

Leasing the Rain¹: Water, Privatization, and Human Rights

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Introduction

Bolivia, in 1999, sought to privatize their water utility – the World Bank had made this a prerequisite for future loans. The Bank further recommended that there be “no public subsidies” to fix prices at low rates. In order to comply with the new requirements, the government moved to ease requirements for private investment through Law 2029, which eliminated the requirement that water distribution reach rural areas, and made existing autonomous water systems, including household wells, illegal. Communities would have to cede control of household and community wells to the private company without compensation. Water prices were fixed against the dollar, and the company was guaranteed a 16% return on their investment, “no matter how management performed or what quality of service was provided.” This concession was to remain in force for forty years, and included a clause that its terms would supercede any other contract, law, or decree. When the concession began, and water prices went up, sometimes as high as 300%, tens of thousands of Bolivians marched on the capital, until the government agreed to renounce the contract.

This would normally be cause for the foreign investor to initiate an international arbitration dispute resolution process, and Bechtel, the parent company, did so that year.

Curiously, the company agreed to settle, as long as Bolivia publicly agreed that the contract was

¹ This phrase was used by Cochabamba protestors to denounce a water privatization contract in Bolivia that forbade residents from using home rainwater catchments. *Bolivians End Foreign-Owned Water Privatization in Cochabamba ‘Water War’*, Global Nonviolent Action Database, <https://nvdatabase.swarthmore.edu/content/bolivians-end-foreign-owned-water-privatization-cochabamba-water-war-2000>. See also William Finnegan, *Leasing the Rain*, The New Yorker (Apr. 1, 2002). <https://www.newyorker.com/magazine/2002/04/08/leasing-the-rain>; Oscar Olivera, *Cochabamba: Water War in Bolivia* (2004).

cancelled due to civil unrest, and “not because of any act done or not done by the international shareholders.”² Bechtel’s media relations manager said:

We had offered some time ago not to continue arbitration if we received a clear, unambiguous statement that [we] acted entirely without fault, during time of concession and released of any liabilities . . . Given how poor Bolivia is, Bechtel's intent was not to squeeze money out of the country. *We simply couldn't accept blame for what happened.*³

More likely, the company recognized it had intended to act without the level of public attention to the contract that the “Bolivian Water Wars” placed on their practices, and could no longer afford to do so.⁴

This one-sided concession might be forgotten in history as a uniquely unconscionable agreement that was rightly cancelled. However, the agreement shows the peculiar mix of considerations that comprise any international agreement surrounding water and water rights: public and private law frameworks theoretically operate simultaneously in these types of concessions. The residents of Cochabamba asserted their rights, and demanded the government of Bolivia honor those commitments. At the same time, the foreign investors demanded the government honor their commitments. However, the former found no legal channels to effectively hear their claims. The foreign investors, however, easily found a venue to air their grievances.

This asymmetry reflects the values prioritized in international law today. Public international law considerations in investor-state disputes should include human rights,

² Paul Harris, *Bechtel, Bolivia resolve dispute / Company drops demand over water contract canceling*, SFGate (Jan. 19, 2006).

³ *Id.* (emphasis added).

⁴ Another interesting footnote to this story is that Bolivia would become the first country to leave ICSID in favor of other arbitral bodies. Damon Vis-Dunbar, Luke Eric Peterson, & Cabrera Diaz, *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, *Bilaterals*, (May 9, 2007) <https://www.bilaterals.org/?bolivia-notifies-world-bank-of&lang=fr>

indigenous rights, environmental rights. All too often, the priority is given to foreign investor rights, and any economic liberalization requirements of the World Bank and International Monetary Fund loans. International investment law, and the contractual rights that investors claim through their concession contracts, are given the most deference and attention in international arbitration settings, even when the arbitration is about a right and human need as fundamental as water. Even when panels try to consider values other than commercial values, they are generally considered secondary or tertiary to the commercial rights in play.

Tribunals emphasize private law concepts in part because investment treaties (BITs) and investment contract are considered “self-contained.”⁵ The contracts are another reflection of the consent-based system, and private law is therefore seen as neutral – consent assumes no great power dynamics are at play, and no international political considerations need to be accounted for if it is merely a common law contract at issue.

However, this emphasis on private law in investor-state disputes ignores that international law and international institutions created the conditions that led to States taking on investment concessions. Because international law was constitutive in creating the global investment environment, and the conditions requiring it, international law can and should be considered in full alongside the BITs and contracts. Private law concepts, seen as “neutral” in these settings, then are not neutral, and prioritize the rights of foreign investors over the rights of people, and completely ignore other conceptions of water that exist outside of individualist interpretations. Among the many parties that can claim rights to water, it seems that only foreign investors have a forum to do so.

⁵ See generally, Henok Gabisa, *The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?*, *The Int'l Lawyer* 153 (____).

Critiques of an oversimplified or fictional public/private distinction is not new, even in the world of investor-state arbitration.⁶ Other scholars have noted that the nature of investment law and investor-state disputes unnecessarily bind the host State's ability to regulate in the interest of public policy. Still others note that there are ways to abandon the most unequal BITs through traditional contract doctrine.⁷ However, the literature does not address alternative ways for arbitral tribunals to consider the full range of host State obligations in light of human rights and other treaties.

Water law illuminates the pitfalls of viewing investment contracts as purely private law matters. Water law requires states to honor, or at least consider, multiple obligations and rights holders: private property rights, the right to water and sanitation, environmental rights, and foreign investor rights. Historically and geographically, approaches to water are and have been extremely varied. The 20th century debates over recognizing a human right to water, or primarily conceiving water as an economic good, happened at virtually the same time. Our understanding of how to use our shared water is more important now than ever, as climate change threatens to upset the status quo of water resource management.

Part I discusses how the commodity and human rights approaches to water became dominant. After a brief discussion of alternative approaches to water law, Part I will provide a historical summary of the major approaches: the commodification of water; and the human rights approach. The World Bank adopted the commodity approach, while the human rights regime responded with a late, but clear statement that a human right to water exists as well. The choice, made by international organizations and actors, to view water as an economic good and a human

⁶ See Amr. A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 Harv. Int'l. L. J. 419 (2000).

⁷ See Britta Redwood – Unconscionability in Treaties

right was made over other reasonable views of water, including collective ownership or collective stewardship approaches. These individualistic approaches devalued the concept of water as a shared collective resource, and allowed for widespread private sector participation.

Part II will give an overview of the development of international investment law: first through the history of the post-war investment regime, then through the story of Argentina. It will describe the story of privatization in Argentina, the subsequent failures during the 2001 economic crisis, and arbitrations that followed. Argentina was a relatively early adopter of the privatization model. Part II will focus on the arbitral award in the case *Urbaser v. Argentina*, which became notable for its willingness to consider a human rights related counterclaim in the arbitration process. *Urbaser* was widely celebrated for its openness to noncommercial considerations. But despite the many human rights-oriented discussions throughout the award, ultimately it continues to reflect the prevailing public/private law distinction, and considered the contract and BIT analysis above the human rights considerations. Part III will offer two alternative analyses in dispute resolution, and apply them to the *Urbaser* case to demonstrate the differences. I will present two alternatives. One is an incremental approach that uses private law doctrines to mitigate damages from breaches by the state that are intended to honor other rightsholders. The second is an approach that banishes the public/private law distinction and allows arbitration panels to consider the obligations of host states and investors with the full regulatory framework of operation

I. Approaches to Water Law

“The great River flows from the mountains to the sea. I am the River, the River is me.” -Maori declaration⁸

Humans have had to negotiate over water resources perhaps as long as humans have been negotiating. The earliest recorded conflicts over water date back to at least 2500 AD.⁹ The approaches to living in harmony with bodies of water and with other humans differ greatly. In Maori society, connectivity to nature, a relational view of the world, an ethic of reciprocity, a sacred regard for the whole of creation guides human relations to water.¹⁰ This is true of other indigenous non-Western cultures, as well. In traditional English common law, a limited property ethic guides usage, with traditional nuisance and trespass laws limiting what one can do if it interferes with a neighbor’s enjoyment of the same body.¹¹ These territorial and property-centric approaches to water rights fail outside the bounds of an island nation, where a river may cross many international borders and legal systems before it settles into the ocean. Early Western treaties, too, covered water usage and rights. The document thought to have “ended attempts to impose supranational authority on European states,” the Treaty of Westphalia, also considered the shared usage of the Rhine River.¹²

⁸ Kennedy Warne, *A Voice for Nature*, National Geographic (Apr. 2019) <https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person/>. In New Zealand, the Whanganui River is now considered a legal person. Maori tribes in the area consider the river an ancestor, and a fellow being. *Id.*

⁹ Water Conflict Chronology, The Pacific Institute, <http://www.worldwater.org/conflict/list/>

¹⁰ Warne, *supra* note 8. To reconcile the traditional Maori approach in the Western governmental system, the New Zealand government has granted legal personhood to the Whanganui River, and intends to do the same for mountains and other sacred sites in the future.

¹¹ *A History of Water, Series III, Volume 2: Sovereignty and International Water Law*, xv

¹² *Id.*, at xv. The agreement stipulates that trade and boat passage should be free of interference, and that new impositions of taxes or other fees shall be charged, among other things.

The many approaches that one can take when regulating water, and ensuring cross border cooperation, has led to a “patchwork” approach to water law:

Historical studies have made it clear that there is no grand theory of development that can explain and grasp change and continuity in international water law, and neither national nor international water law has evolved systematically or naturally according to their own methodology or internal laws. Resolution of particular cases in particular man/water relations has often proved to be the ‘tail’ that wags the ‘dog’ of legal principle. Water law as found around the world today has aptly been described as ‘a patchwork of local customs and regulations, national legislation, regional agreements, and global treaties,’ reflecting that water law developed in a high contextual manner mirroring different political systems, religious traditions and economic activities and relations.¹³

This, in addition to any additional treaty or concession obligations, creates a multilayered, sometimes conflicting, set of obligations with regards to water usage.

This Part discusses a range of possible approaches. This will contextualize the debates over human rights and privatization that occurred when the right to water was being crystallized and show that international organizations played a key role in developing both approaches. Subpart 1 addresses the spectrum of substantive approaches from private property rights to an environmental commons or shared resources approach, though not it is not an exhaustive list. These approaches differ in 3 key ways: 1) the extent to which water is conceptualized within individual bodies or territories or as part of a global whole, 2) the purpose of water law as a mechanism for dispute prevention, distribution (equitable or efficient), or ecological

¹³ *Id.* at xxvi

preservation, and 3) water as an economic good or a right. Subpart 2 discusses the history of the commodification of water, and how the theory of water as an economic good came to dominate the end of the 20th century. Subpart 3 reviews the overlapping history of the development, or refinement, of a human right to water and sanitation. The human right paradigm was strengthened in part as a response to the purely economic approach, and thus the imaginations of those campaigning for the right were limited by the discourse. These individualistic approaches to water would ultimately facilitate the incorporation of foreign investment and investment law into water regimes around the world.

A. Substantive approaches

1. Property Rights¹⁴

Within a territorial approach to sovereignty, it seemed natural to treat water as a feature of the land – whoever possessed the land possessed the water within it. The difficulty with this characterization is reflected in early judicial decisions about water rights in English common law. Generally, the *use* of water, not the water itself, was being litigated.¹⁵ Within English common law, water law developed from the medieval conception of water usage as a servitude, a property right that can only be “quasi-possessed,” to being labeled a “qualified property,” like other natural resources, an interest in land subject to the consideration of other property owners and the “first-in-time” rule.¹⁶ The common law settled on a right to reasonable enjoyment

¹⁴ This section, and this whole Part, are fairly Western – more research on non-Western approaches needed.

¹⁵ *The History of Water Law in the Common Law Tradition*, 71 in Volume III. Within this framework, the author makes a distinction between the “claim to [water as] property” and the “claim to the use of a natural resource.” Within English common law “the distinction between a claim to real property and the claim to enjoy a particular use of that property” is important. However, I see both claims as property claims and treat them as such.

¹⁶ *Id.* Blackstone writes “If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet no so as to injure my neighbour’s prior mill, or his meadow; for he hath by the first occupancy acquired a property in the current.” *Id.* At 83. This is known as “prior appropriation;” Apologies for any reader flashbacks to 1L Property.

standard, where any riparian user had a right to reasonable use, an approach also used by the US and France in the eighteenth century.

However, these property approaches to riverways almost always implicated the rights of another state – Great Britain being an island exception. As discussed above, even as Europe began the era of territorial sovereignty, it recognized and dealt with the exception of shared waterways. The property-centric approach also disregards the global distribution of water, and assumes sufficient amounts of water to, at a minimum, support human life, and more realistically, support human thriving and development. While the privatization boom of the 1990s led scholars to call for the “true” pricing of water,¹⁷ this true pricing approach would be criticized by those advocating for a strengthened human right to water. The human rights approach recognizes minimum requirements of water, and may allow for progressively larger amounts of right guaranteed to individuals through international treaties and national constitutions.

2. Public Trust and Common Concern

Public Trust Doctrine is a domestic law concept that recognizes the State as holding in trust specific natural resources for the use of the public.¹⁸ This doctrine is from Roman law and is used in the United States and several countries in Africa, Asia, and Latin America.¹⁹ It has been expanded from primarily protecting navigational uses of water to now including environmental protection.

¹⁷ Discussed *infra* Part _____. The true pricing movement relied on the assumption by the World Bank and other neoliberal thinkers that the poor would pay for price increases when required, therefore allowing incentivization for corporations.

¹⁸ Stephanie Kpenou, *Fresh Water As Common Heritage and a Common Concern of Mankind*, in Research Handbook on Freshwater and International Relations. 2, 5.

¹⁹ *Id.*

The Common Heritage or Concern of Mankind (“Common Concern”) doctrine brings this ethos to include the interest of humanity as a whole, not just to residents of a particular State.²⁰ Treaties that already incorporate this concept are the Moon Treaty, calling for peaceful use of the Moon and exploitation in the interest of all humanity, and the Convention of the Law of the Sea’s articles on the exploration and use of the seabed.²¹

3. Environmental Commons

Critics of the human rights approach to water regulation note that a human rights approach is individualistic, and focuses only on human needs. The human rights standard is often fairly low, and the categorization as an economic and social right allow states to take a low, but progressive, approach to increasing the guaranteed amounts available to residents. The human rights approach does not take other life, including animal life, into account.

To account for the full picture of biodiversity, Karen Bakker and other scholars advocate for a “commons” approach to water rights.²² The critique from a “commons” perspective is that an individual right to water fails to take into account that water is a resource necessary to human, animal, and ecosystem health.²³ Water is also bound by the hydrological cycle, which has consequences across States and across water systems.²⁴ Advocates for a commons-approach argue that water’s unique characteristics, coupled with its centrality to survival, make it particularly unsuited even to an individualistic frameworks.

B. The Road to Commodification

²⁰ *Id.* The author notes that the Common Concern concept entails shared ownership and control, while Common Heritage operates with an understanding of sovereign ownership of resources. *Id.*

²¹ *Id.* At 6.

²² See, e.g., Karen Bakker, *Commons Versus Commodities: Debating the Human Right to Water*, in SULTANA & LOFTUS, *supra* note 61 (discussing the individualistic nature of human rights, and the particular challenges of such an approach with water rights).

²³ Bakker, *supra* note 49 at 440-41.

²⁴ *Id.* See also Chad Staddon, Thomas Appleby & Evadne Grant, “A Right to Water? Geographico-Legal Perspectives,” in SULTANA & LOFTUS *supra* note 78 at 61.

“At least at one time, no matter what the problem and the local conditions were, the solution was always more private sector participation...During my early days at the World Bank...the Director in charge of water was confronted during a meeting by an employee who said that in the country she worked on, the publicly owned and managed water and sewer utilities were doing a good job, and the private sector participation was not needed there. The Director coldly replied that if she did not like privatization, she could look for a job elsewhere.”

Manuel Schiffler, WATER, POLITICS, AND MONEY.

With rising populations and increasing industrial use, the need for greater water access, especially in the Global South, spurred research and debate in the second half of the twentieth century. As the post-World War II global order emerged, different ideologies of water access were considered. However, over time, a consensus developed toward market solutions; the human right to water would not be settled until, arguably, 2005.

This consensus became increasingly popular through the 1970s and 1980s, alongside other laissez-faire economic policies. This acceptance was facilitated by the major international financial institutions, including the International Monetary Fund (IMF), the World Bank, and the International Finance Corporation (IFC). Water privatization became a requirement of any World Bank loans in the 1990s, and water companies bullishly sought to enter the public utilities space of developing nations.

This uptick in privatization efforts led to a number of high-profile failures of multinational corporations and governments to provide water access, ensure water quality, and keep prices reasonable to the average citizen. The subsequent backlash would mobilize a coalition of activists to call for the explicit recognition of the human right to water. While

activists were, of course, successful, and privatization efforts waned in the 2000s, the market solutions were not roundly rejected. The current iteration of public-private partnership preserves the basic market logic of the 1990s privatization approaches without providing evidence that they help states fulfill their human rights obligations to the right to water.

This subpart provides a narrative of how market ideologies “won” the debates over water policy and regulation. Multinational corporations (MNCs) benefitted from international law, through hard and soft law, and were able to enter into high-profit, large-scale water markets during the 1990s. This era established the rights that MNCs would later be able to claim through arbitration mechanisms, and the obligations of states to accommodate them under threat of loss of current and future financial support.

After World War II, the international world order reorganized to accommodate the lessons learned from the first half of the twentieth century.²⁵ The global community came together to understand the role of the newly minted United Nations, the effects of decolonization, and the adoption of human rights treaties, among other massive changes. The focus on water emerged in the latter half of the twentieth century, as the need for global mechanisms to address poor water quality and access became clear. During this period, two competing perceptions emerged: 1) water as an economic good, and 2) water as a human right.

At various global meetings, participants oscillated between these two conceptions.²⁶ A recognized need for “equitable water use” came in 1972, and the first UN Water Conference in 1977 recognized a right to “access to drinking water in quantities and of quality equal to their

²⁵ See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2007).

²⁶ Salman M. A. Salman & Siobhan McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions*, THE WORLD BANK (2004).

basic needs.”²⁷ The first mention of a right to water in a binding human rights treaty came around this time as well, in 1979. The Mar del Plata Water Conference of 1977 stated the “all people have the *right* to have access to water,” while the Rio Conference in 1992 prioritized satisfaction of basic needs and did not mention a right to water.²⁸

Also in 1992, one conference sought to state definitively that water, though it may be a special case, is an economic good and should be treated as such.²⁹ The World Meteorological Organization, on behalf of the United Nations Administrative Committee on Co-ordination Inter-Secretariat Group for Water Resources, convened the International Conference on Water and the Environment (the Dublin Conference).³⁰ The conference produced four pillars, called The Dublin Statement, around the use of water to “reverse the present trends of overconsumptions, pollutions, and rising threats” through “concerted action: 1) freshwater is a finite and valuable resource, 2) water development must be participatory, 3) women play a central role in the safeguarding of water, and 4) “water has an economic value in all its competing uses and should be recognized as an economic good.”³¹ Within principle four, the document notes:

[I]t is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price. Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of

²⁷ Gupta, *supra* note 17 at 296.

²⁸ Id. at 5 (emphasis added). The authors also briefly discuss the World Water Forums of 1997, 2000, and 2003.

²⁹ International Conference on Water and the Environment: Development Issues for the 21st Century. The Dublin Statement and Report of the Conference vii. World Meteorological Association. Jan. 31, 1992 [hereinafter Dublin Principles] http://docs.watsan.net/Scanned_PDF_Files/Class_Code_7_Conference/71-ICWE92-9739.pdf

³⁰ International Conference on Water and the Environment: Development Issues for the 21st Century. The Dublin Statement and Report of the Conference vii. World Meteorological Association. Jan. 31, 1992. http://docs.watsan.net/Scanned_PDF_Files/Class_Code_7_Conference/71-ICWE92-9739.pdf

³¹ Id.

achieving efficient and equitable use, and of encouraging conservation and protection of water resources.³²

The conference statement went on to outline an action agenda that called for the alleviation of poverty and disease, water conservation, sustainable urban development, and the resolution of water conflicts.³³ Notably, the conference also called for “provision of an enabling environment in terms of institutional and legal arrangements,” and “substantial investment” to achieve the goals of sustainable development outlined in the Dublin Statement.³⁴ The Dublin Statement demonstrate the initial willingness of States to invoke market principles to solve a human rights problem. In fact, in the eyes of the participants of the Dublin Conference, the unwillingness to view water as an economic good led to the mismanagement and waste of water resources and produced the inequality that privatization could help fix.

By 2001, ninety-three countries had “private sector involvement” in their water systems.³⁵ This shift ultimately made “more than 460 million people dependent upon global firms for their water supply.”³⁶ This increase in water privatization projects assumed such efforts would lead to many of the outcome envisioned at the Dublin Conference.

The Dublin Conference marked the emergence of consensus in favor of treating water as a private good, but a confluence of factors led to the shift to large-scale promotion of water privatization. The principles of privatization of a previously public good emerged through the Washington consensus, which favored the logic of market efficiency as a solution to global

³² *Id.*

³³ *Id.* at 5-6.

³⁴ *Id.* at 7.

³⁵ Wills, *supra* note 18.

³⁶ *Id.*

problems.³⁷ Elver describes this shift, supported by international business and trade law, as one that created a regulatory framework that “legally protects the rights of corporations involved in the water sector over and above those of the majority of the population.”³⁸ The project of privatization was enforced by intergovernmental organizations. The World Bank, from 1998 to 2003 and 2004 to 2008, required the conversion of public system to private as a condition for the majority of loans it disbursed related to water projects.³⁹ The World Bank also called for market solutions to increasing water efficiency in reports in 1993 and 2000.⁴⁰

Yet, by 2004, the interest in privatization waned, especially in developing countries.⁴¹ Privatization failed to deliver on several key metrics.⁴² First, the main funding for services was from individual service fees and public subsidies, and therefore failed to generate new sources of capital.⁴³ Companies increased service fees substantially, leaving the poorest without access.⁴⁴ The services were no more efficient than public services, and often resulted in deterioration of quality.⁴⁵ Finally, privatization reduced accountability to the public, often to the detriment of the contracting State:

“This accountability deficit is exacerbated by the power disparity between states in the Global South and powerful TNCs [transnational corporations]. While the latter often do

³⁷ Hilal Elver, *The Emerging Global Freshwater Crisis and the Privatization of Global Leadership*, in *GLOBAL CRISES AND THE CRISIS OF GLOBAL LEADERSHIP* (ed. Stephen Gill 2012), <https://doi.org/10.1017/CBO9781139046596/>.

³⁸ *Id.*

³⁹ *Id.* See also Naren Prasad, *Privatisation of Water: A Historical Perspective*, 3 *LAW, ENVIRONMENT AND DEVELOPMENT J.* 219, 230 (2007)

⁴⁰ *Id.* at 30.

⁴¹ Cassey Lee, *Privatization, Water Access and Affordability: Evidence from Malaysian Household Expenditure Data*, 28 *ECONOMIC MODELLING* 2121, 2122 (2011).

⁴² *But see* Tanya Kapoor, note, *Is Successful Water Privatization a Pipe Dream?: An Analysis of Three Global Case Studies*, 40 *YALE J. OF INT'L L.* 157, 178 (2015) (analyzing three major privatization projects, Kapoor considers one a success, and details potential solutions for future water projects).

⁴³ Wills, *supra* note 17 at 200.

⁴⁴ *Id.* at 201. See also Miles, *supra* note 142 (discussing correlation between privatization and price increases).

⁴⁵ *Id.*

not fulfill the terms of the concessions, they may seek compensation for the termination or modification of contracts which can be prohibitively expensive for many poorer countries.”⁴⁶

By the early 2000s, the experiment of full privatization of State water utilities was considered a failure.⁴⁷ The World Bank itself released an evaluation of privatization projects in which it wrote “getting the private sector to focus on the alleviation of poverty and to design tariffs in a way that does not discriminate against the poor has proved hard to achieve in practice.”⁴⁸ The private sector, initially thought to attract more infrastructure investment, had failed to do so.⁴⁹ The private sector became unwilling to take on the large risks associated with water projects.⁵⁰ However, instead of withdrawing from private investment completely, the World Bank shifted to promoting a new model of private investment: public private partnerships.⁵¹

The World Bank continues to finance public-private partnerships.⁵² Private sector stakeholders agree that the full water sector privatization projects taken on in the 1990s were “not a magic formula” to address water access.⁵³ However, private water firms are still a key player in the sector through partial contracts to operate parts of water utilities. While the number of new public-private partnership (PPP) contracts has decreased, the population served by private water operators in developing and emerging countries has steadily increased.⁵⁴ Eighty-four

⁴⁶ *Id.*

⁴⁷ See Elver, *supra* note 21.

⁴⁸ World Bank, *Bridging Troubled Waters: Assessing the Water Resources Strategy* 25 (2002), quoted in Prasad, *supra* note 30 at 232.

⁴⁹ Prasad, *supra* note 81 at 232.

⁵⁰ *Id.*

⁵¹ *Id.* at 232-33.

⁵² Phillipe Marin, *Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries*, 8 WORLD BANK: TRENDS AND POLICY OPTIONS 2 (2009), <https://openknowledge.worldbank.org/handle/10986/2703/>.

⁵³ *Id.* at 10.

⁵⁴ Marin, *supra* note 38 at 2.

percent of contracts of public-private partnerships awarded since 1990 were still active by 2007, and only 9% were terminated early.⁵⁵ New PPPs are more likely to be localized, either geographically or technically.⁵⁶ Sometimes the contracts are given to individual cities or neighborhoods, or address some operational need without full delegation of management of the system.⁵⁷ Yet, free market ideology remains the foundation of the new partnerships.⁵⁸

The World Bank promotion of PPPs ignores that the risks and inequities that arose from full privatization projects largely remain the same with PPPs.⁵⁹ The World Bank still promotes PPPs as allowing “better allocation of risk between public and private entities.”⁶⁰ Yet, governments and taxpayers still disproportionately bear the risks of such partnerships, while private investors collect a greater share of the profit.⁶¹ At the same time, costs of PPPs are approximately 40% higher than projects “financed by government borrowing.”⁶² While PPPs are represented as a more effective alternative to the failed privatization efforts of the 1990s, they appear to be nothing more than a rebranding of those same efforts.

States ultimately bear the obligation to ensure that water is available, clean, and affordable. Privatization was sold to States as a means of meeting these obligations with the help of market forces. However, the lessons of privatization efforts large and small have demonstrated

⁵⁵ *Id.* Marin attributes these cancellations to geographic concerns: “Most cancellations were in Sub-Saharan Africa, a challenging region for reform, and in Latin America, among concession schemes.” He does not, however, define “challenging region for reform.”

⁵⁶ *Id.* at 10.

⁵⁷ *Id.*

⁵⁸ Prasad, *supra* note 81 at 233.

⁵⁹ See Maria Jose Romero, “Public-Private Partnerships Don’t Work. It’s Time For the World Bank to Take Action,” Devex (Apr. 19, 2018) (describing a campaign of 80+ civil society organizations that signed a letter urging the World Bank to change their PPP strategy) <https://www.devex.com/news/opinion-public-private-partnerships-don-t-work-it-s-time-for-the-world-bank-to-take-action-92585>; Foley Hoag, “Summary Comments on the World Bank Group’s 2017 Guidance on PPP Contractual Provisions,” Heinrich Boll Stiftung Blog (Sept. 15, 2017).

⁶⁰ The World Bank: Infrastructure and Public Private Partnerships. <https://www.worldbank.org/en/topic/publicprivatepartnerships/overview>

⁶¹ Foley Hoag *supra* note 50.

⁶² Romero, *supra* note 51 (quoting UK National Audit Office study of the Private Finance Initiative, <https://www.nao.org.uk/wp-content/uploads/2018/01/PFI-and-PF2.pdf>).

mixed results, often leading to sharp increases in prices, and no more access for rural areas (where urban dwellers generally were always more likely to enjoy access to water).⁶³ Though the data on efficiency is mixed, it may be, on balance, that efficiency is no higher with PPPs than with State run enterprises.⁶⁴ Given the concerns around private sector participation in interacting with human rights, and especially around concerns that water privatization can lead to or exacerbate disputes, solutions beyond PPPs are required.

PPPs are just the latest iteration of international law and international organizations' attempt to organize the global water supply. In the debates over the commodification of water occasionally mentioned a right to water, or other forms of equitable distribution. A consensus around a human right to water did not emerge, surprisingly, until the early 2000s.

C. Emergence of the Human Rights Water Regime

The right to water was not an explicit right for the first three decades after the establishment of the UN system. The Universal Declaration of Human Rights (UDHR), the first human rights document adopted by the United Nations General Assembly, did not include a right to water. The UDHR, ratified in 1948, is not binding on States, but it serves as an important articulation of human rights commitments that is considered by some to be a source of customary international law. It could be the case that the UDHR framers considered the right to water so obvious and fundamental that they assumed it was unnecessary to include, but still, the right to water was contested in the decades after the UDHR was passed. The right to water as a prerequisite to other rights is sometimes read from Article 2 UDHR: the right to life.

⁶³ See Miles, *supra* note 142.

⁶⁴ Naren Prasad, *Privatisation Results: Private Sector Participation in Water Services After 15 Years*, DEVELOPMENT POLICY REVIEW 669, 673 (2006).

Two binding human rights treaties that were drafted and ratified after the UDHR do have explicit discussions of water rights, but in limited circumstances. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) includes a discussion of the right to water for women in rural areas. The treaty calls for State parties to “take into account the particular problems faced by rural women...and shall ensure to such women the right...to enjoy adequate living conditions, particularly in relation to...water supply.” The Convention on the Rights of the Child (CRC) also calls on States to “recognize the right of the child to the enjoyment of the highest attainable standard of health...[and] shall take appropriate measures...to combat disease and malnutrition, including...through the provision of adequate nutritious foods and clean drinking water...” These treaties, however, obliged States to provide water to groups based on their protected status.

Still, no general right to water was recognized in the 20th century. Notably, there is no mention of access to water in the documents that comprise the International Bill of Rights: the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). However, the treaty body of ICESCR, the Committee on Economic, Social, and Cultural Rights (CESCR) would ultimately provide guidance that a right to water, and associated State obligations, arise from ICESCR. In part because of the increased attention to water in the 1990s, and the emergence of competing ideologies, a coalition of NGOs came together to advocate for a human right to water. The coalition determined the best way to move forward would be to advocate the CESCR to release a general comment outlining States’ obligations with regards to water. General comments are writings from CESCR that aim to provide an authoritative explanation of commitments in

ICESCR. They are designed to provide additional interpretive clarity concerning the obligations taken by States when they ratify ICESCR.

CESCR released GC15 in 2002. The GC outlines the legal basis of the right to water as emerging through ICESCR, and clarifies that the rights discussed within are a core obligation of ICESCR. The GC identifies three legal obligations of States: 1) an obligation to refrain from interference with the enjoyment of the right, 2) an obligation to protect the right to water by preventing third party interference, and 3) an obligation to fulfil the right to water by adopting necessary measures for the full realization of the right. It also encourages cooperation with nonstate actors, like UN agencies and NGOs, as being important partners for States to assess their water policies and plan new programs. Notably, privatization was the most controversial topic considered by CESCR, and therefore the GC avoids taking a clear stance. It does, however, state the obligation of water affordability, and stated that “[a]ny payment for water services has to be based on the principle of equity” regardless of public or private ownership.

Though a right to water can appear to be a commonsense extension of other rights in ICESCR (eg; the right to life, the right to food, the right to health), the use of a general comment as a legal tool to legitimize a right to water was an innovation that has since been contested. Some criticized GC 15 as an overreach of CESCR, though many scholars also praised the innovation. Additionally, some States opposed the creation of a human right to water. Canada argued that governments had a duty to provide access to water and sanitation, but this duty did not translate to a human right. After the release of GC15, the United States also submitted views that the US does not see a legal basis to hold that there is a human right to water.

In 2008, the UN Human Rights Council appointed an Independent Expert on rights and obligations related to access of safe drinking water. In 2010, Bolivia, which had been the site of

struggles over water access, introduced a General Assembly (GA) resolution recognizing the human right to water and sanitation. The resolution also called for aid, especially to developing countries, in realizing the right to safe, clean, accessible, and affordable drinking water and sanitation. Despite the forty-one abstentions, the passage of Resolution 64/292 demonstrates an initial consensus around the existence of a right to water. Although forty-one countries abstained, the resolution ultimately passed, and the record suggests that the concerns were primarily procedural; the abstaining countries did not want to vote on a GA resolution prior to the completion of the work of the Independent Expert. The resolution also did not tie the right to water to existing human right instruments like ICESCR.

Later that year, the Human Rights Council (HRC) adopted a resolution affirming the human right to safe drinking water and sanitation with no objections. The HRC resolution differs from the UNGA resolution in that it specifically ties the right to water to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity. The grounding of a right to water in rights recognized by ICESCR, coupled with an affirmation that the right to water is not incompatible with private sector participation, the HRC resolution seems to have sufficiently addressed the concerns of countries that abstained from the UNGA resolution vote. In 2011, the HRC also officially created a Special Rapporteur on the Right to Water.

The establishment of the human right to water was a victory for the coalition of NGOs, who were initially motivated in part by the expansion of water privatization in the 1990s. However, the issue of whether privatization is compatible with a human right to water remains contested. The UN Special Rapporteur on the Human Right to Safe Drinking Water said in 2009 that the privatization of water and a human right to water are distinct issues: “Human rights are

neutral as to economic models in general, and models of service provision more specifically.”⁶⁵ Likewise, Western market governments have “consistently and decisively rejected” arguments that states alone must be the service-providers that make economic and social rights a reality.⁶⁶

Western countries cited concerns about the compatibility of the human rights framework with the ability to privatize during the UNGA resolution vote, and passed the narrower HRC resolution in part because it did not explicitly deny such compatibility. Water privatization can be seen as compatible with a human right to water, where the human rights framework mitigates some of the most harmful effects while not precluding private companies from assisting States in running water utilities. Though private water contractors often do not see themselves as obliged to meet human rights standards, the existence of a standard would allow groups to address inequities in water access regardless of the ability of an individual to pay. A legal framework of enforceable rights requires governments to prioritize services and can provide residents with a legal remedy. Contracts for privatization or public-private partnerships can be analyzed through a human rights framework to ensure that States do not taking on unequitable risks (and associated costs) and pass them on to the consumer.

Ultimately, the HRC resolution leaves open the possibility of privatization, but the central responsibility for ensuring that water rights obligations are met remain with the State. Many have criticized the inclusion of privatized means of achieving the human right to water. Though in the a private companies can play a role in ensuring countries expand water access, data from privatization efforts does not show increases in water access overall. The former Special Rapporteur on the human rights to safe drinking water, Catarina de Albuquerque, called for recognition of the role of private sector participants, with “special safeguards and

⁶⁵ Murthy, *supra* note 46 at 118.

⁶⁶ *Id.* at 119.

supplementary social policies” to ensure inclusion of those who cannot pay. The implementation of those safeguards would depend on their prioritization over the commercial rights of those private sector participants. However, international investment law took center stage, and there would be few ways for tribunals to consider anything but commercial rights. Part II will show that, as with the development of water law, international investment law did not emerge as the neutral, isolated contract law regime. Instead, international organizations made the choice to prioritize contracts and business law over other regimes.

II. Investors’ Rights, State Obligations: Privatization and the Argentina Case

A. The Rise of Investment Arbitration

Water privatization and partial-privatization flourished with the aid of the World Bank and other international institutions. The final puzzle piece came in the second half of the twentieth century with the rise of, and preference for, contract claims in investor state disputes. States and corporations struggled to manage competing goals. States, on the one hand, sought to enjoy a strong definition of sovereignty, and continue to be the ultimate decisionmakers with regards to commercial activity occurring within their borders. To support this, States preferred the venue of international organizations and tribunals. On the other hand, corporations sought to protect their interests and investments without fear of uncompensated expropriation and other monetary losses. Arbitration and contract-based dispute resolution was the preference of MNCs.⁶⁷

⁶⁷ See Ching-Leng Lim, *International Investment Law and Arbitration, Commentary, Awards and Other Materials* (20__) 59.

The recently decolonized nations in particular were interested in redefining the world economic order. Two United Nations General Assembly (UNGA) resolutions, one in 1962 and one in 1974. In 1962, the UNGA sought to clarify the law of foreign investment:

Nationalization, expropriation or requisitioning shall be based rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.
...

Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.⁶⁸

This attempt to restate the international law of investments came after the U.S. decision in *Banco Nacional de Cuba v. Sabbatino*⁶⁹, which held that the U.S. was not able to pass judgment on the actions of another government.⁷⁰ In response, the above resolution was adopted by the UNGA. The resolution reaffirms that while sovereignty is always paramount, a sovereign nation may enter into contracts “in good faith.” This resolution is most characteristic of foreign direct investments, concessions, and arbitration today.

⁶⁸ UN General Assembly Resolution 1803 (XVII), 1194th plenary meeting, 14 December 1962 ...

⁶⁹ 376 US 398. (1964).

⁷⁰ This case comes under the Act of State Doctrine. Later, US courts would benefit from the legislative Foreign Sovereign Immunities Act (56-57).

Yet, just over ten years later, another view emerged at the UNGA. The newly decolonized nations sought to use their new political power to equalize the economic playing field as well. This was part of an effort to create a New International Economic Order (“NIEO”). After independence, decolonized states sought to nullify concession agreements that were made under colonial rule.⁷¹ The states, using their large numbers, used the UNGA to “reaffirm[] its conviction of the urgent need to establish or improve norms of universal application for the development of international economic relations on a just and equitable basis.”⁷² One of the first campaigns was to establish the doctrine of permanent sovereignty over natural resources (PSNR). Throughout colonization, Western trading and mining companies executed contracts for the extraction of mineral and other resources within the colony. These concessions were often “obtained through direct coercion or else by ‘agreements’ which, while possessing a legal form, were hardly comprehensible to the natives who were ostensibly signatories to them.”⁷³ The decolonized nations, in an effort to assert sovereignty over their own resources, sought to nullify these contracts under several legal theories under contract and international law.⁷⁴ Regarding the issue of expropriation and dispute resolution, the body continues:

Each State has the right: ... (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all

⁷¹ See, generally, Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2007) 196-244.

⁷² Resolution 3281

⁷³ See Anghie [[two footnotes above]]

⁷⁴ *Id.*

States concerned that other peaceful means be sought on the basis of the sovereign means.⁷⁵

Decolonized states sought to move judgment about the validity of concession to domestic courts, where domestic and international law considerations could be included in the decision.

The West tended to disagree:

First, it argued in effect that the only sovereignty enjoyed by the Third World was the sovereignty provided by European international law; this international law legitimized conquest and dispossession, as a result of which no remedy was available to the victims. Secondly, the West argued that the new states were bound by established international law, and that the Third World state's control over its natural resources had to comply with the doctrines of state succession and acquired rights which stipulate that a new state must respect the obligations undertaken by a predecessor state...[f]inally, the former colonial powers did not dispute the right of a sovereign to nationalize property per se. Rather, they argued that nationalization was legitimate provided that a number of conditions were met, the most significant of these being payment of compensation according to internationally determined standards.⁷⁶

Arbitration played a key role in the failure of NIEO being established as doctrine in the ensuing decades. In *Texaco v. Libya*, Libya tried and failed to assert the NIEO UNGA resolution as customary law. The arbitrators reject the position, and instead felt that Resolution 1803 instead was a better statement of the law of international investment.⁷⁷ *Texaco v. Libya* marked the most

⁷⁵ UN General Assembly Resolution 3281(XXIX), Charter of Economic Rights and Duties of States, 2315th plenary meeting, 12 December 1974 Article 2

⁷⁶ Anghie 213-14

⁷⁷ Lim, IA Textbook, 56-61.

significant rebuke of an attempted nationalization of a resource industry to that point.⁷⁸ Perhaps to ensure that treaties would bear the burden of analysis moving forward, bilateral investment treaties (BITs) spread widely, beginning with the 1959 Pakistan-Germany BIT.⁷⁹ These agreements would become the backbone of the modern investment arbitration process: treaty interpretation coupled with contract interpretation.⁸⁰

This proliferation was in part a requirement placed by Western nations and institutions such as the World Bank. Since the rebuttal of PSNR, decolonized nations did not have the resources to develop economically. International economic development required the assistance of Western nations, which required arbitration clauses in bilateral investment treaties. World Bank rule-of-law requirements generally require arbitration clauses.⁸¹ Foreign direct investment “will not migrate to the South unless the luggage includes an arbitration clause.”⁸²

The inauspicious beginnings of the economic order for Global South countries spurred many critiques. However, most relevant to water rights is the right for a state to regulate for the public policy after entering into a concession agreement. Shalakany summarizes the assumptions of investment arbitration:

It is invested in an apolitical representation of the private sphere, conceived by liberal political philosophy as a space where people coordinate their economic interests away from the coercive powers of the state. Such a formulation necessarily implies the

⁷⁸ For more, Lim, Shalakany

⁷⁹ Lim 68

⁸⁰ Id.

⁸¹ Shalakany 421

⁸² Id at 422

following perspective: Arbitration is about the coming together of equals to resolve contract law questions arising from disputes over property rights.⁸³

However, this potentially apolitical process reflects the philosophical consensus of the institutions:

Both theory and practice are premised on a similar set of constitutive notions about the relationship between law and development – in particular, their mutual investment in a public/private distinction that generally hold state regulatory interventions in the market as both normatively undesirable (under neoliberal theories of development) and legally unacceptable (as evidenced by international arbitration awards).⁸⁴

Ultimately, the stakes of allowing such bias “exert[] a controlling effect on the imagination of its practitioners, and delimits their normative visions on what is legally permissible.”⁸⁵

This distinction, between public and private, interacts in a peculiar way with the distinction between national and international. The private enterprise expectations that are protected, not only by the contract, but by the willingness of arbitration panels to prioritize the contract language over the public policy justifications of any modifications. This puts the public in a subordinate position to the private enterprise in extreme cases. Then, the domestic laws that would have made nationalization of Libyan oil reserves legal are considered subordinate to international laws. But what if international law requires the host state to regulate the public policy? And if that law changes in the midst of a concession agreement, what room is there to regulate in the interest of the public at the potential detriment of the private enterprise?

⁸³ Shalakany 424-25

⁸⁴ Shalakany 425.

⁸⁵ Shalakany 424.

A common refrain in this debate is that all treaty-based regimes, and all arbitration, is consent based. The consent of the host state is required to enter into the contract with a private entity just as consent would be required for the host state to enter into new agreements in the midst of a concession. There are three concerns in rebuttal. The first is the definition of consent implicit. As discussed in Subpart A, the concessions are often signed under pressure, at best or under duress at worst.⁸⁶ Liberalization of economic policies are required before the International Monetary Fund will allow loans, which can be at the cost of social and economic rights.⁸⁷ Second, this historical view is ignored in order to promote the technocratic model of contract concession analysis and arbitration. Power dynamics have always been relevant in international politics, but it must be recognized as a choice that investor expectations are placed at a higher level than, as in the case in some water contract, the right to water of the citizens of host state. Third, any other obligations of the host state, including to its residents, are considered static, as are the obligations to the investors. However, as we will see with the right to water, the content of the right, as it is clarified, can change and require new regulations.

Ultimately, this view of an international investment is elevated to appear universal:

Once elevated, those values are then stabilised in that ‘universal’ position through a dynamic that constantly recharacterises and displaces issues from the political to the economic institutions of international law, or vice versa.⁸⁸

⁸⁶ See also Britta Redwood, *When Some Are More Equal Than Others: Unconscionability Doctrine in the Treaty Context*, 36 Berkeley J. Int'l L. 396 (2018). The paper opens with a scene of Pakistani officials realizing they were bound by concessions they had no notice and no record of.

⁸⁷ Alexander Kentikelenis et al, *The International Monetary Fund and the Ebola Outbreak*, The Lancet Global Health (Dec. 21, 2014).

⁸⁸ Sundhya Pahuja, *Decolonizing International Law, Development, Economic Growth and the Politics of Universality* 104.

B. A History of Water Concessions in Argentina

The water concessions signed by Argentina and other South American countries in the early 1990s provide a telling case study on the interaction between policy regulation and foreign investment agreements. The story of water concessions tracks the rise of Thatcher/Reaganist development policies in the 90s, the global financial crisis of the late 90s and early 2000s, and the bolstering of the right to water in the mid 2000s. The historical narrative in this subpart draws from the facts of *Urbaser v. Argentina*, as well as other sources on the history of water concessions in Argentina, which are not always aligned.

In Argentina in 1989, Argentina elected a new President, President Menem. He embarked a campaign to privatize many public utilities and services in Argentina, in an effort to cut costs and increase service quality. He treaded carefully in the beginning, starting with the privatization of telecommunications, electricity, and gas. The success in these departments emboldened the administration to try privatization in other departments as well. In Buenos Aires, the water utility had a number of problems: the water pressure was low throughout the city, and the water quality was very low in parts of the city. Sewage was not treated, and so it polluted the rivers, and the sewers overflowed during rainstorms. Finally, water was abundant such that those who had tap connections used as much as taps in the US per capita, but the access was not even, and the poor in particular had trouble accessing water.

At the same time, water companies in Europe were exploring the new market of public utilities. Prime Minister Thatcher of the UK sold UK water utility assets in full in 1989,⁸⁹ and British and French water utility companies in particular were interested in expanding globally.⁹⁰

⁸⁹ Chris Edwards, *Margaret Thatcher's Privatization Legacy*, 37 *Cato J.* 89, 97 (2017).

⁹⁰ Schiffler

With President Menem's experiments in privatization, they saw their chance. Buenos Aires released a call for bids in 1991.

The concession design would not be a UK-style sale of assets. Instead, it was a relatively low-growth model designed to bring in private capital without selling assets. The hopes of the privatization movement was that the increase in efficiency would not only overcome the higher cost of borrowing for private enterprises but lead to profit. Both Argentina and the investors were willing to take on what they considered to be a low risk. In fact, there was a "strong expectation" that household costs and water tariffs would be *lower* after privatization.

All parties seemed to be willing to make the deal work. The government masked some of the true costs by quietly increasing water tariffs in the years before the concession. But, the increases tracked the inflation at the time. The government then approved a large "infrastructure fee" for all newly connected customers. This was designed to incentivize new connections, but ultimately obscured the cost of the full concession, which would lead to a higher water bill for end user even if water tariffs did not increase. Furthermore, in 1991, the government pegged the Argentine peso to the US dollar at a 1:1 exchange rate. This ended hyperinflation and increased confidence of foreign lenders to invest with Argentine companies whose revenues were in pesos. Finally, the government agreed not to transfer the debt to the new utility, allowing for a lower bid.

Even without these administrative changes, the bidding process was difficult because water assets are underground, and it is difficult to check the quality to determine the level of investment needed. The targets were ambitious: it would require at least a \$4 billion investment over the life of the concession, with specific high targets for water quality, continuity, and

pressure. But water companies were as eager as President Menem to make water privatization work.

“If Alan Greenspan had been in Argentina at the time, he might have said, in typical understatement, that there was ‘irrational exuberance’ in the air.”⁹¹ But the bid with the lowest proposed tariffs won, signalling “a success for a development model that bet on liberalization, globalization, and privatization: the private sector, so it was said, was able to provide water at significantly lower tariffs than the public sector because of its greater efficiency.”⁹² It seemed like a great risk for the water companies, one that they might have expected to be able to renegotiate, and run primarily on debt.⁹³

Aguas Argentina was the name given to the conglomerate that would run the concession, though it is made up of primarily European companies. While the project had a good start, before long, a renegotiation was required. Argentina requested acceleration of certain investments in exchange for a 13.5% tariff increase, and increases in infrastructure fees from 36%-48%. However, the consortium had a difficult time recouping costs, because people were not interested in paying the connection fees. In 1996, protests erupted on the streets, where people blocked the roads to the capital.

Finally, from 1999-2001, with the downturn of the Argentine economy, unemployment rose and the IMF imposed austerity measures.⁹⁴ In December 2001, the government defaulted on its external debt, and within a month, the fixed US dollar to peso exchange rate was abandoned, causing the peso to lose 70% of its value. Aguas Argentina requested that the Central Bank

⁹¹ Schiffler

⁹² Schiffler

⁹³ Schiffler. By some estimates, between 1993 and 2001, the companies only spent 2.6% of their own funds, otherwise preferring to remain highly leveraged.

⁹⁴ Schiffler 38

continue to provide US dollars at the old exchange rate so the company could service its many debts, which was a requirement under the renegotiation. The government refused. Then, Aguas Argentina asked for a 42% increase in tariffs. The government refused that as well. The company then defaulted on its loans.

C. Key Issues in the Arbitration

The 2007 arbitration proceedings did not present a clear-cut case of blame. Both parties, the government of Argentina and the corporation, breached various duties in the original concession, first, or second negotiation. The corporation's primary arguments were that they could not meet their obligations because of delays and obstruction by the government. They argued that 1) Argentina violated the fair and equitable treatment principle, 2) that the actions taken by the government were discriminatory, and 3) Argentina expropriated their property. The government claimed necessity in defense of their emergency measures, and offered that the company was not meeting their requirements regardless of the emergency measures taken.

The novel element of the *Urbaser* arbitration, compared with the many other disputes Argentina defended after 2001, is that Argentina raised a counterclaim, arguing that the consortium took on obligations which "gave rise to *bona fide* expectations that those investments would indeed be made and would make it possible to guarantee, in the area in question, the basic human right to water and sanitation."⁹⁵ By failing to make these investments, the corporation violated the contract terms and "basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty."⁹⁶ Argentina argued that the basis of the consortium's obligation come from "international rules that include specific obligations having to do with drinking water," and the bilateral investment treaty (BIT) must be considered

⁹⁵ *Urbaser* 1156

⁹⁶ *Id.*

alongside all “relevant rights and obligations of the Argentine Republic under international law.”⁹⁷

Narrowly, through language in the BIT, the panel concluded that there was jurisdiction over the human rights claim. In the “classical model” BIT, the host State has no recourse to make a counterclaim. The Tribunal noted that the language in the Spain-Argentina BIT in question instead read that any “party” could bring a claim.

On the merits, the Tribunal framed the issue initially as whether investment law existed in “isolation, fully independent from other sources of international law that might provide for rights the host State would be entitled to invoke and to claim before an international arbitral tribunal.”⁹⁸ The Tribunal concludes that the reference in the BIT to “general principles of international law... would be meaningless if the position would be retained that the BIT is to be construed as an isolated set of rules of international law for the sole purpose of protecting investments through rights exclusively granted to investors.”⁹⁹ Therefore, the Tribunal allowed for a broader view of which laws could apply to the concession in question.

The Tribunal would not go so far as to state that the corporations had obligations under human rights law, but they were “reluctant” to share the position that “guaranteeing the human right to water is a duty that may be born solely by the State.”¹⁰⁰ To bridge this gap, the Tribunal turned away from public law and to private contract law – “the investor’s obligation to perform has as its source domestic law; it does not find its legal ground in general international law.”¹⁰¹ So, while the Tribunal agrees that the consortium’s concession investments were designed to

⁹⁷ *Id.* At 1158.

⁹⁸ 1186.

⁹⁹ 1189

¹⁰⁰ 1193

¹⁰¹ 1210. Here, the Tribunal goes on to note that this is different in the case of negative rights, in cases where there is a prohibition to commit acts. *Id.* The panel does not say why they differentiate, however.

contribute to the “enforcement of the population’s right to water,” the relevance alone does not place human rights obligations on to the consortium.¹⁰²

Finally, the Tribunal agrees that it was the State’s “responsibility to exercise its authority over the Concessionaire in such a way that the population’s basic right for water and sanitation was ensured and preserved.”¹⁰³ The panelists do not state how the State would do this, especially if the State’s human rights obligations interfered with their obligation to the consortium.

Despite the award’s lengthy conversation about the nature of human rights law and the necessity to consider human rights alongside investor rights, they ultimately sidestepped any major reform by boiling down the counterclaim to a narrow question: whether the corporation itself held the obligation of providing a human right to water. The Tribunal, in the rest of the opinion, however, did consider actions by the government in light of the rights they were trying to protect: “

The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not. Only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case.¹⁰⁴

Unfortunately, the Tribunal, after this dismissal, did not comment further on that obligation, or consider why the linguistics gymnastics would make a difference. It does, in any case, leave the door open as precedent in other cases.

The Tribunal’s failure to broaden the analysis reflects the overwhelming inclination of panels to resort to private law analysis, even when the situation calls for broader analysis. While

¹⁰² 1212

¹⁰³ 1213

¹⁰⁴ 1210

the isolated analysis tends to be favored in arbitration, there are alternatives that allow tribunals to consider the full framework of an investor's and State's rights and obligations with respect to international law.

Part III. Alternative Legal Frameworks and Interpretations

This Part discusses alternatives to the “four corners” model of investment arbitration taken to date. The Part proceeds from contract interpretation alternatives, which are the most closely related to the private law approaches currently prioritized in international investment law. However, the use of contract approaches has its limitations, and in many cases does not lead to a coherent set of results.¹⁰⁵ Instead, this Paper argues that a broader set of values need to be incorporated into arbitral decisions, such that the full set of obligations of the host state are considered as a whole. Rather than ignoring investors' rights, this approach would consider the rights of the investors alongside the rights of residents to water and sanitation, the rights of indigenous communities, and the environmental obligations of the State.

A. Contractual Approaches

a. Description

- i. Defenses: unconscionability, duress, impossibility/necessity

b. Drawbacks

- i. Contractual privity – only the investors and shareholders on one side and the State on the other are considered to be in contractual privity, and therefore can bring a dispute.
- ii. “Limited imagination” (Shalakany) and limited, Western precedents

¹⁰⁵ See Giovanni Zarra, *The Issue of Incoherence in Investment Arbitration: Is There a Need for a Systemic Reform?*, 17 Chinese J. of Int'l. L. 137 (2018) (arguing that the attempts by arbitral panels to integrate non-commercial values into the existing system has led to incoherence and a legitimacy crisis).

B. Total Obligations Approach

IV. Conclusion

Investor state dispute resolution, as an offshoot of international investment law, sprung from the preference of international actors to view bilateral investment treaties and the concession contracts as almost entirely under the purview of private contract law, rather than as a mixed breed of public international law and treaty/concession interpretation. Investment law as contract law now appears neutral, legally and politically. However, this characterization betrays the historical and present role international institutions played in encouraging these investments, at best, and requiring them, at their most coercive. The history of water law, and the interventions of the World Bank and other international actors, shows that the economicization of water utilities, and the private sector participation in water, would not have occurred without the influence of public law and institutions.

While some proponents of investor state arbitration and arbitral panelists have been expanding the scope of considerations in investor state disputes, Part IV shows that these expansions are not sufficient to allow the host State to even cover the full spectrum of their legal obligations. Ultimately, international investment law, and arbitration panels, must adopt a total obligations approach to investor state dispute resolution.