As it was its first judgment in default, the Court will undoubtedly take into account the practice and the jurisprudence of other jurisdictions which have already considered cases *in absentia* and build on its own practices on that matter.

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International dispute settlement—investment arbitration—fair and equitable treatment—corporations as subjects of international law—human right to water and sanitation—rights and obligations of investors

URBASER S.A. AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAIA UR PARTZUERGOA v. THE ARGENTINE REPUBLIC, ICSID Case No. ARB/07/26. *At* https://icsid.worldbank.org/en.
International Center for the Settlement of Disputes, December 8, 2016.

On December 8, 2016, an International Centre for Settlement of Investment Disputes (ICSID) tribunal (the Tribunal) held that international human rights condition the treatment that an investor is entitled to receive from a state and that human rights impose obligations on the investor itself.[1] The Tribunal's explicit recognition of these dual consequences of international human rights law breaks new ground. International investment tribunals have not previously held that human rights obligations have any effect on protections due to investors, much less that international human rights law might establish separate obligations for investors.

The case, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (*Urbaser*) arose out of a concession for water and sewage services for the Province of Greater Buenos Aires granted by Argentina in early 2000 to Aguas Del Gran Buenos Aires, S.A. (AGBA), a company established by the Spanish corporations Urbaser and Consorcio de Aguas Bilbao Bizkaia (collectively, Urbaser) (para. 34). A primary purpose of the concession was the "imperative need to expand the drinking water and sewage services" to the impoverished province (paras. 68–69).

The concession soon ran into problems. By mid-2001, Argentina was in the throes of a financial crisis, prompting a series of emergency measures, including "pesification"—the 1:1 conversion of obligations from U.S. dollars into Argentine Pesos while allowing the peso to depreciate dramatically in value (para. 34). At the same time, Argentina's compliance with its safety and health duties deteriorated, eventually leading to a "critical sanitary situation" (para. 71), the result of pervasive poverty, widespread unemployment, and insufficient food and water (para. 74).

[1] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016). The International Centre for Settlement of Investment Disputes (ICSID) documents cited herein are available on the Centre's website at https://icsid.worldbank.org/en.

Argentina ultimately terminated Urbaser's concession in July 2006. One year later, in July 2007, Urbaser initiated an ICSID arbitration pursuant to the Spain-Argentina Bilateral Investment Treaty (BIT) (para. 34). Urbaser alleged that, in an effort to attract foreign capital, Argentina had established a regulatory framework designed to provide security to investors, including mechanisms to ensure tariffs would be set to adequate levels, even in the event of a monetary crisis (para. 561). According to Urbaser, Argentina adopted measures that negatively impacted the investment, including the pesification of tariffs, which destroyed "any chance of obtaining the reasonably expected results" (paras. 562–63). Urbaser alleged that these measures violated the BIT's fair and equitable treatment, expropriation, and discriminatory and unjustified treatment provisions (para. 34). Argentina counterclaimed that Urbaser failed "to provide the necessary investment into the Concession, thus violating its commitments and its obligations under international law based on the human right to water" (para. 36).

The Tribunal addressed Urbaser's claims first. It held that the fair and equitable treatment requirement in this BIT protects the investor's legitimate expectations, which are informed by the host state's constitutional and international legal obligations, as well as the social and economic environment at the time the investment was made (paras. 620, 623). The Tribunal concluded that "[t]he protection of [the] universal basic human right [to water] constitutes the framework within which Claimants should frame their expectations" (para. 624). It also found that Urbaser was aware of Argentina's obligations regarding the right to water (paras. 720–23).

The Tribunal attributed the concession's problems to sources other than Argentina (paras. 638, 672–82), and further concluded "that there existed a situation of necessity as sufficient support for [Argentina's] emergency measures . . ." (para. 718). The Tribunal went on to reject most of Urbaser's claims (paras. 1002, 1106, 1234(3)). It did, however, find that Argentina's lack of transparency in renegotiating the concession violated the BIT, although this breach produced no damages (paras. 845–47, 1234(2)).

The Tribunal next turned to Argentina's human rights counterclaims. After concluding that it had jurisdiction over these claims (paras. 1143–55), the Tribunal addressed whether investors are subjects of international law capable of holding international human rights obligations. In considering this question, the Tribunal reasoned that the BIT accorded rights to investors under international law and, correspondingly, the BIT admitted the possibility that an investor could be subject to international legal obligations. In this regard, the Tribunal noted that the evolving standards of corporate social responsibility include "commitments to comply with human rights" (para. 1195). On this basis, the Tribunal concluded that "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law" (para. 1195).

Having decided that investors could be subjects of international law, the Tribunal turned to Urbaser's obligations. The Tribunal noted that both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) establish a right to water.[2] It reasoned that individuals and entities necessarily have obligations not to act in disregard of the rights enshrined in these instruments (para. 1196).

[2] *Id.*, paras. 1196–97 (specifically locating the right to water in the equal right to public services and the right to an adequate standard of living from the Universal Declaration of Human Rights (UDHR) and the right to an

The Tribunal found confirmation for this conclusion in the provisions of the UDHR and ICESCR that deny any state, group, or person the right to destroy rights.[3] The Tribunal did not explain how the UDHR—which is not a treaty—would create legally binding rights and obligations. It may have accepted Argentina's argument that the UDHR reflects customary international law (para. 1158).

From this analysis, the Tribunal drew the following remarkable conclusion:

> At this juncture, it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights. (Para. 1199)

Thus, the Tribunal recognized that international law imposes human rights-related obligations on corporations.

The Tribunal explained, however, that corporate human rights obligations are not coextensive with state human rights obligations. In its view, the "human right to water and sanitation . . . has as its corresponding obligation the duty of States to provide all persons living under their jurisdiction with safe and clean drinking water and sewage services" (para. 1205). But whereas the state has a duty to provide, the "human right to water . . . does not contain an obligation for performance on [the] part of any company providing the contractually required service" (para. 1208). This statement may imply that the Tribunal considered that human rights law imposes a duty on corporations not to interfere with the right to water, but no corresponding obligations to fulfill or protect this right. The Tribunal's ultimate rejection of the counterclaims on the ground that they were directed at Urbaser's supposed failure to perform expansion work for its water concession bears this implication out (paras. 1211–12).

* * * *

Although Argentina was ultimately unsuccessful with its human rights counterclaim, the *Urbaser* award nonetheless breaks new ground in investment law and in international law more generally. Where prior investment awards treated human rights and investment law as operating independently, *Urbaser* integrates human rights into its analysis of investment protections and even recognizes that investors have human rights obligations. The recognition that investors may have human rights obligations is, in particular, significant for international law more generally, as even traditional human rights actors have rarely acknowledged such obligations.

In the area of investment law, *Urbaser* makes its contributions where human rights enter investment disputes as an element of the state's claims or defenses against the investor, as opposed to the investor's claims against the state.[4] In several investment disputes, the state

adequate standard of living and the right to continuous improvement of living conditions from the International Covenant on Economic, Social and Cultural Rights (ICESCR)).

[3] *Id.* (citing UDHR, Art. 30; ICESCR, Article 5(1)). The Tribunal's reasoning here has received some criticism on the grounds that these provisions were intended to prevent "newly formed fascist groups from relying on human rights as a justification for their activities . . . ." Edward Guntrip, Urbaser v Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EJIL: *TALK!* (Feb. 10, 2017), *at* https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration.

[4] *See, e.g.*, Hesham T. M. Al Warraq v. Republic of Indonesia, Final Award, para. 575 (UNCITRAL Dec. 15, 2014); Yukos Universal Ltd. (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award, para.

has alleged that its human rights obligations—often regarding indigenous rights or the right to water[5]—justified the conduct supposedly in breach of investment protections. Prior tribunals have generally deemphasized these arguments.[6]

The two investment tribunals with the most detailed consideration of state human rights arguments both addressed water concessions in Argentina, and both concluded that the right to water establishes state obligations that operate independently from investment protections. In *Suez v. Argentina*, the tribunal considered Argentina's obligation "to safeguard the human right to water" as a necessity defense.[7] After rejecting the defense because the infringing measures were not the only way to safeguard that right, the tribunal added that human rights obligations would not, in any event, trump investment treaty obligations.[8] In *SAUR v. Argentina,* the tribunal concluded that "the fundamental right to water and the rights of the investor . . . operate on different planes" and so the protection of the right to water "must be combined with respect for the rights and guarantees granted to the foreign investor in virtue of the [treaty]."[9]

It is against this backdrop that the *Urbaser* Tribunal delivered its novel analysis of the relationship between human rights and investment law. The *Urbaser* Tribunal made human rights obligations a central consideration in evaluating whether Argentina breached the applicable investment protections. Instead of dismissing human rights concerns as operating on a different plane from investment law, it attempted to integrate human rights obligations with investment protections and generate a consistent set of state obligations (paras. 618–24, 720). While the Tribunal did not refer to Vienna Convention Article 31(3)(c), which requires consideration of "[a]ny relevant rules of international law applicable in the relations between the parties" when interpreting the investment protections, it in effect sought the systemic integration of human rights and investment protections.[10]

765 (UNCITRAL July 18, 2014). This use of human rights would not normally be in substantial tension with investment law because human rights law may simply support, fill in, or complement independent investment protections for the investor.

[5] Glamis Gold, Ltd. v. The United States of America, Award, para. 8 (UNCITRAL June 8, 2009). Both *South American Silver Limited v. Bolivia*, PCA Case No. 2013–15 (UNCITRAL), and *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/2 involve similar defenses. See *supra* note 2 and accompanying text for the right to water.

[6] Although the state raised the right to water in disputes like *Azurix*, *Biwater Gauff*, and *Impregilo*, the tribunals effectively ignored these arguments in their awards. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, paras. 254, 261 (July 14, 2006); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 434 (July 24, 2008); Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, paras. 228, 230 (June 21, 2011). The *Glamis Gold* tribunal, confronted with an indigenous rights defense, dismissed the argument perfunctorily as irrelevant. Glamis Gold, *supra* note 5, para. 8. The *Grand River* award, where claimants raised indigenous rights, also gave short shrift to the arguments. *See, e.g.*, Grand River Enterprises Six Nations, Ltd. v. United States of America, Award, paras. 181, 209 (UNCITRAL Jan. 12, 2011).

[7] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, para. 252 (July 30, 2010).

[8] *Id.*, para. 260. The *EDF* tribunal dismissed a similar argument on the related basis that Argentina could have complied with the investment protections after the crisis abated and so its actions were not necessary to guarantee human rights. EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S. A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, paras. 912–14 (June 11, 2012).

[9] SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, para. 331 (June 6, 2012) (authors' translation).

[10] Vienna Convention on the Law of Treaties, Art. 31(3)(c), May 23, 1969, 1155 UNTS 331.

The Tribunal's analysis is original, even if it is a natural extension of existing interpretations of investment law. The Tribunal does not integrate human rights and investment law by simply limiting the scope of the investment protections to avoid a conflict with human rights. Instead, it interprets the investment protections, and specifically the fair and equitable treatment protection, to take into account the background human rights obligations of the state. Specifically, the Tribunal concludes that any protected expectations must be legitimate in light of the regulatory and legal context of the investment, including human rights commitments (para. 624).

The *Urbaser* Tribunal further assumes the truly revolutionary position that investors have human rights obligations, and specifically obligations regarding the right to water. No previous investment tribunal has seriously contemplated such obligations, much less found that they exist. Notably, these obligations do not arise, in the *Urbaser* Tribunal's view, from the investment treaty, but instead from human rights treaties and general international law (paras. 1195–99).

Although groundbreaking, the *Urbaser* Tribunal's conclusion that investors have international human rights obligations can be seen as an extension of its attempt to provide a framework that coherently integrates investor protections and state human rights obligations. In this framework, the investment environment includes stable legal commitments to human rights that condition what treatment the investor can legitimately expect and what treatment the investor is entitled to receive (*see, e.g.*, paras. 623–24). Human rights commitments need not be pretexts to justify the state's actions but instead are a general and stable part of the investment environment, at least where the investor knew of the state's obligations (paras. 623–24, 721).

If human rights are not generally part of the investment environment, then it follows that human rights and investment protections may "operate on different planes," as several tribunals reasoned before *Urbaser*.[11] Instead of being part of the expected legal environment, human rights and corresponding obligations appear to be parochial commitments states owe to third parties, to whom the investor itself has no relationship, on the basis of separate legal instruments from those invoked by the investor. It might seem unfair to limit investment rights based on commitments so conceived, just as it might seem unfair to limit contractual rights based on a counterparties' contractual commitments to third parties (*see* paras. 693–94).

However, if human rights are instead generally applicable sources of legal obligations present in the investment environment, the analysis is different. The investor would have accepted that the investment environment included a commitment to the human rights of individuals (at least when the commitments were clear to the investor).[12] These human rights generate corresponding state obligations that constrain the investment protections that the investor might otherwise have enjoyed. However, the investor is equally subject to the human rights of individuals. From here, it is not a stretch to conclude that human rights both constrain investment protections and place demands on investors, even if different from the demands on states.[13]

[11] *See supra* notes 7–9.

[12] The Human Rights Committee seems to have adopted a similar perspective on the status of human rights in its General Comment Number 26. *See* Human Rights Committee, General Comment No. 26, para. 4, UN Doc. No. CCPR/C/21/Rev.1/Add.8/Rev.1.

[13] Notably, this mutual commitment could run both ways. It is possible that there are situations in which human rights might justify investor conduct that would otherwise be subject of a complaint by the state.

The *Urbaser* award also marks a watershed moment in international law more broadly because it potentially heralds a sea change in the relationship between corporations and human rights. Historically, international law has not "impose[d] any *direct* legal obligations on corporations."[14] As classically conceived, states are the only actors in and subjects of international law. International human rights law thus has a limited reach. It principally addresses state obligations, and as a result, human rights courts and treaty-monitoring bodies are primarily empowered to hear individual complaints against states or to review state compliance with human rights obligations.[15] Given this framework, human rights monitoring bodies have not developed international human rights law to address corporate responsibilities and behaviors.

Instead, the international law applicable to corporate activity has developed separately, generally through domestic courts. But domestic courts have only exceptionally exercised jurisdiction—to the extent they have it—over extraterritorial acts committed by corporations which violate very clear norms of international law, such as the prohibitions on genocide and slavery. Even when addressing this category of egregious crimes, corporate liability for human rights violations remains exceedingly rare.[16]

In recognition of this governance gap, there have been attempts to address corporate misdeeds more generally. The most prominent to date are the United Nations' Guiding Principles on Business and Human Rights, which explicitly state that "[b]usiness enterprises should respect human rights."[17] But the Principles only espouse best practices and neither purport to impose binding international obligations nor claim that such obligations exist.

It was against this backdrop that the *Urbaser* Tribunal recognized corporate human rights obligations. It may seem surprising that an investment tribunal, rather than a human rights body, was the first to do so. After all, investment law and investment tribunals are often thought to ignore non-economic social considerations like individual rights. But international human rights fora lack the jurisdiction to resolve claims against corporations, while investment tribunals—like *Urbaser*—can assert jurisdiction over international law counterclaims against corporations. They are thus uniquely positioned to arrive at novel conclusions about international law as it applies to corporations.

[14] *See* Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13 J. WORLD INV. & TRADE 349, 356, n. 33 (2012) (with extensive citations).

[15] *See, e.g.*, International Covenant on Civil and Political Rights, Art. 40, Dec. 6, 1966, 999 UNTS 171[hereinafter ICCPR]; ICCPR Optional Protocol, Art. 1; International Covenant on Economic, Social and Cultural Rights, Art. 16, Dec. 16, 1966, 993 UNTS 3 [hereinafter ICESCR]; ICESCR Optional Protocol, Art. 1; UN Economic and Social Council Res. 1985/17 (May 28, 1985).

[16] For a summary of suits brought in Europe against European companies for human rights violations committed abroad, see European Center for Constitutional and Human Rights, *Human Rights Violations Committed Overseas: European Companies Liable for Subsidiaries* (Policy Paper, June 3, 2015), *at* https://www.ecchr.eu/en/our_work/business-and-human-rights.html. Some human rights cases against corporate defendants have been brought in the United States under the Alien Tort Statute (ATS). The United States Supreme Court has, however, limited the extraterritorial scope of the ATS in cases involving both corporate and individual defendants. Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 114 (2013). Some lower courts have held that ATS cases cannot be brought against corporations at all, an issue that is currently before the U.S. Supreme Court. *See* Jesner v. Arab Bank, 808 F.3d 144 (2d Cir. 2016), *cert. granted* (Apr. 3, 2017).

[17] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Principle 11, UN Doc. A/HRC/17/31 (Mar. 21, 2011).

Concerns about institutional legitimacy may also motivate an investment tribunal to recognize corporate obligations. Fears that foreign investment protections prevent the domestic regulation of public interests without imposing obligations on foreign investors feature prominently in doubts about the fairness of the system. In response, some have called for investment tribunals to do what *Urbaser* did: treat international human rights and investment law as integrated and complementary parts of the international legal system.[18] In so doing, *Urbaser* lays the framework for addressing international human rights obligations in the context of international investment protections. Whether other tribunals will build upon this framework to impose liability on a corporation for human rights violations remains to be seen.

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[18] *See, e.g.,* Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?* 60 Int'l & Comp. L. Q. 573, 580 (2011); Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 Lewis & Clark L. Rev. 423, 425 (2013).