MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic

ICSID Case No. ARB/17/17

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AMICUS CURIAE SUBMISSION

By the Centro de Estudios Legales y Sociales (CELS), Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Políticas Públicas y Derechos Humanos - Perú EQUIDAD, Project on Organization, Development, Education and Research (PODER), European Center for Constitutional and Human Rights (ECCHR), Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) and Center for Economic and Social Rights (CESR)

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I. INTRODUCTION

1. Article 9 of the International Covenant on Economic, Social and Cultural Rights provides that "the States Parties to the present Covenant recognize the right of everyone to social security including social insurance".

2. In the debates over its text, in January 1957, the Saudi Arabia representative remarked that "man had always been hounded by the fear of want" and that "for that reason, society had from the earliest times made some provision for the sick, the aged, and those who for various reasons were unable to work." "In the Arab world", he continued explaining to his colleagues, "the tribes had taken care of all their members; and since the coming of Islam, the community chests, supported by generous voluntary taxes on capital, had carried on the tradition." Now, he concluded, is "generally recognized that States must make similar provision for all their nationals".[1] Recovering its ancient tradition, the Saudi representative brought to New York the *Zakat*, which is the Third Pillar of Islam and has been understood as the Islamic contribution to social justice. A mandatory duty of almsgiving for all believers, *Zakat* was collected as a tax by the State and the funds were distributed to defined needy groups.[2]

3. Social justice and solidarity –to provide for the needy of our communities in moments of despair or need– has been for long one of the very foundations of societal organization. People in their old age are one of the groups traditionally understood as needing the help of the rest of society to assure that after years of work they do not end their lives in precarious conditions and indignity. Most social security systems understand that old age is one of the social risks for which the State must provide a satisfactory and adequate response. In a context of ageing populations and changes in families' dynamics, it is even more important that the State lives up to this role.

4. To accomplish its duty to secure a decent life for the elderly, States shall put in place suitable institutional arrangements, in accordance with their national contexts and circumstances. Those institutional arrangements may vary for social security systems in societies with differing social indicators, as may be poverty, unemployment rates, the

[1] UNGA, Third Committee, 728th meeting, A/C.3/SR.728, January 11, 1957, para. 41.
[2] Powell, Russell (2018) Social Justice and Islamic Jurisprudence, *Seattle Journal for Social Justice*, 17, 1; Powell, Russell (2010) Zakat: Drawing Insights for Legal Theory and Economic Policy from Islamic Jurisprudence, *Pittsburgh Tax Review*, 7, 43. Rahman, Fazlur (1970). Islam and Social Justice, *Pakistan Forum*, 1(1), 4.

extent of the informal economy, etc. It is not the same to address a comprehensive social security system for Argentina, than arrange it for countries like Germany or France, which have three times less informal employment.[3] The institutional arrangements, the financing and the requirements to access to pension benefits have to be in accordance with each national context and adapt to societal conditions.

5. Notwithstanding the differences among national institutional arrangements, most countries understood that the most suitable way to achieve its purposes, is through a social security system run by the State. Others, very few, decided to experiment with a system partially or entirely run by private actors in which corporations oversee the managing of the funds collected by the State and provide the pension benefits for older people. Backed by International Financial Institutions such as the World Bank and the International Monetary Fund, since the early 1980's some countries decided to privatize their pension systems. Chile was the first country to do this in 1981during the dictatorship of Augusto Pinochet. Between that year and 2014 other 29 countries followed their lead with the technical and financial help of the abovementioned IFIs.

6. Almost 40 years after Chile privatized its pensions the experiment has proven to have negative effects in the very population it is meant to protect: those who cannot longer work. According to a recent publication by the International Labour Organization (ILO) pension privatization did not deliver the expected results in the countries that followed this trend: coverage rates stagnated or decreased; pension benefits deteriorated and gender inequalities compounded; the risk of financial market fluctuations was shifted to individuals; administrative costs increased reducing pension benefits; the high costs of transition created large fiscal pressures; the governance of the system was weakened and workers participation in management was eliminated; the regulatory and supervisory functions were captured by the same economic groups responsible for managing the pension funds, creating a serious conflict of interest moving the insurance market towards concentration; and finally, pension reforms had limited effects on capital markets and growth in most developing countries.[4] For these reasons, of the 30 countries that

[3] ILO, Women and men in the informal economy: a statistical picture (third edition), International Labour Office – Geneva: ILO, 2018, Table B.1, p. 85.
[4] ILO, Reversing Pension Privatizations: Rebuilding public pension systems in Eastern Europe and Latin America /International Labour Office – Geneva: ILO, 2018.

privatized their pension systems more than half (18 countries) have reversed it, as Argentina did in 2008.[5]

7. The fundamental shortcomings of this approach were acknowledged by the World Bank's own Independent Evaluation Group in a 2006 report assessing the Bank involvement in pension reform during the last decades. It cautioned that "too often the Bank has not addressed sufficiently the primary goal of a pension system to reduce poverty and provide adequate retirement income (…)"and that in some countries "the Bank did not assess the needs of the elderly before providing support for proposed multi-pillar reforms."[6]

8. In theory, privatizing the system would reduce the costs for the state as well as fiscal deficit, guarantee its sustainability, and ensure better benefits for the people. However, the years showed that these good wishes were far from becoming a reality in Argentina. Transition costs added to the cost of maintaining the public pillar meant a heavy financial burden for the government and, as a result, the pension privatization-driven annual deficit grew from 1% of GDP in 1994 to almost 3% in 2001.[7] Meanwhile, the administrative cost as a percentage of contributions also grew exponentially, going from 6.6% of the contributions in 1990 to 51% in 2002.[8] Additionally, instead of increasing the number of workers covered by the system, it decreased: while in 1992 84.4% of the males older than 65 and 73,9% of women were covered, by 2004 this number was 71.0% and 62,1% respectively. [9]Also, retirees were supposed to receive larger pensions but, when adjusting inflation over the years, it is found that, by the end of the privatization experiment pension amounts were 10.6% smaller than those registered in the 80's.[10] Concentration in the pension administrators' market was also an issue in Argentina. Between 1994 and 2003, the proportion of the four largest AFJPs had increased from 47% to 70% in number of affiliates and between the four they handled 74% of the total funds.[11] Likewise, the total number of AFJP fell from 24 in the mid-1990s to just 10 at the time of the reversal of

[5] *Ibid*.
[6] Andrews, Emily S. "Pension reform and the development of pension systems: an evaluation of World Bank assistance" (World Bank, Washington DC 2006) p.27.
[7] ILO, *supra* note 4, p. 17.
[8] ILO, *supra* note 4, p. 23.
[9] Basualdo, Eduardo (coord.) "Documento de trabajo N°2: La evolución del sistema previsional argentino". Centro de Investigación y Formación de la República Argentina (CIFRA) (Buenos Aires 2009). Available at http://aaps.org.ar/pdf/area_politicassociales/Basualdo.pdf, 11; ILO, *supra* note 4, p. 100
[10] Basualdo, *supra* note 9.
[11] Cetrángolo, O.; Grushka, C. "Sistema Previsional Argentino: Crisis, Reforma y Crisis de la Reforma, 2004", CEPAL, Serie Financiamiento del Desarrollo Núm. 151, 2004, p. 52.

privatization.[12] This oligopolist nature also meant that even in the cases when the administrative costs were reduced, this was not reflected in the costs for those affiliated: although between 1993 and 2001 the operational costs of the AFJP's decreased a 40% in that period the fee paid by their clients reduced only 7%.[13]

9. In Argentina, the decision of privatizing the social security system was implemented through Law 24.241 in 1993. In 2008, after fifteen years, the thunderous failure of the individually funded system managed by private corporations made Congress decide to return to a system managed by the State.

10. The 2008 counter-reform was the result of a series of smaller reforms and a national debate that started in 2001 with the political and economic crisis as a backdrop. It continued in 2003 with the publication of the *Libro Blanco de la Seguridad Social*" (Social Security White Paper) in which the national government outlined some first approaches for its reform. This was followed by the first two moratoriums in 2003 and 2004 (the second passed by unanimity in the Congress) which gave access to a retirement to older people that had not completed all the contributions that the law required, providing for the pending contributions to be deducted from the retirement payment in instalments. It continued with the 2007 reform, that was passed in both chambers of Congress with a large majority, and which increased the importance of the public pillar of the pension system. Finally, in 2008 the Argentinean State decide to reverse its 1993 decision. In each of these instances there was a large national debate that included the government, the opposition parties in Congress, the AFJP's and other private companies' representatives, the academia, the workers unions, and the society in general.[14]

11. The privatized system that existed between 1993 and 2008 was clearly deficient in several economic dimensions and meant a regression in terms of the right to social security. Privatization was a catastrophe for the Argentine people and only the corporations who got to manage the private pension funds benefited from this system. Ten years later, the claimant is suing because of the end of a pension system with appalling consequences in which it had a commercial interest.

[12] ILO, *supra* note 4, p. 23
[13] Colina, Jorge. Las AFJP y las compañías de seguro de retiro en la Argentina: Un estudio comparativo. Banco Interamericano de Desarrollo, Washington DC, 2003
[14] Rulli, Mariana. La política de las reformas previsionales en Argentina (1993-2015). Universidad Nacional de Rio Negro, 2015

12. In the instant case the claimant argues that the 2008 Argentinean Congress decision to reverse the social security reform enacted in 1993 amounted to a breach of the 1991 US-Argentina BIT. As the Claimant used to participate in the business of private pension funds administration that was created in 1993, it demands compensation because of the Argentinean decision to go back to the public social security system.

13. On March 8, 2021, the Tribunal issued its Procedural Rule No. 8 granting us leave to intervene pursuant to ICSID Arbitration Rule 37. The Tribunal recognized the expertise and interest that the applicant organizations had demonstrated in the area of human rights law and gave us leave to file a non-disputing party brief of no more than 50 pages "on or before Tuesday, 30 March 2021 limited to the following issues: How International Human Rights Law and International Investment Law are related and the interests at stake may be balanced as well as the threshold issue of why the Tribunal should deliberate on matters external to the terms of the BIT."

14. Argentina engages in the international arena in various forums and not only has obligations arising from the BIT under analysis. There is an international legal corpus on human rights with which Argentina decided to commit itself and which provides essential elements to consider when analysing its public policy decisions. As we will see, the decision to reverse the 1993 reform was a public policy decision adopted by the Argentine State in accordance with its domestic legal system and respecting its international obligations, both those relating to investment protection, as well as those arising from international human rights law.

II. INTERNATIONAL HUMAN RIGHTS LAW AND INVESTMENT LAW DIALOGUE

15. As this Tribunal is aware International Law is not made up of hermetic compartments, without interaction with each other. On the contrary, diverse international norms coexist and interact in various ways. Evaluating and interpreting that relationship is the precious task that has been entrusted to this Tribunal, pursuant US-Argentina BIT, ICSID Convention and Arbitration Rules and the Vienna Convention on the Law of Treaties (VCLT). In the instant case, the adjudication process encompasses the scope and accurate application of the US-Argentina BIT while assessing its compliance by the Argentinean State, in relation to national law 26,425 and the State's international human rights obligations.

16. In what follows we will address the legal reasons why in the adjudication of this case it is essential to consider the regulatory context in which the US-Argentina BIT takes effects and the way in which it impacts on its interpretation and application.

17. For this, we will first refer to the formal norms agreed by the BIT parties, which did not express their intention to dismiss other commitments assumed in the international arena, such as their human rights obligations. Following, we will develop the reasons why in the present dispute it is required to analyse Argentina's international human rights obligations, pursuant the rules laid in the Vienna Convention on the Law of Treaties and the systemic integration approach to International Law. Subsequently, we will address the relevant international rules that provide for the Respondent State's duties to enact a social security system that affords protection for the elderly.

18. We will also elaborate on a special element of the dialogue between International Human Rights Law and International Investment Law: the scope of the State obligation to guarantee the essential rights of its population under International Human Rights Law, which mirrors with the State's ability to take non-discriminatory public interest measures that do not amount to a breach of their investment protection commitments. Because International Human Rights Law imposes positive duties on States to adopt effective public policy measures to ensure the full realization of the rights of the people under their jurisdiction, States must have a protected regulatory space for this purpose. We will emphasize why Law 26,425 is an expression of the State's legitimate regulatory space to enact regulations on behalf of the public interest, insofar it reflects its duty to adopt concrete and effective measures to ensure the rights of the people under its jurisdiction.

19. Recognizing the need to weigh-in the relevant international human rights rules so to adequately assess Argentina's conduct in compliance with its international obligations and the alleged breach of the 1991 US-Argentina BIT, we will explore how the interests at stake can be balanced, attentive always to the duties of the respondent State in relation to the right to social security of the people under its jurisdiction. For this purpose, we will address the enhanced duties that States have to protect and promote the human rights of vulnerable groups such as the elderly and the substantive issues regarding the scope and content of the human right to social security, in accordance to international human rights law and its development through the years. Because of the particular issues at stake in the instant case, we will also delve into what International Human Rights Law has established regarding the privatization of essential services for people's lives, such as social

protection schemes. Finally, we will address the duty that States have, to monitor and change public policy in social security matters, when current policies do not give the expected results or are inappropriate to effectively guarantee the rights of the people under their jurisdiction.

A. The willingness of the BIT parties not to ignore their international duties

20. As a general rule of treaty interpretation, VCLT article 31 (3) instructs that "there shall be taken into account, together with the context (c) any relevant rules of international law applicable in the relations between the parties". Because of this, when interpreting and applying International Law, the relevant norms in the concrete case cannot be dispensed with. As a Tribunal under the ICSID rules illustrated in a previous case against Argentina, "the BIT cannot be interpreted and applied in a vacuum". The Tribunal explained that, notwithstanding the BIT's special purpose as a Treaty promoting foreign investments, it cannot be interpreted and applied "without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights".[15]

21. In this vein, ICSID Convention article 42 (1) provides that the Tribunal shall decide a dispute in accordance with rules of law as may be agreed by the parties and that in absence of such agreement the Tribunal shall apply the "rules of international law as may be applicable". In its detailed analysis of this sentence, Gaillard and Banifatemi explains that article 42(1) should "be understood as an option for the tribunal to determine the applicable substantive rules of international law in accordance with the sources set forth in Article 38 of the Statute of the International Court of Justice. In other words, international law should be understood as a body of substantive rules which may be applicable to a particular issue presented to an ICSID tribunal".[16]

22. Meanwhile, the US-Argentina BIT expressly provided that its entry into force would not imply in any case the disregard of others the international obligations contracted by the parties. Article X of the BIT provides that "this Treaty shall not derogate from: (a) laws

[15] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 08 December 2016, para. 1200.

[16] Gaillard, Emmanuel and Banifatemi, Yas, "The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process", ICSID Review Foreign Investment Law Journal, vol. 18, 2003, p. 397. Also, Dupuy, Pierre-Marie, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law", in P-M Dupuy, F Francioni and E-U Petersmann (eds), Human Rights in International Investment Arbitration (Oxford University Press, Oxford 2009) pp. 45-62.

and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party; (b) international legal obligations". By doing this, the parties agreed that their aim to foster trade and investment between them shall not be in detriment of each other's previous duties under international law, such as human rights obligations. According to its text, the interpretation and application of the BIT between the United States and Argentina requires adequate consideration of international human rights law.

23. The only treaty on which the BIT has a superseding effect is the one expressly mentioned in Article 7 of the Protocol: the 1854 Treaty of Friendship, Commerce and Navigation between the Parties. National regulations such as constitutional and statutory provisions, as well as international obligations, such as their human rights duties with respect to the individuals that inhabit their territories, are not overridden by the rules of this investment agreement, as expressly agreed by the parties in Article X of the BIT.

24. Moreover, in the preamble of the BIT the parties stated that "the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights". This statement highlighted the significance of people's wellbeing as a key goal of the public policies fostered by the agreement.

B. The need for a systematic integration approach to International Law

25. When preparing the final report of the Study Group of the International Law Commission on the rising issue of "fragmentation", Martti Koskenniemi explained that, actually, "no rule, treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a vacuum. Its normative environment includes … not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the forms through which those rights and duties may be supplemented, modified or extinguished."[17] Likewise, Pierre-Marie Dupuy signalled that "international treaty provisions cannot be interpreted in vacuum as they all belong to the same legal order, namely the international one. This provides the *ratio legis* for the classical rule of treaty interpretation as laid down under Article 31.3.c of the Vienna Convention on the Law of Treaties".[18]

[17] Koskenniemi, Martti, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006, para. 120.
[18] Dupuy, *supra* note 16, p. 57.

26. Each State is simultaneously bound, along with their domestic legal systems, by a plethora of international obligations. This is why it is "not a surprise that the Vienna Convention on the Law of Treaties deals with the plurality of rules and principles in the context of treaty interpretation."[19] Such is its relevance when it comes to treaty interpretation technique, that it has been postulated that this rule has a "status of a constitutional norm within the international legal system,"[20] and "is by now itself part of customary international law."[21] It gave the systemic nature of international law its clearest formal expression and, as coined by current ICJ judge Ms. Xue Hanqin, operates as the "master key to the house of international law."[22]

27. Regarding the principle of systemic integration in the VCLT, Koskenniemi points out that it "goes further than merely restate the applicability of general international law in the operation of particular treaties. It points to a need to take into account the normative environment more widely."[23] It "goes beyond the truism that 'general international law' is applied generally and foresees the eventuality that another rule of conventional international law is applicable in the relations between the parties".[24] Other conventional obligations and rules may be relevant to a given adjudication process over the interpretation of a particular treaty.

28. These provisions included in article 31 are a mandatory part of the interpretation process, unlike the ones included in article 32, "supplementary means of interpretation". The interpreters are bound to considerer, together with the context, any other relevant rules of international law applicable to the best understanding and adjudication in the concrete process before them.[25] This is because treaties are no islands, nor self-contained regimes.[26] Different international regimes interact in various ways within the broad international law environment to which States are committed to, and where the interpreter

[19] Koskenniemi, *supra* note 17, para. 413.
[20] McLachlan, Campbell "The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention", International and Comparative Law Quarterly, vol. 54, April 2005, p. 280
[21] Simma, Brunno, "Foreign Investment Arbitration: A place for human rights?" International and Comparative Law Quarterly, vol. 60, July 2011, p. 584
[22] Cited in Koskenniemi, *supra* note 17, para. 420. Also, McLachlan, *supra* note 20, p. 281.
[23] Koskenniemi, *supra* note 17, para. 415.
[24] Koskenniemi, *supra* note 17, para. 470.
[25] Koskenniemi, *supra* note 17, para. 425
[26] Simma, Brunno and Pulkowski, Dirk, "Of Planets and the Universe: Self-contained Regimes in International Law", European Journal of International Law Vol. 17 no.3, 2006, pp. 483–529. Also, Koskenniemi, Martti, "Study on the function and scope of the lex specialis rule and the question of 'self-contained regimes'", Preliminary Report, International Law Commission Study Group on Fragmentation, 2004; Peters, Anne, "The refinement of international law: From fragmentation to regime interaction and politicization", International Journal of Constitutional Law, vol. 15, Issue 3, July 2017.

is called to "situate the rules", so to find out "what the law is".[27] This is not unsuited with the adjudicators own jurisdictions, raised from a particular treaty, but on the contrary, it is necessary for its decision to be in accordance with the Law. As Koskenniemi explains, "although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment - that is to say 'other' international law".[28] The interpreter's endeavour through international law systemic integration "offers the enticing prospect of averting conflict of norms, by enabling the harmonization of rules rather than the application of one norm to the exclusion of another".[29]

29. Systemic integration principle shall apply even in the absence of an express clause in the treaty under interpretation. It takes form in two intertwined presumptions: 1) that the parties refer to general principles of international law for all questions which the treaty does not itself resolve expressly and 2) that in entering into treaty obligations, the parties intend not to act inconsistently with principles of international law and previous treaty obligations towards third States.[30]

30. International law is dynamic, its content and scope are continuously changing and developing. International law "provides a constantly shifting canvas against which individual acts, including treaties, fall to be judged. Any approach to interpretation has to find a means of dealing with this dynamism".[31] Fixed and closed structures of analysis and interpretation, circumscribed to the sealed borders of a Treaty of a given specialized section of Law, will not achieve its objective of fairly adjudicating and allocate the interests at stake, but will only arrive to an incomplete mirage of Justice.

31. In the case under study, International Human Rights Law is called to play a major role in assessing Argentinean State's actions. An adjudication in this concrete case may not be understood to be in accordance to Law if it is limited to the sole reading of the US-Argentina BIT, without adequately analysing and weighing Argentina's international human rights obligations, in the matters relevant to the subject under analysis. These

[27] Koskenniemi, *supra* note 17, para. 479
[28] Koskenniemi, *supra* note 17, para. 423; McLachlan, *supra* note 20, p. 290
[29] McLachlan, *supra* note 20, p. 286
[30] McLachlan, *supra* note 20, p. 311; Koskenniemi, *supra* note 17, para. 465; Fahner, J., & Happold, M., "The Human Rights defence in International Investment Arbitration: Exploring the Limits of Systemic Integration", International and Comparative Law Quarterly, vol. 68, Issue 3, 2019 p. 750.
[31] McLachlan, *supra* note 20, p. 282

circumstances are certainly related to the increasing "acknowledgment that international human rights matter for basically all issue-areas and subfields of international law."[32]

i. International Investment and Human Rights Law

32. As cautioned by former ICJ judge Brunno Simma, "international investment protection and human rights are not 'separate worlds'."[33] He argues that, although investment law practitioners might tend to regard human rights as ancillary issues this is, however, a "myopic" understanding, since nowadays "human rights compliance is a priority in any decent host State's public policy agenda and thus it cannot but affect the regulatory spaces of a host State vis-a`-vis foreign investors and other States"[34]

33. In 2015, in the annulment decision in the Tulip case, the ad-hoc Committee reviewed the discussions around what it called the "influence on international investment arbitration of human rights". After developing the systemic integration approach stemmed from article 31 (3) (c) of the VCLT, the Committee expressed that, in investment arbitration cases, reference to human rights law and its interpretation by human rights courts are no novelty. Actually, the Committee explained that "in investment cases involving parties to the ECHR, some tribunals have relied on the Convention and its case law. In other cases involving non-parties, that case law was used as authority on a number of points concerning individual rights. In a similar way, investment tribunals have relied on the Inter-American Convention on Human Rights (IACHR) and on the practice of its Court. In one case, the tribunal was 'mindful' of the Universal Declaration of Human Rights (UDHR). One tribunal undertook an extensive examination of the right to a fair trial in international human rights instruments, especially the International Covenant on Civil and Political Rights (ICCPR), for purposes of interpreting a treaty provision on fair and equitable treatment."[35] So, the ad-hoc Committee explained that "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 ". The Committee emphasized that "this is not to add extraneous obligations to the ICSID Convention. Rather, resort to authorities

[32] Peters, *supra* note 26, p. 689
[33] Simma, *supra* note 21, p. 576
[34] Simma, *supra* note 21, p. 578
[35] Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015, par. 91

stemming from the field of human rights for this purpose is a legitimate method of treaty interpretation."[36]

34. Likewise, as was mentioned before, in 2016 in *Urbaser*, the Tribunal cautioned that VCLT demands for taking into account any relevant rules of international law applicable in the relations between the parties, which encompasses human rights law. So the Tribunal underlined that the investment treaty that ruled the dispute "has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights."[37] Meanwhile, when assessing Uruguay's regulations on tobacco in the *Philip Morris* case, the tribunal gave specific weight to internationally agreed protection for the right to health, so as to conclude that Uruguay's decisions did not amounted to a violation of the BIT with Switzerland.[38]

35. Dupuy signals that "States are under an obligation to respect the human rights of all individuals living on their territory", so in occasions "there may be situations in which these obligations, in particular when interpreted as positive ones, may be in contradiction with other obligations, which the same state, acting as a host of foreign investments, has been led to accept".[39] This will certainly require an effort when it comes to interpreting State actions and evaluating the fulfilment of its duties, both with respect to its population and to investors. In the same vein, others have reasoned that, "as far as the protection of property and other rights or interests of foreign investors are concerned, the necessity that the law-appliers (including courts and tribunals) reconcile the private (property) rights and public interests now arises in international law just as it is familiar from domestic law". And that, in shaping and informing public interest, specific branches of international law "might come into play for the definition of the public interest and will flow into the exercise of balancing and reconciling private investor interests with the host state's policy goals".[40]

36. In this sense, the VCLT call to "taking into account" the relevant international law means "that the interpreter must engage in balancing" the interest, policies and rights at stake.

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[36] Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015, par. 92

[37] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 08 December 2016, para. 1200.

[38] 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, Award, July 8, 2016.

[39] Dupuy, *supra* note 16, p. 53

[40] Peters, *supra* note 26, p. 677

Therefore, for instance, when assessing fair and equitable treatment-standard, "tribunals must determine the fairness and equitableness through balancing the legitimate expectations of the investor against other rules and principles of international law, including human rights law".[41]

37. Regarding Human Rights Law structure, Simma has explained that the theory and practice has developed a specific method for its "correct reading", consisting in "the 'translation', so to speak, of the Covenant rights into correlative obligations on States parties. These obligations are grouped in three categories: obligations to respect, to protect, and to provide."[42] In understanding these States' duties, treaty bodies have developed the ways in which the broad terms of the text are to be applied in the national contexts, through General Comments or Advisory Opinions on specific issues or through the analysis and ruling in individual cases of human rights violations. The standards developed by these human rights bodies "express the understanding of these obligations reached after careful consideration by the body possessing the highest authority to do so".[43] Regarding the matters involved in this case, both the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) and the Inter-American Court of Human Rights have developed the standards that the States parties to their respective treaties must follow, such as the case of Argentina.

38. In this regard, Dupuy explains that when faced with cases in which human rights matters are at stake, arbitrators may "have to refer, should the case arise, to the way in which the principles at issue have been interpreted and applied by human rights courts.[44] Simma goes further and argues that "if an investment tribunal confronted with a Covenant matter neglected to consider these pronouncements, its reasoning with regard to that matter would be insufficient—with all the consequences attached to this default."[45]

39. Human rights treaty bodies have also highlighted the interactions and potential conflicts between States' duties under human rights law, and trade and investment agreements. For instance, in 2003 the ESCR Committee noted the States' special duties to ensure that international agreements, as trade and investment treaties, "do not adversely impact upon

[41] Peters, *supra* note 26, p. 694
[42] Simma, *supra* note 21, p. 588
[43] Simma, *supra* note 21, p. 591
[44] Dupuy, *supra* note 16, p. 57.
[45] Simma, *supra* note 21, p. 591

the right to water".[46] The same year, the UN Office of the High Commissioner for Human Rights (OHCHR) prepared a special report on "Human rights, trade and investment", with a set of considerations over States' duties to protect, respect and fulfil people's rights. In the report the OHCHR underlined that, although "investment agreements establish a set of rights and obligations between States in relation to their treatment of investors and investment", those investor's rights, which are meant to promote investment and economic cooperation between countries, are fundamentally different from human rights. The report explained that "national, regional and international treaties recognize a range of civil, cultural, economic, political and social rights -known as human rights- that are fundamental to a life of human dignity. Investors' rights, on the other hand, are instrumental rights: rights created and modified by States in order to meet certain economic and developmental objectives."[47]

40. Likewise, the ESCR Committee recently cautioned that "States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist". Also, it stated that "the interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations".[48]

41. When the 1991 BIT under analysis was signed, Argentina had already various concrete duties to protect, respect and fulfil the human rights of the people under its jurisdiction.

42. In this regard, Dupuy reasons that municipal or domestic law of the host State may play a role for international adjudication in international investment arbitration, since it may well determine the scope and content of States duties, especially if the host State "establishes a constitutional link between public international law and the municipal legal order". Dupuy cautions that these circumstances demand that "when negotiating a contract with a host state, the potential investor should take due notice of the constitutional law that could affect the implementation or interpretation of its contract

[46] ESCR Committee, General Comment No. 15 (2002) The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003, para. 35
[47] UN OHCHR, Human rights, trade and investment, E/CN.4/Sub.2/2003/9, 2 July 2003, para. 24.
[48] ESCR Committee, General comment No. 24(2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 13

with that state."[49] International investment agreements are signed within a specific normative landscape, with the parties having national and international obligations. This specific legal environment is well known by the foreign investor: it would be unreasonably to think that the foreign investor may imagine that the only rule to be applied would be the BIT that covers its investment, and not the normative structure as a whole. And, unless expressly provided in the investment agreement, there is no reason to presume that the State parties are to renounce to previous international or constitutional obligations, to third parties or to their own people.

43. As mentioned, US-Argentina BIT considered these circumstances when it provided that its entry in force shall not derogate from the international obligations that the parties already have, such as their human rights duties under international law.

44. Since the mid-twentieth century, States have sovereignly committed to different types of human rights obligations. These commitments are an essential part of the regulatory environment in which states make trade and investment policy decisions and can certainly affect their regulatory space.[50] This regulatory environment not only affects the State's room for manoeuvre, but also the possibilities and legitimate expectations of investors. State commitments on human rights will require a careful weighing of the investors' claimed expectations, which deploy their economic activities in countries with domestic and international legal systems that demand from them specific actions to ensure the rights of individuals. This is why P-M Dupuy argues that "for their expectations to be considered as 'legitimate', investors must also have taken due notice of the state's obligations deriving from its human rights obligations".[51]

C. Relevant rules of international law. Argentina's social security duties

45. The factual issues in the process refer to the 2008 Argentinean policy decision which decide to reverse the privatization of the pension funds management and the individual accounts system, decided in 1993. It is claimed that this reversal implied a breach of the US-Argentina Bit. Given the content of the contested decision, which essentially concerns the way in which the social security rights of the Argentine population are satisfied, it is unavoidable to carefully analyse what international obligations the responding State assumed in this regard. Only by these means it is possible to assert that the relevant rules

[49] Dupuy, *supra* note 16, p. 59
[50] Simma, *supra* note 21, p. 578
[51] Dupuy, *supra* note 16, p. 54

of international law applicable are effectively integrated into the analysis and adjudication of the case, as provided by article 31(3)(c) of the Vienna Convention on the Law of Treaties of May 23, 1969.

46. Several decades ago, the Argentinian State understood that the right to social security of its inhabitants should be guaranteed by the highest normative standards. Through constitutional reforms in 1949 first, and 1957 later, article 14 bis, a true catalogue of constitutionalized social rights, was incorporated into the Argentine Constitution. It established that "The State will grant the benefits of social security, which will be integral and inalienable. In particular, the law will establish (…) retirements and mobile pensions; comprehensive protection of the family; the defence of the family good; family financial compensation and access to decent housing". This constitutionalization of the right to social security is reinforced by the various international treaties ratified by Argentina, which establish a series of state obligations in this regard.

47. Already in April 1948 the American States unanimously adopted the American Declaration of the Rights and Duties of Man (ADRDM). Its article XVI provides that "every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living." also, the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in December 1948, states that "everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" (Article 22). It also established that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Article 25(1)).

48. Likewise, Article 9 of the 1966 United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) provides: "The States Parties to this Covenant recognize the right of everyone to social security, including social insurance.". For its part, the American Convention on Human Rights (ACHR) provides in Article 26 that States shall undertake to adopt measures to achieve progressively "the full realization of

the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States". Other treaties ratified by Argentina also protect the right to social security, including the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Article 11), the 1989 Convention on the Rights of the Child (Article 26), and the 2006 Convention on the Rights of Persons with Disabilities (Article 28).

49. According to Article 75.22 of the Argentinean National Constitution, all the aforementioned declarations and treaties have constitutional hierarchy, superior to the laws and other international treaties without that specific hierarchy. And, it is worth noting that both Argentina and the United States of America are signatories of the ADRDM, the UDHR and the ICESCR. Meanwhile, OAS members (as the US and Argentina) agreed "to dedicate every effort" so as that work is performed under conditions that ensure "a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working" and to the "development of an efficient social security policy" (Article 45 of the OAS Charter)

50. Also, and complementing the American Convention, the Protocol of San Salvador provides that everyone shall have the right to social security protecting them from the consequences of old age and of disability which prevents them, physically or mentally, from securing the means for a dignified and decent existence (Article 9). Meanwhile, the Inter-American Convention on Protecting the Human Rights of Older Persons provides that "older persons have the right to social security to protect them so that they can live in dignity" and that State shall progressively promote "the provision of income to ensure a dignified life for older persons through social security systems and other flexible social protection mechanisms" (Article 17). Long before that, in February 1955 the country also ratified Conventions 35 and 36 of the International Labour Organization, which had been adopted in 1933 and established specific rules on old-age insurance in industry and agriculture. Although these treaties do not have the same constitutional status as the previous ones, all have higher hierarchy than national laws in Argentina.

51. The international human rights commitments assumed by the Argentine State regarding the right of social security are not mere moral or goodwill declarations, but binding duties that require the adoption of concrete and affirmative policies to make it effective. As we will see, States must take deliberate, concrete and targeted actions to make these rights

true for everyone under its jurisdiction. What we are interested in highlighting before this panel is the obligation of the Argentine State to ensure the effective enjoyment of the right to social security of its population. To fulfil this obligation, the State must regulate the private actors that intervene in this area. And, certainly, it is obliged to evaluate the performance of its social security systems, having to reform and amend them when, as in the Argentine case, they result in the denial of the rights of millions of people. The content and scope of the obligations contained in these international instruments ratified by Argentina have been developed by treaty bodies, to which we will return later.

52. Finally, it should be noted that the Bilateral Investment Treaty signed between Argentina and the United States clarifies in its preamble that its object and purpose of promoting greater economic cooperation "can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights". This reflects the special importance that the parties attached to the well-being of their peoples and the promotion of worker rights, as one of the elements that guided their desire to bind each other. It is unnecessary to remember that since the beginning of the twentieth century, social security has been one of the most important of the "internationally recognized worker rights". Thus, taking steps that falls within this scope, the adoption of reasonable and non-discriminatory measures to guarantee the right of its workers to social security, can hardly be understood as a breach of this Bilateral Investment Treaty.

D. Argentina's duty to take positive steps to fulfil its people's rights and its ability to take non-discriminatory public interest measures

53. The case under study involves the assessment of the State's ability to regulate business activities in its territories and its margins of action regarding social security reforms for the well-being of its people. To assess these issues is crucial to pay attention to Argentina's human rights duties. Ratifying international human rights agreements is not a mere expression of good wishes or some sort of non-binding moral commitment. When Argentina obliged itself to respect, protect and fulfil the fundamental liberties and rights of its population, in a sovereign act Argentina bound itself to a set of specific obligations regarding each of these liberties and rights.

54. And these are not only "negative" obligations, so the State shall refrain from direct violations of their people's rights, but also involves concrete positive duties. It has been long since it was abandoned the narrow understanding of State's duties regarding their people rights and liberties as a solely refraining duty. At least since the core international

human rights agreements were drafted in the dawn of the post-War era. Indeed, both the American Convention on Human Rights (ACHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) –both with constitutional hierarchy in Argentina–provide for positive obligations for their States parties.

55. Along with forbidding discrimination in the enjoyment of rights, article 2 of the ICESCR establishes that "each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". As noted by the ESCR Committee in its 1990 General Comment on the nature of States obligations, this article is of "particular importance to a full understanding of the Covenant" and is in a "dynamic relationship with all of the other provisions".[52] ICESCR article 2 (1) provides for an obligation of progressive realization of all economic, social and cultural rights included in the Covenant. This is "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" and reflects "the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights".[53]

56. However, this does not mean that States may discharge their duties by simply referring to economic restraints. On the contrary, States have the duty to take explicit measures, to the maximum of their available resources, so to make those rights progressively effective for their people. The Committee explained that "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned." It also underlined that "such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[54] States are bound to take positive steps in the effective implementation of the rights and liberties recognized in the ICESCR, as is the right to social security. Therefore, States shall take "deliberate, concrete and targeted" steps so to make these rights true for everyone under its

[52] ESCR Committee, General comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), E/1991/23, annex III, para. 1
[53] ESCR Committee, General comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), E/1991/23, annex III, para. 9
[54] ESCR Committee, General comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), E/1991/23, annex III, para. 2

jurisdiction. They must "move as expeditiously and effectively as possible" to attain the goal of a decent life and, in this case, a decent old age for all.

57. In the same vein, the American Convention on Human Rights also provides for explicit positive obligations for States, so to make their provision true in the real world. ACHR Article 1 (1) encompasses two broad general obligations, providing that State parties "undertake *to respect* the rights and freedoms recognized herein and *to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination". While the obligation "to respect" refers to classical State's negative duty to refrain from public authority actions that may impair human rights, the obligation "to ensure" relates to the positive actions that States shall take to guarantee the effective and full exercise of the rights and liberties granted in the Convention.

58. This difference has been explicitly asserted by the Inter-American Court of Human Rights (IACtHR) since its first judgments in the late eighties. The Court explained that the second obligation, to ensure the free and full exercise of the rights recognized by the Convention, "implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights". It is not enough, the Court stated, that a legal system is designed to make this happen, but the Convention requires "the government to conduct itself so as to effectively ensure the free and full exercise of human rights".[55] In complying this duty, States shall provide that people can enjoy their rights and liberties and prevent third parties to interfere with it.

59. The criteria developed by the IACtHR are consistent with the three-tiered States obligations identified by the ESCR Committee in its General Comments. The Committee has explained over the years that States has three kinds of general duties in respect to each right guaranteed in the Covenant: the obligations to respect –this is, to refrain from interfering directly or indirectly with the enjoyment of human rights–, to protect –to take measures that prevent third parties from interfering with the enjoyment of rights– and to fulfil –to facilitate, promote or provide human rights enjoyment for its people.[56]

[55] IACtHR, Case of Velásquez-Rodríguez v. Honduras Judgment of July 29, 1988 (Merits), paras. 166 and 167.

[56] ESCR Committee, General Comment No. 12 (1999) The right to adequate food (art. 11), E/C.12/1999/5, May 12, 1999, para. 15; General Comment No. 13 (1999) The right to education (art. 13), E/C.12/1999/10, December 8, 1999, para. 46; General Comment No. 14 (2000) The right to the highest attainable standard

60. The obligation to ensure (in the words of the IACtHR) or to fulfil (in the ESCR Committee's terms) requires States to facilitate and promote human rights enjoyment and to directly provide certain goods and services, when necessary for its actual universal enjoyment. This specific duty to fulfil is particularly relevant when it comes to assess the enjoyment of economic, social, and cultural rights, as the one involved in this case.

61. The foundation of States' duty to organize their entire governmental apparatus to guarantee the full enjoyment and free exercise of the rights and freedoms recognized to the human person lies in the fact that it is precisely the welfare of the human person the very purpose of that governmental apparatus. This is intertwined with article 2 of the ACHR, which requires States to adopt, in accordance with their constitutional processes, such legislative or other measures as may be necessary to give effect to the rights and freedoms recognized in the Convention.

62. This obligation of normative adaptation arises from the *pacta sunt servanda* principle that accounts for the binding nature of the agreements. As noted in the Vienna Convention on the Law of Treaties preamble, "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized". Already in its first Advisory Opinion in 1922, the Permanent Court of International Justice stated that the clauses contained in the treaties ratified by the States are not "a mere moral obligation". On the contrary, its clauses "constitutes an obligation by which the Parties to the Treaty are bound to one another".[57] Similarly, in 1925 the Court explained that it is "self-evident" that when assuming international obligations, States must adopt measures to ensure the

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of health (art. 12), E/C.12/2000/4, August 11, 2000, para. 33; General Comment No. 15 (2002) The right to water (arts. 11 and 12) E/C.12/2002/11, January 20, 2003, para. 20; General comment No. 16 (2005) The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3) E/C.12/2005/4, August 11, 2005, para. 17; General Comment No. 17 (2005) The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c)), E/C.12/GC/17, January 12, 2006, para.28; General Comment No. 18 (2005) The right to work (art. 6), E/C.12/GC/18, February 6, 2006, para. 22; General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008, para. 43; General comment No. 21 (2009) Right of everyone to take part in cultural life (art. 15, para. 1 (a)), E/C.12/GC/21, December 21, 2009, para. 48; General comment No. 22(2016) on the right to sexual and reproductive health (art. 12), E/C.12/GC/22, May 2, 2016, para. 39; General comment No. 23 (2016) on the right to just and favourable conditions of work (art. 7), E/C.12/GC/23, April 27, 2016, para. 58; General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, August 10, 2017, para. 10 and General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4)), E/C.12/GC/25, April 30, 2020, para. 41.

[57] Permanent Court of International Justice, First (Ordinary) Session, Advisory Opinion No. 1, 22 July 1922, Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, p. 19.

useful effect of these norms on the domestic realm. The Court explained that treaty clauses requiring the parties to adapt their laws so to ensure the treaty effectiveness "merely lays stress on a principle which is self-evidence, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."[58]This self-evident principle obliges States to take an active position to ensure the effectiveness of their international commitments, as is the case with international human rights obligations. Regarding Argentina's obligations, the IACtHR cautioned that "under the law of nations, a customary law prescribes that a State that has concluded an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken". Moreover, the IACtHR clarified that "domestic legal measures must be effective" and the State "must adopt all measures necessary so that provisions contained in the Convention have full force and effect within its domestic legal system".[59]

63. When States sovereignly assume human rights international obligations they are bound to adapt its domestic normative landscape so as to make them effective for the people under its jurisdiction. And, more importantly, States are bound to take deliberate steps, to arrange its entire governmental apparatus, aimed at ensuring that everyone in their territories is fully enjoys the rights and liberties recognized. This is an active attitude to address societal inequalities that may exist and to tackle the challenges in the process of making it effective.

i. Positive steps to fulfil human rights, investment protection and State's liability.

64. The claimant argues that Argentina's decision to reverse the social security privatizing reform enacted in the mid-nineties, amounted to a breach of the US-Argentina BTI, since the pension funds administration business in which it was involved ceased to exist.

65. As the OCDE cautioned in 2004, it is not always an easy task to distinguish between legitimate governmental regulatory measures, which may produce harm to a given investor's expectations, but no compensation is due, from a measure that actually amounts

[58] Permanent Court of International Justice, Sixth (Extraordinary) Session, Advisory Opinion No. 10, 21 February 1925, Exchange of Greek and Turkish Populations (Lausanne Convention VI, January 30th, 1923, Article 2), Greece v. Turkey, para. 52.
[59] IACtHR, Case of Garrido y Baigorria v. Argentina, Judgment of August 27, 1998, para. 68-9

to indirect expropriation, requiring compensation. Therefore, tribunals are to undertake a thorough case-by-case examination in adjudicating over these issues.[60] The line between these two scenarios is not sharp-clear, but rather demands to weigh-in the societal interests involved in the impugned regulatory decision, its character, purpose, and context. This is important since, as posed by the OECD, "it is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police powers of the State, compensation is not required".[61] As various arbitral tribunals have noted before, both the 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens and the Third Restatement of the Foreign Relations Law of the United States of 1987, support the assessment that in the face of non-discriminatory and bona fide regulations, there is no wrongdoing and no compensation is due.[62]

66. The specific facts and circumstances in the case under analysis concern the enactment of Law 26,425 through which the private pension funds administrators, AFJP, ceased to exist. The pension funds once managed by the AFJP were transferred to the governmental agency ANSES, that oversaw the managing the public pillar of the pensions system in the previous system and has manage it in its entirety since then.

67. Argentina's decision was an expression of its right to enact governmental regulations in the public interest, in this case, to regulate the degree of corporate involvement in pension funds administration. Provided that they are not arbitrary or discriminatory measures, the States have a margin of action to adopt this type of measures which, as explained, are a reflection of their international obligation to adopt concrete and effective measures so that the people under their jurisdiction fully enjoy their fundamental rights. Further, States not only can but are obliged to regulate the involvement of private actors in social life and in many cases, this may require limiting or even excluding them from participating in the provision of essential services for people's lives.

68. As expressed by the ICSID Tribunal in *Feldman* case, "the ways in which governmental authorities may force a company out of business, or significantly reduce the economic

[60] OECD, 'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law, *OECD Working Papers on International Investment,* No. 04, OECD Publishing, 2004, p 22.
[61] *Ibid*, note 10.
[62] Restatement of the Law Third, the Foreign Relations of the United States, American Law Institute, Vol. 1, (1987), Section 712; Draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School (1961), article 10 (5).

benefits of its business, are many" some of which may indeed amount to be expropriatory actions. But, in the same breath the Tribunal cautioned that "at the same time, governments must be free to act in the broader public interest." And stated that reasonable governmental regulation in this regard "cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."[63] A year later in *Tecmed* the ICSID Tribunal also underlined this issue, stating that "the principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."[64] In the same vein, when dismissing Claimant's argument in *Methanex* the Tribunal emphasized that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[65] Likewise, in *Saluka* in 2006 the arbitrators emphasized that, according with international law, "States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[66] They also express that "the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today."[67]

69. Bilateral investment treaties are intended to foster and encourage investment between the parties and to protect the foreign investor against potential discriminatory or unfair policies. But although foreign investors are protected against arbitrary or discriminatory actions taken by host States, they are not granted with a right to regulatory stagnation.

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[63] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Awards, December 16, 2002, para. 103.
[64] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, para. 119.
[65] Methanex Corporation v. United States of America, UNCITRAL. Part IV, Chapter D, Final Award, August 3, 2005, para. 7
[66] Saluka Investments B.V. v. The Czech Republic, 1976 UNCITRAL Arbitration Rules, Partial Award, March 17, 2006, para. 255.
[67] Saluka Investments B.V. v. The Czech Republic, 1976 UNCITRAL Arbitration Rules, Partial Award, March 17, 2006, para. 262.

This is why it has been noted that "realizing that legitimate investment-backed expectations deserve protection while simultaneously recognizing that regulatory frameworks are subject to change over time (due to scientific discoveries, developments in risk assessment or shifting societal attitudes) is important, as it allows for greater coherence in distinguishing two situations: those in which compensation is required, from those in which an investor simply faces a different regulatory environment and must bear the risk associated with an investment."[68]

70. Laws and governmental regulations change over the time. They are meant to change. Otherwise, they would be unable to adapt to societal conditions, needs and values of a given time and space. And that is, precisely, State's raison d'être. The very foundation of societal organization lays in the responsibilities conferred to the State to take action, to adapt its norms and regulations so to cope with social needs, as the need to assure a decent life in the old age. Just as Argentinean social security regulation changed in 1993 and provide for private companies to act as pension funds administrators, fifteen year later, in face of its catastrophic results, regulation changed again, reversing that sovereign decision. And this was through a democratic process which crystalized in Law 26,425.

71. Furthermore, International Human Rights Law requires that laws and policies change. It requires States to constantly monitor the performance of laws and public policies in force, to evaluate the fulfilment of their objectives of guaranteeing the rights of people. And, as we will see later, it requires them to evaluate, design and implement the reforms that may be necessary when the laws and policies in force are not effective in achieving their purpose. Both the privatizing reform and its reversal, it is worth to note, took place after Argentina and the United States of America agreed to promote greater economic cooperation between them, through 1991 US-Argentina BIT.

72. If it is non-arbitrary and non-discriminatory, a changing regulatory landscape should be no surprise for any given investor, whether foreign or national. Already in 1934, the PCIJ asserted in the *Chinn* case that investors constantly face changing circumstances and not all expectations must necessarily be fulfilled.[69] In the same vein, in *Saluka* the tribunal cautioned that "no investor may reasonably expect that the circumstances prevailing at

[68] Wagner, Markus, Regulatory Space in International Trade Law and International Investment Law, *U. Pa. J. Int'l L.* 36 (1) (2014), p. 52.
[69] The Oscar Chinn Case, Britain v. Belgium, Permanent Court of International Justice, Thirty-Third (Extraordinary) Session, Judgment No. 61, December 12, 1934.

the time the investment is made remain totally unchanged", so that "in order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well".[70] Also, in a case against Argentina in 2007 the arbitrators noted that "in order to adapt to changing economic, political and legal circumstances the State's regulatory power still remains in place."[71] Likewise, in 2013 an ICSID Tribunal also stated that "the fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change."[72] Later on, in a 2017 ruling, the arbitrators understood that "absent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs".[73]

73. In this regard, *Philip Morris* case is of particular interest. The final award declared that the Uruguayan regulation did not amount to expropriation because sufficient value remained after the measures were implemented, which by itself was sufficient to dismiss Claimants' claim. But the Tribunal decided to furthermore clarify that "there is however an additional reason in support of the same conclusion", which is that "the adoption of the Challenged Measures by Uruguay was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation".[74] The Tribunal explained that "protecting public health has since long been recognized as an essential manifestation of the State's police power" and described how different arbitral tribunals, both under the ICSDI and UNCITRAL rules, have expressly recognized this regulatory space of the States, in the face of claims of foreign investors whose interests are affected by legitimate public policy decisions.[75]

[70] Saluka Investments B.V. v. The Czech Republic, 1976 UNCITRAL Arbitration Rules, Partial Award, March 17, 2006, para. 305
[71] BG Group Plc. v. The Republic of Argentina, 1976 UNCITRAL Arbitration Rules, Award, December 24, 2007, para. 298
[72] 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, ICSID Case No. ARB/05/20, Award, December 11, 2013, para. 666
[73] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, May 4, 2017, para. 362
[74] 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, Award, July 8, 2016, para. 287
[75] 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, Award, July 8, 2016, para. 291, 295-9

74. The Tribunal also noted that as of 2000 the BIT models of several countries, such as the United States and Canada, had begun to expressly include clauses to safeguard the police power of the States. This in order to reaffirm the right that countries have under International Law to establish regulations motivated by the public interest and the welfare of their people, provided they are not discriminatory or arbitrary. And in this regard, the Tribunal emphasized that "these provisions, whether or not introduced *ex abundanti cautela*, reflect the position under general international law."[76] Finally, the Tribunal underlined that the measures challenged by the Claimant were indeed "adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health."[77]

75. So national regulatory changes may not be deemed as a surprise for any investor, both national and foreign. States have a duty to take concrete and effective measures so that the people under their jurisdiction fully enjoy their fundamental rights and they have a regulatory space when it comes to enact laws and regulations in the public interest, provided that they are non-discriminatory, nor arbitrary decisions. In these cases, investors interests and expectations may be affected, though no compensation will arise from it.

76. Argentine Law 26,425 has the explicit public interest aim of protecting the integrity and sustainability of the national social security system and of the pension funds of the elderly. As this Tribunal is aware, various private companies used to compete in the pension fund administration market created in 1993. In 2008, for all these companies, the legitimate business in which they were devoted to, ceased to exist. Law 26,425 treated equally all companies that profited from the management of pension funds. Not only the AFJPs managed by foreign companies ceased their functions, nor was it decided to close any particular AFJP.

77. The reason that motivated the law was not that the private pension administrators were in the hands of one or another company, whether national or foreign. But in the fact that, as it happened in every other country that experimented with this model, the very system was not working. Not only the system did not solve the macroeconomic problems it was

[76] 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, Award, July 8, 2016, para. 300-1
[77] 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, Award, July 8, 2016, para. 302.

supposed to, as public deficits increased, but in every country that these systems were implemented thousands were left without the right to social security or with pension levels below the poverty line. The effects were especially serious in groups that historically have had difficulties in accessing pensions such as women.

78. The 2008 decision was not discriminatory, nor was it arbitrary or whimsical. It was a decision guided by the objective of promoting the well-being of people and it was made after an evaluation process of the adverse results of a pension administration model that was an exception at the international level. And it was through a democratic process, open to all stakeholders, which culminated in the decision of the people's representatives to return to a system managed by the State.

79. Faced with the possibility of its business come to an end, AFJPs may well have had expectations over the prevalence of this scheme, and they promoted their policy options in the Congress during the parliamentary discussion. Both in the House of Representatives and in the Senate, the directors of the "AFJP Administrators Union" participated in the parliamentary discussion, raising the reasons why, in their opinion, the individual capitalization system managed by the AFJPs should be maintained.[78] The Union even presented and lobbied a document entitled "Guidelines for a better pension system" to guide future legal reforms, as an alternative to the law that was finally approved by Congress.[79] Corporations involved in the business of managing pension funds can freely promote their legal proposals, but they cannot demand for a society not to decide whether it prefers to continue with the catastrophic experiment it embarked on fifteen years ago, or to return to the path followed by the rest of the countries in the world.

80. As long as they are not arbitrary or discriminatory, international law recognizes that measures taken by a State in the sake of public interest and to provide for the welfare of its people, do not require compensation to be paid, as is the case under study. This conclusion does not only stem from the international investment law but is also deeply

[78] Poder Ciudadano – Transparency International argentinean chapter, Seguimiento del tratamiento legislativo del proyecto 27-PE-08 [Monitoring of the legislative treatment of project 27-PE-08], available at: http://www.poderciudadano.org/up_downloads/temas/106_1.pdf ; Senado de la Nación, República Argentina, Versión Taquigráfica Reunión Plenaria de las Comisiones de Presupuesto y Hacienda y de Trabajo y Previsión Social [Shorthand Version Plenary Meeting of the Budget and Finance and Labor and Social Welfare Committees], 11 de noviembre de 2008, available at: https://www.senado.gob.ar/upload/6956.pdf

[79] Clarín, "Las AFJP presentan hoy su propio plan" [The AFJP present their own plan today], 3 november 2008, available at: https://www.clarin.com/ediciones-anteriores/afjp-presentan-hoy-propio-plan_0_r1kfhKi0atl.html

rooted in States' duties under international human rights law. Particularly, States' obligations to protect and promote human rights, which are the "closest approximation" to its twin concept of the State's right to regulate in the international investment law realm.[80] To these human rights´ duties and its relevance for the fair adjudication in this case will be devoted the further sections.

E. Enhanced duties regarding special groups

81. Inequality is a reality in most of our countries. Not all people are in the same conditions to exercise and enjoy their fundamental rights. There are groups that, due to structural conditions, face special difficulties in doing so. States are obliged to recognize this and assume their responsibilities to change this social reality. They must take specific and targeted measures to end this situation, so that all people can live a dignified life.

82. For the resolution of the instant case, it is key to recall that State duties in fulfilling human rights have special weight when it comes to the rights of groups or collectives traditionally neglected or subjected to structural conditions of discrimination and inequality, as women, children, LGBTIQ, persons with disabilities, indigenous people or, as in this case, older people. Already in its firs General Comment, the ESCR Committee underlined that the monitoring process to assess the Covenant compliance by the States would require that "special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged".[81]

83. Also, the IACtHR has repeatedly use the concept of vulnerability as a criterion to enhance State's obligations regarding human rights protection of individuals considered to belong to a vulnerable group. The Court had explained that "any person who is in a vulnerable condition is entitled to special protection, which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights." State shall not only refrain from violating their rights, "but also adopt positive measures, to be determined according to the specific needs of protection of the legal person, either because of his personal condition or the specific situation he is in."[82]

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[80] Krommendijk, Jasper and Morijn, John, "'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration", in P-M Dupuy, F Francioni and E-U Petersmann (eds), Human Rights in International Investment Arbitration (Oxford University Press, Oxford 2009), p. 433

[81] ESCR Committee, General Comment No. 1 (1989), Reporting by States parties, E/1989/22, annex III, para. 3.

[82] IACtHR, Case of Ximenes-Lopes v. Brazil Judgment of July 4, 2006, para. 103

84. This reasoning stems of the concrete application of the principle of equality and non-discrimination, which demands affirmative actions in some cases. In a recent judgment concerning an older person healthcare, the Court recalled that "the right to equality and non-discrimination encompasses two concepts: a negative concept related to the prohibition of arbitrary differences in treatment, and a positive concept related to the obligation of States to create conditions of real equality for groups that have been historically excluded or that are at a greater risk of being discriminated against. Therefore, the adoption of positive measures is increased in relation to the protection of individuals who are in a vulnerable situation or at risk."[83] This special standard to assess the aggravated States duties on protecting and fulfilling the rights of certain people has been applied by the IACtHR, for instance, in cases of children, women, migrants, indigenous people, people with disabilities and older people.[84] Concerning older people, the Court explained that they "have the right to increased protection and, consequently, this requires the adoption of differentiated measures."[85]

85. In the same vein, the ESCR Committee underlined the special situation of vulnerability in which many older persons live. In its 1995 General Comment No. 6, the Committee recalled that "side by side with older persons who are in good health and whose financial situation is acceptable, there are many who do not have adequate means of support, even in developed countries, and who feature prominently among the most vulnerable, marginal and unprotected groups."[86]

86. People living in poverty at their old age, is a shaming image that is real in many countries, both in highly industrialized States as in developing ones. The Committee cautioned that, "in times of recession and of restructuring of the economy (as 2001 was in Argentina or the current global crisis), older persons are particularly at risk."[87] These are people who are more exposed to the effects of economic crises, with less chance of coping with them

[83] IACtHR, Case of Poblete Vilches et al. v. Chile, Judgment of March 8, 2018, para. 123.
[84] *Cfr*. IACtHR, Advisory Opinion OC-16/99, "The right to information on consular assistance in the framework of the guarantees of the due process of law", October 1, 1999; Advisory Opinion OC-18/03, "Juridical Condition and Rights of Undocumented Migrants", September 17, 2003; Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005; Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006; Case of Ximenes-Lopes v. Brazil Judgment of July 4, 2006; Case of Vélez Loor v. Panama, Judgment of November 23, 2010; Case of Nadege Dorzema et al. v. Dominican Republic, Judgment pf October 24, 2012, etc.
[85] IACtHR, Case of Poblete Vilches et al. v. Chile, Judgment of March 8, 2018, para. 127.
[86] ESCR Committee, General Comment No. 6 (1995) The economic, social and cultural rights of older persons, E/1996/22, annex IV, para. 17.
[87] ESCR Committee, General Comment No. 6 (1995) The economic, social and cultural rights of older persons, E/1996/22, annex IV, para. 17.

with dignity and autonomously during difficult times. The Committee also explained that, "in so far as respect for the rights of older persons requires special measures to be taken, States parties are required by the Covenant to do so to the maximum of their available resources".[88]

87. Particularly when it comes to old women the Committee highlighted the special duties States have, because of their enhanced vulnerability as a product of social and cultural restraints. It warned that the governments "should pay particular attention to older women who, because they have spent all or part of their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow's pension, are often in critical situations". The Committee recommended States to "institute non-contributory old-age benefits or other assistance for all", from which "women would be the principal beneficiaries".[89]

88. States have various specific obligations with respect to the people who are under their jurisdiction, to ensure that they can live with dignity and enjoy their rights in conditions of equality and without discrimination. Since in real life there are situations of factual inequality, which often respond to structural patterns of exclusion, States have enhanced duties to guarantee the effective enjoyment of the rights of the people who are members of these disadvantaged groups, such as the elderly and those who are not able to work

F. Scope and content of the right to social security

89. The right to social security or social protection was included in the Universal Declaration of Human Rights and later reasserted in various UN and regional human rights treaties.[90] The Inter-American Court of Human Rights has noted that the "purpose of the right to social security is to ensure life, health and a decent standard of living to everyone in their old age, or in the case of events that deprive them of the possibility of working; that is, in relation to future events that could affect their quality of life"[91]. Regarding older people, the Court emphasized that its aim is "to protect an individual from situations that will arise when they reach a certain age and are physically or mentally unable to obtain the

[88] ESCR Committee, General Comment No. 6 (1995) The economic, social and cultural rights of older persons, E/1996/22, annex IV, para. 10.
[89] ESCR Committee, General Comment No. 6 (1995) The economic, social and cultural rights of older persons, E/1996/22, annex IV, paras. 20-21, 30.
[90] Sepúlveda, Magdalena, "Chapter 6 - The right to social security", in Dugard, J., Porter, B. Ikawa, D. and Chenwi, L. Elgar (eds.) Research Handbook on Economic, Social and Cultural Rights as Human Rights 2020, p. 89.
[91] IACtHR, Case of Muelles Flores V. Peru, Judgment of March 6, 2019, para. 173

necessary means of subsistence for an adequate standard of living, which may, in turn, deprive them of their ability to fully exercise all their other rights."[92] Also, the Court has asserted that a "fundamental element of the right to social security is its relationship to the guarantee of other rights" and that "ultimately, the pension and, in general, social security constitute a measure of protection for the enjoyment of a decent life".[93]

90. The Court has explained that while States have immediate obligations to "take effective measures to ensure access, without discrimination, to the benefits recognized by the right to social security and equal rights for men and women", they also have obligations of a progressive nature. This means that the "States Parties have the specific and constant obligation to advance as rapidly and efficiently as possible towards the full realization of this right, subject to available resources, by legislation or other appropriate means" while there is "also an obligation of *non-retrogression* regarding the realization of the rights attained".[94] Therefore, privatisation cannot result in either de facto or de jure retrogression in social rights[95], and this must be ensured through both ex-ante and post-facto human rights impact assessments (HRIAs), as underlined by recent UN Guiding Principles.[96]

91. As was mentioned before, Article 9 of the International Covenant on Economic, Social and Cultural Rights establishes "the right of everyone to social security including social insurance". In the first meeting of the UN General Assembly Third Committee to consider de draft of article 9 there were several debates regarding who should be covered by this right and who should bear the burden. For example, although there were proposals to guarantee the right to social security only for workers finally a unanimous consensus was reached when approving Article 9 that social security right is a right for all individuals.[97]

92. The financing of social security right was also discussed in the Committee. The USSR and others wanted to include specific funding schemes: its costs should be borne by the State or by the States and employers, they proposed. This amendment was rejected. The main argument to reject the soviet proposal was that States should be in stand to arrange

[92] IACtHR, Case of Muelles Flores V. Peru, Judgment of March 6, 2019, para. 182
[93] IACtHR, Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru Judgment of November 21, 2019, para. 185.
[94] IACtHR, Case of Muelles Flores V. Peru, Judgment of March 6, 2019, para. 190.
[95] Warwick, B.T., Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights. Human Rights Law Review 19, 2019, 467–490
[96] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, 2018. Guiding Principles on Human Rights Impact Assessments of Economic Reforms, A/HRC/40/57.
[97] UNGA, Third Committee, 728th meeting, A/C.3/SR.728, January 11, 1957, para 33.

the most suitable system for each national context, according to its specific circumstances and possibilities.[98] Article 9 is the Covenant shorter provision. In the debates the countries expressly assessed the inconvenience to include a definition of social security, or a detailed list of benefits or social risk covered by this right. They agreed to keep a succinct Article that may be implemented in each country, according to its own needs and able to adapt to the evolution of social security.

93. Article 9 of the Convention is deliberately laconic in its content, so as that each State may implement it in accordance with the national conditions and being able to adapt to the evolving consensus on what a comprehensive and fair security system should include. The 2008 CESCR General Comment No. 19 developed the regulatory content of the right to social security guaranteed in ICESCR Article 9, describing its five fundamental elements.

i. The first one, "Availability", requires "that a system, whether composed of a single scheme or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies".[99]

ii. Secondly, social security right requires suitable protection for what the Committee refers to as nine "social risks and contingencies", namely: i) health care, ii) sickness, iii) old age, iv) unemployment, v) employment injury, vi) family and child support, vii) maternity, viii) disability, and ix) survivors and orphans.[100]

iii. Thirdly, the "Adequacy" element demands that "benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care"[101].

iv. In turn, the fourth element, "Accessibility", involves five different requirements:

    a. "Coverage", so as that "all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups", for which purpose "non-contributory schemes will be necessary".

[98] UNGA, Third Committee, 726th meeting, A/C.3/SR.726, January 9, 1957, para 54.
[99] ESCR Committee, General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008, para. 11.
[100] ESCR Committee, General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008, paras. 12-21.
[101] ESCR Committee, General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008, para. 22.

b. "Eligibility" so as that the "qualifying conditions for benefits must be reasonable, proportionate and transparent".
c. "Affordability" so as that in contributory schemes "costs and charges associated with making contributions must be affordable for all, and must not compromise the realization of other Covenant rights".
d. "Participation" requires that beneficiaries "must be able to participate in the administration of the social security system".
e. And "Physical access" so as that "benefits should be provided in a timely manner and beneficiaries should have physical access", with special attention to persons with disabilities, migrants, and persons living in remote or disaster-prone areas.[102]

v. Social security fifth element is its relationship with other rights, since it plays a key role in supporting the realization of many economic, social and cultural rights.[103]

94. When it comes to old-age social risk, the IACtHR stressed that the "lack of financial resources resulting from the failure to pay pension allowances directly undermines the dignity of an older person, since at this stage of life the pension constitutes their main source of income to cover the basic and essential necessities of a human being". These circumstances "causes anguish, insecurity and uncertainty regarding their future […] since deprivation of income intrinsically affects the progress and development of their quality of life and their personal integrity".[104]

95. In this regard, the social security right "Adequacy" element is crucial. It requires that States take positive steps to assure that all individuals are in full stand to enjoy their rights in a dignified position, without having to go through hardships when unable to bread-win. No one should be in poverty and forced to a precarious life when faced with the different social risks and contingencies identified by the Committee. In its General Comment, the CESCR emphasized that, while States may take different approaches and enact various methods for their social security systems, these "should ensure the adequacy of benefits"

[102] ESCR Committee, General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008, paras. 23-27
[103] ESCR Committee, General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008, para. 28.
[104] IACtHR, Case of Muelles Flores V. Peru, Judgment of March 6, 2019, paras. 205-6; Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru Judgment of November 21, 2019, para. 185.

and, more importantly, the Committee noted that "the adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights."[105]

96. Regarding the "Adequacy" requirement the IACtHR underlined that "an adequate level of benefits should provide a person with a decent standard of living that not only seeks to satisfy their purely biological needs, but also to ensure dignified living conditions. It is important to emphasize that, as a general rule, the retirement pensions of older adults constitute the only source of income for the pensioner and his family; therefore, an amount equivalent to an adequate level of income is of special importance for older persons."[106]

97. In the years that the Covenant was agreed, the consensus floor was enshrined in the 1952 ILO Convention on Social Security Minimum Standards. Certainly, through the last seventy years, people, societies and needs have changed, but Article 9 continues to demand positive actions for the States. As posed by the ESCR Committee, the right to social security must be accessible and, because of it, it must pursue universal coverage, which may require the enactment of non-contributory social security schemes. This means that all people must be covered by the social security system without discrimination, especially those who are part of vulnerable groups. Although States have progressive duties in this regard, there is a minimum of core contents of this right termed as Social Protection Floors by the ILO. According to the 2012 ILO recommendation 202 social protection floors are "nationally defined sets of basic social security guarantees with secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion. [107] As minimum they should include:

a. Essential health care including maternity care that meets the criteria of availability, accessibility, acceptability, and quality.
b. Basic income security for children that at least ensures access to nutrition, education, care and any other necessary goods and services.

[105] ESCR Committee, General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008, para. 22.
[106] IACtHR, Case of Muelles Flores V. Peru, Judgment of March 6, 2019, note 201.
[107] ILO Recommendation No. 202, concerning National Floors of Social Protection. Adoption: Geneva, 101st ILC session (14 Jun 2012), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:3065524,en:NO

c. Basic income security for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability
d. Basic income security for older persons

98. In this same recommendation, the ILO stablishes that social security must be guided by the principles of universality; adequacy and predictability; non-discrimination; social inclusion; coherence with social, economic and employment policies; tripartite participation with representative organizations of employers and workers, as well as consultation with other relevant and representative organizations of persons concerned; and coherence across institutions responsible for delivery of social protection.

99. As mentioned, the Committee on Economic, Social and Cultural Rights recommends the implementation of non-contributory schemes to achieve universal coverage.[108] In its General Comment No 19, the Committee exhort the States to stablish old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, have not completed a qualifying period of contributions or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance, and have no other source of income. The then Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona stated in a 2010 report that "The traditional reliance of many States on contributory pension systems as the main source of social security in old age has left a significant portion of older persons unprotected. This problem is particularly serious for women as most are not covered by contributory pension schemes although they tend to live longer." And that "non-contributory pensions are the only means by which universal pension coverage can be achieved and gender imbalances redressed."[109]

100. Argentina entered the experiment of privatization of social security systems urged by the IMF and the WB with the promise that this system would reduce fiscal deficits and improve the pension system with more affiliates and better benefits. However, as the 2018 ILO report makes clear, these were only empty promises: the system was a resounding failure and a catastrophe for the lives of older people in Argentina.[110]

G. Privatization and International Human Rights Law

[108] ESCR Committee, General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008
[109] Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, A/HRC/14/31, March 31, 2010, paras. 105-6.
[110] ILO, *supra* note 4.

101. In achieving the goal of fulfilling their people's human rights, national institutional arrangements may vary greatly. In the case of social security, particularly for the old age, some countries may assess that privatizing pension fund administrations may be an adequate policy for this goal. In other places, the great majority, society decided to keep its administration run by the State.

102. In its 1990 General Comment the ESCR Committee understood that "in terms of political and economic systems the Covenant is neutral." The Committee explained that States' duties "to take steps" in accordance with ICESCR Article 2, "neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected".[111] This, however, does not mean that public policy decisions in economic matters do not have an impact on the enjoyment of human rights, and that all policies are compatible with human rights. In a specific report on trade liberalization and human rights, the UN Office of the High Commissioner of Human Rights (OHCHR) warned in 2002 that "the liberalization of trade in services can impact on these rights in various ways" and that privatization may come with a series of harmful effects. Among them, the OHCHR identified "the establishment of a two-tiered service supply with a corporate segment focused on the healthy and wealthy and an underfinanced public sector focusing on the poor and sick", "an overemphasis on commercial objectives at the expense of social objectives which might be more focused on the provision of quality health, water and education services for those that cannot afford them at commercial rates" and "an increasingly large and powerful private sector that can threaten the role of the Government as the primary duty bearer for human rights by subverting regulatory systems through political pressure or the co-opting of regulators".[112]

103. In its conclusions, the OHCHR stressed the need to ensure "Governments' right and duty to regulate". In accordance with article 2 (3) of the 1986 UN Declaration on the Right to Development, the OHCHR stated that it is crucial "that they have the flexibility at the local, regional and central government level to use development tools in order to exercise

[111] ESCR Committee, General comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), E/1991/23, annex III, para. 8.
[112] Office of the United Nations High Commissioner for Human Rights, Liberalization of trade in services and human rights, E/CN.4/Sub.2/2002/9, June 25, 2002, Summary.

their right and duty to formulate appropriate development policies that aim at the constant improvement of the well-being of the entire population and of all individuals."[113]

104. More recently, in 2017 the OHCHR recalled that "international community is faced with ever-increasing challenges, among them the global economic crisis, shrinking policy space through privatization and unregulated activities of transnational corporations". And in facing these challenges the OHCHR called for the States to "revitalize" public sector and warned that "privatization of health, education, social security, water, and personal liberty and security services must not take place at the expense of equitable access to these services and the protection of human rights and should be subject to human rights impact assessments".[114]

105. Similarly, and in the face of the increasing involvement of private actors in delivering goods and services that were traditionally in the hands of the State, in 2017 the ESCR Committee warned that this situation "poses new challenges for States parties in complying with their obligations under the Covenant". It indicated also that although International Human Rights Law does not prohibit privatizing public services the "private providers should, however, be subject to strict regulations that impose on them so-called 'public service obligations'."[115] This issue was specifically addressed in respect to water supply in its 2003 General Comment No. 15, when the Committee stated that, in fulfilling its obligations, States must guarantee that any scheme shall be "based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups."[116]

106. Regarding social security, the ESCR Committee also cautioned that "where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security". The Committee underlined that "an effective regulatory system must be established which includes framework legislation, independent

[113] Office of the United Nations High Commissioner for Human Rights, Liberalization of trade in services and human rights, E/CN.4/Sub.2/2002/9, June 25, 2002, para. 70.
[114] Office of the United Nations High Commissioner for Human Rights, Right to development, A/HRC/36/23, July 26, 2017, paras. 49 and 55.
[115] ESCR Committee, General comment No. 24 (2017) State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, August 10, 2017, para. 21
[116] ESCR Committee, General Comment No. 15 (2002) The right to water (arts. 11 and 12) E/C.12/2002/11, January 20, 2003, para. 27.

monitoring, genuine public participation and imposition of penalties for non-compliance".[117]

107. More generally, the Committee has noted that privatization "should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socioeconomic segregation", nor should "result in excluding certain groups that historically have been marginalized, such as persons with disabilities."[118] In its Concluding Observations to Croatia, the Committee called on the State to "carefully review the probable effects of its plans to privatize portions of the national health-care system on the most disadvantaged and marginalized sectors of society, including, in particular, the unemployed and underemployed, the homeless and those living in poverty."[119] The Committee has stressed that, regarding privatized services, States "retain at all times the 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."[120] This reasoning has been also adopted by other treaty bodies, such as the Committee on the Rights of the Child.[121]

108. The Inter-American Commission has clearly stated that since public services are closely related to the fulfilment of human rights, when these services are privatized the States maintain the responsibility and the obligation to protect and guarantee the human rights of people under their jurisdiction. Specifically, the duty to prevent demands that the authorities prevent any harm to human rights from the actions of these enterprises, particularly in the case of social security. This duty is aggravated when it involves people or communities from traditionally excluded categories (such as women and indigenous communities).[122]

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[117] ESCR Committee, General Comment No. 19 (2008) The right to social security (art. 9), E/C.12/GC/19, February 4, 2008, para. 46.
[118] ESCR Committee, General comment No. 24 (2017) State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, August 10, 2017, para 22.
[119] ESCR Committee, Concluding observations on Croatia, E/C.12/1/Add.73, December 5, 2001, para 34.
[120] ESCR Committee, General comment No. 24 (2017) State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, August 10, 2017, para. 22.
[121] Committee on the Rights of the Child (CRC), Concluding Observations on the combined fifth and sixth periodic reports of Costa Rica, 4 March 2020, CRC/C/CRI/CO/5-6
[122] Inter-American Commission on Human Rights. Special Rapporteurship on Economic, Social, Cultural an Environmental Rights. OEA/Ser.L/V/II CIDH/REDESCA/INF.1/19

109. So, at first glance, international human rights law does not preclude countries possibilities to privatize goods and services that have previously been managed or provided by the State. This as long as it is recognized that the obligation to ensure the realisation of the rights of the population rests on the State and that it actively controls that this policy does not negatively affect the population. This can only be achieved through independent, in-depth human rights impact assessments of all policy reforms[123] Within their domestic manoeuvre margin, they may decide to privatize some services that are essential for people to enjoy their human rights, which was the case of Argentina when allowed private companies to manage pension funds and provide its benefits for the people.

110. However, it is worth noting that this understanding of human rights law as neutral regarding political economy, in particular regarding privatization of public services, is a contested issue within the human rights community.

111. The U.N. Special Rapporteur on extreme poverty and human rights, Philip Alston, paid special attention to the deleterious effects that privatization has on the enjoyment of human rights. In his 2018 report, Alston alerts that "the ways in which (privatisation) has most often occurred in recent decades and the ideological motivations driving much of it call for a different set of responses from the human rights community".[124] This is urgently needed because, he emphasizes, "the consequences for human rights are overwhelmingly negative."[125]

112. In the same vein, in 2019 the U.N. Special Rapporteur on the right to development stressed that "States should move away from 'financializing' social policies, that is, turning social services into profit-generating opportunities". In this regard, he asserted that "there is a need to reverse the trend of privatizing social services, such as health care and education, which are the primary responsibility of States under international human rights law".[126] In 2020, he again expressed concern by "the trend of privatization, or the 'financialization', of services" and recalled that although "development finance institutions have advised States to privatize the provision of services such as health care

[123] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, 2018. Guiding Principles on Human Rights Impact Assessments of Economic Reforms, A/HRC/40/57.
[124] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, para. 87
[125] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, para. 83
[126] Report of the Special Rapporteur on the right to development, Saad Alfarargi, A/HRC/42/38, July 2, 2019, para. 59

and education, States have the primary responsibility for social services under international human rights law".[127]

113. The UN Special Rapporteurs on the right to education, on the human rights to water and sanitation, on the right to housing as a component of the right to an adequate standard of living and the UN Independent Expert on the effects of foreign debt and other related international obligations of States on the full enjoyment of human rights have further highlighted the negative human rights impacts of privatisation in their reports over the past decade.[128] In 2020, UN human rights experts came together to sound the alarm on privatisation in both a public online event129 and in a joint open editorial published in numerous media outlets.[130]

114. In his 2018 report Alston asserted that, although privatization is "generally presented as a technical solution for managing resources and reducing fiscal deficits", it is in fact "an integral part of an economic and social philosophy of governance"[131]. He explained that privatization may be understood as the "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".[132] Since the seventies, several waves of privatization have swept the world, in which there are no limits "as to what can be privatized, and public goods ranging from social protection and welfare services, to schools, pension systems, parks and libraries, and policing, criminal

[127] Report of the Special Rapporteur on the right to development, Saad Alfarargi, A/HRC/45/15, July 8, 2020, para. 85-6.
[128] Report of the Special Rapporteur on the right to education, Koumbou Boly Barry, Right to education: the implementation of the right to education and Sustainable Development Goal 4 in the context of the growth of private actors in education, A/HRC/41/37, 10 April 2019; Report of the Special Rapporteur on the right to education, Kishore Singh, A/70/342, August 2015; Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller: Human rights and the privatization of water and sanitation services, A/75/208, 21 July 2020; Report of the Independent Expert on the effects of foreign debt and other related international obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, A/HRC/43/45, 3 January 2020; Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context Leilani Farha, A/HRC/34/51, 18 January2017.
[129] Philip Alston, Juan Pablo Bohoslavsky, Koumbou Boly Barry, Olivier De Schutter, Leilani Farha, Léo Heller, Tlaleng Mofokeng and Magdalena Sepúlveda Carmona, "Enough is enough. Privatisation and public services: a conversation with the experts", 19 October 2020, available at: https://www.youtube.com/watch?v=2zXjzgOOyCY&feature=emb_logo.
[130] The Global Initiative for Economic, Social and Cultural Rights, 'Enough is enough: UN experts' open editorial sparks worldwide media interest' (The Global Initiative for Economic, Social and Cultural Rights, 20 October 2020) https://www.gi-escr.org/latest-news/enough-is-enough-un-experts-open-editorial-sparks-worldwide-media-interest, accessed 4 February 2020.
[131] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, Summary
[132] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, para. 1

justice and the military sector, have all been targeted".[133] These processes, Alston argued, are "premised on assumptions fundamentally different from those that underpin respect for human rights, such as dignity and equality. Profit is the overriding objective, and considerations such as equality and non-discrimination are inevitably sidelined."[134]

115. In his report, Alston also explained that the "mitigation techniques" of the negative consequences of privatization –as those requiring more regulation, monitoring and accountability mechanism, safety nets for the poor and the expelled by the market, the increasingly common voluntary guidelines for companies, etc.– have failed to address the fundamental challenges that privatization poses for the fulfilment of human rights.[135] So, as a first step, Alston called to acknowledge the problem so to tackle it: "the patent inadequacies of existing responses to the dramatic spread of the privatization of formerly public goods and services must thus be recognized".[136] The Special Rapporteur also signalled the need "to highlight the many reasons why government should be best placed to carry out community responsibilities". These includes "government's commitment to promoting substantive equality", that under a privatization regime "are for the most part, replaced by the single measure of economic efficiency, a concept that cannot possibly capture the range of objectives that those entrusted with promoting the public good should seek to achieve."[137] For these reasons, Alston cautioned that "societies that constantly proclaim that human rights are inalienable cannot permit privatization to alienate them."[138]

i. International human rights law requires States to provide public services. Remunicipalisation processes: the return from private to public delivery

116. Further, it appears increasingly clearly that not only is privatisation not always compatible with human rights, but that States have an obligation to ensure everyone has access to non-commercial social services that are publicly controlled. U.N. human rights bodies

[133] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, para. 81
[134] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, para. 82.
[135] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, paras. 50-64.
[136] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, para. 66
[137] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, paras. 68 and 70.
[138] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, para. 74.

and experts have on a number of occasions explicitly recognised that States have an obligation to provide public services.

117. For instance, the Committee on Economic, Social and Cultural Rights (CESCR) observed in General Comment 24 that "[t]he obligation to fulfil requires States parties...in certain cases, to directly provide goods and services essential to such enjoyment.[139] Similarly, the CESCR stated in General Comment 13 that "it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances."[140] Both the CESCR and the Committee on the Rights of the Child (CRC) have also in Concluding Observations explicitly called for specific States to provide "public services", both generally and in relation to particular sectors.[141] The CESCR has further stated in four General Comments that, as part of their obligation to ensure access to services necessary for the realisation of economic, social and cultural rights, States are required to directly provide facilities or services to those with insufficient means to access them on the private market.[142] This position has also been made very clear for the right to education. The Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education, which interpret existing human rights law and standards, and which were adopted by 57 of the most eminent experts in February 2019, lay out for instance the obligation of States "to provide free, public education of the highest attainable quality to everyone within their jurisdiction" (Overarching Principle 2).[143] In addition, U.N. human rights bodies have on a number of occasions indicated that public services are necessary for the realisation of ESCR, particularly, but not exclusively, for marginalised groups.[144] For instance, in its 2020 Statement on the Coronavirus Pandemic, the CESCR suggested that the public

[139] ESCR Committee, General comment No. 24 (2017) State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, August 10, 2017, para 23.
[140] ESCR Committee, General Comment No. 13 (1999) The right to education (art. 13), E/C.12/1999/10, December 8, 1999, para 48.
[141] Aubry, Sylvain and Jameson, Sarah, States' Human Rights Obligations Regarding Public Services: The United Nations Normative Framework, The Global Initiative for Economic, Social and Cultural Rights, Policy Brief, 19 October 2020, available at: https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5f8d736e8d29366e86cc98a5/1603105651434/2020-10-19-Policy-Brief-States-HR-Oblig-PS-UN-NormFram.pdf
[142] *Ibid*.
[143] Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education, 13 February 2019, available at: https://www.abidjanprinciples.org/en/background/overview accessed 4 February 2020.
[144] Aubry and Jameson, *supra* note 143.

provision of goods and services is necessary to ensure that those living in poverty are able to access such goods and services.[145]

118. Because of the fundamental shortcomings of the privatized public services experiences, many countries have gone back to public managed systems. The reversal of the privatization of the Argentinean pension system in 2008 is not a unique experience. Quite the contrary. As this panel is fully aware, only 30 countries around the world decided to experiment with private companies managing pension funds. More than half of them had reversed that policy decision, since the results, in all cases, were catastrophic.[146] They decided to return to their previous path, the one followed by the vast majority of the societies in the world, to a State-run social security system to provide for a decent life for their people in need. And indeed, in broader terms beyond pension systems, privatization reversals are taking place through the world in various realms, in the face of the deeply problematic results that these ventures showed, particularly for the welfare of individuals. In its 2018 report, Alston noted that it seems to be that, in some industries and sectors, privatization "is slowing down in the face of 'remunicipalisation'"[147], which is the return of public services from private to public delivery.

119. Water supply is illustrative of this trend. A 2015 study found a global trend of remunicipalisation of water supply and sanitation services, all around the world, in high, middle, and low-income countries. While in 2000 there were less than one million people affected by the reversal of privatization, in only two countries, in March 2015 there had been registered 235 cases of remunicipalisation, in 37 countries: more than a 100 million were served by remunicipalised water services. A later study found 835 examples of remunicipalisation of public services worldwide, in more than 1600 cities in 45 countries, from 2000 to January 2017. 83% of them took place between 2009 and 2017. Most referred to energy and water supply, but they also encompassed other services, as waste collection, transport, education, health, and social services.[148]

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[145] ESCR Committee, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, E/C.121/2020/1, 17 April 2020.
[146] ILO, *supra* note 4.
[147] Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, A/73/396, September 26, 2018, para. 12.
[148] Kishimoto, Satoko and Petitjean, Olivier (eds.) (2017) "Reclaiming Public Services: How cities and citizens are turning back privatization", Transnational Institute, Multinationals Observatory, Austrian Federal Chamber of Labour, European Federation of Public Service Unions, Ingeniería Sin Fronteras Cataluña, Public Services International, Public Services International Research Unit, We Own It,

120. So, actually, the reversal of social security privatization in Argentina is no exception, nor a whimsical or unreasonable decision. It is part of a global trend that reflects the growing awareness of the authorities about the incompatibility of the commodification of some essential services if the intention is to ensure a decent life for all people, without discrimination and regardless of their socioeconomic status.

H. The duty to assess public policies and to change it when needed and suitable.

121. To effectively ensure the rights of individuals it is essential to evaluate the policies and laws in force to identify their shortcomings and problems, so to outline the necessary reforms in public policy. In accordance with their international commitments, States have the obligation to constantly monitor the effectiveness of public policies aimed at guaranteeing the rights of the people under their jurisdiction. This obligation is aggravated when it comes to groups or collectives that, as in this case, are in a special situation of vulnerability or subject to structural conditions of inequality. And, in this specific case, the duty of the State to safeguard the rights of its population is additionally enhanced because these are services traditionally in charge of the State, which have been transferred to private companies through privatization processes.

122. In this regard, when the ESCR Committee issued its first General Comment, on the periodic review of the countries' performance in complying with the Covenant, it highlighted the importance of the States conducting periodic evaluations of the degree of satisfaction of the economic, social, and cultural rights of the people under its jurisdiction. The Committee underlined that the periodic reports would "ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction". It explained that "the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation" and considered this monitoring as "an integral part of any process designed to promote accepted goals of public policy and (…) indispensable to the effective implementation of the Covenant."[149] It also highlighted that "the principal value of such an overview is to provide the basis for the elaboration of

Norwegian Union for Municipal and General Employees, Municipal Services Project and Canadian Union of Public Employees, Amsterdam and Paris, available at: https://www.tni.org/files/publication-downloads/reclaiming_public_services.pdf

[149] ESCR Committee, General Comment No. 1 (1989), Reporting by States parties, E/1989/22, annex III, para. 3.

clearly stated and carefully targeted policies, including the establishment of priorities" and that it will "enable the State party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range of economic, social and cultural rights".[150] Later on, the Committee also cautioned that "the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints."[151]

123. Likewise, in its 1995 General Comment the Committee also noted that State's obligations for the fulfilment of older persons rights would include at least "the need to determine the nature and scope of problems within a State through regular monitoring, the need to adopt properly designed policies and programmes to meet requirements, the need to enact legislation when necessary and to eliminate any discriminatory legislation, and the need to ensure the relevant budget support."[152] Additionally, it is worth noting that the ESCR Committee has also highlighted that when it comes to privatized services, as this case, States has the duty to ensure that the services provided by private companies "are regularly assessed in order to meet the changing needs of the public and are adapted to those needs."[153]

124. States are called upon to carry out evaluation processes of the public policies aimed at satisfying the fundamental rights of their population. And when faced with situations in which these policies are ineffective, do not achieve their purposes or have detrimental effects on society, States have to seek alternative ways and modify those policies. These reforms may be partial, but they can also be structural. One of these structural reforms occurred when in 1993 an individual capitalization system was established, which would be managed by private companies, the AFJP. Another structural change, consequence of the disastrous effects of the above, was the return in 2008 to a solidarity and distribution system managed by the State, currently in force. After fifteen years of the unusual

[150] ESCR Committee, General Comment No. 1 (1989), Reporting by States parties, E/1989/22, annex III, para. 4 and 8.
[151] ESCR Committee, General comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), E/1991/23, annex III, para. 11.
[152] ESCR Committee, General Comment No. 6 (1995) The economic, social and cultural rights of older persons, E/1996/22, annex IV, para. 18.
[153] ESCR Committee, General comment No. 24 (2017) State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, August 10, 2017, para. 22.

experiment of pension funds being administered by private companies, and after concluding that that experiment failed to protect the rights of the elderly, Argentina decided to return to a public system.

125. In this point is worth to recall what the ESCR Committee expressed in the monitoring process of Argentina's compliance with article 9 of the ESCR Covenant, in the years where the privatizing reform was enacted.

126. In its 1994 Concluding Observations the Committee noted that "the implementation of the structural adjustment programme may harm certain social groups" and that "it is unclear whether the Government has taken measures to resolve the problem of housing and pensions".[154] More specifically, among the "principal subjects of concern" the Committee was particularly worried on the effects that the 1993 reform may have in fulfilling the right of social security in the country. It expressed that it "notes with concern the extension of the Government's privatization of pensions programme. The basic payment system, to which all are entitled, is gradually being replaced by a new capitalization scheme whose return depends on the pensioner's contributions. This calls in question the prospects for those who are unable to capitalize adequate pensions, including lower-paid workers, and unemployed and underemployed persons."[155] Meanwhile, in its 1999 Concluding Observations, the Committee again noted "with concern the extent of the Government's privatization of the pension programme".[156] Also, it criticized a 1995 Law that allowed government to reduce public pensions by invoking economic constraints. The Committee "urge[d] the State party to ensure that its social security system guarantees workers an adequate minimum pension".[157]

127. The 1993 privatization was meant to improve Argentina's pension system. Supposedly it would alleviate the financial burden assumed by the State, increase the coverage of the population and improve the replacement rate of pensions, ensuring its adequacy for a dignified old age. As explained above, the International Labour Organization 2018 report is explicit in stating that these were all indisputably unfulfilled promises.[158]

[154] ESCR Committee, Concluding Observations, Argentina, E/C.12/1994/14, December 19, 1994, para. 11.
[155] ESCR Committee, Concluding Observations, Argentina, E/C.12/1994/14, December 19, 1994, para. 13.
[156] ESCR Committee, Concluding Observations, Argentina, E/C.12/1/Add.38, December 8, 1999, para. 18.
[157] ESCR Committee, Concluding Observations, Argentina, E/C.12/1/Add.38, December 8, 1999, para. 33.
[158] ILO, *supra* note 4.

128. As this Tribunal is aware, the crisis that Argentina faced at the beginning of this century was devastating and demanded a re-evaluation of the way in which the rights of its impoverished and precarious population were assured. In the framework of this re-evaluation process and in view of the evidence of the failure of the individually funded system managed by private companies, a series of structural reforms were introduced to the Argentine social security system. This was necessary and urgent. The Argentine population, and in particular those in vulnerable situations such as the elderly, needed positive and concrete actions by the State to guarantee their right to a decent life.

129. The situation of the pensions system in Argentina prior to 2008 did not meet any of the criteria that allow assessing the suitability of a functional social security system. This ultimately led to the enactment of Law 26,425, after a democratic deliberation process in which various actors participated, including the claimants' representatives. That year Argentine society decided to return to the path followed by most of the rest of the countries, in which social security for old age is run by the State, with a criterion of social and intergenerational solidarity, according to each country social conditions and needs.

130. This decision was framed within the regulatory space that States have in accordance with international investment law and was a change of policy resulted from a thorough democratic process, aware of the State's duties towards its population and in compliance with its international human rights obligations.

131. The scheme that existed in Argentina until 2008 may indeed have been a lucrative business opportunity, by granting companies the management of social security trust funds to be invested in the financial market, but it certainly did not constitute a social security system to ensure a decent life for the elderly. Corporate profits at the expense of peoples' old age poverty was a situation that required solution.

III. CONCLUSION

132. The undersigned organizations wish to emphasize that in the instant case the claimant demands compensation as a result of a public policy decision adopted by the Argentine State, that was in accordance with its domestic legal system and respecting its international obligations, both those relating to investment protection, as well as those arising from International Human Rights Law.

133. We believe that the issues addressed in this brief will serve for this tribunal when assessing the decisions of the respondent State and the alleged breach of the bilateral investment treaty under analysis.

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