

## **URBASER S.A. AND CONSORCIO DE AGUAS BILBAO BIZKAIA V THE ARGENTINE REPUBLIC**

- **Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia v The Argentine Republic**, ICSID Case NO ARB/07/26, **8 December 2016**
- **Legalities involved**: international investment law vs human rights law.
- **Tool to deal with inter-legality**: VCLT art. 31(3)(c).

### **SUMMARY**

The dispute concerned a concession of water to be provided by the investor Urbaser in the Province of Buenos Aires. The emergency measures taken by Argentina in the context of the 2001 economic crisis led the concession to run into deadlock. Urbaser made numerous requests for a new evaluation of its tariffs and for a complete review of the concession. However, the negotiating process did not lead to a successful outcome and in 2006 the province terminated the concession. The investor initiated arbitral proceedings against Argentina but Argentina filed a counterclaim against the investor for alleged violations of human rights, in particular the right to water.

The Tribunal first affirmed that it had jurisdiction on a counterclaim based on human rights, rejecting the investor's argument that Argentina's counterclaim was based solely on domestic law. The Tribunal agreed with Argentina that failure to provide the necessary investment caused a violation of the fundamental right regarding an access to water, "which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT" (para. 1151).

On the merits, although it eventually ruled against Argentina, the Tribunal recognized that, based on the current development of international human rights law, investors can potentially be held responsible for violations of international human rights law.

The Court first held that that it would be wrong to categorically understand BITs as not providing any rights to the host state and not imposing any obligations upon investors (paras. 1182–1183). It ruled that the BIT is not a closed system as it allows reference to other sources of international law. Thus, the BIT cannot be construed as an isolated set of rules of

international law for “the sole purpose of protecting investments through rights exclusively granted to investors” (para. 1189).

*“The Tribunal is reluctant to share Claimants’ principled position that guaranteeing the human right to water is a duty that may be born solely by the State, and never borne also by private companies like the Claimants. When extended to human rights in general, this would mean that private parties have no commitment or obligation for compliance in relation to human rights, which are on the States’ charge exclusively.”* (para 1193).

*“A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals. A simple look at the MFN Clause of Article VII of the BIT shows that the Contracting States accepted at least one hypothesis where investors are entitled to invoke rights resulting from international law (in addition to the rights resulting from Article X). If the BIT therefore is not based on a corporation’s incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations.”* (para 1194)

To construe a legal obligation on the investor to provide the international human rights to water, the Tribunal affirmed: “[f]or such an obligation to exist and to become relevant in the framework of this BIT, it should either be part of another treaty or it should present a general principle of international law” (para. 1207). The tribunal also found that the situation would be different if a negative obligation was at stake (an obligation to abstain, such as the prohibition to commit acts that violate human rights). The tribunal noted that such a negative obligation “can be of immediate application, not only upon States, but equally to individuals and other private parties” (para. 1210).