlawfully, non-

[814] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic) Award rendered on 20 August 2007, paragraph 3.3.5
[815] Urbaser S.A.and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 622
[816] Ibid

transparently or unreasonably, therefore, need to be shaped by the clear duties afforded under human rights rules. For example, it might well amount to an unreasonable conduct for a state to cancel a concession contract for the provision of water, if the services were being provided in an available, accessible, affordable way, ensuring good quality provision. To use an example, it might amount to a discriminatory conduct that breaches the legitimate-conduct expectation of the investor, if the state was to nationalise only one water provider (out of 12 for example), while the investor was providing water in an available, accessible, affordable way, ensuring good quality provision.

On the contrary, in cases related to privatised social rights services, a host state's conduct to protect social rights, ensuring the adequacy of its service provisions, cannot be considered to amount to arbitrariness, unlawfulness or unreasonable behaviour, if it has acted in a non-discriminatory manner and in compliance with international human rights law. The investor should, therefore, be operating in a way that ensures that it is compatible with the state's obligations in relation to adequacy, but if it does not, then it necessarily has to expect that the host state will conduct itself in way that ensures the provision of the service is compliant with human rights obligations. In other words, the investor would have to expect that the state will indeed intervene and further regulate in order to protect the social rights of its population, if it is not providing services adequately under human rights standards. This reiterates once again the potential usage for due diligence assessments. In particular, the *Glencore* Tribunal indicated that a due diligence assessment would ensure that 'the investor conduct itself properly, before and during the duration of the investment.'[817] If a due diligence assessment was performed, an investor providing social rights services would know that it would have to provide services in

[817] Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award rendered on 27 August 2019, paragraph 1311

a way that met the criteria of adequacy under human rights terms, and if not, expect the state to intervene. There might be need to consolidate this further in new forms of investment agreements, to ensure coherence and consistency. This will be expanded in the last section of this Chapter.

Overall, to more easily exemplify this interpretative-integration to the conduct-expectation approach, the following chart is presented:

Legitimate expectation of conduct		
Investment Law Interpretation	**Human Rights Norm**	**Interpretative integration**
Host state will act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor	States are required to respect, protect, and fulfil rights, ensuring the adequacy of services destined to fulfil social rights (respect for the normative content of the right).	When dealing with cases related to the provision of social rights, an expectation of conduct must be read in light of the state's obligation to protect and fulfil social rights, and ensure services are provided adequately. This includes an expectation that the state will take measures to guarantee that a service is affordable, accessible, acceptable, and of good quality.
Host state will use the legal instruments that govern the actions of the investor within the functions to which the instruments were enacted for, and not to harm the investor.	Human rights law requires states to act in a non-discriminatory manner.	
Host state will act in a way that is not manifestly inconsistent, non-transparent, unreasonable (related to some rational policy), or discriminatory (based on justifiable distinctions).	States are required to respect, protect, and fulfil rights, ensuring the adequacy of services destined to fulfil social rights (respect for the normative content of the right).	

IV. The expected stability

As detailed in the last Chapter, one of the approaches used to determine the content of legitimate expectations has been that of regulatory stability. Under this approach, investors have a right to expect a 'predictable, consistent, and stable legal framework', which must be safeguarded regardless of the authority or organ of the state that might compromise such stability.[818] As we have also seen, this approach has been subject to heavy criticism by other investment tribunals, who consider that the fair and equitable treatment standard was not designed to ensure the immutability of the legal order, the economic world, and the social universe;[819] and therefore, international investment law cannot protect an expectation based on regulatory stability.

Overall, the research conducted by the author, as demonstrated in Chapter V, has determined that there are at least three ways in which investment tribunals have interpreted the content of legitimate expectations in relation to stability:

1) Legitimate expectations protect investors from radical transformations to the legal framework. Such radical transformations will have a direct negative effect on the investor which it had not expected to be subject to.

[818] OAO Tatneft v. Ukraine, PCA Case No. 2008-8, Award on the Merits rendered on 19 July 2014, paragraph 407

[819] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award renderon 31 October 2011, paragraph 368. Similarly, see: Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award rendered on 11 September 2007, paragraph 332

2) Legitimate expectations protect investors from unjustified or unreasonable modifications to a legal framework, without a justification of an economic, social or other nature.

3) Legitimate expectations protect the stability of the investor's financial interest. Legitimate expectations does not include a guarantee that the legal regime in place will remain unchanged, but changes that negatively affect the investment may require compensation if the investor would no longer have reasonable returns.

A final view, which contradicts all the previous approaches, is that legitimate expectations does not protect the stability of the legal framework. Regulatory changes in order to respond to the public interest, even if it adversely affects the investment, does not amount to a breach of the FET standard, as there can be no expectation of the state not to exercise its right to regulate.

All these different approaches are the result of the interpretation afforded by investment arbitral panels. In relation to stability, no case has engaged with human rights so far, with the limited exception of the *Philip Morris* tribunal. As discussed in Chapter II, the *Philip Morris* tribunal concluded that contrary to the investors allegation of stability, the nature of the product that the investor sold and the impact it has on public health, could not provide for an expectation that new and more onerous regulations will not be imposed.'[820] Although the tribunal did not directly acknowledge the obligation to progressively realise the right to health, it did conclude that the investor had to had expected that the state would progressively bring new regulation to

[820] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award rendered on 8 July 2016, para 429

protect public health from harmful products such as tobacco. In particular, the tribunal concluded that:

> […] in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringentregulation of the sale and use of tobacco products. Nor is it a valid objection to a regulation that it breaks new ground. Provisions such as Article 3(2) of the BIT do notpreclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are notdiscriminatory. Article 3(2) does not guarantee that nothing should be done by the hostState for the first time.[821]

In relation to stability, the *Philip Morris* tribunal's reasoning demonstrates that the context of the investment, and the state's obligations to fulfil its fundamental human rights obligations, can directly shape the legitimate expectations of an investor. At its core, it acknowledges that progressive regulation is often necessary to protect the general population and ensure the realisation of their rights. This final point is particularly important in cases related to the privatisation of social rights, as the rights are conditioned to the obligation of progressive realisation and the prohibition against retrogression. The following section places its attention on these two obligations, demonstrating that when analysing cases related to privatised social rights, investment tribunals must interpret stability taking into account these two obligations.

a) Progressivity

Relevant to understanding the stability-expectation approach, it is important to highlight the state's duty to progressively realise rights, as discussed in detail in Chapter III. As was explained previously, the obligation of progressive realisation is considered to be the cornerstone of the UN Covenant on Economic, Social, and Cultural Rights.[822] The duty is also

[821] Ibid
[822] Philip Alston and Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly (1987) at 172

found in the American Convention of Human Rights,[823] the Protocol of San Salvador,[824] and, to a limited degree, in the European Social Charter,[825] and the Revised European Social Charter.[826]

As discussed, progressive realisation imposes what can be described as 'specific and continuing'[827] or 'constant and continuing'[828] duties. As the fulfilment of social rights does not stop at any given level, states are therefore called to always and perpetually seek to improve the enjoyment of social rights. As was also discussed, when resources are limited, privatisation is often seen as one step to be able to progressively realise rights. Attracting foreign investment and agreeing on concession contracts for the provision of social rights services can be considered to constitute a 'deliberate, concrete and targeted' step. However, the obligation to progressively realise the rights does not stop once a service has been privatised. States are still required to continue to move 'as expeditiously and effectively as possible' to realise the rights, as the duty is 'constant and continuing.' This also relates to the normative content of the rights, as described above. This means that the state is required to progressively improve the adequacy of the provision of services, aiming for them to be more accessible, more affordable, and of better quality. If a private provider does not guarantee such improvements over time, a state might be called to intervene and further regulate. If it does not, a state might be found to be in breach of its obligation to progressively realise social rights.

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[823] Article 26
[824] Article 1
[825] While the Charter only expressively recognises it in relation to the right to social security (article 12), the European Committee on Social Rights (the authoritative interpretative body of the Charter) has recognised progressive realisation as underpinning other rights as well. In particular, the Committee has indicated that "When the achievement of the right in question is exceptionally complex and particularly expensive to resolve, a State party must take measure that allow it to achieve the objectives of the charter within a reasonable time, with measurable progress and to an extent consistent with maximum use of available resources. States parties must be particularly mindful of the impact their choices will have for groups with heightened vulnerabilities." ECSR, Autism Europe v France, Complaint 3/2002, Decision on the Merits, 4 November 2003, paragraph 53.
[826] Only In relation to the right to safe and healthy working conditions (article 3) and to the right to social security (article 12)
[827] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, paragraph 44
[828] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, paragraph 18

Now some investment tribunals have concluded that legitimate expectations protect thestability of the legal framework. One of those interpretations seem to be directly incompatiblewith the obligation of progressive realisation. In particular, a stability-expectation that is basedon the protection from radical transformations to the legal framework that have a direct negative effect on the investor, does not seem to acknowledge that states might be required totake such radical transformations to progressively realise rights if the circumstances require them. It is clear from international legal standards that privatisation of social right services is not prohibited, but states do not abdicate their obligation of progressive realisation when they do so.[829] In fact, as discussed in Chapters III and IV, they are required to subject private providers to stick regulations to ensure universality of coverage and continuity of service, pricing policies, quality requirements, and user participation.[830]

Two other interpretations of stability-expectation found in the arbitral practice seem to be consistent with the principle of progressive realisation. First, the interpretation that the expectations that are protected are that against 'unjustified or unreasonable modifications to a legal framework, without a justification of an economic, social or other nature,' can be read to be consistent with what the obligation of progressive realisation implies. In this sense, measures that are enacted to ensure that social rights are progressively realised can be deemed to be 'justified' and 'reasonable' under this protection. Changes to the regulatory framework that are not aimed at improving the realisation of rights, nor have an economic or social justification, might then amount to a breach to the stability-expectation protection.

Second, progressive realisation is undoubtably compatible with a more critical stream of interpretation afforded by arbitral panels, which denies completely the protection of legal

[829] Aoife Nolan, Privatisation and Economic and Social Rights, Human Rights Quarterly, (2018) at 817
[830] CESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, paragraph 21

stability as part of investors' protected expectations. This is centred on the interpretation that regulatory change in order to respond to the public interest, even if it adversely affects the investment, does not amount to a breach of the fair and equitable treatment standard, as there can be no expectation that the state will not to exercise its right to regulate. In order words, there can never be a stability-expectation protected under investment law as the state is required to regulate, progressively, to ensure the wellbeing of its population.

The conditions of legitimacy described previously in this Chapter can play a critical role in the systemic integration of the stability approach. First, the requirement of a due diligence assessment in the context of privatised social rights services should provide the necessary information to the investor regarding the human rights obligations to which a service may be subject to. Such assessment – if done in a rigorous way as detailed previously – should have concluded that social rights are subject to progressive realisation, requiring states to improve the overall enjoyment of services and enact further regulation over time to ensure that the population is able to fulfil their rights. If due diligence is then performed well, and such assessment is to limit the protection of an expectation (as proposed by some tribunals), then one could argue that an investor's expectation of legal stability is never protected in the context of privatised social rights. This is, the investor must always expect that further regulation will be enacted, and while the investor is protected under other substantive standards of investment law (such as the protection against expropriation), the investor is not protected against changes to the legal environment.

The condition of knowledge is also important to discuss here. While a due diligence assessment can be a useful tool to ensure the investor is well aware of the regulatory framework and other conditions of the host state, the knowledge that a prudent investor should have had is equally important. As explained previously, the condition of knowledge in the context of privatised

social rights services ensures that the expectation of an investor is shaped by the human rights obligations that the state is subject to, as well as the conditions that were present at the time of privatisation. The *Urbaser* tribunal is clear on all of these aspects, as discussed in detail before. The *Philip Morris* tribunal exemplifies the issue of a stability-expectation even better. As previously discussed in this Section, it emphasises that no stability is protected. Rather the opposite, the investor should have expected further regulation, given the particular nature of the product it was investing in. In the context of privatised social rights services this is true as well. Not only the investor should have no expectation of legal stability, but it should also expect that there will indeed be further regulation over time. If it decides to invest, it should be clearly aware of that this will be the case and frame its expectations accordingly.

b) Non-retrogression

In order to understand when it might be possible for the obligation of progressive realisation to not be applied, this section focuses on the prohibition of non-retrogression and its limits to legitimate exceptions. This is of particular relevance, as many of the cases related to privatised social right services – such as the water cases in Argentina – are related to the host state's decision to not implement retrogressive measures and ensure that the current level of enjoyment of a right was maintained.

As I explained in detail in Chapter III, retrogressive measures are considered to be prohibited under the International Covenant on Economic, Social and Cultural Rights. If a particular level of enjoyment or protection of a right has been achieved, there is a clear and unequivocal obligation to maintain it.[831] If any retrogressive measure is adopted, states are obliged to

[831] Radhika Balakrishnan, Diane Elson and Raj Patel, Rethinking Macro Economic Strategies from a Human Rights Perspective (Why MES with Human Rights II), Marymount Manhattan College (2009) At 8

demonstrate that they did so with caution, having evaluated all possible alternatives.'[832] There are two forms in which retrogressive measures can materialise: i) *de jure*, in which entitlements guaranteed in laws or policies are revoked or modified, therefore reducing the level of enjoyment of a rights; or ii) *de facto*, in which there is a backsliding on the enjoyment of the rights, either because the state has not acted to prevent this, or because various political or economic measures implemented by the state have led to a reduction in the enjoyment of a right.[833]

Many of the cases related to Argentina that have been described in this thesis were related to measures enacted by the state – in times of a severe economic crisis – to ensure that no retrogression occurred in relation to the access to water services. This is, there would have been a *de facto* retrogression as water would have become unaffordable to a high proportion of the population. However, the arbitral panels had very diverging views on the margin of appreciation that a state has to implement regulatory measures. For example, the *AWG*and *Impregilo* tribunals determined that a state's goal to secure access to water was a legitimate objective, but however placed a very limited weight on a state's choice to select the measures it can implement to pursue such objective.[834] On the other hand, the *Urbaser* tribunal afforded a much 'greater deference to state's actions to pursue a state's objective.'[835]

Most importantly, the *AWG* tribunal determined that Argentina's human rights obligations and its investment treaty obligations were not inconsistent, contradictory, or mutually exclusive and

[832] Magdalena Sepulveda Carmona, Alternatives to austerity: a human rights framework for economic recovery in *Economic and Social Rights After the Global Financial Crisis*, edited by Aoife Nolan, Cambridge University Press (2014) at 27
[833] Ben T. C. Warwick, Unwinding Retrogression: Examining the Practice of the Committee on Economic, Socialand Cultural Rights
[834] Yulia Levashova, The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaserand Beyond, Utrecht Law Review (2020) at 122
[835] Ibid

therefore the state could respect both obligations, but it did not explain in detail how could Argentina ensure that the enjoyment of affordable water of good quality was guaranteed while also not implementing measures to limit the profitability of the investors' services.[836] The tribunal did not engage in any detail with the specific human rights obligations of Argentina, so it is not clear how this mutually supportive application of investment rules and human rights rules should be done. Most importantly, the tribunal's ultimate finding is that the state breached the legitimate expectations because it did not renegotiate the contract which the investor had expected to be stable for 30 years.[837] States are required to demonstrate that, even in times of severe resource constrains, it has acted diligently to ensure the progressive realisation of social rights, or at the very least, avoided introducing retrogressive measures.[838] Under the analysis provided by the *AWG* tribunal it is not clear how Argentina could have both ensured non-retrogressive measures were implemented while also affording stability to the contractual arrangement with the investor.

What does this mean for stability-expectation? An investor might prefer for the state not to act, as to ensure its investment is not affected, but ultimately resulting *in de facto* retrogressive measures, where a large portion of the population would have their rights impacted. Most importantly, one of the interpretations afforded by the current investment arbitral practice is that investors are protect only against unjustified or unreasonable modifications to a legal framework, without a justification of an economic, social, or other nature. As with progressive realisation, this interpretation of stability-expectation is also compatible with the obligation of non-retrogression. That is, measures enacted to ensure that the level of enjoyment of a right is

[836] AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Liability (30 July 2010) paragraph 262
[837] Ibid, paragraph 247-248
[838] Magdalena Sepulveda Carmona, Alternatives to austerity: a human rights framework for economic recovery in *Economic and Social Rights After the Global Financial Crisis*, edited by Aoife Nolan, Cambridge University Press (2014) at 25

not reduced cannot be considered unjustified or unreasonable, as they are based on a fundamental human rights obligation that protects the general population.

Knowledge of the prohibition of non-retrogression becomes therefore of paramount importance. By using the conditions of legitimacy described earlier, a tribunal can clarify that the investor should have known (and could have determined it through a rigorous due diligence assessment) that the prohibition of non-retrogression will always require the state to intervene when the conditions of a country might result in the reduction of the enjoyment of fundamental rights for its population. In the author's view, adjudications like the one determined by the *AWG* tribunal are wrong. Without considering the obligations of progressive realisation and non-retrogression, the tribunal considers that it was legitimate for the investor to have expected a contractual agreement to be in place for 30 years. If the tribunal had engaged with progressive realisation and non-retrogression it might not have been able to arrive to the same conclusion. To frame it as a question: why would the investor be able to expect a stable legal framework for 30 years if it knew or should have known that the state was required to act and regulate if at any time the right to water was compromised? In the context of the provision of water, as human rights are to shape the investor's protected expectations, as formulated by the *Urbaser* tribunal, then the investor should not have been protected against the measures enacted by Argentina.

If progressive realisation and non-retrogression are such fundamental norms of social rights, and in the context of privatised services such norms should shape the expectations of an investor, the question one should rather ask is: why should legitimate expectations provide any protection at all for a stable legal environment? In the authors views, the answer is simple: it should not. An interpretative-integration approach would demand that, in the context of

privatised social rights, given the overall fundamental obligations attached to such rights, any expectation of legal stability is not protected under the fair and equitable treatment standard. The question remains, however, should an investor ever be compensated for modifications to the legal framework? This question is the focus of the next and final section of the stability-approach.

c) Compensation

A final interpretation of the stability-expectation approach is that investment law protects the stability of an investor's financial interest. Under this premise, the expectations that are protected under investment law are not that of legal stability but to be provided with compensation if the investor would no longer have reasonable returns if the legal framework was to be modified. In such a case, the state is free to progressively realise rights and to implement new regulation for such purpose, but if such measures reduce the profitability of the investor's investment, then investors are entitled to be compensated.

As was discussed in Chapter V, this approach is in stark contrast with other interpretations afforded by investment tribunals. This is, that regulatory changes in order to respond to the public interest do not breach an investor's expectations, even if they adversely affect the investment. With minimum justification provided by the very few tribunals that have interpreted stability-expectation in a way that protects the financial interests of the investor,[839] it is difficult to see why investor's financial interests should be protected above the general population. As determined by the *Parkerings* tribunal, when an investor makes an investment in a country, it takes on the 'business risk' that regulatory measures might be enacted, which

[839] See RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum rendered on 30 November 2018, paragraph 399

might even be detrimental to the investment.[840] If such risk was to materialise, as occurred with *Parkerings,* then no compensation is required.[841]

Why should a state be expected to guarantee such financial stability? In reality, a state is never able to guarantee stable financial conditions. This is confirmed by the Permanent Court of International Justice in 1934 which concluded that '[n]o enterprise – least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates – can escape from the changes and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change.'[842]

There is, therefore, an inherent risk in all investments to which investors should not be shielded from, including the need for further regulation in order to guarantee the economic or social wellbeing of a host state. A different argument might be made, however, when the measures implemented amount to expropriation. This, however, is not the focus of this research, as the issue presented here is related to the question of compensation for breaching the stability-expectations of the investor, as contained within the fair and equitable treatment standard.

Moreover, as argued by Mouyal, it is profoundly detrimental to the 'fundamental values and the ethos of international law, when states seek to promote human rights through regulatory measures that either do not apply to investors or require states to compensate investors pursuing

[840] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award rendered on 11 September 2007, paragraphs 336-338
[841] Ibid, paragraph 338
[842] PCIJ, Oscar Chinn (United Kingdom v. Belgium), Judgement of 12 December 1934, P.C.I.J. Rep., Serie A/B, No. 63, para. 88

such goals. The problem is aggravated if the regulating party is a developing state. This problem becomes a legal problem to the extent that states are duty-bound to make certain policy prioritizations to safeguard core human rights while being duty-bound to protect foreign investments. In international investment law this problem is currently left with the arbitrators, who do not necessarily appear to acknowledge the problem at all.'[843] Arbitrators should therefore consider the other streams of interpretation which limit the protection of stability-expectation only to unjustified or unreasonable modifications of the legal framework.

The *Saluka* tribunal was the first to emphasise that there can be no protection of stability – and therefore no right to compensation – unless there is an express and unequivocal agreement between the host state and the investor.[844] Investors must always expect that the law will change,[845] is the ultimate conclusion in the *Saluka* case. The *Copper Mesa* tribunal adds that the investor takes a real risk that changes in the legal regime can happen when it decides to make a long-term investment, and therefore, it does not have a protected expectation against the negative impacts that changes in regulation can have.[846]

As was explained in detail in the previous Chapter, the *El Paso* tribunal emphasised that it was inconceivable that any state – because it entered into a bilateral investment agreement – could no longer modify legislation that can have a negative effect in foreign investors, particularly when it had to deal with modified economic conditions.[847] A bilateral investment agreement, therefore, cannot guarantee that legal and economic conditions will be maintained, the tribunal

[843] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective*, Routledge (2016) At 231
[844] Parkerings-Compagniet ,1S v. Lithuania, ICSID Case No. ARB/OS/8, Award of September 11, 2007,paragraph 330-331
[845] Ibid
[846] Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2, Award rendered on 15 March 2016, paragraph 6.61
[847] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award rendered on 31 October 2011, paragraph 367

adds.[848] In a similar way, the *Belenergia* tribunal further indicated that legitimate regulatory changes in order to respond to the public interest, even if it adversely affects the investment, do not amount to a breach of the fair and equitable treatment standard, as there can be no expectation of the state not to exercise its right to regulate.[849]

The underlaying conclusion present in all the previous mentioned decisions is that compensation for changes to the regulatory regime are not protected as part of the fair and equitable treatment standard. This is, if an expectation of legal and financial stability is not legitimate under international investment law, then compensation for such lack of stability is not required.

The previous discussion on the condition of knowledge and due diligence assessment is relevant here as well. The prudent investor should have known (or determined through an assessment) that a privatised social rights service would require state intervention, either to improve the service or to ensure that the minimum conditions of adequacy were met. The question is then rather: why should the investor expect compensation for changes to the regulatory framework if they were done in order to protect social rights? It is by no means clear why should the protection of legitimate expectations provide any form of compensation when the state has acted transparently and in a non-discriminatory manner to protect the rights of its population. The text of investment agreements does not articulate any clear protection that requires compensation in such circumstances. This is why the tribunals mentioned above have rejected the notion that investors can be protected and compensated when the host state has acted in order to protect its population. A different question, however, will be if the measures

[848] Ibid, paragraphs 365-366
[849] Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award rendered on 28 August 2019, paragraph 572

taken amount to other forms of breaches, such as expropriation. In such cases, compensation may be necessary, but this is beyond the scope of this research.

In conclusion, to more easily exemplify this interpretative-integration to the stability-expectation approach, the following chart is presented:

<table>
<tr><th colspan="3">Legitimate expectation of stability</th></tr>
<tr><th>Investment Law Interpretation</th><th>Human Rights Norm</th><th>Interpretative integration</th></tr>
<tr><td>Investors are protected from radical transformations to the legal framework if it will have a direct negative effect on the investor.</td><td>N/A</td><td rowspan="4">When dealing with cases related to the provision of social rights, an expectation of a stable legal framework must be read in line with the obligation to progressively realise the right. Although the state is required to act transparently, proportionally, and non-arbitrarily, legitimate expectations does not protect the stability of the legal environment in the context of privatised social rights services.</td></tr>
<tr><td>Investors are protected from unjustified or unreasonable modifications to a legal framework, without a justification of an economic, social or other nature.</td><td>The realisation of economic, social, and cultural rights is subject to an obligation of progressive realisation, and therefore, states are required to improve its laws, policies, and services over time.</td></tr>
<tr><td>Investors are not guaranteed to have a legal regime in place unchanged, but to be provided with compensation if the investor would no longer have reasonable returns.</td><td>N/A</td></tr>
<tr><td>Investors are not protected against regulatory changes. Regulatory changes in order to respond to the public interest, even if they adversely affect the investment, do not amount to a breach, as there can be no expectation of the state not to exercise its right to regulate.</td><td>The realisation of economic, social, and cultural rights is subject to an obligation of progressive realisation, and therefore, states are required to improve its laws, policies, and services over time.</td></tr>
</table>

V. The expected promise

A final approach to legitimate expectations is that of promise. As detailed in Chapter V, the promise approach considers that the expectations that are legitimately protected are those the investor acquired after it had received an assurance by the host state. Therefore, under this approach expectations arise when a host state makes representations that provide assurances, upon which the foreign investor – in the exercise of an objectively reasonable business judgment – relies, and the frustration occurs when the state thereafter changes its position against those expectations in a way that directly causes an injury to the investor.[850]

The research conducted by the author has determined that there are three ways in which investment arbitral panels have interpreted promise-expectation:

1) Investor is entitled to expect whatever it has been promised through the appropriate means;

2) Investor is entitled to expect what it was promised, if such promise was relied on and critical to decide to invest in the host state; or

3) Investor can expect what it was promised if such expectation was reasonable.

The exact content of an expectation under the promise approach is not clear, as it can protect a wide range of issues. In other words, international investment law will protect the frustration

[850] Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award rendered on 27 August 2019, paragraph 1367

of any expectation that was unequivocally promised to the investor, whatever that promise might be. No attempt has been made to consider how promise-expectation can be reconciled with international human rights norms, and particularly, if human rights can shape or limit the legitimacy of a promise-expectation. For such purposes, this section is focused mostly on the question of reasonableness of a promise. In doing so, the author argues that in cases related to privatised social rights services, human rights norms need to be used to directly limit any promise made which can lead to a detrimental effect on the enjoyment of human rights.

One of the points emphasised by several tribunals is that, for a promise-expectation to be protected, the investor has to demonstrate that it relied on such promise to make the decision to invest.[851] In the words of the *Peter Allard* tribunal, the decision was 'critical when deciding in making or not the investment.'[852] This means that the condition of 'moment of creation' described above is important to take into account, as the assurance that the investor can claim to have raised an expectation needs to have occurred before making the investment, as it has to have had an instrumental role in the decision to invest.

An added condition is that such reliance needs to have been reasonable. How do we determine the reasonableness? The *Biwater* tribunal is one of the few that provides an answer to such question. The tribunal indicates:

> 'Crucial to the application of [legitimate expectation] is therefore whether the host State breached specific representations the investor reasonably relied on. The question is not what the investor would prefer to have happened, or even what the investor subjectively

[851] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, Award rendered on 27 June 2016, paragraph 194
[852] Ibid, paragraphs 194, 218

> expected to happen, but what the investor was objectively entitled to expect. All relevant circumstances, including the governing municipal law, should be considered in determining what was objectively reasonable. In this case, for example, BGT's legitimate expectations must be considered in light of the terms of the Lease Contract, PSRC's answer to bidder's questions, and the economic and other circumstances generally prevailing in Tanzania.'[853]

What is key from the tribunal's decision is that the reasonableness of relying on an assurance has to be contextualised objectively within the legal regime in which the investment is taking place. While the *Biwater* tribunal only mentions municipal law, we can make the same argument for other areas of law, including domestic and international human rights laws. In this sense, a promise is reasonable if it is within the accepted scope of what is permissible under domestic and international law. One could assume from this premise that, a promise in which a state authority has reassured an investor that it can do (or not do) something which is contrary to human rights law, would therefore not be considered reasonable.

The *Urbaser* tribunal takes a similar approach to the *Biwater* tribunal, in this regard. While analysing the type of expectation-promise that a contractual agreement between the host state and the investor can have, the tribunal emphasised that:

> '[…] the investor's expectations, are not exclusively related to the investor's rights under the contract,'[854] as there are other important elements that must be taken into account. This is, 'contractual rights should not be considered in isolation [as they] are placed in a legal framework embracing the rights and obligations of the host State andof its authorities, subject to the protections provided in the BIT.'[855]

[853] Biwater Gauff Ltd. v United Republic of Tanzania, ICSID Case No. ARB/05/22, Decision of 24 July 2008, paragraph 564
[854] Urbaser S.A.and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award rendered on 8 December 2016, paragraph 618
[855] Ibid, paragraph 619

The tribunal's analysis, overall, is that the wider regulatory framework of a host state needs to be able to frame and limit the expectations of an investor, regardless of the specific assurances provided through a concession contract. The reasonableness of the expectation, according to the tribunal, has to be shaped not by the sole interests of the investor, but also by a legal environment that covers core interests of the host state, as 'protected by sources of law prevailing over the Contract, based on international or on constitutional law.'[856]

In the context of a privatised social rights service, the reasonableness of an assurance needs to be framed within the wider legal context in which the service takes place, including the domestic and international human rights obligation attached to the service. The conditions of knowledge and due diligence can once again play an important role in defining the reasonableness of a promise.

As described above, the expectation needs to be shaped by the knowledge the investor should have known (or determined through a due diligence assessment). This same condition can shape the meaning of reasonableness of an assurance, in line with the reasoning provided by the *Biwater* and the *Urbaser* tribunals. Particularly important for this point is the prohibition of derogations of social rights, and the reduced scope for limitations, as described in detail in Chapter III.

As was explained in Chapter III (Section III.f), the rights contained in the International Covenant on Economic, Social and Cultural Rights are not subject to derogations.[857] This is, it

[856] Ibid
[857] Elizabeth Mottershaw, Economic, Social and Cultural Rights in Armed Conflict: International Human RightsLaw and International Humanitarian Law, The International Journal of Human Rights 12, no. 3 (2008): 449–70.

is not possible to completely (or partially) eliminate or suspend the obligations that are attached to them. While the Covenant allows for the rights to be limited, this is only for 'the purpose of promoting the general welfare in a democratic society.'[858] As I explained, what this effectively means is that limiting the provision of services such as education, water, or housing, can only be done if the limitation is justified as it will protect the social wellbeing of the population (in cases of pandemics or natural disasters, for example).

The investor of a privatised social rights service would have to have known that derogations are not possible, and limitations are restricted. An assurance given to an investor, which would ultimately derogate or limit the enjoyment of a right would therefore not be reasonable under investment law. As the reasonableness of the assurance needs to be contextualised within the legal framework that the investor is operating, the investor should not be able to rely on an assurance that clearly contradicts a state's obligations towards fundamental human rights. This is why a due diligence assessment for those providing social rights services might be of crucial importance, as the investor would be able to have full clarity of the legal context (in relation to human rights) in which it would be operating, and then assess and ultimately rely on any assurance provided, given the information that it has.

In conclusion, to more easily exemplify this interpretative-integration to the promise-expectation approach, the following chart is presented:

[858] ICESCR Article 4

Legitimate expectation of promise		
Investment Law Interpretation	**Human Rights Norm**	**Interpretative integration**
Investor is entitled to expect whatever it has been promised through the appropriate means.	N/A	Investor can expect what it was promised; if such promise is reasonable. The reasonableness of a promise has to be contextualised within the legal framework in which an investor is operating, and therefore, this includes human rights laws. An assurance that derogates human rights obligations is not reasonable under investment law.
Investor is entitled to expect what it was promised, if such promised was relied on and critical to decide to invest in the host state.	N/A	
Investor can expect what it was promised if such expectation was reasonable.	Social rights are non-derogable, limitations can only be for the general welfare, and states have ratified human rights treaties with the intention of complying with them (*pacta sunt servanda*).	

VI. The interpretative method

After reviewing the overall practice of investment arbitration, including new trends that further limit the protection of legitimate expectations (and the limited exception that take human rights into account, such as *Philip Morris* and *Urbaser*), and attempting to combine various interpretations found in the case-law, the author considers that, for a systemic integration, investment tribunals need to be able to interrogate the following questions:

- What is the context in which the investment took place?

- Did the investor perform a due diligence assessment to determine the exact legal, societal, historical, environmental conditions of the host state?

- If it did not perform a due diligence assessment, did the investor know or should have known about the legal, societal, historical, environmental conditions of the host state, particularly those pertinent to its investment?

- What are the relevant investment rules applicable to the investment, given the context?

- What are there any other international legal rules relevant to the investment dispute, such as human rights rules?

- Is there a single interpretation to the meaning of the applicable investment rule being claimed? If not, what are the various meanings to such concept?

- Is there one meaning of the relevant standard that is most compatible with the relevant human rights obligation?

- Are the claims legitimate given all the above considerations?

Based on the above questions and the overall research that this thesis has presented, the author proposes that in cases related to the privatisation of social rights services and alleged breaches to investor's legitimate expectations, investment tribunals should adopt the following 7 step method of interpretation:

1. CONTEXT.

The tribunal must first determine if the dispute in question relates to the privatisation of a social rights service. In particular, the tribunal should seek to understand the social, political, legal, and economic context in which the investment initially took place and the reasons why the state decided to outsource the provision of the specific service.

2. HUMAN RIGHTS RULES.

The tribunal must then also determine what are the relevant human rights rules applicable to the context. The tribunal must particularly consider the obligations of progressive realisation, maximum available resources, minimum core obligations, non-retrogression, and the normative content of the rights relevant to the dispute. The tribunal may want to seek experts and witnesses under its own initiative, to better determine the human rights rules that are applicable to the dispute in question. The tribunal may consider to directly seek the expertise of authoritative bodies that can provide expert advice, such as the Inter-American Commission on Human Rights, the European Committee of Social Rights, and the African Commission on Human and People's Rights.

3. INTEGRATION.

The tribunal must determine if there is one interpretation of legitimate expectations which is most compatible with the relevant human rights obligation of the state. Depending on the type of expectation being alleged by the investor, the tribunal might be required to answer one of the following questions:

a. **The meaning of conduct:** What conduct can the investor expect if providing social rights services, taking into account both investment and human rights

obligations of the state, to which the investor should have known when entering into the investment? The author considers that when dealing with cases related to the provision of social rights, an expectation of conduct must be read in light of the state's obligation to protect and fulfil social rights, and ensure services are provided adequately. This includes an expectation that the state will take measures to guarantee that a service is affordable, accessible, acceptable, and of good quality.

b. **The meaning of stability**: What type of stability can the investor expect if providing social rights services, taking into account both the investment and human rights obligations of the state, to which the investor should have known when entering into the investment? The author considers that when dealing with cases related to the provision of social rights, an expectation of a stable legal framework must be read in line with the obligation to progressively realise the right. Although the state is required to act transparently, proportionally, and non-arbitrarily, legitimate expectations does not protect the stability of the legal environment in the context of privatised social rights services.

c. **The meaning of promise:** What promise is legitimate when the investor is providing social rights services, taking into account both the investment and human rights obligations of the state, in which the investor should have known when entering into the investment? The author considers that when dealing with cases related to the provision of social rights, an investor can expect what it was promised; if such promise is reasonable. The reasonableness of a promise has to be contextualised within the legal framework in which an investor is

operating, and therefore, this includes human rights laws. An assurance that derogates human rights obligations is not reasonable under investment law.

4. MOMENT OF CREATION

The tribunal must seek to determine when did the investor decide to invest in the host country. This will provide clarity as to whether the alleged stability, conduct, or promise can be considered legitimate. Determining the moment of creation of a potential expectation will also be important to determine the next two conditions (due diligence and knowledge).

5. DUE DILIGENCE.

The tribunal must then require evidence of the performance of a due diligence assessment from the investor that determined the exact legal, societal, historical, environmental conditions of the host state, under which it created its alleged expectations. Did the assessment provide information of the domestic and international human rights obligations of the host state, as identified in stage 2?

6. KNOWLEDGE.

If it the investor did not perform a due diligence assessment, the tribunal must determine what knowledge the investor knew or should have known about the legal, societal, historical, environmental conditions of the host state, particularly those pertinent to its investment. Are there relevant human rights norms of which the investor should have known to shape its expectations?

7. DETERMINATION.

Legitimate expectations will be found breached when it amounts to a breach under the integrationist reading of the standard, as afforded in step 3, and taking into account the legitimacy requirements in steps 4, 5, and 6.

VII. Moving forward

Despite the various proposals detailed above, which have demonstrated how an interpretative-integration is possible within the current rules, one still has to ask the question: is this enough? It would be irresponsible for me to respond positively to this question, at least in unequivocal terms. The striking reality of the investment legal regime is that there is a degree of inconsistency and contradictory practice within investment arbitration that can make any integration of human rights and investment law – solely through interpretation – quite challenging.

As Daza-Clark explains, the nature of investment arbitration requires a case-by-case basis analysis, as there is an underlying risk given the type of assumptions in which each tribunal can arrive to, even in almost identical cases.[859] In other words, as tribunals are not required to follow previous case law, there can be conflicting or contradictory interpretations of the same facts and the same standards (as has been clearly demonstrated in this thesis). As Daza-Clark further explains, this has ultimately led to a wide degree of criticism of investment law, as it has contributed to the fragmentation of international economic law.[860]

[859] Ana Maria Daza-Clark, Protection of Foreign Investment and the Implications for Regulation of Water Servicesand Resources: Challenges for Investment Arbitration, Water Law (2009) At 114
[860] Ibid

In my view, all of this is exacerbated by the nature of a fragmented community that is present in international law. As discussed in Chapter II, while fundamental rules and principles of international law – such as *pacta sunt servanda* and systemic integration – exist to ensure a coherent interpretation of the international legal system, the different ethos present among international lawyers has led to divergence in the interpretation of the law. This is of course greatly facilitated by the nature of the broad and open-ended rules found in international law that can be subject to various types of interpretations. This is evident in the interpretations that have been afforded to legitimate expectations, as described in Chapter V.

In the introduction of this thesis, I explained that this research was focused on what can be done now with the current existing rules of investment law. I further indicated that, while the thesis does not deny the need for radical reforms of the investment regime, the research was centred at demonstrating how the rules of investment law could be interpreted to more effectively and coherently integrate international human rights law. However, given the shortcomings described above, and conscious that the interpretative-integration approach I have proposed might be disregarded by investment tribunals, states may wish to incorporate more exact and specific clauses in their investment treaties.

a) Limiting compensation clause

Given the way that legitimate expectations has been developed by the investment arbitral practice; the contradictory interpretations it has had; and the impact to the right (and duty) of states to regulate; states may consider drafting investment treaties clauses that directly limit the scope of legitimate expectations.

There are examples of this approach already taking place. For example, the recent New Zealand-UK trade and investment agreement expressly acknowledges that 'for greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article even if there is loss or damage to the covered investment as a result.'[861] The treaty demonstrates the view of at least some states that consider that compensation for breaches to legitimate expectations, when done in order to exercise the state's regulatory powers, is not appropriate.

While this type of clause might be useful to ensure that the state's regulatory powers are not undermined, or that the state is expected to compensate an investor when it does, it does not however provide a systemic-integration approach. This is, it does not provide for any mechanism in which human rights norms can be used to interpret investment rules, when appropriate. However, the simple and elegant solution might be more effective, as it leaves clear without a doubt that legitimate expectations does not provide a right to investor to be compensated when the state has acted, for example, to protect the rights of its population.

b) An interpretative-integration clause

A second option is for states to insert in their investment treaties a general clause that requires for rules to be interpreted holistically within the context of public international law. In other words, to require tribunals that, when interpreting a standard of protection afforded in the investment treaty, they must consider the totality of the host state's international legal obligations that are relevant to the case in question. While this should always be the case, as this is demanded by the principle of *pacta sunt servanda* and the rule of systemic integration,

[861] Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand (2022) article 14.11(4)

a specific clause could ensure that the tribunal is required to interpret investment law in a way that does notresult in contradictory interpretations (as discussed in detail in Chapter II). This clause would effectively require that all arbitral tribunals perform the type of analysis presented in this thesis,in particular the one in the present Chapter, rather than adopting an isolationist approach (as discussed in Chapter II Section IV.a)

An interpretative-integration clause could be articulated in the following way:

> When interpreting the protections afforded in this treaty [the investment treaty], an arbitral panel must take into account the totality of international rules applicable to the area of dispute, including international human rights laws. When a standard protection can be interpreted in various ways, the tribunal must seek the interpretation that is consistent with other areas of public international law.

c) Conditionality clauses

A third option is to directly articulate the conditions of legitimacy developed by some investment tribunals. This is, that an investor is expected to perform a due diligence assessment and create their expectations based on the information the prudent investor should have known. The requirement should indicate that the assessment must be rigorous, and asses all the conditions present at the host state before investing, including the political, economic, social, cultural, and legal context. The clause can, therefore, clarify that expectations are to be shaped by the context in which the investment in taking place, to which the investor has a responsibility to familiarise itself with.

The clause could also be more exact in relation to privatised services. In particular, a sub-clause could clarify as well that, when an investor is investing in an outsourced social rights service, such as water, education, health, housing, the investor is required to know what the human rights obligations of the state are, and therefore, to frame its expectations based on such human rights rules. This sub-clause would effectively seek to incorporate in more precise terms the approach taken by the *Urbaser* tribunal, as has been detailed in this Chapter.

d) Human Rights clauses

A final approach is to directly craft clauses that unequivocally incorporate human rights obligations into the protections afforded by investment law. While just this point could be subject to a full thesis, the point in this section is to just briefly exemplify that a further option is to be more precise in the way that investment and human rights norms should interact.

Examples of the types of clauses that could be incorporated in investment treaties were developed by Tara Van Ho, Anil Yilmaz-Vastardis, and myself, and submitted to the UN Working Group on the issue of human rights and transnational corporations and other business enterprises.[862] In particular, we indicated that an important clause that could help ensure investors act in a way that is compatible with the human rights obligations was to directly require investors to respect and uphold human rights in the states they were investing in. We proposed the following:

1) Investors and investments shall respect and uphold human rights in the host state.

[862] Tara Van Ho, Anil Yilmaz Vastardis, and Luis Felipe Yanes, Proposed Investment Treaty Provisions, Essex Business and Human Rights Project, (2018) available at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Forum2018Submission5.pdf

2) Investors shall not manage or operate an investment in a manner that circumvents international environmental, labour, or human rights obligations to which the host state and/or home state are Parties.

3) The investor and the investment shall, in keeping with good practice relating to the size and nature of the investment, develop and maintain a publicly disclosed environmental management system and a human rights management and mitigation plan. These systems and plans must include appropriate standards for due diligence, mitigation and management of risk, and provision of remedies and reparations to those harmed by the investment. In developing and carrying out the human rights management and mitigation plan, reference shall be made to the rights provided for in any international treaty or via customary international law that is binding on the home or host state. The development and maintenance of such plans are a necessary precondition for an investor to invoke the substantive and procedural protections found in this Agreement.

4) The Parties will adopt measures necessary to ensure this Clause is reflected in domestic law.[863]

A further clause that we proposed was to do with the right of the host state to regulate. In such model clause, we proposed that 'non-discriminatory measures taken by a State Party to comply with international obligations under other treaties, including but not limited to treaties applicable to anti-corruption, human rights, humanitarian, criminal, environmental, and labour law, shall not constitute a breach of the substantive rights afforded to the investor under this

[863] Ibid, Model clause 3

Agreement, except for cases of direct expropriation.'[864] This is relatively similar to the New Zealand-United Kingdom FTA discussed above (limiting compensation clause). While the New Zealand-United Kingdom clause is intended to limit only compensation related to the protection of legitimate expectations, our proposal is more comprehensive as it attempts to ensure that regulatory measures that the state is required to take in order to comply with other international obligations are not interpreted in a way that breaches investment protections, and therefore, require compensation.

There are many other proposals put forward, which all aim to ensure that investment agreements are not read in a way that can result in the types of contradictions or impact to the enjoyment of human rights described in this thesis.[865] As indicated earlier, while I consider – and hope to have demonstrated – that the rules of investment law can be used to correctly integrate human rights, the proposals for further and more dramatic reforms should be taken seriously into account.

VIII. Conclusions

In Chapter II, explaining the approach to systemic integration used by the Inter-American Human Rights System, I used a metaphor of a pair of red lenses: if you put them all, you continue to see the same objects, but now through a red shade. What I have aimed in this

[864] Ibid, Model clause 4

[865] See for example: Alessandra Arcuri, Francesco Montanaro, Federica Violi, Proposal for a Human Rights-Compatible International Investment Agreement: Substitute Investor-State Arbitration with Public Alternative Complaint Mechanisms (PACOMS). Available at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Forum2018Submission3.pdf; International Institute for Sustainable Development, INTEGRATING HUMAN RIGHTS IN IIAs (2018) https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Forum2018Submission1.pdf; Daria Davitti, Kathryn Greenman, Ntina Tzouvala, Designing a Human Rights-Compatible International Investment Agreement (2018) https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Forum2018Submission6.pdf

Chapter is to do exactly that, to use human rights law as the lenses in which investment law should be read when social rights services are privatised.

The Chapter has responded affirmatively to the final research sub-question: the core duties inherent to the realisation of social rights should indeed be considered when determining the legitimate expectations of an investor. By using the conditions of legitimacy: due diligence; knowledge; and moment of creation; I have demonstrated how each approach should be read harmoniously with human rights law. These conditions of legitimacy serve as a mechanism that can ensure that expectations that are not shaped by the state's human rights obligations are not deemed to be legitimate under investment law.

I have demonstrated that, when dealing with cases related to the provision of social rights, an expectation of conduct must be read in light of the state's obligation to protect and fulfil social rights, and ensure services are provided adequately. This includes an expectation that the state will take measures to guarantee that a service is affordable, accessible, acceptable, and of good quality.

Further, I have argued that an expectation of a stable legal framework must be read in line with the obligation to progressively realise the right. Although the state is required to act transparently, proportionally, and non-arbitrarily, legitimate expectations does not protect the stability of the legal environment in the context of privatised social rights services.

Finally, I have argued that an investor can expect what it has been promised; but such promise must be reasonable. The reasonableness of a promise has to be contextualised within the legal framework in which an investor is operating, and in cases of privatised social rights services,

this includes human rights laws. An assurance that derogates human rights obligations is not reasonable under investment law.

To ensure consistency in interpretation, I have proposed a 7-step method of interpretate-integration that could allow clarity, coherence, and consistency in the investment arbitral practice, ensuring investment law and human rights law are not read in isolation. Nonetheless, I am conscious of the inconstant and contradictory practice of investment arbitration, and therefore, have further proposed 4 potential new investment treaty clauses that could ensure permanent and more effective integration between investment law and human rights law.

Chapter VII
Conclusions

'England's water can be renationalised without compensation, activists say.'[866]

This is what I wrote at the very beginning of this thesis. What I have demonstrated across in the past 300 odd pages is that it is not as simple and straightforward as that. Privatisation (and re-nationalisation) requires to take very careful attention at the rules and interpretations afforded to both international investment law and international human rights law. Of particular challenge has been the interpretation afforded to the protection of legitimate expectations (as part of the FET), which has been mostly read in clinical isolation from human rights law.

The main research question of this thesis was to determine to what extend the protection of legitimate expectations of an investor under international investment law could be made compatible with the inherent obligations of social rights. The research has demonstrated that, if one takes an interpretative integration approach, the compatibly of legitimate expectations and social rights protection is possible. Among the main findings of this thesis are:

1) **Lack of contradictions**

   Actual normative clashes – contradictory obligations – between investment law and human rights law might not exist, but rather it has been in the way that such rules have been interpreted that they might create conflicting results. This is particularly evident in the interpretations afforded to legitimate expectations.

[866] Sandra Laville, '*England's Water Can Be Renationalised Without Compensation, Activists Say*,' The Guardian,(2 December 2022) Available at http://www.theguardian.com/environment/2022/dec/02/water-renationalised-without-compensation-activists-shareholders-england <accessed 2 December 2022>

2) **Demand for systemic integration**

The rules and principles of *pacta sunt servanda* and systemic integration (which constitute the cornerstone of public international law) ultimately demand that investment law and human rights law be read harmoniously and not in contradiction or in clinical isolation.

3) **Human rights create expectations**

The provision of social rights services is conditioned to very specific and stringed obligations. While the services can be outsourced (privatised) the state is ultimately responsible for the satisfaction of the rights, under human rights law. This, however, places a duty on the state to regulate, requiring it to ensure the continuous adequate satisfaction of the right. Such human rights rules frame the expectations of an investor when it is providing social rights services.

4) **Isolationist reading of legitimate expectations**

Investment tribunals have interpreted legitimate expectations without taking into account human rights law (with the exception of the *Philip Morris* tribunal and the *Urbaser* tribunal). This isolationist reading of legitimate expectations has ultimately resulted in a conflict between what the state should do under investment law versus what is required to do under human rights law.

5) **Three approaches to legitimate expectations**

While contradictory and inconsistent, investment tribunals have determined that there are three modalities of protection to legitimate expectations: i) expectation of a specific

state conduct (to act transparently and non-arbitrarily); ii) expectation of regulatory or financial stability; and ii) expectation based on a promise from the host state.

6) **Conditions can be placed on legitimate expectations**

   Investment tribunals have been willing to place specific limitations or conditions to the protection of legitimate expectations. These conditions (due diligence, knowledge, and moment of creation) are of fundamental importance for systemic integration, as they require legitimate expectations to not be read in isolation from the environment in which an investor is operating in.

7) **Legitimate expectations can be systemically integrated**

   Given their broad interpretation, legitimate expectations can be read in a way that does not undermine international human rights law. Using an interpretative-integration method, all approaches to legitimate expectations (conduct, stability, and promise) can be read harmoniously with human rights law. To ensure consistency, a 7-step interpretative approach is suggested.

As indicated in the end of Chapter VI, I am conscious of the inconstant and contradictory practice of investment arbitration, for which I have further suggested more permanent solutions, which would see new clauses added to investment treaties. However, it is important to end this thesis acknowledging some other limitations that might require further research. In particular, given the constrains of space and time, I have focused on the protection of legitimate expectations, demonstrating both the impacts to human rights and the possibility of systemic integration. This protection, however, is not the only standard in investment law that can have an important negative impact to the protection of human rights. It would be necessary to further analyse other elements of the fair and equitable treatment standard, as well as the protection

against expropriation. Both are subject to be read in isolation, creating contradictory results with human rights law. Finally, I have focused only on social rights, but it will be important to analyse other areas of human rights, to which some findings and suggestions in this thesis might be applicable. This will, however, require further work.

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