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The Perils of Privatization: International Developments and Reform in Water Distribution

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The Perils of Privatization: International Developments and Reform in Water Distribution

Adam D. Link*

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“The world is running out of available, clean freshwater at an exponentially dangerous rate”¹ A recently released report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) states that by 2030, 47% of world population will be living in areas of high water stress and if present trends continue more than two thirds of the world population may still be without improved sanitation.² There are even genuine concerns that water could be treated as a commodity much like oil or other minerals, and that water cartels may spring up on the international stage, drastically changing the landscape for countries, corporations, and citizens.³ These fears have manifested themselves in an ongoing debate over the future of water delivery systems, and whether public

* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2010. A special thanks to Professor Stephen McCaffrey for his help and guidance in making this comment possible.

1. MAUDE BARLOW, *BLUE COVENANT: THE GLOBAL WATER CRISIS AND THE COMING BATTLE FOR THE RIGHT TO WATER* 29 (The New Press 2008) (2007).

2. Press Release, United Nations Educ. Scientific and Cultural Org., *New Report Highlights Crucial Role of Water in Development* (Mar. 12, 2009).

3. BARLOW, *supra* note 1, at xi.

or private control over these systems is preferable. At the core of this water privatization debate is the matter of who ultimately controls the distribution, and what price consumers pay.

In the United States, publicly owned systems account for more than ninety percent of all U.S. water production.⁴ In addition, rates are some of the lowest in the developed world at just over 50 cents per cubic meter.⁵ In part, this has a great deal to do with the existing infrastructure in the United States, which is far more advanced than many developing nations, as well as its steady tax base and reduced rates of corruption. Nations of the Global South⁶ do not have these same advantages that allow municipalities in the United States to successfully manage their systems. These struggling nations face difficulties on all sides, many having high rates of corruption and inefficiency in their publicly controlled systems, yet noticeably wary of the threat of expensive services and public discontent with the prospect of privatized systems. Some commentators have even classified attempts to privatize once public assets as a serious threat to future generations.⁷ The prospect of privatization is not entirely negative, however. Privatizing water systems can be attractive from a government's perspective with incentives including improvement, development, and expansion of infrastructure, increasing efficiency of water supply and distribution, and development of technical expertise.⁸

Given the decreasing amounts of potable water around the world and rapid population growth, the legal issues surrounding water allocation and distribution will be a future battleground of vital importance. Some of the focus will inevitably center on tensions between the private and public sector and the underlying philosophy of water distribution. At the nexus between basic contract law and national sovereignty, between private rights and public duties, there stands this controversial and complex issue of water privatization.

This Comment will focus on a number of distinct legal issues that arise from the privatization of water in the Global South. First, this Comment will explore

4. The National Academies' Water Information Center, Drinking Water Basics, http://water.nationalacademies.org/basics_part_5.shtml (last visited Mar. 15, 2009).

5. Richard Soutanian, *Worldwide Survey Reveals Water Costs Rising*, 19 WATER & WASTEWATER INT'L 7 (Oct. 2004), available at <http://www.waterworld.com/index/display/article-display/215862/s-articles/s-water-wastewater-international/s-volume-19/s-issue-7/s-features/s-worldwide-survey-reveals-water-costs-rising.html>.

6. Countries of the Global South is a term generally used to describe lesser developed nations that are usually, though by no means exclusively, found south of the equator. This designation includes many African and South American countries including the United Republic of Tanzania, Bolivia, and other nations discussed in this Comment. For more information on the Global South See U. N. Comm. on South-South Cooperation, Special Unit for South-South Cooperation, *Forging a Global South: United Nations Day for South-South Cooperation* (Dec. 19, 2004), available at [http://tcdc.undp.org/doc/Forging a Global South.pdf](http://tcdc.undp.org/doc/Forging%20a%20Global%20South.pdf).

7. Huey D. Johnson, *Whose Earth Is It Anyway?*, UN CHRONICLE VOLUME 39 ISSUE 3, Sept. 1, 2002, at 9, available at http://www.un.org/Pubs/chronicle/2002/issue3/0302p8_unconventional.html.

8. Celine Ruben-Salama et al, *Thirsty for Change: Considering Water Privatization in Developing Nations*, CONSILIENCE: THE COLUM. J. OF SUSTAINABLE DEV., Spring 2008, at 90.

the existing water distribution landscape and how current international rules and norms provide incentives for developing countries to privatize their systems. Second, this Comment will explore notable ways in which privatization has failed in some nations as well as the difficulties encountered and remedies available to both nations and corporations involved in these failed endeavors. Third, this Comment will examine the human right to water as articulated by the United Nations and individual countries, and whether the existence of this independent right carries with it any legal consequences. Finally, this Comment will explore the viability of alternative public/private systems, some theoretical and some which have proven successful in other countries.

I. LENDING LEVERAGE: THE INTERNATIONAL FRAMEWORK ENCOURAGING PRIVATIZATION

Water policy is left to the determination of each sovereign nation where the water is distributed as the “development of water resources management policy, as with all government policy, is the sovereign function of national states.”⁹ Theoretically, then, each nation should investigate which type of water distribution system most benefits its people, then try to implement that system efficiently and effectively. This is only an idealistic model, however. Many countries, especially those in the Global South, lack the capital to construct the infrastructure and delivery systems necessary to provide fresh water to their citizens. In need of this capital and in response to the demands of its people, countries without funding for such projects seek it in the international arena through a variety of sources. Most commonly, nations needing capital try to attain at least some of that funding through the World Bank and the International Monetary Fund (IMF).

The World Bank is not a bank in the common sense, but rather a development institution owned by 186 countries.¹⁰ As part of its mission, the World Bank via the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) provides low-interest loans as well as interest free credits and grants to developing countries for a wide variety of purposes, including infrastructure and natural resource management.¹¹

The IMF, on the other hand, has a broad scope of activities, only one of which involves lending. The IMF provides loans to countries experiencing financial difficulties, enabling these countries to stabilize their currencies,

9. Nile Basin Initiative, Water Resource Planning and Management Project, http://wrmpm.nilebasin.org/index.php?option=com_content&task=view&id=18&Itemid=44 (last visited Mar. 15, 2009).

10. World Bank—About Us, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited Oct. 15, 2009).

11. *Id.*

continue paying for imports, and restore conditions for strong economic growth.¹² In contrast to other international lending institutions and development banks such as the World Bank, the IMF does not lend for specific projects.¹³

While these institutions are designed to provide the very assistance needed by struggling nations, the support and capital of these organizations does not come without restriction. One major tool these two groups have at their disposal is conditionality in lending, which can be used to encourage particular goals set by the World Bank and IMF. In this context, conditionality is defined as “the application of specific, pre-determined requirements that directly or indirectly enter into a donor’s decision to approve or continue to finance a loan or grant.”¹⁴ Sometimes the prescribed terms are simply triggers and benchmarks, but they can also include an element of mandatory privatization.¹⁵ In fact, “for more than a decade the IMF has included privatization as a standard condition of its structural adjustment lending.”¹⁶ This focus on privatization is part of what is commonly referred to as the Washington Consensus, a set of economic policy reforms focusing on developing nations in crisis and considered desirable by several key Washington D.C. institutions.¹⁷

Policies of the World Bank, the IMF and larger industrialized countries making foreign investments strongly encourage, if not outright demand, increased privatization across the board, including water distribution and purification.¹⁸ Given the capital needs of these struggling nations, international groups like the IMF, World Bank, and even regional development banks (as well as the nations that back them) have a certain amount of leverage over smaller and less fiscally established countries. Because of their situation, desperate government leaders will often eagerly adopt policies they may not necessarily agree with in order to secure necessary resources.¹⁹ This lending leverage can create both internal and external conflict for a country seeking capital. Internally, leaders may have difficulty attempting to provide their citizens with basic water

12. International Monetary Fund—IMF Lending (2009), <http://www.imf.org/external/np/exr/facts/howlend.htm>.

13. *Id.*

14. Benedicte Bull, Alf Morten Jerve, & Erlend Sigvaldsen, *The World Bank's and the IMF's use of Conditionality to Encourage Privatization and Liberalization: Current Issues and Practices*, SUM REPORT NO. 13 (Norwegian Ministry of Foreign Affairs, Oslo Conditionality Conference), Nov. 2006, at vi.

15. See *Conditionality in Development Policy Lending*, OPERATIONS POL'Y AND COUNTRY SERVICES (World Bank), Nov. 15, 2007, ¶ 13, ¶ 41 [hereinafter *Conditionality in Lending*].

16. Nancy Brune, Geoffrey Garrett, & Bruce Kogut, *The International Monetary Fund and the Global Spread of Privatization*, 51 IMF STAFF PAPERS 195, 199 (2004) [hereinafter IMF STAFF PAPER].

17. John Williamson, *What Washington Means By Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* (John Williamson ed. 2002) (1990), available at <http://www.piie.com/publications/papers/print.cfm?doc=pub&ResearchID=486>.

18. See *IMF and World Bank Push Water Privatization and Full Cost Recovery on Poor Countries*, NEWS & NOTICES FOR IMF AND WORLD BANK WATCHERS, Spring 2001, at 22 [hereinafter NEWS & NOTICES], available at <http://www.citizen.org/documents/IMF-WB%20promote%20privatization.pdf>.

19. *Id.* at 23.

service while simultaneously trying to attract foreign capital and keep its international loan commitments. Meeting these obligations may require rate hikes or service changes often disfavored by their own citizens. In some cases, these rate hikes and service changes have resulted in outright protest and revolt by those who have been affected. Externally, these nations may have difficulties interacting with the corporations running the privatized water systems, and by extension may face criticism from the nations where those corporations are centered.

Much focus has been given to the difficulties and potential negative ramifications of water privatization. Rate increases may make water unaffordable to the poor, some neighborhoods and groups can lose access to water, and any resultant profits from the system will inevitably leave the community.²⁰ In addition, once a government privatizes its water system, withdrawing from the deal is difficult and can subject the government to complicated international litigation or arbitration.²¹ However, it would be in error to claim that privatization is always detrimental to a nation's interests. In addition to the potential benefits of increased efficiency and reduced corruption, one study found that conditionality has important ancillary economic benefits not commonly cited. The value of privatized assets in IMF debtor countries increase as measured by investor willingness to pay more for those privatized assets because investors see adoption of pro-privatization policies as "a signal of credible policy reform."²² This increased willingness to invest creates more capital that is very beneficial to these countries.²³

While the ultimate impact of privatization of a nation's water distribution system can vary from case to case, the lending leverage possessed by the World Bank and IMF appears to be undisputed. "By the early 1990s, the World Bank, the International Monetary Fund and other regional development banks. . .were encouraging poor countries to let the big European water corporations run their water systems for profit. . .and by 2006, the vast majority of loans for water were conditional on privatization."²⁴ Developing countries are often desperate for foreign capital, and the World Bank (as well as private investors who look to Bank involvement as a seal of approval) makes such infusions possible. As a result the IMF and World Bank, the two most prominent organizations involved in this type of lending, are at the forefront of the privatization and lending leverage controversy.

20. Food and Water Watch, *Top 10: Why Water Privatization Fails* (June 2006), <http://www.foodandwaterwatch.org/water/private-vs-public/Top10WhyPrivatizationFails.pdf>.

21. See, e.g., *Aguas del Tunari S.A. v. The Republic of Bolivia and Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, available at <http://icsid.worldbank.org/ICSID/Index.jsp> (follow "Cases" link and search by case number) (case discussed in detail later in this Comment).

22. IMF STAFF PAPER, *supra* note 16, at 195.

23. *Id.*

24. BARLOW, *supra* note 1, at 38.

A. *Specific Legal Arrangements and World Bank/IMF Policies Encouraging Privatization*

The IMF and World Bank have several different categories of loan conditions with corresponding degrees of leveraging power.²⁵ The three main categories of agreements in descending order of private controls are concession agreements, lease agreements, and management contracts. Under a concession agreement, the private company is responsible for everything including setting customer and tariff rates, labor, and expanding the infrastructure.²⁶ These contracts are typically of longer duration than the other types and at termination, control over the assets remains with the private entity.²⁷ Under a lease agreement, the company also derives its revenues from customer fees and has control over both the tariff structure and labor, however these can be shorter in duration than concession agreements, may or may not include infrastructure development, and usually specify assets revert to the state at termination.²⁸ Finally, under a management agreement, the private company receives a set fee for managing the distribution system but control of all fees, rates, and assets remain with the state.²⁹

In addition to these three basic categories, the World Bank also maintains policies discouraging government subsidies and encouraging a plan of full cost recovery.³⁰ The notion of full cost recovery “implies that the water consumers should cover the cost of operating, maintaining, and expanding the water utility as needed.”³¹ There is some sensitivity as to whether under a privatized system full cost recovery includes a reasonable rate of return on investment for the participating private company, but it seems private companies do include this reasonable profit margin in their recovery figures.³² As part of its pure full cost recovery goal, the World Bank also discourages government subsidization of the water systems.³³ This is a questionable demand given that industrialized nations such as the United States provide substantial public subsidies to water and sanitation services.³⁴ If and when these contracts fail for whatever reason, ousted companies or angry nations may resort to legal remedies, but in the international context this is far more difficult and complicated than in a purely domestic setting.

25. NEWS & NOTICES, *supra* note 18, at 22.

26. *Id.* at 26 (Box 10).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 22.

31. *Id.* at 27.

32. *Id.*

33. *Id.*

34. *Id.* at 28.

II. LEGAL REMEDIES AND ICSID

When difficulties with privatization programs go beyond that which the host government finds acceptable, both countries and companies have resorted to legal efforts to solve their problems. There have been several instances where countries have challenged and canceled contracts with existing water service providers, and the corporations have fought back.

Suits involving nations and foreign corporations can be quite complex. Among the potential complicating factors are jurisdiction, forum non conveniens, taking of evidence, foreign sovereign immunity and the enforcement of judgments. Layers of complexity include the additional costs of enforcement, uncertainty about the ability to enforce contractual rights, risks arising from unfamiliarity with foreign legal process, and the risk of unknown and unpredictable legal exposure.³⁵ While disputes over venue and jurisdiction are present in domestic litigation as well, such disputes are of a different order, and frequency, when cross border transactions are involved.³⁶ Some of these issues can be, and often are, avoided by dispute resolution clauses in concession agreements, which commonly choose arbitration rather than litigation.

The primary cases in the field of water distribution contracts have been adjudicated in the International Centre for the Settlement of Investment Disputes (ICSID). ICSID, a part of the World Bank Group, is an international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and has more than one hundred forty member States.³⁷ ICSID's main function is "to provide facilities for conciliation and arbitration of international investment disputes"³⁸ and is "the leading international arbitration institution devoted to investor-State dispute settlement."³⁹ Like all arbitral institutions, "recourse to ICSID facilities is always subject to the parties' consent."⁴⁰

Despite the voluntary consent requirement, "foreign investors generally have been able to submit to international arbitration claims against host states alleging violations of a BIT, even where those violations arose out of a contract including an exclusive choice-of-forum clause designating local remedies."⁴¹ It is also important to note that although ICSID and Bilateral Investment Treaties (BITs)

35. Honourable J.J. Spigelman, AC Chief Justice of New South Wales, Address to the 16th Inter-Pacific Bar Association Conference: Transaction Costs and International Litigation (May 2, 2006), available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/11_sc.nsf/pages/SCO_spigelman020506.

36. *Id.*

37. International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp (last visited Oct. 4, 2009).

38. *Id.*

39. *Id.*

40. *Id.*

41. Kenneth J. Vandeveld, *Aguas Del Tunari, S.A. v. Republic of Bolivia*. ICSID Case No. ARB/02/3., 101 AM. J. INT'L L. 179, 182 (2007).

are often referenced as if they cover the same territory, they are distinctly different concepts.⁴² ICSID itself is regulated by the convention as described above, while BITs are independent treaties that offer investors certain protections, often including consent of the host nation to participate in ICSID arbitration.⁴³ This has important consequences for the possibility of withdrawal from the ICSID Convention discussed later.

The following cases from Tanzania and Bolivia, both of which were argued and decided before ICSID tribunals, provide good illustrations of how these disputes are decided.

A. *Bolivia: Rapid Rate Increases and Popular Revolt Leads to ICSID Arbitration and Jurisdictional Challenges*

In the late 1990s, Bolivia attempted to privatize the water service in Cochabamba, the nation's third largest city.⁴⁴ The privatization agreement was eventually reached with Aguas del Tunari S.A. (AdT) whose principal owners were foreign investors.⁴⁵ AdT's largest shareholder, which owned 55 percent of AdT's shares, was a subsidiary company incorporated in the Cayman Islands but owned by Bechtel, a U.S. company.⁴⁶ Bechtel also inserted three tiers of Dutch companies into the chain of ownership between itself and its subsidiary.⁴⁷

The concession agreement was immediately controversial within the local community as many feared dramatic rate increases.⁴⁸ Within weeks of taking over, AdT raised rates by more than 50 percent and in many cases much higher.⁴⁹ These price hikes were met with fierce public protest, forcing the Bolivian government to declare a state of martial law.⁵⁰ The government subsequently forced Bechtel to leave the country and ownership of the water company was transferred back into public control.⁵¹ In response, AdT claimed violation of the Netherlands-Bolivia Bilateral Investment Treaty (BIT) and requested ICSID arbitration.⁵²

While the more political and social aspects of the Cochabamba water protests are well documented, the eventual ICSID arbitration of *Aguas del Tunari v.*

42. Marco E. Schnabl & Julie Bédard, *The Wrong Kind of 'Interesting'*, NAT'L L. J., July 30, 2007, available at <http://www.arbitralwomen.com/files/publication/1910231238362.pdf>.

43. *Id.*

44. Vandeveld, *supra* note 41, at 179.

45. *Id.*

46. *Id.*

47. *Id.* at 180.

48. *Id.* at 179.

49. Press Release, Earth Justice, Bechtel Surrenders in Bolivia Water Revolt Case (Jan. 19, 2006), <http://www.earthjustice.org/news/press/006/page.jsp?itemID=27533393> [hereinafter Earth Justice].

50. *Id.*

51. *Id.*

52. See Vandeveld, *supra* note 41, at 179.

Republic of Bolivia illustrates a more basic difficulty that corporations have in obtaining relief for cancellation of these service contracts: establishing jurisdiction. After the Concession Agreement was canceled and AdT brought a claim for relief to ICSID, Bolivia challenged jurisdiction on several grounds.

First, Bolivia asserted that it did not consent to jurisdiction and that the arbitration clause in the Concession Contract precluded ICSID jurisdiction. In response, the Tribunal dismissed this claim stating the dispute settlement provision in the Concession Contract did not constitute an explicit waiver of ICSID jurisdiction.⁵³ Next Bolivia argued that it was not the proper party to the dispute, and that in fact the proceeding should have been instituted against the Water Superintendency of Bolivia which was the entity that took all the actions at issue including rescission of the Concession Agreement.⁵⁴ The Tribunal dismissed this claim stating that attribution to the State of actions of the Water Superintendency would be determined in the merits phase.⁵⁵

Bolivia also asserted that Article 2 of the BIT under which the suit was brought should be interpreted to recognize the exclusive jurisdiction of Bolivian law over the dispute.⁵⁶ In response, the Tribunal rejected this interpretation.⁵⁷ Next Bolivia argued “that the transfer of the Claimant’s stock from a Cayman Islands holding company to a Luxemburg company barred the jurisdiction of the Tribunal because the transfer should have been authorized by Bolivia.”⁵⁸ The Tribunal held that the migration of the holding company did not constitute a breach of the Concession Contract and therefore did not defeat jurisdiction of the ICSID.⁵⁹

Finally, Bolivia objected to jurisdiction “on the ground that the Claimant was not a ‘national’ of The Netherlands as defined in the BIT insofar as it was not ‘controlled directly or indirectly’ by nationals of The Netherlands.”⁶⁰ Bolivia alleged that “control” referred to the ultimate controller, which was in fact Bechtel, a U.S. company.⁶¹ After extensive analysis the Tribunal “found that the Dutch entities...were not corporate shells established for the purpose of obtaining ICSID jurisdiction, and that the control requirement under the BIT was met.”⁶²

These jurisdictional objections were argued and briefed before ever reaching the substance of AdT’s claims. While domestic litigants are also forced to deal

53. Ucheora Onwuamaegbu, Introductory Note, *Aguas del Tunari SA v. The Republic of Bolivia (ICSID Case No. ARB/03/2)*, 20 ICSID REV. FOREIGN INVESTMENT L. J. 446 (2005).

54. *Id.* at 445.

55. *Id.* at 446.

56. *Id.* at 445.

57. *Id.* at 446.

58. *Id.* at 445.

59. Onwuamaegbu, *supra* note 53, at 446.

60. *Id.* at 445.

61. *Id.* at 446.

62. *Id.*

with jurisdictional challenges, the types of arguments made in this context create a layer of complexity which can potentially make relief more difficult and expensive to obtain. Had the Tribunal ruled against AdT based on any one of the above arguments proffered by Bolivia, it would have been without legal remedy or recourse. *Aguas Del Tunari, S.A. v. Republic of Bolivia* illustrates that establishing the right to argue your case in a particular forum can be highly complex and time consuming in the international context. Companies seeking to establish service contracts such as this need to be aware that their corporate structure and actions may have a significant impact on jurisdictional challenges during ICSID arbitration. States should also take note of the types of jurisdictional objections raised by Bolivia in the proceeding. Even though their jurisdictional challenges failed in this instance, the Tribunal's thorough discussion and analysis shows that on different facts, such arguments may succeed in the future.

B. Tanzania: Inadequate Preliminary Information and Failure to Realize Profits Leads to ICSID Arbitration and Jurisdictional Challenges

In 2003, the Republic of Tanzania was awarded \$140 million by the World Bank and other development institutions for the purpose of instituting a comprehensive program of repairs, upgrades, and expansions of the water and sewage infrastructure and distribution in Dar es Salaam.⁶³ The Republic was required to appoint a private company to manage and operate the system as one of the conditions of receiving World Bank funds, and eventually chose Biwater Gauff Tanzania (BGT).⁶⁴ Serious problems were encountered in the performance of the contract from the start, including BGT's poorly prepared and ill-informed bid and numerous management and implementation difficulties.⁶⁵ It would be unfair to blame the problems entirely on privatization, however. Even before this privatization initiative, the water situation in Dar es Salaam was precarious.⁶⁶ The conditions in Dar es Salaam echoed some of the more common complaints about publicly controlled water systems, including poor management, lack of resources, increased demand and insufficient capital expenditures.⁶⁷ In addition, the tariffs imposed on users had historically been very low. In fact, before 1991, water was provided without charge to users.⁶⁸

After considerable difficulties and a failed renegotiation, the Republic terminated the contract, senior management was deported, and government

63. *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, 2008 WL 4619779, ¶ 3 (2006) [hereinafter *Biwater Gauff*].

64. *Id.* ¶¶ 3-4.

65. *Id.* ¶ 486.

66. *Id.* ¶ 96.

67. *Id.*

68. *Biwater Gauff*, ICSID Case No. ARB/05/22, 2008 WL 4619779, ¶ 96.

officials seized the company's assets and installed new management.⁶⁹ BGT brought arbitration proceedings in ICSID, claiming that these events constituted the expropriation of BGT's investment and were a breach of the Tanzania's international and domestic obligations.⁷⁰ The ICSID Tribunal agreed that the various actions of Tanzania amounted to an expropriation of BGT's investment,⁷¹ however BGT's claims for damages were dismissed, and the ruling in favor of BGT was merely declaratory in nature.⁷²

As in *Aguas Del Tunari, S.A. v. Republic of Bolivia*, this arbitration involved considerable jurisdictional difficulties. Much like courts in the United States, ICSID tribunals must analyze and establish their jurisdiction before tackling substantive matters. In order to establish whether it had jurisdiction, the Tribunal examined Article 25(1) of the ICSID Convention to determine whether the dispute was: (1) legal, (2) arising out of an investment, (3) between a contracting state and a national of another contracting state and, (4) whether the parties had consented in writing to the submission.⁷³

Two of these elements were essentially undisputed, as the tribunal determined that the claims contained in the complaint were legal in nature,⁷⁴ and that the parties to the dispute were a state (Tanzania) and a United Kingdom company (BGT).⁷⁵ Tanzania and the UK were both parties to the convention and therefore both are considered contracting states.

However, Tanzania initially disputed the jurisdiction of the ICSID Tribunal on a number of other grounds.⁷⁶ Tanzania claimed its grievances did not arise directly out of an investment within the meaning of Article 25 of the ICSID Convention,⁷⁷ while BGT argued that given the duration, regularity of profit, risk, substantial commitment, and development surrounding the water privatization project, it should be deemed an investment as required by the convention.⁷⁸ Tanzania also adamantly contended that the consent in writing requirement was not satisfied. Tanzania claimed the Tanzanian Investment Act of 1997 (TIA) was controlling and that jurisdiction was not necessarily satisfied under the TIA.⁷⁹ They also claimed that even under the BIT, BGT had not attempted to resolve the dispute through alternative means as required.⁸⁰ However, the tribunal disagreed⁸¹

69. *Id.* ¶ 15.

70. *Id.* ¶¶ 16, 18.

71. *Id.* ¶ 519.

72. *Id.* ¶ 807.

73. *Biwater Gauff*, ICSID Case No. ARB/05/22, 2008 WL 4619779, ¶ 230.

74. *Id.* ¶ 232.

75. *Id.* ¶ 246.

76. *Id.* ¶ 286.

77. *Id.* ¶ 287.

78. *Biwater Gauff*, ICSID Case No. ARB/05/22, 2008 WL 4619779, ¶¶ 233-234, 519.

79. *Id.* ¶ 286.

80. *Id.*

81. *Id.* ¶ 255.

and determined that requirements of consent in writing came in the form of a bilateral investment treaty (BIT) which stated that each party to the BIT consents to submit to ICSID any legal dispute between the parties relating to investments as described above.⁸²

A common thread in both *Aguas Del Tunari S.A. v. Republic of Bolivia* and *Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania* is the persistent challenge of ICSID jurisdiction. Substantively, however, *Biwater Gauff* can be readily distinguished from the *Bolivia* case. *Biwater Gauff* was not the end result of a popular revolt or high tariff increases, but rather a breakdown in information prior to inception of the project which led to a complete lack of profitability on all sides. *Biwater Gauff v. Tanzania* demonstrates that foreign investors who establish a profit margin going into the privatization project in water distribution may be forced to reevaluate their returns given that there are a number of unknowns regarding existing infrastructure. Investors also need to be aware that when countries are faced with a choice between significant rate increases or terminating the contract, the latter seems to be the preferred approach. In addition, while privatization was attached as a condition of the World Bank loan procured for the project, it seems that Tanzania was not at all initially opposed to the inclusion of a private foreign corporation. In fact, the nation openly acknowledged that the inclusion of such an actor may be a necessity given the poor state of the Dar es Salaam water and sewer system. This is in stark contrast to *Aguas del Tunaris*, where there was apprehension about the inclusion of a private company from the very beginning.

C. *Synthesizing ICSID Case Studies*

These two cases are prime examples of what happens when privatization programs in developing nations become untenable. While determinations of ICSID tribunals are necessarily fact-based and will vary from case to case, some general conclusions and patterns can be derived from both the *Bolivia* and *Tanzania* cases.

First, it appears that jurisdiction in ICSID cases dealing with service contracts will be a hotly contested issue, and therefore both corporations and nations should plan accordingly. Countries brought before ICSID will seemingly challenge jurisdiction on multiple grounds whenever possible, even though one of the goals of the ICSID Convention was to establish a forum precisely for these types of disputes. Second, when privatization programs lose favor with host nations' citizens, countries will inevitably rescind the agreement rather than upset their own people. Finally, in both instances the rulings of ICSID tribunals, while technically in favor of the petitioning corporation, were primarily declaratory in nature. After winning its jurisdictional arguments, in 2006 AdT/Bechtel settled

82. *Id.* ¶¶ 251-53, 257.

their claims for a token payment that amounts to thirty cents.⁸³ A somewhat similar result followed in Tanzania, where the tribunal determined that that none of the Republic's violations of the BIT caused the loss and damage for which BGT requested compensation, and therefore the claims for damages were dismissed and the ruling could only be declaratory in nature.⁸⁴ While a token settlement and a declaratory ruling may be considered a victory by some, it is unlikely that the companies and their shareholders were fully satisfied with those results. Even when the results of the arbitration are favorable to states however, the issues underlying the need for ICSID arbitration can lead to reaction and backlash from individual nations.

D. Future Applications: Is Bolivian Withdrawal a Trend?

The Republic of Bolivia's confrontation with Bechtel was not the final chapter of that nation's brush with water privatization. In May of 2007, Bolivia formally withdrew from the ICSID Convention, which is the first time a contracting nation has formally denounced the Convention.⁸⁵ The Bolivian government believed ICSID favors multinational corporations over governments, and officials are quoted as saying that "there is no record of any fee or sanction imposed by ICSID to any transnational for failing to comply with agreements."⁸⁶ Bolivia's withdrawal from the treaty governing ICSID may have consequences beyond a mere signal of their discontent.

Despite Bolivia's actions, it is possible that withdrawing from the ICSID would not preclude or foreclose the possibility of future arbitration at ICSID.⁸⁷ The reason is that governments have signed bilateral investment treaties that are independent of the ICSID convention, but which contain consent clauses which still theoretically subject them to ICSID arbitration (sometimes exclusively).⁸⁸ Nations would have to also denounce those treaties to fully withdraw.⁸⁹

Nonetheless, several countries primarily in South America have threatened withdrawal and begun to examine alternatives to the ICSID. Nicaragua has given mixed signals on this front, saying that the nation was looking closely at Bolivia's experience before determining its next step.⁹⁰ However, as some

83. Earth Justice, *supra* note 49.

84. *Biwater Gauff*, ICSID Case No. ARB/05/22, 2008 WL 4619779, ¶ 807.

85. Marco Tulio Montanes, *Introductory Note to Bolivia's Denunciation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 46 I.L.M. 969, 969 (2007).

86. *Bolivia Withdraws from ICSID*, LATIN LAWYER, May 22, 2007, available at http://www.americasnet.net/news/Bolivia_ICSID.pdf.

87. *Id.*

88. *Id.*

89. *Id.*

90. Fernando Cabrera Diaz, *South American Alternative to ICSID in the Works as Governments Create an Energy Treaty*, INVESTMENT TREATY NEWS, Aug. 6, 2008, <http://www.investmenttreatynews.org/cms/news/archive/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-create-an-energy->

indication of their position, for the last year Nicaragua has stopped referring to ICSID in its investment treaties.⁹¹ Venezuela has sent similarly mixed signals. Last year the National Assembly passed a resolution approving Venezuela's withdrawal from ICSID, but soon thereafter requested an ongoing dispute regarding oil fields return to ICSID.⁹² Despite these moves, to date both Nicaragua and Venezuela remain ICSID members.⁹³

Though Bolivia is the only nation to officially withdraw to date, this does not mean countries are not exploring alternatives. In July of 2008, several South American nations met to discuss energy policy as well as the possibility of a regional alternative to the ICSID.⁹⁴ At the conclusion of that meeting it was announced that a working group would be assembled "whose task is to design a legal mechanism to settle investor-state disputes related to the energy sector" with the ultimate goal being the replacement of the ICSID "as the preferred means to settle disputes between foreign energy companies and governments of Latin America."⁹⁵ This exploration of regional alternatives could become a trend among signatories dissatisfied with results in the ICSID forum.

IV. NATIONS LOOK AHEAD: A HUMAN RIGHT TO WATER

Some commentators argue that treating water as a privatized commercial commodity demeans its role as a human necessity and right by increasing prices and decreasing access to some of the most desperate populations on the planet.⁹⁶ In fact, as early as 1992 there was some discussion of the possibility of a human right to water.⁹⁷ At that point, "A basic human right to water [was] as yet imperfectly defined and established . . ." and even "the mere suggestion that one state might have a right to receive water from another [was] quite controversial."⁹⁸ Though this right has not found concrete articulation in the intervening years, there have been several notable developments. In recognition of the human rights implications of access to water, both the United Nations and individual countries have begun to address these issues.

treaty.aspx.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Debt, the World Bank, IMF and Water*, JUBILEE USA NETWORK (2004), http://www.jubileeusa.org/fileadmin/user_upload/Resources/Policy_Archive/Debt_and_Water_2004.pdf.

97. Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 1 (1992).

98. *Id.* at 2.

A. *The United Nations*

Although the United Nations does not actually classify a human right to water in any of its official or binding documents, it has articulated that right in other publications.⁹⁹ General Comment 15 of 2002, articulated as part of the substantive issues arising in the implementation of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), is one such expression of the human right to water. Article 15 states “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”¹⁰⁰ While the Comment is non-binding in the traditional sense, it does contain some language of obligation. According to the Comment, “[s]tate parties have immediate obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind” as well as “a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water.”¹⁰¹ General Comment 15 is nonbinding and therefore imposes no legal obligations on member states,¹⁰² though it does contain an interesting approach to an existing international document acknowledged by most nations.¹⁰³

Another alternative, though admittedly less concrete, is to infer the right to water from the International Covenant on Civil and Political Rights (ICCPR) which guarantees the inherent right to life in Article 6(1).¹⁰⁴ The inference is that because water is necessary for life, there is a right to water inherently built in to the right to life.¹⁰⁵

Both the ICCPR and ICESCR are applied to nations, but what about transnational corporations? In 2003, the United Nations published a document entitled the “Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights” which may provide some guidelines for a human right to water as applied to these corporations.¹⁰⁶ In Section A, Paragraph 1 the Draft Norms state that “[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect,

99. Melina Williams, Note, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 MICH. J. INT’L L. 469, 475 (2007) [hereinafter Williams].

100. U.N. Econ. & Soc. Council [ECSOC], Comm. on Econ., Soc. and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15*, ¶ 2, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

101. *Id.* ¶ 17-18.

102. Williams, *supra* note 99, at 475.

103. For a more thorough examination of the basis for an international human right to water, See Williams, *supra* note 99.

104. *Id.* at 473.

105. *See id.*

106. *Id.* at 489.

ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”¹⁰⁷ In addition Section E Paragraph 12 states:

“Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.”¹⁰⁸

The norms are an attempt “to remedy the fact that international human rights laws address the obligations and duties of states and international organizations, but often fails to address transnational corporations.”¹⁰⁹ All of these guidelines and treaty provisions exist on the international level, a stage where consent of the multitude of nations with differing priorities is difficult to come by and even more difficult to enforce. On the national level, nations such as Uruguay and South Africa have struggled to address the human right to water on their own.

B. *Uruguay*

On October 31, 2004, Uruguay became the first nation in the world to vote on the human right to water ensuring that access to water and sanitation is available to everyone and that when creating water policy social considerations would take precedence over economic considerations.¹¹⁰ In addition, this referendum guaranteed that the service of water supply would be controlled exclusively and directly by state legal persons and not by for-profit companies.¹¹¹ The text of amendment 47 reads: “Water is a natural resource essential to life. Access to drinking water and sewage system services, constitute a fundamental human right.”¹¹² It also stipulates that “[e]very authorisation, concession or permission that in any way violates these principles will be abandoned without result” and that “[t]he public service of the sewage system and the supply of

107. U.N. Econ. & Soc. Council [ECSOC], Comm’n on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

108. *Id.* at 5 (emphasis added).

109. Williams, *supra* note 99, at 489.

110. Blue Planet Project, *Water is a Human Right*, http://www.blueplanetproject.net/documents/RTW_handbill.pdf [hereinafter Blue Planet].

111. *Id.*

112. Carlos Santos & Alberto Villareal, *Uruguay: Direct Democracy in Defence of the Right to Water*, in *RECLAIMING PUBLIC WATER 1* (Belén Balanyá ed., Jan. 2005, rev. July 2006), available at <http://www.tni.org/archives/books/wateruruguayrev.pdf>.

water for human consumption will be provided exclusively and directly by legal state representatives.”¹¹³

The popularity and drive for this amendment stems in part from a failed contract with Aguas de la Costa (a subsidiary of multinational water company Suez) and URAGAU, another large private water company. Instead of taking the dispute to ICSID, some groups chose to take the issue directly to the people. While the Constitutional amendment was not the reason cited for cancellation of these contracts in Uruguay, it undoubtedly had an influence on their continued viability and will prevent such contracts from being executed in the future. These constitutional amendments are expected to result not only in the exclusion of private water companies but also increased public participation and control over Uruguay’s water resources.¹¹⁴ This may become a trend in South America, as “[p]eople in Argentina are now organizing to promote a similar constitutional amendment on the right to water.”¹¹⁵

C. South Africa

South Africa is another nation attempting to address the human right to water internally. Section 24 of the Final Constitution of South Africa specifies:

“Everyone has the right to. . . (b) have the environment protected, for the benefit of present and future generations, through reasonable and other legislative matters that. . . (3) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”¹¹⁶

The legislative measures designed to protect this right include the National Environmental Management Act (NEMA), Act 73 of 1998, and the National Water Act (NWA), Act 36 of 1998. NEMA defines the environment as including the land and water of the earth¹¹⁷ and South African courts “have defined the environment as inclusive of all conditions and influences affecting life and habits of man.”¹¹⁸ In accordance with Section 24(b) of their Constitution, the South African Legislature adopted the National Water Act (NWA), Act 36 of 1998. The NWA is the “primary legislation pertaining to the regulation and conservation of water within South Africa. . .” the purpose of which is “to ensure proper management and protection of water resources.”¹¹⁹ The NWA provides one of the

113. *Id.* at 6.

114. *Id.* at 4-5.

115. Blue Planet, *supra* note 110.

116. MORNE VAN DER LINDE & ERNST BASSON, CONSTITUTIONAL LAW OF SOUTH AFRICA, PART II – THE BILL OF RIGHTS § 50.3(c) (2d ed. 2008).

117. *Id.* § (c)(i)(aa).

118. *Id.*

119. *Id.* § (c)(i)(ee)(3).

most solid bases for an express human right to water available today. In its preamble, the NWA states “water is a natural resource that belongs to all people” acknowledges the government’s “overall responsibility for and authority over the nation’s water resources and their use” and that “the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users.”¹²⁰

Not just the intent, but the content of the act also speaks volumes about the affirmative role of the government in ensuring all individuals have access to water. Chapter I, Section 3(1), entitled “Public Trusteeship of Nation’s Water Resources” provides “As the public trustee of the nation-s water resources the National Government acting through the Minister must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons in accordance with its constitutional mandate.”¹²¹

Extrapolating from these series of legislative and Constitutional developments, an argument can be made that South Africa has thoroughly articulated a human right to water in both its Constitution and supplemental legislation. What may be more telling, however, is the manner in which these developments have been applied in the South African judiciary.

Relatively recently, a South African court heard a case about the fundamental right to have access to sufficient water and the right to human dignity. In a judgment delivered on April 30, 2008 in the matter of *Mazibuko v. City of Johannesburg*, the Court ruled that the City of Johannesburg’s forced installation of prepayment water meters was unconstitutional and unlawful, and also ordered the City to provide local residents with fifty liters of free basic water per person per day rather than the limit of twenty five which had been in existence.¹²²

After a brief discussion of Article 15 and other international efforts to define a right to water, the court concluded that “against the background of international law, decisions of the various international institutions and the similar language used in the Bill of Rights as that used in the various international instruments, the State is obliged to provide free basic water to the poor.”¹²³

This ultimate conclusion of the Court, that basic water for the poor is a Constitutional requirement, is significant.¹²⁴ Some believe the effect of this decision will be to “put pressure on municipalities to extend free basic water” to

120. National Water Act 36 of 1998 Preamble.

121. National Water Act 36 of 1998 s. 3(1).

122. SONKITA CONTEH & ASHFAQ KHALFAN, CENTRE ON HOUSING RIGHTS AND EVICTION (COHRE), ANALYSIS OF THE JUDGMENT OF THE HIGH COURT OF SOUTH AFRICA IN THE PRE-PAID WATER METERS CASE (2008), <http://www.cohre.org/store/attachments/RWP%20-%20PHIRI%20CASE-%20ANALYSIS%20%20May%2008.pdf>.

123. *Mazibuko v. City of Johannesburg*, 2008 (4) All SA 471 (W) ¶ 40 (S. Afr.), available at <http://www.cohre.org/store/attachments/Mazibuko%20Judgment.pdf>, *aff’d*, 2009 (8) BCLR 791 (SCA).

124. Conteh & Khalfan, *supra* note 122.

the poor, many of whom currently lack access.¹²⁵ In addition, the decision may help protect vulnerable users from water disconnection in situations where they cannot afford to pay.¹²⁶ Whatever the ultimate consequences, the Mazibuko case provides an excellent demonstration of how a human right to water can have meaning in a legal context.

D. Future Applications

The reality is that tensions between a human right to water and privatization will continue to exist, if only because “the goals of the right to water do not necessarily align with the goals of privatization.”¹²⁷ As outlined above, there are several approaches to recognition and application of a human right to water.

The Constitutional Referendum of Uruguay is probably the most direct and explicit means used to date, though the long-term effects of the Amendment remain to be seen. The South African NWA appears to be the most detailed and explicit example of an individual nation’s commitment to providing all its citizens with access to water, though such a sweeping approach and obligation may not be feasible in some developing nations. Finally, the more indirect approach of Bolivian withdrawal from ICSID is not in itself an explicit recognition of the human right to water, but rather an indication that such a right may exist in the minds of the people, even if not explicitly stated. No one approach to creating a human right to water is the answer, but the combination of international pressure from the United Nations and Constitutional articulation from individual states is a necessary first step in creating the contours of the human right to water.

V. ALTERNATIVES: A NEW MODEL OF PUBLIC/PRIVATE PARTNERSHIP

With increasing pressure from a number of groups and publicized failures such as those in Bolivia and Tanzania, the World Bank and IMF have begun to reform their privatization and conditionality in lending policies in recent years. At least one study has demonstrated a reduction in the use of conditionality related to privatization combined with a greater focus on policies that are better harmonized with the target country.¹²⁸

While privatization has its benefits and drawbacks, there are some models of public/private partnership that seem to be humane, effective and profitable at the same time. More often than not this involves the corporation in a more managerial or consultancy role, with a fixed fee to manage certain portions of the process. The government then sets the rates and overall policy for distribution

125. *Id.*

126. *Id.*

127. Williams, *supra* note 99, at 496.

128. *Conditionality in Lending*, *supra* note 15.

and retains control over the assets. This way, individual citizens are not charged excessive rates and countries benefit from the expertise and economy of scale that these corporations have built. However, these types of purely managerial agreements do not seem to address issues of corruption, and as shown in the *Mazibuko* case, even publicly controlled systems can sometimes have adverse effects on poor citizens.

Whether their role is managerial or concessionary, it seems clear that investing companies should scale back expectations in this type of investment. In addition, the World Bank and IMF should re-examine rules calling for the complete exclusion of government subsidies, especially considering how subsidies have worked with some success in developed nations such as the United States. The World Bank and IMF also need to take a more individualized approach towards lending projects, analyzing the culture and needs of each individual borrower nation and determining on a one-time basis whether privatization (or what level of privatization) would be most beneficial for all those involved.

On the flip side, individual nations need to understand that when implemented properly, privatization does not have to translate into rate increases and citizen revolts. Sometimes, these issues can be avoided simply by demanding a more thorough due diligence process before project implementation. For example, BGT's involvement in the Tanzania Dar as Salaam Project was "based on a presumption that the Project would generate regular and sustainable profit in the mid-long term." BGT reached this conclusion "based on the information provided to it during the bid process."¹²⁹ In the end, faced with massive shortfalls in projections of costs and revenues, the project was deemed not viable. Had information been more readily available or estimates been more accurate, some of these disputes might have been avoided. This may be easier said than done, however, as countries seeking the funding for these projects are often in dire need of the promised improvements as soon as possible.

In summary, there are three major steps that can improve the success rate of water distribution projects in developing nations and reduce the possibility of disputes relating to water privatization programs in the future. The first is to reduce the conditionality in lending that has been a hallmark in World Bank and IMF lending policy over the last decade, a step that is already being slowly implemented.¹³⁰ The second is to continue to create norms and guidelines relating to the human right to water on the national and international level similar to UN Comment 15, the Transnational Norms, the Uruguay Constitution, and the South African Constitution and National Water Act. The third is for nations to continue to collaborate with private entities in finding a way to reap the benefits of privatization without some of its downfalls, finding that delicate balance between

129. *Biwater Gauff*, ICSID Case No. ARB/05/22, 2008 WL 4619779, at ¶ 237.

130. *Conditionality in Lending*, *supra* note 15.

project viability on one side and serving the nation's citizens on the other. There is also a need not only for nation-corporation collaboration, but also increased citizen participation.

In the future, conditionality could include requirements of citizen participation in the planning and implementation process. Ideas such as this were included in the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the Aarhus Convention. The Convention "establishes that sustainable development can be achieved only through the involvement of all stakeholders", and is "forging a new process for public participation in the negotiation and implementation of international agreements."¹³¹ Such citizen-nation-corporation participation in each stage of the process could lead to better results for everyone involved.

By looking into the future and taking each of these steps in a conscientious way, nations, international organizations, and transnational corporation can all successfully avoid the perils of privatization and more effectively distribute water to the some of the world's neediest people in the process.

131. U.N. Econ. Comm'n for Europe, Introduction to the Aarhus Convention, <http://www.unece.org/env/pp/welcome.html> (last visited Oct. 2, 2009).

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