

IN THE MATTER OF the United Nations Human Rights Council Decision 2/104: Human Rights and Access to Water

Preliminary Submissions of
the Council of Canadians
Blue Planet Project

by Stephen Shrybman



April 15, 2007

Madame Louise Arbour
High Commissioner for Human Rights
Office of the United Nations High
Commissioner for Human Rights
UNOG-OHCHR
1211 Geneva 10
Switzerland

Dear Madame Arbour:

**Re: United Nations Human Rights Council Decision 2/104:
Human Rights and Access to Water**

We welcome this opportunity to comment on the important task you have undertaken to study, draw conclusions and make recommendations human rights and access to water.

The submissions attached were prepared and are submitted on behalf of the Council of Canadians Blue Planet Project. As you may know, the Council of Canadians is a prominent, community-based, civil society organization for which the protection of water is a key priority.

The Blue Planet Project is actively engaged with civil society groups around the world who are fighting to preserve water as a human right, public good, and ecological trust. All over the world, groups who are fighting for local control of water are championing an international instrument on the right to water.

In a separate submission, the Blue Planet Project has joined with a large number of these groups in writing to you to urge that certain steps be quickly taken towards the establishment of an International Convention on the Human Right to Water.

The submissions attached set out the rationale for such an initiative. Time has not permitted the circulation of these submissions to other organizations for comment or approval. For the same reason it is incomplete.

We understand that over the next few months your Office will be holding meetings and consulting with various stakeholders. We trust that this will allow an opportunity to address some of the issues that our submissions only touch on, but which warrant more thorough treatment. The integration of development and ecological imperatives concerning water is a key example.

With these qualifications we offer the attached submissions.

Sincerely,
Steven Shrybman

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IN THE MATTER OF the United Nations Human Rights
Council Decision 2/104: Human Rights and Access to Water

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IN THE MATTER OF the United Nations Human Rights
Council Decision 2/104: Human Rights and Access to Water

Preliminary Submissions of the Council of Canadians Blue Planet Project

The following submissions are presented in response to the request for stakeholder views concerning human rights and water. In its Decision 2/104 on Human Rights and Access to Water, the *UN Human Rights Council* (hereafter the Council) requested:

“ . . . the Office of the United Nations High Commissioner for Human Rights, taking into account the views of States and other stakeholders, to conduct, within existing resources, a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, which includes relevant conclusions and recommendations thereon, to be submitted prior to the sixth session of the Council.”

PART I: OVERVIEW

It is common to begin any commentary about human rights and water by reciting the horrendous statistics that describe the extent of human suffering caused by the lack of access to clean water and basic sanitation. The moral imperative to address these problems is compelling, and sadly has been so for too long.

While progress has been made in some parts of the world over recent years, the impacts of climate change, growing scarcity, and widespread misuse of water threatens to undo these gains and put further out of reach the *Millenium Development Goals* of cutting by half the proportion of people without sustainable access to safe drinking water and basic sanitation by 2015. Moreover, the challenge of meeting this goal is growing more difficult as worldwide water consumption continues to increase at rates much greater than population growth. Estimates are that by 2025, more than two-thirds of the world's population, 5.5 billion people, will experience water shortage.¹

For much of humanity, clean water is already in critically short supply, and insufficient water to support food production is becoming an urgent crisis in parts of world. The impact of climate change on water and hydrologic cycles, and the complex inter-relationship between degraded and depleted water resources and biodiversity loss, underscore the enormity and global dimensions of these challenges. More than 34% of

¹ Stockholm Environment Institute, 1997, *Comprehensive Assessment of Freshwater Resources of the World*.

the world's population live in countries with significant water stress, and this figure is expected to almost double during the next 25 years.²

It is against this backdrop that the human right to water³ must be understood. Is water to be regarded as integral to the global commons and as part of a public trust; or is water to be treated as a commodity, with access, protection, management and allocation decisions being left to the market? Is water a basic human right, an essential guaranteed every human being, or is it to be treated as an economic good available only to those who can afford to pay?

The answer to these questions will in large measure depend upon the capacity of United Nations bodies to establish a binding and enforceable international instrument that clearly recognizes water as a fundamental human right, and that also overcomes the constraints that have traditionally limited the effectiveness of human rights instruments.

Unfortunately, the most significant developments in international law that bear upon the human right to water are not taking place under the auspices of the United Nations – but rather under the World Trade Organization, and more importantly under a myriad of foreign investment treaties. Under these regimes, water is regarded as a good, an investment and a service – as such it is subject to binding disciplines that severely constrain the capacity of governments to establish or maintain policies, laws and practices needed to protect human rights, the environment or other non-commercial societal goals that may impede the private rights entrenched by these trade and investment agreements.

Moreover, trade and investment agreements have equipped private and commercial entities with powerful new tools for asserting and defending their interests in water and water services as proprietary rights, with which the state may not interfere.

The codification of such private rights creates an obvious and serious impediment to the realization of the human right to water. As we describe below, treaty-based investor rights are now being asserted in a manner that fundamentally undermines the capacity of nations to honour current international human rights obligations. As the case studies included here document, private tribunals operating under these treaties are now engaged in arbitrating conflicts between human rights norms and those of investment and trade law - a role that at best, they are ill-suited to serve.

The recent reports of the UN Secretary General's *Special Representative on Business and Human Rights* (hereinafter the Special Representative), acknowledge the problems created by the “fundamental institutional misalignment” that now exists between the

² Ibid.

³ As noted by the Special Rapporteur, General Assembly resolution 54/175 and general comment No. 15 (2002) both refer to “right to water” - as he did, we propose to use the that term, rather than the phrase “equitable access to safe drinking water”.

rights that corporations enjoy, including those gained under trade and investment treaties, and their accountability under both national and international law.

It is essential, in carrying out the present task, for the Office of the High Commissioner for Human Rights to acknowledge the challenges posed by these developments and the importance of responding in a timely manner to them. The course of present events suggests that unless UN bodies are able to reassert their role as the fundamental arbiters of human rights, they risk becoming bystanders as key questions of human rights law are resolved by private tribunals operating entirely outside the UN framework. The continuing rapid advancement of international trade and investment law underscores the need to proceed in this regard, with some urgency.

The establishment of a new instrument that deals explicitly and comprehensively with water as a human right would clearly represent a critical milestone towards redressing what has been described as the most fundamental failure of 20th century development – the lack of clean water and sanitation for billions of people.

We need to stress, however, that given the advent of legally enforceable international disciplines concerning private and commercial rights to water and water services, to be effective such an instrument must assert the primacy of the human right to water where these norms conflict with private and commercial interests and the legal protections these have been accorded under international law. A failure to do so will only allow the gap to grow between the protection of commercial interests in water and those necessary to ensure human rights.

The other constraints that have encumbered the effectiveness of international human rights instruments arise for the general view that the obligations they engender have no direct application to non-state actors. The need to expand the application of international human rights law in this regard has been acknowledged by expert commentators, and is acknowledged by *General Comment 15* to the *International Covenant on Economic, Social, Cultural Rights* (ICESCR). Again the report of the Special Representative is helpful in underscoring the need to ensure greater accountability for corporations and other business entities in regard to human rights, and for pointing the way towards meaningful reforms. Similar reforms are also needed to ensure that international financial institutions, international bodies such as the WTO, and UN bodies as well, adhere to and are accountable for non-compliance with the norms of human rights law.

Therefore we strongly encourage the OHCHR to not only acknowledge the need for a new instrument concerning the human right to water, but also to stress that such an instrument must address the legal and practical limitations that currently confine the scope, content and ultimately the effectiveness of international human rights law.

PART II: THE CODIFICATION OF COMMERCIAL AND INVESTOR RIGHTS TO WATER

This part describes the challenges presented for human rights in relation to water by developments in international trade and investment law, which are given prominence here for several reasons. The first is because of the corrosive effect of trade and investment disciplines on the capacity of nations to formulate, establish and implement measures required to respect, protect and fulfill the human right to water. Second, under these regimes, fundamental questions concerning the nature and extent of international human rights obligations are now being resolved by ad hoc and institutional dispute bodies that exist entirely outside the UN framework. The third is to underscore the asymmetry that now exists between the protection of commercial rights and human rights. The fourth is to bring attention to the fact that trade and investment regimes have emerged as primary vehicles for asserting and defending commercial and proprietary rights to water and water services.

Taken together, the impacts and implications of these developments represent the most compelling rationale for a new international instrument on the human right to water which transcends the limitations that have historically undercut the effectiveness of such human rights obligations.

Expanding the Rules of ‘Trade’

Over the past ten years or so, the scope of international trade and investment agreements has been dramatically expanded to encompass broad areas of policy and law that have until now been primarily matters of national and local concern. In addition to rules concerning trade in goods, the framework of the World Trade Organization (WTO) now includes agreements concerning investment, services, procurement, intellectual property, and all forms of domestic regulation.

Moreover, certain regional trade Agreements such as the North American Free Trade Agreement (NAFTA), go even further by eliminating most tariffs and establishing comprehensive disciplines concerning investment and services. These trade regimes are also now complemented by more than two thousand bi-lateral investment treaties (BITS), most of which were negotiated over the past decade with little fanfare and even less public discussion and debate.

The importance of these developments is underscored by the fact that, unlike the treaties they supercede, the new generation of international trade and investment agreements are binding and enforceable. Furthermore, under NAFTA and the BITs, investors have the unilateral right to invoke binding international arbitration to enforce these treaties.

As described below, these extraordinary remedies have now been invoked to challenge a diverse array of government measures that reflect, or were taken to implement, international human rights obligations concerning water.

Water, International Trade and Foreign Investment

Much of the debate on water and trade has centered on whether water is a product to be treated like any other in accordance with rules concerning “trade in goods”. While there may be some doubt about the scope of these particular trade rules as they apply to water, there is no doubt that water is subject to international rules concerning investment and services.

Most services, particularly water, are delivered on a local basis and therefore are not “traded” in any conventional sense. However, the General Agreement on Trade in Services (GATS) defines trade so expansively that even the most local transactions are covered by the agreement. Some GATS provisions apply to all services, with an ambiguously worded exception for those delivered “in the exercise of governmental authority”. The most onerous GATS provisions apply only to services voluntarily submitted to GATS disciplines.⁴ The UN Human Rights Commissioner, in a 2002 report, expressed concern about the difficulty in withdrawing GATS commitments given the need for governments to retain flexibility to meet their human rights obligations.⁵

To our knowledge, no country has yet committed water supply services, but the European Communities are seeking such commitments in the current round of negotiations to expand GATS coverage. The EC has proposed a new classification relating to environmental services - “Water for Human Use and Wastewater Management”. This classification would include “potable water treatment, purification and distribution, including monitoring.”⁶ Currently, environmental services include sewage services but not those related to water supply.

However, several countries have already made GATS commitments with respect to water-related activities, such as services related to agriculture and fishing, waste water services, construction/engineering of waterworks and mains, and management consulting.

⁴ The listing process allows a country to specify which GATS disciplines it is willing to embrace for a particular sector. Commitments can be of three types: Market Access, National Treatment and Additional Commitments. A country may limit each commitment to: certain modes of supply (e.g., cross-border); a certain time frame; or to particular regulatory elements (i.e., controls on the number of service suppliers). This is not the case under the Services provisions of NAFTA, which apply to all services unless explicitly exempt or subject to reservation. For water, the most important reservation in NAFTA is one for non-conforming provincial measures that were in place on Jan. 1, 1994, and which have been maintained or promptly renewed since that time

⁵ *Liberalisation of Trade in Services and Human Rights*, Report of the High Commissioner E/CN.4/Sub.2/2002, (June 2002), para. 64.

⁶ *Communication from the European Communities and Their Member States, Classification Issues in the Environmental Sector*. S/CSC/W/25, 28 September, 1999 and *Communications from the European Communities and their Member States, GATS 2000, Environmental Services* S/CSS/W/38, 22 December 2000. *Liberalisation of Trade in Services and Human Rights*, Report of the High Commissioner E/CN.4/Sub.2/2002, (June 2002), para. 64.

In doing so, they may have put at risk their capacity to adopt or maintain measures that may be required to honour human rights commitments and obligations.

While no water-related conflict has yet arisen under any WTO agreement, such conflicts will be more likely if the GATS is changed to include new disciplines on domestic regulation, government procurement, and subsidies as some WTO delegations are advocating. Proposed wording for new disciplines on domestic regulation are of particular concern. As noted in the UN High Commissioner's report on liberalization of trade in services, these new GATS disciplines might have the effect of making human rights obligations subordinate to trade rules.

Bi-lateral Investment Treaties (BITS)

In 1998, efforts to create a Multilateral Agreement on Investment (MAI) under the auspices of the Organization for Economic Cooperation and Development (OECD) were abandoned because of widespread opposition by governments and civil society. However, the principles of the MAI have since been imbedded in more than 2000 bi-lateral investment treaties (BITS). More than one hundred nations are now party to such a treaty: France, to 65; Argentina to 38; Thailand to 17, and Ghana - 8.⁷ Most have been negotiated under the auspices of the International Center for Settlement of Investment Disputes (ICSID), established by the World Bank in 1966.

In certain ways these investment treaties are built on the same framework that is common to most “trade” agreements, which includes an obligation to provide foreign investors non-discriminatory treatment. However, like the GATS, investment treaties go well beyond the conventions of international trade law by prohibiting domestic policy and regulatory measures entirely non-discriminatory in both design and application.

The most remarkable feature of these regimes is the unilateral right accorded foreign investors to claim damages for violations of the broadly-worded constraints these treaties impose on government policy and law.⁸ Moreover, foreign investors have no obligations under the treaty they can directly enforce.

For this reason, investment treaties represent a dramatic departure from the norms of international law under which only nation states have access to dispute resolution.⁹ The result has unleashed the enforcement mechanisms of the BITS from the diplomatic,

⁷A catalogue of BITs can be found on the web site of the International Centre for Settlement of Investment Disputes (ICSID) at <http://www.worldbank.org/icsid/treaties/treaties.htm>.

⁸ Under Article 1122, all three NAFTA parties have unilaterally consented to international arbitration of claims arising under the Chapter, notwithstanding the absence of any contractual relationship with the foreign investor. While foreign investors must waive their rights to pursue similar claims in domestic courts, they need not exhaust domestic remedies before resorting to international dispute resolution, which is the case under many of the BITS.

⁹ Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 3rd edition. p.65.

strategic and practical constraints that often limit state-to-state dispute resolution. Moreover, the dispute procedures mandated by the BITS engage the norms and procedures of international commercial arbitration, which are at best ill-suited to resolve broad questions of public policy and law, including those concerning human rights.

In fact, the conflict between commercial and public interests has already come to the fore in several disputes that have invoked the dispute procedures of these investment treaties. Some of these disputes concern measures implemented by governments to protect drinking water quality or groundwater ecology. Other disputes concern concession agreements for water and sewer services when these are privatized.

In two recent cases, the tribunals involved have explicitly acknowledged the relevance of human rights considerations to the dispute and have accorded certain NGOs the right to intervene as *amicus curiae*.¹⁰

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal v. Argentina (“Suez v. Argentina”)¹¹

In one of these cases, claims were made by three water conglomerates against Argentina because of actions it had taken to contend with an economic crisis in late 90s, which included devaluing its currency and freezing tariff levels of certain essential services, including water and sanitation.

The austerity measures were opposed by the companies because they would drastically reduce the foreign exchange value of the water and sanitation concessions the companies had in Argentina. When the government proceeded, several of the conglomerates filed substantial damage claims under BITS Argentina had negotiated with various European countries. The *amicus* brief filed in the case provides a good description of the conflicts that can arise between a nation’s human rights obligations and those engendered by investment and trade agreements¹².

As the *amicus* groups explained, but for the government’s intervention the price of water and sewage services would have increased three fold during a time of extreme economic crisis, and put at risk the access of millions of Argentines to water and sewage services. As the groups put it, such increases had the potential to transform “an economic and

¹⁰ ICSID case No. ARB/03/19 Between Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. And The Republic of Argentina and *Bewater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

¹¹ In ICSID case No. ARB/03/19 Between Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. And The Republic of Argentina.

¹² The *amicus* was presented on behalf of of: Centro de Estudios Legales y Sociales (CELS); Asociación Civil por la Igualdad y la Justicia (ACIJ); Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria; Unión de Usuarios y Consumidores; and the Center for International Environmental Law (CIEL), April 4, 2007.

social crisis into a full-fledged humanitarian disaster by abruptly depriving millions of citizens of their access to life-giving water. Such increase in tariffs would have triggered further social unrest and riots, thereby aggravating the already severe public order crisis.”

Argentina’s obligations under various international human rights instruments are well established under both international and domestic law. As we know, under these treaties,¹³ Argentina is obligated to take steps to protect both access to and the quality of drinking water. Moreover, as noted by the *Special Rapporteur on the Right to Water* (Special Rapporteur), the right to drinking water is “an essential component of the right to life” and “the lack of access to drinking water and sanitation jeopardizes the lives of millions of individuals.”¹⁴ Argentina’s measures were also arguably required to progressively realize its citizens’ right to water, as well as to protect and promote its citizens’ right to health in accordance with its obligations under ICESCR.

The human rights treaties to which Argentina is a party were also incorporated into Argentine law, and its Constitution lists and gives full status to international and regional human rights instruments. Accordingly, the *amicus* interveners argue, human rights law provided a rationale for the measures taken by Argentina, and its obligation under the BITs must be interpreted in light of these human rights obligations. More particularly, human rights law required Argentina to adopt measures to ensure that its people maintained their access to water notwithstanding the economic crisis, and thus its decision to freeze tariff levels fully conformed to human rights law.

It is of note that the type of problem confronted by Argentina was specifically referred to by the Special Rapporteur, who expressed “[a] particular concern . . . the phenomenon of companies’ raising prices when the local currency is devalued. Any concession contracts should specify that the risk of devaluation shall not be borne by the poorest consumers.”¹⁵

The case, which is now underway, will require the tribunal to resolve a number of complex and difficult questions including whether human rights law is relevant to the interpretation and application of a BIT and the choice of law appropriate to the resolution of such disputes, and may also require a determination of the fundamental question of whether human rights law should have primacy in the case of a conflict with the norms of international investment law.

¹³ These include the International Covenant on Economic, Social and Cultural Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.

¹⁴ Preliminary report submitted by Mr. El Hadji Guissé, Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, , U.N. Doc. E/CN.4/Sub.2/2002/10, 54th Sess., ¶ 42 (June 25, 2002)

¹⁵ Report of the Special Rapporteur, El Hadji Guissé, the *Realization of the right to drinking water and sanitation*, E/CN.4/Sub.2/2005/25, at para.60.

However, there are good reasons to question the competence of tribunals convened under international investment treaties to address such issues. The lack of independence and transparency that characterizes such tribunals, the limited role permitted interveners, and the lack of adequate judicial oversight of arbitral procedures and awards, all raise serious questions about the appropriateness of this dispute forum to address questions of international human rights law. Yet with very little public debate, and with no apparent effort to engage human rights bodies, investor-State tribunals have been empowered to play a central role in resolving fundamental questions of human rights law. The only option that may be less appealing than having these tribunals address such questions is for the human rights dimensions of investor-state claims to simply be ignored during the litigation process, and as the following case study illustrates, this may often be the case.

Metalclad Inc. vs. Mexico (ICSID Additional Facility Rules) ¹⁶

As the *Metalclad* case illustrates, human rights issues may be engaged by foreign investor claims and yet remain obscure during the litigation process. This may be a consequence of the fact that those most directly affected have no notice of, or standing in, the arbitral process.¹⁷

The *Metalclad* case proceeded under NAFTA investment rules, and involved a challenge by a U.S. hazardous waste company arising from the refusal by a small and poor municipality to authorize the operation of a hazardous waste facility in the community. As the facility had been authorized by the federal government, albeit in dubious circumstances, the tribunal found Mexico liable to pay \$U.S. 16 million in damages to Metalclad on the grounds, *inter alia*, that by refusing to issue the company a construction permit, the local government had, in effect, expropriated its investment in the waste facility. The tribunal was unimpressed with the argument that the local government's decision was entirely warranted because of valid environmental and public health concerns, and because the company had built much of its project before applying for a local construction permit.

The tribunal also found Mexico in breach of its obligations to accord foreign investments *treatment in accordance with international law*. The tribunal faulted Mexico for failing to provide a more transparent regulatory process for a project that would be just as fraught with legal controversy in Canada or the United States. Finally, the tribunal objected to a decision by the state government to establish an ecological preserve that included the company's site. In its view, this also represented an unlawful taking of Metalclad's property.

Mexico subsequently sought judicial review of the tribunal award, but was unsuccessful. What is relevant about the case for present purposes is that at the heart of the dispute between an international hazardous waste company, and a poor rural community in

¹⁶ *Metalclad Corporation vs. The United Mexican States*, Final Award of Tribunal, Aug.25, 2000.

¹⁷ See discussion of this case in Phillippe Sands QC, *Lawless World*, 2005, 2006.

Mexico, was the latter's efforts to protect local groundwater for community use. These local concerns were particularly acute because local groundwater had already been contaminated by hazardous waste dumped on the site by the previous owner, and despite Metalclad's assurances, no remediation had taken place. These facts are barely acknowledged by the perfunctory reasons issued by the tribunal, but are fully set out in the uncontroverted pleadings of the government of Mexico in support of its application for judicial review.¹⁸

Arguably the actions of the local municipality were warranted, and, in fact required to ensure adequate access by local residents to clean water in accordance with the normative content of the right to water as described by Article 10 of General Comment 15, which speaks of the right to access uncontaminated water supplies; Article 12, which requires water to be safe and free from chemical substances; and under Article 23, which obliges State parties to "prevent third parties from interfering in any way with the enjoyment of the right to water". In *Metalclad* the positions of the national government, which had authorized the project, diverged from those of the state and local government that opposed the project. Yet only the national government had the right to notice or participation in the tribunal proceedings. For whatever reason, the question of human rights does not appear to have been raised in defence of the measures taken by local governments.

This underscores yet another problematic feature of the arbitral regimes established pursuant to investment treaties, which is that they provide no recourse for those affected by abuses either condoned by or perpetrated by the state.

There are several other investor-state claims that engage similar human rights issues, and we have briefly described several of these in Appendix "A". However, it is beyond the scope of these submissions to fully canvass the complex issues of law and jurisdiction that are engaged by this intersection of investor rights and human rights law. Nevertheless, we note the cases to underscore the fact that trade and investment regimes have emerged as primary vehicles for asserting and defending commercial and proprietary rights to water and water services.

Getting the Genie Back into the Bottle

Some organizations have responded to the challenges presented by this dramatic expansion of international investment law by suggesting reforms that would explicitly accord these tribunals with the authority to consider and weigh international human rights law in adjudicating the private claims that may be asserted in this forum. The proposals argue for greater transparency and scope for non-party intervention,¹⁹ but are fraught with difficulty and would certainly marginalize the role and authority of UN human rights

¹⁸ Pleadings of Applicant Government of Mexico, *Mexico v. Metalclad Corp.*, [2001] BCSC 664 (B.C.S.C.), available from the author, sshrybman@sgmlaw.com

¹⁹ International Institute for Sustainable Development: International Human Rights in the Bilateral Investment Treaties and Investment Treaty Arbitration, April 2003.

bodies. One must also wonder why, if human rights obligations are to have primacy, the resolution of conflicts between such norms and commercial rights would be left to tribunals that operate in accordance with the norms of private commercial arbitration.

While the process of human rights reform has made modest progress over the past two decades, international trade and investment law has forged forward in dramatic fashion. As we have described, the private rights protected by these regimes encompass investments in water, water services and in enterprises that either depend upon or may impact water. It is not surprising, therefore, that the powerful enforcement mechanism authorized by these regimes has now been invoked to challenge government measures relating to water that were either partially or entirely motivated by human rights or environmental protection concerns, often both. It is entirely unsatisfactory to suggest that the answer to the dilemma posed by these developments is to impose modest procedural reforms on the private tribunals that have ascended to a prominent, but undeserved, role in arbitrating the legitimacy of measures taken for human rights purposes.

Finally in this regard we should note that the notoriety, cost and potential liability associated with trade challenges and investor-State claims have produced a chill over the development of domestic policy and law by governments.²⁰ Thus the cases that we can observe may represent only the tip of the iceberg when it comes to observing the impacts of these international investor rights.

PART III: THE NEED TO ASSERT THE PRIMACY OF INTERNATIONAL HUMAN RIGHTS

The Right to Water Under International Human Rights Instruments

As we know, only two of the principal and legally binding human rights treaties explicitly refer to water: the *Convention on the Right of the Child* [Article 27(2)(c)], and the *Convention on Elimination of Discrimination Against Women* [Article 14(2)(h)]. However the right to water can also be derived from other human rights instruments, most notably the ICESCR. In this regard General Comment 15 regarding Articles 11 and 12 of the ICESCR offers the most expansive articulation of the nature, scope and content of the human right to water. Unfortunately, General Comment 15 is not binding and the status of water as a fundamental human right is still one resisted by several nations.

The Need to Acknowledge Water as Right Also Guaranteed by the *International Covenant on Civil and Political Rights* 1966

Often absent for the recitation of human rights instruments bearing on the right to water is any reference to the *International Covenant on Civil and Political Rights* 1966

²⁰ Howard Mann, *Private Rights and Public Problems* (International Institute for Sustainable Development and the World Wildlife Fund, 2001); and also see David Schneiderman, *Investment Rules and New Constitutionalism*, 25 *Law and Social Inquiry* 757 (2000).

(ICCPR). However there is no apparent justification for regarding the the ICCPR as extraneous to the right to water, and we encourage the OHCHR to acknowledge its importance.

Article 1(2) of this Covenant provides that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. **In no case may a people be deprived of its own means of subsistence.** [emphasis added]

Article 6(1) further provides:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

While water is not explicitly mentioned in the final document of the Covenant, clearly the right to water is necessary to enable life itself, and the lack of access to clean water will readily deny people their means of subsistence. The right to water should also be seen as sitting as comfortably with these provisions and within the framework of the ICCPR as it does with the right to housing, and to the highest attainable standard of health, under Articles 11 and 12 of the ICESCR.

Further, the drafting history and preparatory documents leading to the establishment of the Human Rights Committee (HRC) under the ICCPR indicate an intent to accord a broad view of the right to life. As the Commission noted, States are required to take positive action to provide the “appropriate means of subsistence” necessary to support life:

“ . . . the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restricted manner, and the protection of this right requires that States adopt positive measures” (United Nations, 1989a).²¹

In addition, the Inter-American Court of Human Rights has interpreted the right to life as including the right to a dignified life.²² Water most certainly must be regarded as such a condition. As one advocate puts it: “To assume the contrary, would mean that there is no

²¹ As referenced in Peter H. Gleick, *The Human Right to Water*, Water Policy I (1998) 487-503, at p. 493

²² As cited by the submissions of the *amicus* interveners in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.; And The Republic of Argentina*, ICSID case No. ARB/03/19 --- Corte Interamericana de Derechos Humanos, *Caso Villagrán Morales y Otros (Caso de los “Niños de la Calle”)*, Sentencia del 19 de noviembre de 1999 (Ser C) No. 63, párr. 144.

right to the single most important resource necessary to satisfy the human rights more explicitly guaranteed by the world's primary human rights declarations and covenants.”²³

For these reasons, the ICCPR should be included in the catalogue of international human rights instruments that engender the right to water.

The Need for a New Instrument on Water as Human Right

Notwithstanding our view that the right to water is already firmly established in international law, the need for a new instrument that deals explicitly and comprehensively with water as a human right is apparent. Any doubt that may have existed about this imperative is resolved by the advent of binding and legally enforceable instruments that assert private and commercial rights to water. Unless international human rights law is fortified and expanded, the forces unleashed by trade agreements in general, and by international investment treaties in particular, will certainly overwhelm the norms engendered but not adequately protected by current instruments concerning water as a human right.

Fortunately the principles that must comprise the content for such an instrument have largely been identified and described by the Special Rapporteur and are further delineated by General Comment 15 - we deal with these more fully below. At first instance, a new instrument is required to give legal and binding effect to these principles.

Without underestimating the benefits that would be derived from doing that and no more to rein in the development of international trade and investment concerning the right to water, a new instrument on water as a human right must address and overcome the limitations that undermine the effectiveness of present international human rights guarantees. Thus such an instrument must forge new ground in several respects, including by:

- i) establishing mechanisms for ensuring the adherence to human rights norms by non-state entities, including corporations, international financial institutions, and trade and investment organizations and tribunals;
- ii) establishing international dispute resolution procedures and remedies to complement those required at the national level to ensure recourse for those who suffer human rights violations against both state and non-state bodies;

²³ Gleick, *supra* note at 492-493. As further noted by the author: The InterAmerican Convention on Human Rights and the European Convention on Human Rights also supports the requirement that States take positive, proactive steps to support the right to life. Article 2 of the European Convention requires that States have an obligation “not only to refrain from taking life ‘intentionally’ but further, to take appropriate steps to safeguard life” (DRECHR, 1979; Churchill, 1996). Even narrow definitions of Article 6 of the ICCPR interpret it as guaranteeing protection against arbitrary and intentional denial of access to sustenance, including water (Dinstein, 1981; McCaffrey, 1992).

- iii) establishing clear benchmarks, indicators and timeframes for achieving the right to water;
- iv) providing a framework for the future negotiation of protocols that may be required to give full effect to the human right to water;
- v) more clearly delineating funding and other requirements for international cooperation and assistance to ensure that human right to water is met in nations that lack the capacity and financial resources to fulfill their obligations;
- vi) addressing new areas not covered in detail by the Guidelines or General Comment, such as the use of water for subsistence farming and productive uses necessary to give effect to human rights upon which access to clean water and sanitation depend; and
- vii) bridging the gap between the imperatives to ensure that human right to water, and those related to water and ecology.

Several, but not all aspects of these requirements are considered next.

The Content of the Human Right to Water

As for the scope and content of a new instrument on the right to water, we commend the draft guidelines prepared by the Special Rapporteur, and the description of the purposes, content, obligations and other matters delineated by General Comment 15 in relation to the right to water. However, as noted, to be truly effective, such an instrument would have to transcend the limitations that currently hamper the implementation of human rights agreements.

The Need to Address the Limitations of Current Human Rights Instruments

Compliance, Enforcement and Dispute Resolution

The first of these challenges is to address the need for meaningful enforcement. Even if we assume the availability of the recourse available under the Optional Protocol to the ICCPR, that would not be sufficient to ensure compliance by state parties or effective and timely remedies to the victims of human rights abuses.

The General Comment speaks to the need for effective remedies. Paragraph 55 of the General Comment provides:

Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels (see General Comment No. 9 (1998), para. 4, and Principle

10 of the Rio Declaration on Environment and Development).²⁴ The Committee notes that the right has been constitutionally entrenched by a number of States and has been subject to litigation before national courts. All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right.

Paragraph 56 further provides:

Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)).

The draft guidelines prepared by the Special Rapporteur include provisions that also underscore the importance of establishing effective mechanisms to ensure participatory rights and effective recourse for those whose rights are denied. Thus, paragraph 8 provides that “Everyone has the right to participate in decision-making processes that affect their right to water and sanitation.” Paragraph 9.1 further stipulates that; “Everyone should have access to administrative or judicial procedures for the making of complaints about acts or omissions committed by persons or public or private organizations in contravention of the right to water and sanitation.”

As noted, in the context of international law, the development and implementation of legally binding dispute procedures has greatly advanced over the past decade, but this ‘progress’ has been limited to the protection of private and commercial interests. The irony, of course, is that the principal beneficiaries of this development are corporate entities already well-equipped to defend their interests.

Nevertheless, we commend these developments as establishing the new benchmarks against which human rights law reform must now be measured. If in fact human rights are to have primacy in the new global environment, new dispute mechanisms are required to overcome the institutional and doctrinal constraints that have so seriously limited the influence of human rights instruments.

²⁴ Principle 10 of the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development*, see footnote 5 above), states with respect to environmental issues that “effective access to judicial and administrative proceedings, including remedy and redress, shall be provided”.

The establishment of more effective enforcement and dispute procedures for human rights abuses is overdue. Accordingly, we encourage the OHCHR to set a course for meeting this challenge by acknowledging the need to address the gross disparity that now exists between the enforcement of commercial and private rights, on the one hand, and human and environmental rights on the other. In our view, it would also be appropriate to identify the essential characteristics of such a compliance and dispute regime. In this regard, we believe that such a mechanism or procedures, should:

- provide an effective incentive for nations to become Parties to the Convention, and thereafter to comply with its requirements;
- allow for the protection of individual as well as group rights;
- provide effective and meaningful recourse for individuals, groups or communities that are denied rights accorded by the convention;
- provide effective remedies against any entity that interferes with or conducts itself in such a manner as to deny any individual, group or community the rights accorded by the Convention;
- emphasize the consensual resolution of disputes;
- provide for intervention by interested third parties, including non-governmental organizations;
- require that local remedies be exhausted before recourse is sought to any international dispute resolution process; and
- ensure that adjudicators, mediators, and arbitrators are competent; that is, possess the specialized expertise needed to address the full social, environmental, economic and technical issues that may arise in dispute resolution.

It is clear that to achieve these objectives, both domestic and international mechanisms will be required. Several existing international instruments mandate the establishment of domestic judicial and administrative procedures to give effect to their respective objectives.²⁵ The most rigorous of these are once again found in international trade, investment and services regimes,²⁶ which provide useful models for domestic enforcement procedures relating to the human right to water, and these warrant more thorough review than permitted here.

²⁵ See for example the Agreement on Trade Related Intellectual Property Rights.

²⁶ In addition to investor-state procedures which have been discussed herein, the cross retaliation permitted under WTO rules also provides a powerful incentive for governments to comply with trade disciplines.

The Need to Bind Non-State Actors

Corporations

International law has also failed to articulate the human rights obligations of corporations or to provide mechanisms to enforce such obligations. While corporate codes of conduct have been promulgated by various institutions, these are voluntary and unenforceable. Yet it is indisputable that corporations are capable of and indeed have often interfered with the enjoyment of a broad range of human rights. Nevertheless they are largely immune to liability for such violations, and their victims often remain without redress.

Recent reports issued by the UN Secretary General's Special Representative on Business and Human Rights, John Ruggie, acknowledges this problem in the course of providing a comprehensive review of international human rights as it relates to transnational corporations and other business enterprises.²⁷ These reports underscore the need for reforms to ensure more effective control of corporate conduct to prevent human rights abuses. As the Special Representative describes the problem:

*. . . a fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.*²⁸

However, and in direct contradiction to this prescription, when it comes to conventional notions of international development, the emphasis has been and remains on reducing the liabilities and risks of foreign lenders and investors. This is so notwithstanding the extensive protection these powerful entities already enjoy, including those provided by international trade and investment treaties which have been noted.

In this regard, paragraphs 23 and 33 of General Comment 15 are relevant because they specifically speak to the obligations of nation states to ensure that corporations adhere to the norms on human rights concerning water:

Para. 23 The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents

²⁷ Reports of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. The creation of the Special Representative's mandate was requested by the United Nations Commission for Human Rights in its resolution 2005/69 and approved by the Economic and Social Council on 25 July 2005.

²⁸ *Idem: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*" A/HRC/4/035, February 2007, para. 3.

acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.

Para. 33: Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

It is noteworthy that the *General Comment* stipulates that States establish legal and other constraints on resident companies to ensure that these do not violate the right to water in other countries. Certainly, establishing legal accountability for transnational corporations in their home jurisdictions can provide a powerful incentive for them to adhere to human rights norms, for as noted by the Special Representative, the governments in these other countries:

. . . may be unable to take effective action, whether or not the will to do so is present. And in the international arena states themselves compete for access to markets and investments, thus collective action problems may restrict or impede their serving as the international community's "public authority." The most vulnerable people and communities pay the heaviest price for these governance gaps.²⁹

These dynamics can certainly be observed in the relationship between the handful of trans-national water corporations that dominate the water sector, and developing countries that enter into concession or other agreements with these conglomerates. The challenge, as the Special Reporter notes, is to redress this power imbalance.

While measures to hold domestic corporations to account for human rights abuses committed abroad are important and necessary, there is also an apparent need for international mechanisms to directly impose accountability, and where appropriate, liability on international corporations for human rights abuses.

Such notions have typically been greeted with doctrinal arguments that corporations cannot be considered "subjects" of international law, and therefore direct legal responsibility cannot be attributed to them. According to the Special Representative, it is time for such arguments to yield to new realities, and he notes in this regard that Corporations are increasingly recognized as "participants" at the international level, including as claimants under bilateral investment treaties.

²⁹ *Idem*, para. 82.

It is also relevant to note the Special Rapporteur's comment that:

some observers hold that these instruments already impose direct legal responsibilities on corporations but merely lack direct accountability mechanisms. For example, the UN Sub-Commission on the Promotion and Protection of Human Rights, explaining that its proposed Norms “reflect” and “restate” existing international law, attributed the entire spectrum of state duties under the treaties – to respect, protect, promote, and fulfil rights – to corporations within their “spheres of influence.”³⁰

The Special Representative's report arrives at an opportune moment, as it provides important authority for addressing the “fundamental institutional misalignment” that now exists between the rights of corporations under both national and international law, and the capacity of many nations to comply with human rights norms concerning water.

We encourage the OHCHR to acknowledge the limited capacity of many states to implement the obligations described in the General Comment and by the draft guidelines prepared by the Special Rapporteur, and for the need for new mechanisms under international law to redress the present misalignment he describes. As noted by the Special Representative,³¹ there is a need for more guidance from treaty bodies on the scope and content of state obligations regarding the fulfilment of human rights duties as they pertain to corporations and other business entities.

The Need to Bind International Financial Institutions “IFIs”

General Comment 15, paragraph 60, provides in part:

. . . The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects (see General Comment No. 2 (1990)), so that the enjoyment of the right to water is promoted . . .

In most nations where the need for water is greatest, governments are dependent upon funding or credit arrangements from international financial institutions, such as the World Bank, to establish water and sanitation infrastructure and services. Not only do IFIs play a central role funding water and sanitation projects in developing countries, but the privatization conditionality they often insist on has, many argue, created structural and institutional impediments to ensuring the universal human right to water.

While some IFIs have been willing to take part in a dialogue about human rights, none have accepted legal obligations in this sphere, relying, as do corporations, on the

³⁰ *Idem*, para. 35

³¹ *Idem*: *State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries*. HRC/4/35/Add.1 13 February 2007, p. 3.

conventional view that only states are the proper "subjects" of international law and therefore only states are capable of bearing legal rights and duties.

Among other consequences, this has allowed IFIs to escape accountability and liability for failed policies and programs, even where these have undermined, if not directly interfered with, the realization of human rights norms. Moreover, the obligations of a poor nation to provide universal access to water mean very little if it is compelled, by the terms of a lending or credit agreement, to implement market-oriented policies that are incompatible with or that explicitly prohibit the very government actions needed to ensure water as a human right. Similar problems arise where water services are privatized and nations lose effective if not formal legal control over pricing and service policies.

Certainly, the challenge of requiring IFIs to adhere to the objectives and goals of international human rights law concerning water is a formidable one. But there is a clear moral imperative and a valid legal rationale for such reform. International institutions are after all the creations of nation States, and act on their behalf. They must therefore be held to the same standard of conduct. Arguably, therefore, if an action or inaction of a national government violates human rights, then similar conduct by the World Bank or another IFI must be viewed the same way.

Nevertheless, it is simply not tenable as either a matter of policy or morality for an international bank or funding agency to claim that, in funding water projects, it is not obliged to respect fundamental human rights. Accordingly we encourage the OHCHR to recognize the need to the give more than hortatory effect to the requirement for the World Bank and other IFIs to conform and be accountable for their lending practices and other activities that may affect the human right to water.

Resolving Potential Conflicts with Other Treaties and International Bodies

Paragraph 60 of General Comment 15 provides in part:

United Nations agencies and other international organizations concerned with water, such as WHO, FAO, UNICEF, UNEP, UN-Habitat, ILO, UNDP, the International Fund for Agricultural Development (IFAD), as well as international organizations concerned with trade such as the World Trade Organization (WTO), should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to water at the national level . . .

The Guidelines articulated by the Special Rapporteur are more precise and call upon:

International organizations, including United Nations specialized agencies, trade and financial institutions, and the States members of such bodies should ensure that their policies and actions respect the right to water and sanitation. States

*should take account of the right to water and sanitation when formulating and implementing international agreements that have an impact on this right.*³²

The challenge is to raise the status of these obligations so that they are binding and may be enforced. For the reasons noted, the most pressing and immediate potential conflicts that require attention are those between human rights and international investment law, and between the institutions and dispute bodies that attend these disparate regimes.

To begin with, one can assert that human rights must be accorded primacy in any conflict of norms with trade or investments rights. Indeed this has been recognized by the international community in *The Vienna Conference on Human Rights*, which stipulates that “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of government.”³³

The primacy of human rights law can also be derived from the imperative character of *Ius Cogens*, which as we know entirely concern human not commercial rights. There is also jurisprudence that can be invoked for this proposition, namely the decision of the Inter-American Human Rights Court in the *Case of Velásquez-Rodríguez vs. Honduras*, holding that States are under a duty “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”³⁴

However, this doctrinal argument does little to address the practical problem that has arisen from the empowerment of trade and investment tribunals to determine foreign investor claims that may engage these legal questions and materially affect human rights. We have noted the lack of competency of such tribunals to address such issues, and the uncertainty that human rights issues will even be raised in cases where they are clearly relevant. A similar problem arises with respect to other trade dispute bodies. There is also no institutional relationship between human rights bodies and those empowered under trade and investment agreements.

As noted, we believe there is an urgent need for human rights bodies to address these problems and we strongly encourage the OHCHR to acknowledge the importance and put forward recommendations for doing so.

Putting aside the institutional dimensions of these problems, we can describe the provisions of a new instrument on water as human right that would amplify and clarify

³² Report of the Special Rapporteur, El Hadji Guissé: ECONOMIC, SOCIAL AND CULTURAL RIGHTS Realization of the right to drinking water and sanitation GE.05-14909 (E) 030805 030805, para. 10.4

³³ World Conference on Human Rights, Vienna Declaration and Programme of Action, Article 1, A/CONF.157/23, (12 July 1993).

³⁴ Case of Velásquez-Rodríguez v. Honduras, Inter-Am. C.H.R. 35, OAS/Ser. L/V/III. 19, doc. 13, app. VI, ¶166 (1988).

the obligations described by the provisions of the General Comment, cited above. These would state as follows:

The Parties shall protect and promote the goals of this Convention in all international instruments that could adversely affect the right to water, and seek, if necessary, to amend those instruments to accord with the principles and requirements of this Convention.

The Parties shall take steps to ensure that the principles and requirements of this Convention are reflected in the policies and practices of international financial institutions, including the International Monetary Fund, the World Bank and regional development banks.

The Parties shall respect the principles and requirements of this Convention with respect to the interpretation and application of other international instruments and shall foster mutual supportiveness between this Convention and other international instruments.

In the event of a conflict between the obligations of the Parties under this Convention and their obligations under any international agreement concerning trade, investment and services, their obligations under this Convention shall prevail.³⁵

In particular, when any international trade or investment dispute concerns measures relating to the human right to water, and notwithstanding the provisions of the trade or investment treaties pursuant to which the dispute has arisen, the Parties agree that the matter will be referred to an expert and competent human rights body for determination.

CONCLUSION

Having provided an our overview of these submissions in the introduction to this brief, we will not repeat that exercise here. As these submissions stress, added to the other challenges confronting efforts for progressive reform of human rights law are those arising from the enormous and rapid advancement of international trade and investment law. Because these commercial regimes entrench private rights to and investments in water and water services, they directly undermine norms of human rights law concerning water.

³⁵ See Article 103 of the Charter of the United Nations, which reads:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

At the same time, the legally binding and enforceable nature of such rights can provide a model for the reforms needed to serve human, rather than commercial rights. To paraphrase the conclusion of the Special Representative, there is a need for greater guidance from UN bodies to address this fundamental misalignment of priorities and values.

Appendix “A”

Re. International arbitration proceedings that engage obligations to protect the human right to water.

General Note:

Proceedings that engage questions relating to the price and quality of water will inevitably have implications for whether the poorest and most vulnerable members of society will have access to water.

Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19

- water services concession (rates)
- registered July 17, 2003
- status of proceeding: pending
 - same legal issues as *Anglian Water Group v. Argentine Republic* UNCITRAL arbitration filed in 2003.

Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic, ICSID Case No. ARB/03/17

- investment treaty arbitration related to a disputed water services concession (rates and service)
- registered July 17, 2003
- status of proceeding: pending

Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic, ICSID Case No. ARB/03/18

- water services concession (rates and service)
- registered: July 17, 2003
- outcome: settlement (Order of discontinuance, January 24, 2007)

Synopsis

The Company sought to raise tariffs and rates in order to compensate for losses resulting from the declining Peso.

Note: While the company has mounted three separate claims against the Argentine Republic in relation to three separate water contracts, the legal issues in each claim are the same.

Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3

- water and sewer services concession
- unreasonable rate increase making water unaffordable
- registered: February 25, 2002
- outcome: settlement agreed by the parties (Order noting discontinuance March 28, 2006)

Synopsis

City gives Company exclusive rights to all water in the area. The Company subsequently increases local water rates (with some bills amounting to a quarter of monthly incomes) and expropriates all public water supplies (for example water in wells formerly held by the community). This leads to protests, violence, and the eventual declaration of martial law.

Company's claim was for \$25 million for profits lost as a result of the public uprising, but is ultimately abandoned under the weight of local and international civil society pressure.

Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award July 14, 2006.

1. water and sewer services concession agreement
 - dispute related to setting appropriate rate, water quality, and the adequate supply of water
 - outcome of proceeding: award rendered July 14, 2006
2. annulment proceeding
 - registered: December 11, 2006
 - status: pending

Synopsis

Company obtains a 30-year concession to run the newly privatized water system in Buenos Aires. Shortly thereafter, the Province issues a Resolution that prohibit the billing of amounts which exceed those billed by the state prior to the concession. Conflicts also arise with respect to water quality (algae in reservoirs resulted in cloudy and hazy water with an earth-musty taste and odour) and poor water pressure (inability to provide both the quantity agreed to in contract between province and various private companies prior to concession). Government measures taken to protect population from poor water quality (warns population to avoid drinking water and to minimize exposure and Azurix alleges that population was advised not to pay their bills).

Tribunal finds that province took arbitrary measures that impaired Azurix's use and enjoyment of its investment: award \$165,240,753 USD.

Azurix Corp. v. Argentine Republic, Case No. ARB/03/30

- water and sewer services concession agreement (details unknown as pleadings not available)
- registered: December 8, 2003
- status: pending (tribunal not yet constituted)

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006; Procedural Order No. 3, 29 September 2006.

- water and sewer services concession agreement (rates, quality and service)
 - following the concession rates were increased, water quality decreased, service to the most populated areas was reduced, and the expansion of water service to low-income areas, as agreed to in the concession, never took place.
 - there is no evidence showing that this decrease in service (or non-expansion of service to low-income areas), and denial of the basic human right to water which resulted, was deliberate.
- registered November 2, 2005
- status: pending

Synopsis

Company granted concession for water distribution and water and waste treatment. Two years into the ten year concession agreement, Tanzania ends concession on the grounds that the Company had failed to make half of the required investment or improve service to the largest city affected. For example, service to parts of the city that previously had water available twice a week was reduced to once a month.

Branimir Mensik v. Slovak Republic, ICSID Case No. ARB/06/9

- mineral water spring project (details unknown)
- registered: May 10, 2006
- status: pending (tribunal not yet constituted)

Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3

- water and sewer services concession agreement (quality, rate, service)

Synopsis

Province alleges that Company failed to provide water and sewage services as required by the terms of the Concession Agreement. The parties disagreed on the method for measuring water consumption, the level of tariffs for customers, the timing and percentage of any increase in tariffs, the remedy for non-payment of tariffs, the Company's right to "pass-through" to the customer certain taxes and the quality of water delivered.

Metalclad Corporation v. Mexico, ICSID Case no. ARB(AF)/97/1

- water quality (ban of waste disposal facility located near stream)
- claim: \$90 million
- award: August 30, 2000 (\$15,6 million to Metalclad)

Synopsis

Company challenges municipality's refusal to grant permit for construction of toxic waste disposal facility and declaration of ecological preserve surrounding the site.

Tribunal rules that the denial of the permit and the creation of the ecological reserve are tantamount to an "indirect" expropriation and that Mexico violated the minimum standard of treatment guaranteed foreign investors (this is because the firm was not granted a "clear and predictable" regulatory framework).

In 2002, the ruling was challenged by the government (in the Canadian Federal Court). The Court reduced the award by \$1 million (finding that the arbitrator had erred in part by importing transparency requirements of NAFTA ch. 18 into ch. 11).

Methanex Corporation v. United States of America (California), UNCITRAL, Final Award of the Tribunal, August 7, 2005

- water quality (ban of carcinogen leaking from fuel tanks into water supply)
- registered: December 3, 1999
- claim amount: \$970 million
- status: pending

Synopsis

Corporation, which produces methanol (component of gasoline additive MTBE), challenges California phase-out of MTBE, which is contaminating drinking water throughout the State. Claim dismissed on ground that government measures justified in exercise of police powers.

SAUR International v. Argentine Republic, ICSID Case No. ARB/04/4

- water and sewer services concession agreement (rate)
- registered: January 27, 2004
- status: pending (Tribunal suspends proceedings on October 27, 2006)
- amount of claim: \$258 million USD

Synopsis

Saur, water utility firm, files claim after rates were frozen for water and sewerage concession, following an economic crisis that hit Argentina in December 2001.