Leasing the Rain:
Water, Privatization, and Human Rights

Alveena Shah*

Abstract

The 1990s saw the unprecedented emergence of corporate engagement in national water systems. Before 1990, international funding went exclusively to public entities. By 2001, ninety-three countries had "private sector involvement" in their water systems. This shift, supported by international business and trade law, created a regulatory framework that legally protected the rights of corporations involved in the water sector. The regulatory framework that protected the populations that needed access to clean water was relatively ineffectual, and would be until the human right to water was officially recognized in 2003 by the Committee on Economic, Social, and Cultural Rights. The logic of market efficiency, brought into international law and finance through the Washington consensus, came to dominate thinking about international water law. This project of privatization was enforced by intergovernmental organizations. The World Bank, from 1998 to 2003 and 2004 to 2008, required the conversion of public systems to private as a condition for the majority of loans it disbursed related to water projects.

Yet, privatization failed to deliver on several key metrics. First, the main funding for services was from individual service fees and public subsidies, and therefore failed to generate new sources of capital. Companies increased service fees substantially, leaving the poorest without

* Alveena Shah is a Visiting Assistant Professor at Tulane Law School. She was Editor-in-Chief of the UCLA Law Review and a graduate of UCLA Law in Critical Race Studies, International and Comparative Law, and Public Interest Law and Policy. She would like to thank Aslı Bâli, Mara González Souto, Alex Wang, and Tim Webster for helpful comments and insights, as well as the editors of JILFA for their help in the development of this Article, especially Catherine Kang, Ramya Swami, Sam Lusher, and Amy McMeeking.

access. The services were no more efficient that public services, and often resulted in deterioration of quality. Finally, privatization reduced accountability to the public, often to the detriment of the contracting state. Corporations did not feel that they were obligated to meet human rights standards in water delivery, and are rarely held accountable.

However, in 2017, an investment arbitration panel at the International Center for Settlement of Investment Disputes recognized, for the first time, a human rights related counterclaim from a state against an investor. In *Urbaser v. Argentina*, Argentina argued that the water company failed to invest in ways that were sufficient to meet minimum human rights standards. While the claim ultimately failed, it was the first time ICSID found jurisdiction over a human rights based claim against an investor.

This paper will explore the available legal avenues for holding corporations accountable when they violate minimum standards in a human right to water framework. It will especially focus on the emergence and potential of arbitration as a vehicle for accountability, and the drawbacks of this approach.

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Introduction: Leasing the Rain:[1]

In 1999, the Bolivian government sought to privatize its 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.[2] 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.[3] Communities were required to cede control of household and community wells to a private utility company without compensation. Water prices were fixed against the U.S. dollar, and the company was guaranteed a 16 percent return on its investment, "no matter how management performed or what quality of service was provided."[4] This concession was to remain in force for forty years and included a clause that its terms would supersede any other contract, law, or decree. When the concession began and water prices went up, sometimes as high as 300 percent from prior to the passage of Law 2029, tens of thousands of Bolivians marched on the capital until the government agreed to renounce the contract.

This renouncement would normally be cause for a foreign investor to initiate an international arbitration dispute resolution process, and Bechtel, the parent company of the private utility, did so that year. Curiously, the company agreed to settle so long as the Bolivian government publicly agreed that the contract was cancelled due to civil unrest, and "not because of any act done or not done by the international shareholders."[5] 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

1. Cochabamba protestors used this phrase 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', 2000*, Glob. Nonviolent Action Database, https://nvdatabase.swarthmore.edu/content/bolivians-end-foreign-owned-water-privatization-cochabamba-water-war-2000 [https://perma.cc/58EA-8EP7]; *See also* William Finnegan, *Leasing the Rain*, New Yorker, Apr. 8, 2002, https://www.newyorker.com/magazine/2002/04/08/leasing-the-rain [https://perma.cc/C837-FZ67]; Oscar Olivera & Tom Lewis, ¡Cochabamba! Water War in Bolivia (2004).

2. Olivera & Lewis, *supra* note 1, at 8.

3. *Id.* at 8-9.

4. *Id.* at 10.

5. Paul Harris, *Bechtel, Bolivia Resolve Dispute: Company Drops Demand Over Water Contract Canceling*, SFGate (Jan. 19, 2006), https://www.sfgate.com/news/article/Bechtel-Bolivia-resolve-dispute-Company-drops-2523974.php [https://perma.cc/XM6V-A96P].

> 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*.[6]

More likely, the company intended to act without the level of public attention the "Cochabamba Water Wars" attracted to the contract but could no longer do so.[7]

This one-sided concession might be forgotten in history as a uniquely unconscionable agreement that was rightly cancelled. However, the agreement is actually reflective of the contradictory considerations that comprise any international agreement implicating water utilities and water rights. Nations like Bolivia, in theory, must balance creating an environment that attracts foreign investment by ensuring that it will be profitable for companies to invest while ensuring that the utilities ultimately benefit the people they serve. Again, theoretically, public and private law frameworks must operate simultaneously in these types of concessions.

The reality in Cochabamba and elsewhere is quite different. Both Bechtel and Bolivians demanded the Bolivian government honor their rights. However, the Bolivian people found no legal channels to effectively hear their claims. But Bechtel had a well-honed international investment tribunal to turn to when their contract was rescinded.

This asymmetry reflects the values prioritized in international law through the second half of the twentieth century. International investment law should be considered alongside public international law obligations including human rights, indigenous rights, and environmental preservation. However, priority is ultimately given to foreign investor rights by default, due to the judicialization of investment law and the unwillingness of arbitration panels to give equal weight and attention to competing obligations of the state. Even when panels try to consider values other than commercial values, they are generally considered secondary or tertiary to the commercial rights at play.

Tribunals emphasize private law concepts in part because bilateral investment treaties (BITs) and investment contracts are considered

6. *Id.* (emphasis added).

7. Another interesting footnote to this story is that Bolivia would become the first country to leave the International Center for the Settlement of International Disputes ("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 [https://perma.cc/H3HQ-T9TS].

"self-contained."[8] These 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 a mere contract law question is 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 BITs and contracts. Private law concepts, then, are not neutral, but rather prioritize the rights of foreign investors over the rights of the people living in states that enter BITs and foreign investment contracts.

Critiques of an oversimplified or fictional public-private distinction are not new, even in the world of investor-state arbitration.[9] 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.[10] However, the existing 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, as the development of water law reflects the same public/private law debate and had the same outcome. 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. Twentieth-century debates over categorizing water as a human right or as an economic good occurred as the international investment law system coalesced around market liberalization. Our understanding of how to use our shared water is more important now than ever, as

8. *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?*, 48 Int'l L. 153 (2014).

9. *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).

10. *See* Britta Redwood, *When Some Are More Equal than Others: Unconscionability Doctrine in the Treaty Context*, 36 Berkeley J. Int'l L. 396 (2018).

climate change threatens to further disrupt water management and distribution systems.

Recently, there have been attempts to include public law considerations within the existing investment arbitration infrastructure in place. In *Urbaser v. Argentina,* for the first time, an arbitration panel accepted and considered the human rights related counterclaim of a state party against an investor.[11] However, this Article shows that piecemeal approaches to inserting human rights and other public law considerations into investment-oriented systems do not sufficiently address human rights or public law concerns. Water law is an especially useful area to study because the public/private debate in water management mirrors the public/private distinction in investment law. Advocates of a human right to water in an investment dispute face a dual burden: they must prevail in casting water rights as a public law issue rather than a private law issue, and then must also prevail in casting a state's obligation to provide water as more important than a state's obligation to enrich foreign shareholders under BITs and investment contracts.

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 provides 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's later response clearly stated that a human right to water exists, but that this right is still compatible with a commodity approach. The choice made by international organizations and actors to view water as an economic good and a human 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 collective resource and allowed for widespread private sector participation.

Part II gives 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 describes 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 focuses on the arbitral award in the case *Urbaser v. Argentina*, which became notable for

11. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf [https://perma.cc/97YJ-4UN6] [hereinafter Urbaser].

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 because it considered the contract and BIT analysis above human rights considerations.

Part III offers two alternative analyses in dispute resolution and applies them to the *Urbaser* case to demonstrate the differences. The first alternative 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." -Māori declaration[12]

Humans have negotiated over water resources perhaps as long as humans have been negotiating. The earliest recorded conflicts over water date back to 2500 BCE.[13] Approaches to living in harmony with bodies of water and with other humans differ greatly across societies. For example, in Māori society, connectivity to nature, a relational view of the world, an ethic of reciprocity, and a sacred regard for the whole of creation guide human relations to water.[14] This is true of other indigenous non-Western cultures as well.[15] In traditional English common law, a limited property ethic guides usage, with traditional nuisance and trespass laws limiting one's usage of a body of water if that usage interferes with a neighbor's enjoyment of the same body.[16] This territorial

12. Kennedy Warne, *A Voice for Nature,* Nat'l 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. Māori tribes in the area consider the river an ancestor and a fellow being. *Id.*

13. *Water Conflict Chronology*, Pacific Inst., http://www.worldwater.org/conflict/list/ [https://perma.cc/C4EN-FN7E].

14. Warne, *supra* note 12. To reconcile the traditional Māori 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. *See also* Elizabeth Jane Macpherson, Indigenous Water Rights in Law and Regulation (2019).

15. *See id.*

16. A History of Water, Series III, Volume 2: Sovereignty and International Water Law xv (Terje Tvedt, Tadesse Kasse Woldetsadik, & Owen McIntyre eds., 2015).

and property-centric approach to water rights fails 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 continental European treaties also covered water usage and rights. For example, 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.[17]

The many approaches to regulating water and ensuring cross-border cooperation have 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.[18]

This, in addition to any additional treaty or concession obligations, creates a multilayered and 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 during the development of the right to water and show that international organizations played a key role in developing both approaches.

A. Substantive Approaches

The approaches discussed in this Subpart differ in three 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 preservation, and (3) water as an economic good or a right.

17. *Id.* at 6. The agreement stipulates, among other requirements, that trade and boat passages should be free of interference and that new impositions of taxes or other fees shall be charged.

18. *Id.* at 17.

1. Property Rights[19]

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 litigated.[20] 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.[21] The common law settled on a right to reasonable enjoyment standard, where any riparian user had a right to reasonable use, an approach also used by the United States and France in the eighteenth century.[22]

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, European states recognized and dealt with 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,[23] this true pricing approach would be criticized by those advocating for a strengthened human right to water.[24]

19. This Subpart and this Part as a whole consider predominantly European and American approaches. More research on non-Western approaches is needed.

20. William Howarth, *The History of Water Law in the Common Law Tradition*, *in* A History of Water, Series III, Volume 2, *supra* note 16, at 66, 71. 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.

21. *Id.* Blackstone writes "If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not 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.

22. *Id.*

23. Discussed *infra* Part II. 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.

24. *Id.*

2. Public Trust and Common Concern

The Public Trust Doctrine is a domestic law concept which recognizes that a State holds in trust specific natural resources for the use of the public.[25] This doctrine originates from Roman law and is used in the United States as well as several countries in Africa, Asia, and Latin America.[26] Use of the Public Trust Doctrine has been expanded from primarily protecting navigational uses of water to environmental protection.

The Common Heritage or Concern of Mankind (Common Concern) doctrine brings this ethos to include the interest of humanity as a whole, not just the interest residents of a particular State.[27] Both 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, incorporate this concept.[28]

3. Human Rights

The human rights approach, which is discussed more extensively in Part II, relies on the human rights system, codified in treaties, and relies on the assumption that states are obligated to protect and ensure that individuals have a baseline amount of water. The human rights approach recognizes minimum requirements of water and may allow for progressively stronger rights guaranteed to individuals through international treaties and national constitutions. The human rights approach allows for the protection of water resources inasmuch as they are required to meet the needs of humans. The next subsection explains the critique that the human rights approach is anthropocentric and does not properly protect water resources as they relate to animals, biodiversity, or other uses.

4. Environmental Commons

Critics of the human rights approach to water regulation note that a human rights approach is individualistic and focuses only on human

25. Stephanie Kpenou, *Fresh Water as Common Heritage and a Common Concern of Mankind*, *in* Research Handbook on Freshwater and International Relations 2, 5 (Mara Tignino & Christian Bréthaut eds., 2018).

26. *Id.*

27. *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.*

28. *Id.* at 6.

needs.[29] The human rights standard is often fairly low, and the categorization of the right to water as an economic and social right allows states to take a low but progressive approach to increasing the guaranteed amounts available to residents.[30] The human rights approach does not take other life, such as 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.[31] The critique of the individual right to water from a commons perspective is that it fails to take into account that water is necessary to human, animal, and ecosystem health.[32] Water is also bound by the hydrological cycle, which has consequences across States and across water systems.[33] Advocates for a commons approach argue that water's unique characteristics, coupled with its centrality to survival, make it particularly unsuited even to individualistic frameworks, or frameworks like the public trust doctrine, that rely on domestic legal systems.

B. The Road to Commodification

> *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.*[34]

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

29. *See, e.g.*, Karen Bakker, *Commons Versus Commodities: Debating the Human Right to Water*, *in* The Right to Water Politics, Governance and Social Struggles 19 (Farhana Sultana & Alex Loftus eds., 2012) (discussing the individualistic nature of human rights and the particular challenges of such an approach with water rights).

30. For example, in South Africa, the Constitutional Court determined that cities providing 25 liters per person per day was sufficient to meet South Africa's constitutional and human rights obligations. Zeenat Sujee, *Using the Court to Secure Water Rights,* U. Witwatersrand Johannesburg Rsch. News (May 18, 2018).

31. *See, e.g.*, Bakker, *supra* note 29.

32. *Id.* at 27.

33. *Id.; See also* Chad Staddon, Thomas Appleby & Evadne Grant, *A Right to Water? Geographico-Legal Perspectives*, *in* The Right to Water Politics, Governance and Social Struggles, 61 (Farhana Sultana & Alex Loftus eds., 2012).

34. Manuel Schiffler, Water, Politics and Money: A Reality Check on Privatization 3 (2015).

were considered. However, over time, a consensus developed toward market solutions; the human right to water would not be settled until, arguably, 2005.

Market solutions 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). By the 1990s, water privatization became a requirement for World Bank loans, and water companies bullishly sought to enter the public utilities space of developing nations.[35]

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 successful and privatization efforts waned in the 2000s, 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 privatization helps states fulfill their human rights obligations to the right to water.

Ultimately, market ideologies won the debates over water policy and regulation. Multinational corporations (MNCs) benefitted from international law, and—through hard and soft law—were able to enter 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.[36] The global community came together to define the role of the newly minted United Nations, understand the effects of decolonization, and adopt human rights treaties, among other massive changes in international law and politics. The focus on water emerged in the latter half of the twentieth century, as the need for global mechanisms to address

35. Benedicte Bull, Alf Morten Jerve, & Erlend Sigvaldsen, Ctr. for Dev. And the Env't, The World Bank's and the IMF's Conditionality to Encourage Privatization and Liberalization: Current Issues and Practices 24 (2007), https://www.duo.uio.no/bitstream/handle/10852/32692/Bull.pdf [https://perma.cc/XCL9-GGLG].

36. *See generally, e.g.*, Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2007).

poor water quality and access became clear. During this period, two competing perceptions emerged: water as an economic good and water as a human right.

At various global meetings, participants oscillated between these two conceptions.[37] A recognized need for "equitable water use" came in 1972; later, in 1977, the first UN Water Conference recognized a right to "access to drinking water in quantities and of quality equal to their basic needs."[38] The Mar del Plata Water Conference of 1977 stated that "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.[39]

1992 also marked one conference's attempt to definitively state that water, though it may be a special case, is an economic good and should be treated as such.[40] 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).[41] The Dublin Conference produced four pillars, called the Dublin Statement, stating:

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.[42]

Within principle four, the Dublin Statement 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 achieving efficient and equitable use, and of encouraging conservation and protection of water resources.[43]

37. Salman M. A. Salman & Siobhan McInerney-Lankford, The World Bank, The Human Right to Water: Legal and Policy Dimensions (2004), https://openknowledge.worldbank.org/handle/10986/14893 [https://perma.cc/NK2X-EZB3].

38. Joyeeta Gupta et. al.,The Human Right to Water: Moving Towards Consensus in a Fragmented World, 19 Rev. of European Community & Int'l Env. L. 294, 297 (2010).

39. Salman & McInerney-Lankford, *supra* note 37, at 5 (emphasis added). The authors also briefly discuss the World Water Forums of 1997, 2000, and 2003.

40. Int'l Conf. on Water and the Env't: Dev. Issues for the 21st Century, The Dublin Statement and Report of the Conference (1992) [hereinafter Dublin Principles].

41. *Id*.

42. *Id.*

43. *Id.*

The Dublin Statement went on to outline an action agenda calling for the alleviation of poverty and disease, water conservation, sustainable urban development, and the resolution of water conflicts.[44] Notably, it 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.[45] The Dublin Statement demonstrates 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, 93 countries had private sector involvement in their water systems.[46] This shift ultimately made "more than 460 million people dependent upon global firms for their water supply."[47] Based on the increase in water privatization projects, one can infer there was a general assumption that such efforts would lead to many of the outcomes 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 a shift toward large-scale promotion of water privatization. The principles of privatization of a previously public good emerged through a set of economic policy principles which favored the logic of market efficiency as a solution to global problems.[48] Hilal 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."[49] The project of privatization was enforced by intergovernmental organizations. The World Bank at various points, required the conversion of public systems to private ones as a condition for most loans it disbursed to water projects.[50] The World Bank

44. *Id.* at 5–6.

45. *Id.* at 7.

46. Joe Wills, *A Commodity or a Right? Evoking the Human Right to Water to Challenge Neo-liberal Water Governance*, *in* Contesting World Order? Socioeconomic Rights and Global Justice Movements (2017).

47. *Id.*

48. *See* Hilal Elver, *The Emerging Global Freshwater Crisis and the Privatization of Global Leadership, in* Global Crises and the Crisis of Global Leadership 107 (Stephen Gill ed., 2012).

49. *Id.*

50. *Id.* at 111; *see also* Naren Prasad, *Privatisation of Water: A Historical Perspective,* 3 L. Env't & Dev. J. 217, 230 (2007).

also called for market solutions to increase water efficiency in reports in both 1993 and 2000.[51]

Yet by 2004, interest in privatization waned, especially in developing countries.[52] Privatization had failed to deliver on several key metrics.[53] The main funding for services derived from individual service fees and public subsidies, and therefore failed to generate new sources of capital for the investors.[54] Companies had increased service fees substantially, leaving the poorest without access.[55] The services were no more efficient than public services and often resulted in deterioration of quality.[56] 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 [transnational corporations]. While the latter often do 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.[57]

By the early 2000s, the experiment of full privatization of State water utilities was considered a failure.[58] The World Bank itself released an evaluation of privatization projects, writing, "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."[59] The private sector, initially expected to attract more infrastructure investment, had failed to do so.[60] The private sector became unwilling to take on the large risks associated with water projects.[61] However, instead of withdrawing from private investment

51. *Id.* at 230.

52. Cassey Lee, *Privatization, Water Access and Affordability: Evidence from Malaysian Household Expenditure Data,* 28 Econ. Modelling 2121, 2122 (2011).

53. *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).

54. Wills, *supra* note 46, at 200.

55. *Id.* at 201.

56. *Id.*

57. *Id.*

58. *See* Elver, *supra* note 48.

59. George Keith Pitman, Bridging Troubled Waters: Assessing the Water Resources Strategy 25 (2002).

60. Prasad, *supra* note 50, at 232.

61. *Id.*

completely, the World Bank shifted to promoting a new model of private investment: public-private partnerships.[62]

The World Bank continues to finance public-private partnerships.[63] 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.[64] 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.[65] Eighty-four percent of contracts of public-private partnerships awarded since 1990 were still active by 2007, whereas only 9 percent were terminated early.[66] New PPPs are more likely to be localized, either geographically or technically.[67] Sometimes the contracts are given to individual cities, or neighborhoods, or address some operational need without full delegation of management of the system to private operators.[68] Yet, free market ideology remains the foundation of new partnerships.[69]

The World Bank's promotion of PPPs ignores that the risks and inequities that arose from full privatization projects remain largely the same with PPPs.[70] The World Bank promotes PPPs as allowing a

62. *Id.* at 232–33.

63. Phillipe Marin, World Bank, Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries 2 (2009), https://openknowledge.worldbank.org/handle/10986/2703/ [https://perma.cc/MWM8-JB4Q]. For more information about ongoing WorldBank PPPs in water, *see Water & Sanitation PPPs*, World Bank, https://ppp.worldbank.org/public-private-partnership/water-and-sanitation/water-sanitation-ppps [https://perma.cc/FNW9-JXP2].

64. *Id.* at 10.

65. *Id.* at 2.

66. Philippe 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 what he means by "challenging region for reform." *Id.*

67. *Id.* at 10.

68. *Id.*

69. Prasad, *supra* note 50, at 233.

70. *See* Maria Jose Romero, *Public-Private Partnerships Don't Work. It's Time For the World Bank to Take Action*, Devex (Apr. 19, 2018) https://www.devex.com/news/opinion-public-private-partnerships-don-t-work-it-s-time-for-the-world-bank-to-take-action-92585 (describing a campaign of over 80 civil society organizations that signed a letter urging the World Bank to change their PPP strategy) [https://perma.cc/8V5C-82T4]; Foley Hoag, *Summary Comments on the World Bank Group's 2017 Guidance on PPP Contractual Provisions,* Heinrich Böll Stiftung (Sept. 15, 2017), https://us.boell.org/en/2017/09/15/summary-comments-world-bank-groups-2017-guidance-ppp-contractual-provisions [https://perma.cc/3QPT-Y5D4].

"better allocation of risk between public and private entities."[71] Yet, governments and taxpayers still disproportionately bear the risks of such partnerships, while private investors collect a greater share of the profit.[72] At the same time, costs of PPPs are approximately forty percent higher than projects "financed by government borrowing."[73] While PPPs are portrayed 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. Though the data on efficiency is mixed, it appears that PPPs are no more efficient than State-run enterprises.[74] Given the concerns around private-sector participation in interacting with human rights, solutions beyond PPPs are required.

PPPs are just the latest iteration of international law and international organizations' attempts to organize the global water supply. Debates over the commodification of water occasionally mention 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

This Subpart 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 ongoing discourse. The resulting individualistic approaches to water as a human right would ultimately facilitate the incorporation of foreign investment and investment law into water regimes around the world.

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

71. *Public-Private Partnerships Overview*, World Bank (last updated Oct. 4, 2019), https://www.worldbank.org/en/topic/publicprivatepartnerships/overview [https://perma.cc/HFP3-VTZL].

72. Foley Hoag, *supra* note 70.

73. Romero, *supra* note 70 (quoting National Audit Office, PFI and PF2, 2017-19, HC 718, at 15 (UK)).

74. Naren Prasad, *Privatisation Results: Private Sector Participation in Water Services After 15 Years,* 24 Dev. Pol'y Rev. 669, 673 (2006).

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.[75] The UDHR framers might have considered the right to water so obvious and fundamental that they assumed it was unnecessary to include, but the right to water was nevertheless 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 of the UDHR on the right to life.[76]

Two binding human rights treaties that were drafted and ratified after the UDHR do contain explicit discussions of water rights, albeit 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 to "ensure to such women the right . . . to enjoy adequate living conditions, particularly in relation to . . . water supply."[77] 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 to "take appropriate measures . . . to combat disease and malnutrition, including . . . through the provision of adequate nutritious foods and clean drinking water."[78] These treaties obliged States to provide water to groups based on their protected status.

No general right to water was recognized in the twentieth 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, 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

75. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 288, 289 (1995).

76. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) [hereinafter UDHR]; Article 2: John Scanlon, Angela Cassar & Noémi Nemes, Water as a Human Right?: IUCN Environmental Policy and Law Paper No. 51, 3-4 (2004).

77. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 14 (Dec. 18, 1979).

78. G.A. Res. 44/25, art. 24 (Nov. 20, 1989).

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 General Comment No. 15 (GC) 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.[79] It also encourages cooperation with nonstate actors, such as UN agencies and NGOs, as important partners for States to assess their water policies and plan new programs. Notably, privatization was the most controversial topic considered by CESCR, and thus the GC avoids taking a clear stance. It does, however, state the obligation of water affordability, and further states that "[a]ny payment for water services has to be based on the principle of equity," regardless of public or private ownership.[80]

Though a right to water may appear to be a commonsense extension of other rights in the ICCPR and ICESCR (such as the right to life, the right to food, and 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 GC15 as an overreach of CESCR, though many scholars also praised the innovation.[81] 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 GC 15, the United States also submitted views that it does not see a legal basis for holding there is a human right to water.[82]

In 2008, the UN Human Rights Council (HRC) appointed an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. In 2010, Bolivia, which

79. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15: The Right to Water (arts. 11, 12), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf [https://perma.cc/4H4C-8FAD] [hereinafter "GC 15"].

80. *Id.* ¶ 27.

81. Philip Alston & Ryan Goodman, International Human Rights 289 (2013).

82. *Id.*

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.[83] Despite the forty-one abstentions, the passage of Resolution 64/292 demonstrates an initial consensus around the existence of a right to water. The record suggests that concerns over Resolution 64/292 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 adopted a resolution affirming the human right to safe drinking water and sanitation with no objections. The HRC resolution differs from the GA resolution in that it specifically ties the right to water with the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity. In grounding the right to water in rights recognized by ICESCR and affirming 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 human rights to safe drinking water and sanitation (Special Rapporteur).

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. In 2009, the UN Special Rapporteur said 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 or service provision more specifically."[84] 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.[85]

83. G.A. Res. 64/292 (Jul. 28, 2010).

84. Sharmily L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy Over-Privatization,* 31 Berkeley J. Int'l L.89, 118 (2013) (quoting Indep. Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water & Sanitation, Rep. of the Indep. Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, United Nations Human Rights Council, ¶ 7, U.N. Doc. A/HRC/15/31 (June 29, 2010)).

85. *Id.* at 119.

Western countries cited concerns about the compatibility of the human rights framework with the ability to privatize during the UN GA resolution vote. The narrower version of the HRC resolution was passed, 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 of privatization, while not precluding private companies from assisting States in running water utilities. Though private water contractors often do not see themselves as obligated to meet human rights standards, the existence of a standard would allow civil society 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 take on inequitable 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 remains with the State.

Many have criticized the inclusion of privatized means of achieving the human right to water. Though 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 right to safe drinking water, Catarina de Albuquerque, called for recognition of the role of private sector participants, with some safeguards, to ensure inclusion of those who cannot pay.[86] The implementation of such safeguards would depend on their prioritization over the commercial rights of private sector participants. However, international investment law took center stage in these debates, leaving tribunals with limited opportunity to consider anything but commercial rights. Part II shows that, as with the development of water law, international investment law did not emerge as a neutral, isolated contract law regime. Instead, international organizations made the choice to prioritize contracts and business law over other legal regimes.

86. Ching-Leng Lim et al., International Investment Law and Arbitration, Commentary, Awards and Other Materials 57–60 (2018); *see also e.g.* Catalina de Albuquerque, *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, U.N. Doc. A/HRC/18/33/Add. 2 (Jul. 4, 2011).

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 to solidify the primacy of contracts and business law 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 sought to enjoy a strong definition of sovereignty and to 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 when resolving conflicts.[87] Corporations sought to protect their interests and investments without fear of uncompensated expropriation and other monetary losses. As such, MNCs preferred arbitration and contract-based dispute resolution.[88]

Recently decolonized nations in particular were interested in redefining the world economic order and introduced two United Nations General Assembly (UNGA) resolutions toward that end, 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.[89]

This attempt to restate the international law of investments came after the US decision in *Banco Nacional de Cuba v. Sabbatino,*[90] which held that the United States was not able to pass judgment on the actions

87. *See id.*
88. *Id.* at 59.
89. G.A. Res 1803 (XVII) (Dec. 14, 1962).
90. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

of another government.[91] In response, the UN GA adopted the 1962 resolution. The resolution reaffirms that, while sovereignty is always paramount, a sovereign nation may enter into contracts "in good faith."[92]

Yet, just over ten years later, another view emerged at the UNGA as newly decolonized nations sought to use their new political power to equalize the economic playing field. 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.[93] Using their large numbers, they used the UN GA 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."[94] One of the first campaigns sought to establish the doctrine of permanent sovereignty over natural resources (PSNR). During the colonial era, metropole trading and mining companies based in colonized States executed contracts for the extraction of mineral and other resources within colonies. 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."[95] The newly decolonized nations, in an effort to assert sovereignty over their own resources, sought to nullify these contracts under several legal theories of contract and international law.[96] Regarding the issue of expropriation and dispute resolution, the GA asserted:

> Each State has the right: . . . [t]o 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 States concerned that other peaceful means be sought on the basis of the sovereign means.[97]

Decolonized states sought to move judgment about the validity of concession to their domestic courts, where both domestic and

91. This case comes under the Act of State Doctrine. Later, U.S. courts would benefit from the legislative Foreign Sovereign Immunities Act. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976).

92. GA Res. 1803, *supra* note 89.

93. *See generally* Antony Anghie, *supra* note 36, 196–244.

94. G.A. Res. 3281 (XXIX) (Dec. 12, 1974).

95. Anghie, *supra* note 36, 211–212.

96. *Id.* at 196–244.

97. G.A. Res. 3281, *supra* note 95.

international law considerations could be included in the decision.[98] Western states tended to disagree:

> First, [the West] 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.[99]

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 UN GA resolution as customary law.[100] The arbitrators rejected the position, and instead felt that Resolution 1803 instead was a better statement of the law of international investment.[101] *Texaco v. Libya* marked the most significant rebuke of an attempted nationalization of a resource industry to that point.[102] Perhaps to ensure that treaties would bear the burden of analysis moving forward, BITs spread widely, beginning with the 1959 Pakistan-Germany BIT.[103] These agreements would become the backbone of the modern investment arbitration process: treaty interpretation coupled with contract interpretation.[104]

As noted above, this proliferation was in part a requirement placed by Western nations and institutions such as the World Bank. Since the rebuttal of the doctrine of PSNR, decolonized States lacked the resources to develop economically.[105] International economic development required the assistance of Western States, which required arbitration

98. *See* Anghie, *supra* note 36.

99. *Id.* at 213–14.

100. Texaco Overseas Petroleum Co. v. The Govt. of the Libyan Arab Rep., 104 J. Droit Int'l 350 (1977), *translated in* 17 I.L.M. 1 (1978).

101. Ching-Leng Lim et al., International Investment Law and Arbitration, Commentary, Awards and Other Materials 17–21 (2021).

102. *Id.*; Shalakany, *supra* note 9.

103. Lim *supra* note 86, at 59.

104. *Id.*

105. *See generally, e.g.*, Gunnar Myrdal, *The Economic Impact of Colonialism*, *in* Developing the Underdeveloped Countries (A.B. Mountjoy ed., 1971).

clauses in BITs. The World Bank's rule-of-law requirements generally favor arbitration clauses.[106] Foreign direct investment "will not migrate to the South unless the luggage includes an arbitration clause."[107]

The inauspicious beginnings of a new economic order for decolonized countries spurred many critiques. However, most relevant to water rights is the right for a state to regulate for its public policy after entering into a concession agreement. States may want to regulate water utilities to meet human rights obligations, or simply to expand access to residents. The requirement to defer to international investment law would, at best, disincentivize public regulation and, at worst, require states to defer decisions on utilities to investors. Amr 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 following perspective: Arbitration is about the coming together of equals to resolve contract law questions arising from disputes over property rights.[108]

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).[109]

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."[110]

This distinction between public and private interacts in a peculiar way with the distinction between national and international. Private enterprise expectations are protected not only by the contract but by the willingness of arbitration panels to prioritize contract language over public policy justifications of any modifications. This puts the public in a subordinate position to the private enterprise in extreme cases. In the context of *Texaco v. Libya*, Libya's domestic laws, which would have

106. Shalakany, *supra* note 9, at 421.
107. *Id.* at 422.
108. *Id.* at 424–25.
109. *Id.* at 425.
110. *Id.* at 424.

legalized the nationalization of Libyan oil reserves, are considered subordinate to international investment law. 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, is there room to regulate in the interest of the public, even at the potential detriment of the private enterprise?

A common refrain in this debate is that all treaty-based regimes and arbitration are 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. Rebuttal of this refrain involves three concerns. The first is the definition of consent implicit. As discussed in Subpart A, concessions are often signed under pressure at best, or under duress at worst.[111] Liberalization of economic policies are required before the International Monetary Fund will allow loans, and these policies can be at the cost of social and economic rights.[112] Second, this historical view is ignored to promote the technocratic model of contract concession analysis and arbitration. Power dynamics have always been relevant in international politics, but we must recognize that investor expectations are placed at a higher level than the rights, such as the right to water, of the citizens of host states. Third, any other obligations of the host state, including those to its residents, are considered static, as are its obligations to the investors. However, as we will see with the right to water, the content of the host State's obligations to its residents 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."[113]

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

111. *See also* Redwood, *supra* note 10. The paper opens with a scene of Pakistani officials realizing they were bound by concessions they had neither notice nor record of.

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

113. Sundhya Pahuja, Decolonsing International Law, Development, Economic Growth and the Politics of Universality 96 (2011).

privatization-friendly development policies in the 1990s, the global financial crisis of the late 1990s 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 1989, Argentinians elected a new president, Carlos 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 of his term, starting with the privatization of telecommunications, electricity, and gas. His successes emboldened his administration to privatize other departments as well. In Buenos Aires, the water utility faced several problems: water pressure was low throughout the city, and water quality was very low in parts of the city. Sewage was not treated and subsequently polluted the rivers, and the sewers overflowed during rainstorms. Finally, water was abundant, such that those who had access to water used as much of it as did the United States per capita, but the access was not even, particularly among the poor.[114]

At the same time, water companies in Europe were exploring the new market of public utilities. Prime Minister Margaret Thatcher of the United Kingdom (UK) privatized UK water utility assets in 1989,[115] and British and French water utility companies in particular were interested in expanding globally.[116] With President Menem's experiments in privatization, they saw an opportunity. Buenos Aires released a call for bids in 1991.

The resulting concession 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.[117] The privatization movement hoped that the increase in efficiency would not only overcome the higher cost of borrowing for private enterprises, but also lead to profit. Both Argentina and 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.[118]

All parties seemed to be willing to make the deal work. The government masked some of the true costs of the deal by quietly increasing

114. Schiffler, *supra* note 34, at 32.
115. Chris Edwards, *Margaret Thatcher's Privatization Legacy,* 37 Cato J. 89, 97 (2017).
116. Schiffler, *supra* note 34.
117. *Id.*
118. *Id.* at 30.

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 led to higher water bills for end consumers, even when 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 the 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.[119]

Even without these administrative changes, the bidding process was difficult because water assets are underground, and it is difficult to check their quality to determine the level of investment needed. The deal's 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."[120] But the bid with the lowest proposed tariffs won, signaling "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."[121] 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.[122]

The resulting conglomerate, tasked with running the concession, was named Aguas Argentina, though it was, and is still, made up of primarily European companies. While the project had a good start, before long a renegotiation was required. Argentina requested, and received, acceleration of certain investments in exchange for a 13.5 percent tariff increase and increases in infrastructure fees from 36 percent to 48 percent. However, the consortium had a difficult time recouping costs, because people were not interested in paying the connection fees. In

119. *Id.* at 31-32.

120. *Id.* at 32.

121. *Id.* at 35.

122. *Id.* at 33–34. By some estimates, between 1993 and 2001 the companies only spent 2.6 percent of their own funds on the concessions, otherwise preferring to remain highly leveraged.

1996, protests against the connection fees erupted on the streets, where people blocked the roads to the capital.

Finally, between 1999 and 2001, with the downturn of the Argentine economy, unemployment rose, and the IMF imposed austerity measures.[123] 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 percent of its value. Aguas Argentina requested that the Central Bank 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 percent increase in tariffs. The government refused that as well. As a result, the company defaulted on its loans.

C. Key Issues in the Arbitration

The 2007 arbitration proceedings that followed 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, as well as the first and second rounds of negotiation. The corporation's primary arguments were that it could not meet its obligations because of delays and obstruction by the government. It argued that (1) Argentina violated the fair and equitable treatment principle, (2) the actions taken by the government were discriminatory, and (3) Argentina expropriated its property. The government claimed necessity in defense of its emergency measures and offered that the company was not meeting its own requirements, regardless of the emergency measures taken.

The novel element of the *Urbaser* arbitration, as compared with the many other disputes Argentina defended after 2001,[124] 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."[125] 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

123. *Id.* at 38.

124. For a summary of ICSID arbitrations that occurred in the aftermath of the 2001 financial crisis, see William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 Asian J. WTO & Int'l Health L. & Pol'y 199 (2008). Additional disputes also occurred in domestic courts globally.

125. Urbaser, *supra* note 11, ¶ 1156.

poverty."[126] Argentina argued that the basis of the consortium's obligation came from "international rules that include specific obligations having to do with drinking water," and the BIT must be considered alongside all "relevant rights and obligations of the Argentine Republic under international law."[127]

Narrowly, through language in the BIT, the panel concluded that it had jurisdiction over the human rights claim. Under the classic model BIT, a host State has no recourse to make a counterclaim.[128] The Tribunal noted that the language in the Spain-Argentina BIT in question instead read that any party could bring a claim.[129]

On the merits, the Tribunal initially framed the issue 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."[130] The Tribunal concluded 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."[131] 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 it was "reluctant" to share the position that "guaranteeing the human right to water is a duty that may be born solely by the State."[132] To bridge this gap, the Tribunal turned away from public law toward private contract law, finding that "the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law."[133] So, while the Tribunal agreed that the consortium's concession investments were designed to contribute to the "enforcement of the population's right to water," the relevance of the population's right alone does not place human rights obligations on the consortium.[134]

126. *Id.*
127. *Id.* ¶ 1158.
128. *Id.* ¶ 1143.
129. *Id.*
130. *Id.* ¶ 1186.
131. *Id.* ¶ 1189.
132. *Id.* ¶ 1193.
133. *Id.* ¶ 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.
134. *Id.* ¶ 1212.

Finally, the Tribunal agreed 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."[135] The panelists did not assert how the State would do this, particularly 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, the Tribunal ultimately sidestepped any major reform by reducing the counterclaim to a narrow question: whether the corporation itself held the obligation of providing a human right to water. However, in the rest of the decision, the Tribunal 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.[136]

Unfortunately, after this dismissal, the Tribunal did not comment further on corporate human rights obligations, nor did it consider why negative obligations would have a different legal effect than positive obligations. It did, in any case, leave the door open for obligation to be considered in other arbitrations.

The Tribunal's failure to broaden its analysis reflects the overwhelming inclination of panels to resort to private law analysis, even when the situation calls for broader analysis. While an isolated contract/investment law analysis tends to be favored in arbitration, alternatives exist that allow tribunals to consider the full framework of both investors' and States' rights and obligations with respect to international law.

III. Alternative Legal Frameworks and Interpretations

This Part discusses alternatives to the "four corners" model of investment arbitration taken to date.[137] It first 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-oriented approaches has

135. *Id.* ¶ 1213.

136. *Id.* ¶ 1210.

137. For an explanation and critique of the four corners approach to contract analysis, see Chunlin Leonhard, *Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law*, 21 Pace Int'l L. Rev. 1 (2009).

its limitations, and in many cases does not lead to a coherent set of results.[138] Investment disputes need to incorporate a broader set of values, such that the full set of obligations of the host state, including those to its residents, 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

States have used, and will continue to use, traditional private law contract defenses more liberally when resolving a dispute with foreign investors. For example, Argentina, in *Urbaser* and other cases, initially used necessity as a defense when attempting to avert fallout from the 2001 financial crisis.[139] Argentina, as of 2009, had over forty claims against it related to the 2001 emergency measures, and had used the financial crisis to excuse its liability.[140] Only one panel accepted the defense and limited Argentina's liability as a result. The *Urbaser* panel rejected Argentina's necessity argument as well. According to the panel, the necessity defense requires: (1) that the State has not contributed to the situation of necessity; and (2) there are no viable alternatives to safeguard "essential interests against a grave and imminent peril."[141] The panel followed previous arbitral awards in determining that Argentina had contributed to the economic crisis that it was hoping to mitigate with the emergency measures, failing the first requirement. Additionally, Argentina failed to prove that the act was the only way to safeguard an essential interest—in this case, ensuring water to residents—and therefore failed the second requirement.

The *Urbaser* discussion shows how narrow the necessity requirement can be. Other contract defenses, including unconscionability, duress, impossibility, and *force majeure,* would likely be construed narrowly in favor in investors as well. These contract defenses operate

138. *See generally* Giovanni Zarra, *The Issue of Incoherence in Investment Arbitration: Is There a Need for a Systemic Reform?*, 17 Chinese J. 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).

139. *See, e.g.*, Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, *award* (Sept. 5, 2008).

140. Jose E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* The Yearbook on International Investment Law and Policy 2008/2009 379, 380–81 (Karl P. Sauvant ed., 2009).

141. Urbaser, *supra* note 11, ¶¶ 688–689.

with the "limited imagination" of investment law.[142] Investment law forces the state to approach the dispute resolution defensively—the obligations of the state to the investor are still considered dominant, and there are limited excuses that a state may make in order to avoid fulfilling them. The introduction of human rights counterarguments is unlikely to expand the acceptance of these defenses. As with *Urbaser*, the panels will likely consider the claims, defenses, and counterclaims in isolation, rather than considering the full slate of possibly competing obligations of a state and the interactions among them. Instead, arbitral panels could use the total obligations approach. This approach would allow panels to consider a broader, more relevant set of facts, and would allow States to meet their obligations to both residents and foreign investors.

B. Total Obligations Approach

To attempt to expand the limited imagination of investment law, I argue that the total spectrum of international law obligations of the state must be considered when analyzing a dispute. Even if operating within an arbitral body, the arbitral body must not prioritize the contractual obligations of a state over its human rights or other obligations. Other scholars have found unique ways to incorporate environmental, indigenous, and human rights into more established legal schemes.[143] Valentina Vadi writes that a judicially driven approach could promote the consideration of indigenous rights in international investment arbitrations:

> Arbitral tribunals are of limited jurisdiction and cannot adjudicate on the eventual infringement of indigenous peoples' rights. They lack the jurisdiction to hold states liable for breach of their human rights obligations…However, this does not mean that indigenous rights are and/or should be irrelevant in the context of investment disputes…Arbitral tribunals should interpret international investment law by taking into account 'any relevant rules of international law applicable in the relations between the parties.[144]

This approach is allowed under the Vienna Convention on the Law of Treaties, which requires treaties, and therefore investment contract, to be interpreted in light of "relevant rules of international law

142. *See* Shalakany, *supra* note 9.

143. *See, e.g.*, Benoit Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, 115 Am. J. Int'l L. 409 (2021) (on climate change); Valentina Vadi, *The Protection of Indigenous Cultural Heritage in International Investment Law and Arbitration, in* The Inherent Rights of Indigenous Peoples in International Law (Antonietta Di Blase & Valentina Vadi eds., 2020).

144. Vadi, *supra* note 143, at 236.

applicable in the relations between the parties."[145] Arbitral panels must consider that the relations between the parties is dependent on multiple obligations under international law.

The total obligations approach would require arbitral panels to interpret the relevant BITs and concession contract considering the other obligations that the host state is claiming at the time of breach. In *Urbaser*, the panel had to consider the claims and counterclaims individually. The total obligations approach would have allowed the arbitral panel to properly consider the evidence of Argentina's claim that it suspended the water concession to ensure ongoing water service to residents.

Conclusion

Investor state dispute resolution, as an offshoot of international investment law, sprung from the preference of international actors to view BITs and 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 historic 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 show that the economization of water utilities and private sector participation in the provision of water would not have occurred without the influence of public law and international institutions.

While some proponents of investor-state arbitration and arbitral panelists have been expanding the scope of considerations in investor-state disputes, Part III shows that these expansions are not sufficient to allow the host State to 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.

145. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.