

CONTRACTING FOR BLUE GOLD: AN EXAMINATION OF THE LEGAL DESIGNS SURROUNDING PRIVATE WATER DELIVERY

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INTRODUCTION

California’s historic mega-drought has lasted five years with little sign of relief.¹ Under these circumstances, it is no surprise that water receives vast coverage by news outlets across the United States. Water conservation is a trending topic; 1.2 trillion pounds of waste are released directly into U.S. freshwater sources every year.² Some U.S. water sources are so polluted that they cannot support life, and local

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1. See Doyle Rice et al., *California’s 100-Year Drought*, USA TODAY (Sept. 2, 2014, 4:52 PM), <http://www.usatoday.com/story/weather/2014/09/02/california-megadrought/14446195>.

2. Rinkesh Kukreja, *40 Interesting Facts About Water Pollution*, CONSERVE ENERGY FUTURE, <http://www.conserve-energy-future.com/various-water-pollution-facts.php> (last visited Jan. 28, 2017).

governments have condemned many as unfit for human use.³ Rampant pollution drives the search for clean water underground. Yet, water users (such as the Coca-Cola Corporation) pump groundwater at an unsustainable rate.⁴ Usable water sources are dwindling, and instances of water conflicts are increasing.⁵ Though drought-stricken Californians are already grappling with the issue,⁶ people everywhere should be asking: who owns our water?

Allocating water is a complex task for any government; every country has its unique set of laws and codes that govern water ownership and use rights.⁷ In the U.S., there are two main legal schemes for allocating water rights: riparian and prior-appropriation.⁸ Several states have systems for allocating water that draw from both theories—a “dual system” of water rights.⁹ Governments often grant rights to use water under state permit schemes that allow the right-holder to withdraw a specific amount of water at a particular location for a term of years.¹⁰ Although most state governments legally reserve the discretion to deny a permit for water use that is not in the public interest, this option is rarely, if ever, exercised.¹¹

While state and local governments generally control water rights within their jurisdictions, most states have passed legislation that allows local governments to “privatize” their water delivery systems.¹² Privatization is a term with varying meanings.¹³ However, at its core it

3. See, e.g., MINN. POLLUTION CONTROL AGENCY, MISSOURI RIVER BASIN MONITORING AND ASSESSMENT REPORT 1 (2014), <https://www.pca.state.mn.us/sites/default/files/wq-ws3-10170204b.pdf>.

4. See, e.g., Archana Chaudhary, *Farmers Fight Coca-Cola as India's Groundwater Dries Up*, BLOOMBERG (Oct. 8, 2014, 11:30 AM), <http://www.bloomberg.com/news/articles/2014-10-08/farmers-fight-coca-cola-as-india-s-groundwater-dries-up>.

5. See VANDANA SHIVA, *WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT*, at vii–ix, 1–2 (2002).

6. See, e.g., *California Orders Large Water Cuts for Farmers*, AL JAZEERA (June 12, 2015, 5:12 PM), <http://america.aljazeera.com/articles/2015/6/12/california-orders-large-water-cuts-for-farmers.html>.

7. See generally BARTON H. THOMPSON, JR. ET AL., *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* (5th ed. 2013) (discussing the various schemes state governments use to allocate water).

8. In riparian doctrine, water rights belong to the owner of the land on which the water sits. *Id.* at 14. Under prior-appropriation theory, on the other hand, whoever is first to put water to a “beneficial use” gains the right to use that water source. *Id.*; see also SHIVA, *supra* note 5, at 21–23.

9. See THOMPSON ET AL., *supra* note 7, at 14.

10. See *id.* at 172–73.

11. See *id.*

12. See *id.* at 802–03.

13. See Danwood Mzikenge Chirwa, *Privatisation of Water in Southern Africa: A Human Rights Perspective*, 4 AFR. HUM. RTS. L.J. 218, 220 (2004).

is the action of a government selling one of its assets to a private party, usually a corporation.¹⁴ In the water context, public to private transfer can occur in various degrees that range from the total sale of water rights and infrastructure, to less invasive forms of privatization, such as partnerships between public and private institutions (“PPPs” or “P3”).¹⁵ Privatization is inseparably linked to other neoliberal, free-market principals such as deregulation and liberalization.¹⁶

Margaret Thatcher,¹⁷ the godmother of privatization,¹⁸ began pushing for neoliberal¹⁹ reforms during the nineteen eighties in the United Kingdom as a means to raise state revenue and reduce government intrusion in the economy.²⁰ Thatcher’s program was politically popular because it encouraged widespread ownership of private property in the form of shares.²¹ The U.K. government, starting with the de-nationalization of already profitable industries—namely telecommunications²²—subsequently passed the Water Act that privatized

14. Privatization comes in various forms, including:

(1) full-fledged water privatization, meaning an actual transfer of assets and operational responsibilities to the private sector; (2) public ownership of assets combined with private provision of services under service or management contracts . . . , leases . . . or concessions . . . ; and (3) build, operate and transfer schemes where local government contracts with a private entity to build and operate an infrastructure facility

Jennifer Naegele, *What Is Wrong With Full-Fledged Water Privatization?*, 6 L.J. SOC. CHALLENGES 99, 107 (2004) (citing Isabelle Fauconnier, *The Privatization of Residential Water Supply and Sanitation Services: Social Equity Issues in the California and International Contexts*, 13 BERKELEY PLAN. J. 37, 44 (1999)).

15. THOMPSON ET AL., *supra* note 7, at 802–03.

16. See Chirwa, *supra* note 13, at 221.

17. Margaret Hilda Thatcher was the late prominent British politician and member of the Conservative Party who served as Prime Minister of the United Kingdom from 1979–1990. See *Biography*, MARGARET THATCHER FOUND., <http://www.margarethatcher.org/essential/biography.asp> (last visited Jan. 29, 2017).

18. Perhaps the most prominent public figure to support privatization, Thatcher’s program undoubtedly stemmed from Chicago-school neoliberal and Hayekian ideas. See Naren Prasad, *Privatisation of Water: A Historical Perspective*, 3/2 LAW ENV’T & DEV. J. 217, 225–26 (2007).

19. “Neoliberal” refers to an economic and political policy that deemphasizes government regulation in the market and aims for reductions in government spending. See EMANUELE LOBINA & DAVID HALL, PUB. SERVS. INT’L RES. UNIT, UK WATER PRIVATISATION - A BRIEFING 5 (2001), http://www.archives.gov.on.ca/en/e_records/walkerton/part2info/partieswithstanding/pdf/CUPE18UKwater.pdf.

20. See Prasad, *supra* note 18, at 225.

21. This type of program is often referred to as “popular capitalism”; however, some commentators doubt the validity of the theory in practice. See, e.g., Paul Grout, *‘Popular Capitalism’ of the ‘80s Returns via Royal Mail & Lloyds*, CONVERSATION (Oct. 16, 2013), <http://theconversation.com/popular-capitalism-of-the-80s-returns-via-royal-mail-and-lloyds-19168>.

22. See Richard Seymour, *A Short History of Privatisation in the UK: 1979–2012*, GUARDIAN (Mar. 29, 2012), <http://www.theguardian.com/commentisfree/2012/mar/29/short-history-of-privatisation>.

water delivery in 1989.²³ Following the U.K.'s example, many countries have adopted legal schemes that support water privatization.²⁴

Privatization is popular not only as an outgrowth of neoliberal economic policy but is also touted as a way to alleviate problems associated with aging water infrastructure, water scarcity and water quality. Private water advocates contend that private investment in aging water infrastructure is the only way for financially-strapped local governments to successfully restore America's 100-year old water infrastructure system (some towns still have wooden pipes).²⁵ Furthermore, large water corporations contend that, by benefitting from economies of scale and corporate water expertise, they are in a better position than local governments to assure water quality and water access for users.²⁶ Moreover, proponents argue that private control over water—which means private control over its price—will conserve water because people would be less likely to waste water when it is more expensive.²⁷ Although water privatization has been a rising trend, these purported benefits are not without their costs.

Inseparably linked to water privatization, water commodification is a private water cost that is chiefly borne by water users. The commodification of water means that water is treated as an economic good, subject to the same market forces as any other good available for sale, by which the price of water derives from supply and demand market forces—we have already seen this at play in the bottled-water industry.²⁸ The commodification of water is in direct conflict with the

23. See Ben Page & Karen Bakker, *Water Governance and Water Users in a Privatised Water Industry: Participation in Policy-Making and in Water Services Provision: A Case Study of England and Wales*, 3 INT'L J. WATER 38, 44 (2005).

24. See Prasad, *supra* note 18, at 225–27.

25. See, e.g., *Public-Private Partnerships: A Solution for Infrastructure*, NAT'L CTR. FOR POL'Y ANALYSIS (Jan. 30, 2013), http://www.ncpa.org/sub/dpd/index.php?Article_ID=22790; see also Justin K. Lacey, *How to Profit from America's Crumbling Infrastructure*, MOTLEY FOOL (Jan. 19, 2014, 10:48 AM), <http://www.fool.com/investing/general/2014/01/19/how-to-profit-from-americas-crumbling-infrastructure.aspx>; Tim Ronaldson, *On Nov. 4, Haddonfield Voters Decide Whether to Sell Borough's Water and Sewer Rights to New Jersey American Water*, HADDONFIELD SUN (Oct. 20, 2014), <https://haddonfieldsun.com/on-nov-4-haddonfield-voters-to-decide-whether-to-sell-boroughs-water-and-sewer-rights-to-new-jersey-1ea2da13b088#.ckyB0tqmx> (“We recently redid the utilities on Pamona and we pulled wooden pipe out of the ground there. We’ve come across 125-year-old pipes on Maple.”).

26. See Craig Anthony Arnold, *Privatization of Public Water Services: The States' Role in Ensuring Public Accountability*, 32 PEPP. L. REV. 561, 601 (2005) [hereinafter Arnold, *Privatization of Public Water*].

27. See Peter Rogers et al., *Water is an Economic Good: How to Use Prices to Promote Equity, Efficiency, and Sustainability*, in 4 WATER POL'Y 1, 5–6 (2002) (discussing the allocation of water through the imposition of tariffs).

28. See SHIVA, *supra* note 5, at 99–100.

idea that water is held in “the commons,” or as a social good, due to water’s unique characteristic of being essential for all life on Earth.²⁹ When water is characterized primarily as a profitable commodity, private actors in charge of distributing water can charge the market price for water; often making it vastly more expensive than it is under government-run, subsidized regimes.³⁰ Because corporations exist to make profits, the social and ecological values of water are in danger of being washed away when water is valued primarily as a moneymaking tool.

This paper argues that the legal procedures governments use to erect and support private water regimes are the same instruments that exacerbate the ills of private water and work damage to the public good, to democratic government, and to the sanctity of human rights. Part I of this paper contends experience demonstrates that private water regimes subordinate the public good in favor of private corporate interests due to private companies’ fiduciary duties to shareholders. Part II argues experience illustrates that private arbitration and statute modification often work to erode the transparency required for democratic water management. Part III claims experience reveals that international trade agreements encourage water companies to enter new markets, but serious problems regarding the enforcement of international human rights law allow water corporations to escape punishment for human rights violations in those same markets. The legal armor available to proponents of water privatization makes a government’s decision to privatize water delivery systems difficult to reverse without suffering collateral damage.

I. COMMON GOOD VS. PRIVATE INTERESTS

Experience shows that private water regimes, which value water as an economic commodity, subordinate the public good in favor of private corporate interests due to private companies’ fiduciary duties to shareholders. Part A contends that although private water systems operate on the premise that water markets are the best way to distribute water’s value as an economic good among society, actual markets for water are exceptionally rare. Thus, a government’s wholesale faith in water markets can work against its citizens. Part B argues that private water companies with large amounts of capital to invest, and with the cooperation of government officials, benefit at the expense of

29. See MAUDE BARLOW & TONY CLARKE, *BLUE GOLD: THE FIGHT TO STOP CORPORATE THEFT OF THE WORLD’S WATER* 3, 86–87 (2002).

30. See *id.* at 127.

the general population via favorable contract terms designed to ensure corporate profits. Part C asserts that even if local governments exit their corporate pacts, they are often left with the same financial difficulties that they had before privatizing their water system. Private management of water is largely incompatible with the concept that water is necessary for life due to the profit-centered fiduciary obligations of corporations.

A. Water “Markets”

The 1992 Dublin Conference on Water and the Environment³¹ solidified the idea that water is an economic good.³² Water is essential to human life. There will always be a demand for it, and it can be supplied to meet that demand via delivery networks. Thus, water suppliers can charge a price for water based upon the supply-demand paradigm.³³ Many economists and water managers maintain that these qualities make water’s “economic good” characterization a foregone conclusion.³⁴ As an economic good, these professionals argue that water is allocated most effectively when water is traded in water markets with users paying full-cost price³⁵ for its value.³⁶

However, the premise that water markets exist and operate like markets for other consumer goods is flawed. According to Professor Joseph Dellapenna, using the term “market” to describe the context in which water transfers occur is a misuse of the word—true markets for water are quite rare.³⁷ The existence of the bottled water industry suggests that water markets exist effectively. However, the bottled water

31. The Dublin Conference on Water and the Environment was a meeting of water experts to discuss water-related problems, which convened on January 31, 1992. See Int’l Conference on Water and the Environment, *The Dublin Statement on Water and Sustainable Development* (Jan. 31, 1992), www.ircwash.org/sites/default/files/71-ICWE92-9739.pdf. Participants produced the “Dublin Statement on Water and Sustainable Development,” or the “Dublin Principles.” *Id.*

32. See *id.* at 14; see also Hubert H.G. Savenije, *Water is Not an Ordinary Economic Good, or Why the Girl is Special*, 27 *PHYSICS & CHEMISTRY EARTH* 741, 741 (2002).

33. See Savenije, *supra* note 32, at 741.

34. See, e.g., John Briscoe, *Water as an Economic Good*, in *COST-BENEFIT ANALYSIS AND WATER RESOURCES MANAGEMENT* 46, 65 (Roy Brouwer & David W. Pearce eds., 2005); see also Rogers et al., *supra* note 27, at 2.

35. “Full-cost price” is an economic term of art, which means that basic economics requires the price of a service match the cost of providing that service. See PETER ROGERS ET AL., *GLOBAL PARTNERSHIP TECHNICAL ADVISORY COMMITTEE, WATER AS A SOCIAL AND ECONOMIC GOOD: HOW TO PUT THE PRINCIPLE INTO PRACTICE* 9 (1998).

36. See Rogers et al., *supra* note 27, at 5.

37. See Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 *WM. & MARY ENVTL. L. & POL’Y REV.* 317, 324 (2000) (“Such markets . . . have been used to transfer fairly small quantities of water among similar users in close proximity to each other . . .”).

market is minuscule compared to the possibilities of bulk raw water transactions and the entire water resources sector.³⁸ Water privatization proposals seldom create a real working market scenario—a situation where:

water users will be able to negotiate over the price of water and seek out [the lowest-cost] provider, providers will be able to seek out the [highest-paying] user . . . and both will . . . engage in the sorts of activities that give rise to the expectation that markets are likely to generate the . . . most economically efficient use of water.³⁹

Who gets to use water and at what price is not primarily a market decision, rather, it is a legal, administrative, and social one.⁴⁰

When governments make this error, it is often its citizens who suffer. Consider, for example, the Chilean experience.⁴¹ In Chile, water rights can be freely bought and sold; they are given private property protection by the constitution and civil code, creating a “market” for water that exists unmatched by any other country in the world.⁴² Chile’s tradable water rights system, established by the Water Code of 1981,⁴³ is the longest-running, and arguably most successful, privatization experiment in the world to date. Although this free-market legal framework was meant to cure water scarcity issues, many argue that it has created more problems than it has solved.⁴⁴

Private property is protected from government regulation in Chile; thus, decisions about water use are made without regard to how those uses may affect third parties by private users who have the purchase-power necessary to amass water rights.⁴⁵ Supported by the legal framework, big business interests have collected a majority of Chile’s water rights. This has been to the direct disadvantage of family farmers and rural populations that no longer have access to water because it has been transferred out from their communities for use in

38. *See id.* at 320.

39. *Id.* at 322.

40. *See id.* at 322–23.

41. Chile offers a strong example, as it has privatized not only the delivery of water, but also water rights themselves, which are freely purchased and sold by users. *See generally* Monica Ríos Brehm & Jorge Quiroz, *The Market for Water Rights in Chile: Major Issues*, WORLD BANK TECH. PAPER NO. 285 (1995).

42. *See id.* at 1–2.

43. CÓD. AGUAS, Octubre 29, 1981, DIARIO OFICIAL [D.O.] (Chile).

44. Carl J. Bauer, *Dams and Markets: Rivers and Electric Power in Chile*, 49 NAT. RES. J. 583, 643–51 (2009).

45. *See* CARL J. BAUER, SIREN SONG: CHILEAN WATER LAW AS A MODEL FOR INTERNATIONAL REFORM 32 (2004); *see also* Stephen E. Draper, *The Unintended Consequences of Tradable Property Right to Water*, 20 NAT. RES. & ENV’T 49, 51 (2005).

mining, logging or hydro-electric operations.⁴⁶ Some Chileans' only access to drinking water comes via truck delivery; these populations forego showers and use plastic bags instead of toilets for defecation because they have lost access to potable water.⁴⁷ Many Chilean citizens are calling for a restructuring of the laissez-faire water rights regime and insisting the government to return water to the public domain.⁴⁸ These people urge that the current legal framework "favors profits and the wealthy."⁴⁹ In the words of one Chilean water activist, "Chile's [economic] development cannot come at the cost of sacrificing the water of local communities"⁵⁰

B. *Blue Gold*

Businesses are often thought of as a "nexus of contracts."⁵¹ A business's primary method of operations is via contract; it contracts with other business, individuals, and governments to achieve its goals. By legal design, a publically held corporation separates its owners and its managers.⁵² Furthermore, corporations owe a fiduciary duty to their owners.⁵³ This means that managers of the firm owe a binding legal obligation⁵⁴ to act in the best interests of the firm's shareholders who, collectively, own the firm through buying that firm's stock.⁵⁵ As a shareholder in a corporation, one is legally entitled to a share in the firm's profits. Thus, maximizing shareholder wealth from profitable

46. See Marianela Jarroud, *Laissez Faire Water Laws Threaten Family Farming in Chile*, INTER PRESS SERV. (May 27, 2015), <http://www.ipsnews.net/2015/05/laissez-faire-water-laws-threaten-family-farming-in-chile/>; see also Alexei Barrionuevo, *Chilean Town Withers in Free Market for Water*, N.Y. TIMES, Mar. 15, 2009, at A12.

47. See Jarroud, *supra* note 46.

48. See BAUER, *supra* note 45, at 605; see also *Proyecto de Ley Busca Nacionalizar el Agua*, LA NACION (Mar. 20, 2008), <http://www.lanacion.cl/noticias/vida-y-estilo/proyecto-de-ley-busca-nacionalizar-el-agua/2008-03-19/220549.html>.

49. Marianela Jarroud, *Mining and Logging Companies Are Leaving All of Chile Without Water*, GUARDIAN (Apr. 24, 2013, 7:17 AM), <http://www.theguardian.com/global-development/2013/apr/24/mining-logging-chile-without-water>.

50. See Jarroud, *supra* note 46.

51. See CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 6 (6th ed. 2010); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

52. See O'KELLEY & THOMPSON, *supra* note 51, at 6.

53. *Id.* at 154.

54. In Justice Cardozo's words, the "punctilio of an honor" *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

55. See A.G. Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 780 (1978).

business decisions is the prime objective of modern publically traded corporations.⁵⁶

The global water industry is worth an estimated 591 billion dollars.⁵⁷ For every one U.S. dollar spent on water systems, the economic return can be as high as twenty-eight dollars.⁵⁸ Additionally, some market analysts contend that the water business sector is one of the best current investments—the economic version of a “sleeper hit.”⁵⁹ Ten major corporations dominate the water industry.⁶⁰ The two water-giants, Vivendi Universal and Suez, operate in at least 130 countries.⁶¹ Private water companies, even the smaller ones, are in control of tremendous capital.⁶² This capital becomes an effective bargaining chip when negotiating with governments.

As a result of this bargaining power, contracts between private water companies and governments tend to be very flexible, allow for renegotiations, and favor the company.⁶³ For example, the 1989 contract between the Argentinian government and Suez-led consortium Aguas Argentina contained several advantageous terms that protected the corporation’s profit margins.⁶⁴ One such term allowed Aguas Argentina to file for a rate increase if its costs became too high.⁶⁵ A year after the contract was signed, the company argued the government was making “extra-contractual demands” that poor neighborhoods receive water service immediately and it could not af-

56. See O’KELLEY & THOMPSON, *supra* note 51, at 7.

57. According to 2014 estimates, by 2025, the industry is slated to be worth one trillion dollars. See ROBECO/SAM, *WATER THE MARKET OF THE FUTURE 2* (2015), https://www.robeco.com/images/RobecoSAM_Water_Study.pdf.

58. GUY HOTTON & LAURENCE HALLER, WORLD HEALTH ORG., *EVALUATION OF THE COSTS AND BENEFITS OF WATER AND SANITATION IMPROVEMENTS AT THE GLOBAL LEVEL 3* (2004), http://www.who.int/water_sanitation_health/wsh0404.pdf.

59. See, e.g., David Zeiler, *Water Stocks: Don’t Overlook This \$1 Trillion Opportunity*, MONEY MORNING (Feb. 16, 2013), <http://moneymorning.com/2013/02/06/water-stocks-dont-overlook-this-1-trillion-opportunity>; see also Jeff Siegel, *Investing in Desalination Stocks: A Boring Way to Make a Crap Ton of Money!*, ENERGY & CAP. (Oct. 1, 2014), <http://www.energyandcapital.com/articles/investing-in-water-desalination-stocks/4604>; Jeff Siegel, *Investing in Water Stocks: This is BETTER Than Oil!*, ENERGY & CAP. (Jan. 28, 2015), <http://www.energyandcapital.com/articles/investing-in-water-stocks/4731>.

60. See Naegele *supra* note 14, at 112.

61. See *id.*; see also BARLOW & CLARKE, *supra* note 29, at 117.

62. See Bill Marsden, *Cholera and the Age of Water Barons*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Feb. 3, 2003), <http://www.icij.org/projects/waterbarons/cholera-and-age-water-barons>; see also BARLOW & CLARKE, *supra* note 29, at 118.

63. See MAUDE BARLOW, *BLUE COVENANT: THE GLOBAL WATER CRISES AND THE COMING BATTLE FOR THE RIGHT TO WATER* 38–40 (New Press 2008) (2007); see also BARLOW & CLARKE, *supra* note 29, at 103.

64. See BARLOW & CLARKE, *supra* note 29, at 103.

65. See *id.*

ford to make those improvements without increasing water bills; Argentina acquiesced to the company's demands.⁶⁶ Corporations demand high returns on their investment⁶⁷—flexible terms that benefit the corporation are a hallmark of water privatization contracts.⁶⁸

This favorable-contract scenario has played out in the United States as well. In 2001, the city of Coatesville sold its water system to the publically held Pennsylvania-American Water Company (PAWC) for 38 million dollars to raise revenue, alleviate municipal debt and overhaul the city's aging water infrastructure.⁶⁹ Citing increased costs, PAWC requested nine rate increases over the duration of its tenure in Coatesville based on flexible contract terms allowing for re-negotiations.⁷⁰ The Pennsylvania Public Utility Commission granted every request, even though a water bill for a single-family household could be higher than 100 dollars.⁷¹ Rate hikes such as these, stemming from contract re-negotiations, are a common feature of private water systems,⁷² while private companies can access private capital to fund projects, it seems that water-users pick up the tab over the long-term.

C. *The Fallout*

Because these contractual modifications result in extreme rate hikes, many governments often exit these private contracts prematurely and are left picking up the pieces. For example, in Atlanta, Georgia, a Suez subsidiary named United Water entered into a 20-year, 428 million dollar contract with the Atlanta government to con-

66. *See id.* at 102–03. A price hike of 13.5 percent for consumption, disconnection and reconnections, and a 42 percent increase in an infrastructure surcharge. Prior to these increases, there had already been hikes in 1991 and 1992 of 25 percent and 29 percent, respectively. *Id.*

67. *See, e.g.,* Naegele, *supra* note 14, at 110 (noting that a private water company in Chile demanded, as a condition imposed by the World Bank, a 33 percent return on its investment); *see also* BARLOW & CLARKE, *supra* note 29, at 103–04 (noting that profit margins for Aguas Argentina were beyond excellent—two and a half times higher than margins by private water companies in England and Wales).

68. *Cf.* BARLOW & CLARKE, *supra* note 29, at 111 (noting that, in Europe, “[p]lagued by constant wrangling since [a privatization] contract was first signed, one senior Budapest city official reflected: ‘it is now clear that this kind of privatization was a mistake.’”).

69. Aaron Miguel Cantú, *In Pennsylvania City, The Poor are Paying the Price for a Bad Water Deal*, AL JAZEERA (July 13, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/7/13/in-coatesville-the-poor-are-paying-the-price-for-a-bad-water-deal.html>.

70. Laura Benschoff, *What Your City Can Learn About the Cost of Water in Coatesville, PA*, KEYSTONE CROSSROADS (Oct. 21, 2015), <http://crossroads.newsworks.org/index.php/local/keystone-crossroads/87370-what-your-city-can-learn-from-the-cost-of-water-in-coatesville-pa>.

71. *Id.*

72. *See* PUB. CITIZEN, WATER PRIVATIZATION FIASCOS: BROKEN PROMISES AND SOCIAL TURMOIL 3 (2003), <https://www.citizen.org/documents/privatizationfiascos.pdf>.

trol water delivery in 1998.⁷³ Under United Water's management, Atlanta's water bills increased an average of 12 percent a year before the city withdrew from the contract in 2003.⁷⁴ United Water billed an extra 37.6 million dollars on top of the contract price for work that was never completed; it also engaged in other suspicious billing practices.⁷⁵ When Atlanta exited the contract, the situation was bleak: Atlanta still had a sprawling urban population, a crumbling infrastructure that could not support the expanding city, and constituents who lost faith in the government's ability to provide for their needs.⁷⁶

The situation was similar in Buenos Aires. Contractual re-negotiations produced a 20 percent rise in water prices that were "borne disproportionately by the urban poor."⁷⁷ Furthermore, Aguas Argentina never built the sewage treatment plant it agreed to construct.⁷⁸ When the private water deal eroded, 95 percent of the city's sewage was dumped directly into the Rio de la Plata River.⁷⁹ Notwithstanding obvious long-term costs associated with pollution, financing the upgrades that Aguas Argentina partially completed or neglected would be left to the Argentine government and the taxpayers.⁸⁰ Corporations, guided by market principles, are designed to prioritize short-term monetary gains with little to no regard to the effects of their actions on citizens or the government.

Although private water systems operate on the premise that the economic market will most effectively distribute water's value among society, a government's adoption of that belief is inherently flawed. Unequal bargaining power in privatization negotiations results in contract terms that are overly favorable to the private water corporation, allowing it to maximize profits without regard to the customers it serves. Even if the government ends the contractual relationship, it is often no better off than it was before entering into the privatization

73. *Id.*

74. *Id.*

75. *See id.* ("[United Water] billed an extra \$37.6 million for additional service authorizations, capital repair and maintenance costs, and the city paid nearly \$16 million of those costs."). In addition to neglecting critical infrastructure updates, the company failed to provide acceptable sanitation for the city's drinking water—there were numerous "boil water advisories" during United Water's tenure. *Id.*

76. *See* Geoffrey F. Segal, *Many Questions Remain for Atlanta After United Water*, GA. PUB. POL'Y FOUND. (Jan. 30, 2003), <http://www.georgiapolicy.org/2003/01/many-questions-remain-for-atlanta-after-united-water> ("It's a shame Atlanta decided to cut ties with United Water, ultimately tying the hands of the city well into the future.").

77. *See* PUB. CITIZEN, *supra* note 72, at 2.

78. *See id.*

79. *Id.*

80. *See id.*

agreement. Experience shows that private water regimes, which value water as an economic commodity, subordinate the public good in favor of private corporate interests due to private companies' fiduciary duties to shareholders. No matter how conscientiously a private water company carries out its business, such commercial enterprises are simply not designed with egalitarian principles in mind.⁸¹

II. DEMOCRATIC WATER

This section argues that private arbitration and legislative enactments often work to erode the transparency required for democratic water management. Part A contends that democratic control of water assets is necessary to ensure citizen-centered water management. Part B asserts that, internationally, private arbitration—often a term in Bilateral Investment Treaties—works to remove transparency in water administration. Part C argues that, domestically, many local legislatures have proposed measures that allow finalization of privatization agreements without a popular vote, stripping the privatization process of critical democratic oversight. Less democratic oversight allows water corporations to pursue profits without adequate checks and balances.

A. *The Importance of Democracy*

The very nature of water demands democratic control of water assets so that governments can ensure citizen-centered water management. Water, in addition to being recognized as an economic good, is also recognized by academics as a public good (or, social good).⁸² Although there is no single definition of a public good, public goods often have “spillover” effects.⁸³ For instance, literacy is often cited as a social good, because the ability to read does not just affect the immediate individual—it increases the level of education and sophistication for the entire society.⁸⁴ Availability of clean and affordable water

81. See BARLOW & CLARKE, *supra* note 29, at 89 (“Management of water resources . . . is based on market dynamics of increasing consumption and profit maximization, rather than on long-term sustainability of a scarce resource for future generations.”).

82. See Naegele, *supra* note 14, at 114; see also Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785, 804 (2009) [hereinafter Arnold, *Water Privatization Trends*].

83. See PETER H. GLEICK ET AL., PAC. INST., *THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESH WATER* 5 (2002), http://pacinst.org/app/uploads/2013/02/new_eco_nomy_of_water3.pdf.

84. *Id.*

confers benefits on the individual user as well as the population at large.⁸⁵

In addition to having social, cultural and religious significance, water is essential to life itself.⁸⁶ More than two billion live without access to sanitation services.⁸⁷ Potable water systems greatly reduce instances of water-borne illnesses, saving millions of lives per year.⁸⁸ Without clean water to drink, people turn to polluted lakes and rivers; they have no choice but to accept the risk of fatal illness from doing so. In the words of Jennifer Naegele, “above all, water is a social good and should be regulated in order to ensure equitable use among all users.”⁸⁹

Accepting the premise that clean and affordable water is necessary for society to prosper, the task of overseeing water management should be primarily assumed by the people for whom the system is designed to serve.⁹⁰ The process of supplying water must be accountable to the larger public interest.⁹¹ Thus, decisions regarding water management must be open to public scrutiny. In order for the people to attentively examine water management, information about the choices water providers make must be accessible.⁹² Though access to this information may be lacking in public water systems, private con-

85. See Arnold, *Water Privatization Trends*, *supra* note 82, at 789.

86. See SHIVA, *supra* note 5, at 35.

87. See Naegele, *supra* note 14, at 107.

88. WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2002: REDUCING RISKS, PROMOTING HEALTHY LIFE 9 (2002), http://www.who.int/whr/2002/en/whr02_en.pdf.

89. Naegele, *supra* note 14, at 114.

90. *The Realization of Economic, Social and Cultural Rights*, U.N. ESCOR Comm'n on Hum. Rts., 52d Sess., Agenda Item 4, at 3, U.N. Doc. E/CN.4/Sub.2/2000/NGO/19 (2000) (“Irrespective of the form of water service management and the degree of involvement of private companies in the service, the public authorities must exercise control over the operations of the various public or private bodies involved in water service management. This includes, in particular, the financing of works, the quality of the water, continuity of the service, pricing, drafting of specifications, degree of treatment and user participation.”).

91. See Pankti Vora et al., *Analyzing the Implications of Water Privatization: Reorienting the Misplaced Debate*, 6 NUJS L. REV. 147, 161 (2013) (citing Arnold, *Privatization of Public Water*, *supra* note 26, at 564 (“The more important issues involve identifying under what conditions water privatization should occur and what safeguards and accountability mechanisms should be provided to protect the public.”)).

92. See Karin M. Krchnak, *Improving Water Governance Through Increased Public Access to Information and Participation*, 5 SUSTAINABLE DEV. L. & POL'Y 34, 35 tbl.1 (2005). Project-related decisions include: participation in concessions; facility siting; transparency of award process and final decision on award; and accessibility of performance monitoring and review procedures. See *id.* Policy-making decisions include: participation in the formulation of regional policies, plans and programs; questions on the timeliness and scope of public notice; breadth of consultation in drafting and formulation; lead-time for public comments on proposals; feedback and transparency in communication of final decisions; and accessibility of performance monitoring review procedures. See *id.*

trol over water delivery is, by its nature, antithetical to democratic goals of openness and transparency.⁹³ This transparency deficit starts with the initial contract, as terms are bargained for behind closed doors.

B. *Contracts and Treaties*

Contract terms between governments and water providers are deliberately left general and flexible.⁹⁴ These malleable terms facilitate a system that does not hold private water providers accountable for their actions. Because “the . . . management of water supply is so complex . . . , the performance parameters of the scheme are often left vague”⁹⁵ Hence, these contracts provide significant leeway to the corporation to “flout” contract targets and escape responsibility for doing so.⁹⁶ Moreover, private water concessions are often set to run for decades; the water company stands to benefit from a lack of accountability throughout the life of the investment project.⁹⁷ Private water regimes are generally designed in such a way that protects the interests of the corporation.

Many water corporations also escape public accountability through the use of Bilateral Investment Treaties (BITs). Broadly speaking, a BIT is a contract that establishes the terms and conditions for private investment by citizens and corporations of one nation-state in a different nation-state, granting rights of investors from each country to access the other’s markets.⁹⁸ These agreements allow a corporation to bring legal action against a country if the host country cancels a contractual investment relationship prematurely.⁹⁹ Another distinctive feature of these contracts is the private-arbitration clause. These clauses allow investor-companies to bypass domestic judicial systems;

93. See BARLOW & CLARKE, *supra* note 29, at 207–08.

94. See *supra*, Part I.B.

95. Vora et al., *supra* note 91, at 162.

96. *Id.* In Stockton, for instance, “[a]fter independent analyses showed that a contract was based on underestimated inflation figures, overestimated energy expenditures, and overstated capital cost savings, courts determined that [the California Environmental Quality Act] required the city to engage in thorough environmental impact analysis before approving the contract.” Arnold, *Water Privatization Trends*, *supra* note 82, at 801–02; see also Concerned Citizens Coalition of Stockton v. City of Stockton, 26 Cal. Rptr. 3d 735, 737 (Ct. App. 2005).

97. See Vora et al., *supra* note 91, at 162.

98. See BARLOW & CLARKE, *supra* note 29, at 176; see also *Bilateral Investment Treaty*, CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/bilateral_investment_treaty (last visited Jan. 31, 2017).

99. See BARLOW & CLARKE, *supra* note 29, at 176.

instead, a company's legal claims are adjudicated in secret by an international investment arbitration panel.¹⁰⁰

For example, Bolivia and the Netherlands signed a BIT that facilitated Bechtel Corporation's legal action against the Bolivian government.¹⁰¹ After popular protest resulting from a failed private water contract, the Bolivian government canceled its Cochabamba contract with Aguas del Tunari, a subsidiary of Bechtel.¹⁰² To gain rights under the Bolivia-Netherlands BIT, Bechtel moved one of its holding companies from the Cayman Islands to the Netherlands in order to submit a 40 million dollar legal claim against the Bolivian government after the contract was cancelled.¹⁰³ Unlike the judicial proceedings of many countries that are open to the public, these proceedings are adjudicated in secret.¹⁰⁴ Legal maneuvering by private water advocates that reduces public accountability is not limited to the developing world.

C. *These Great United States*

Legal mechanisms that diminish transparency are at play in the United States as well. In February 2015, New Jersey governor Chris Christie signed a bill into law that removed a public-vote requirement from existing state water laws.¹⁰⁵ The Water Infrastructure Protection Act allows New Jersey cities to privatize their water delivery services without public input if the municipality meets one of six conditions.¹⁰⁶ One of these criteria is the determination that the municipality's water infrastructure has suffered "material damage."¹⁰⁷ Although the exact condition of New Jersey's water infrastructure is unknown, it is well

100. *See id.* at 171.

101. *Id.* at 177.

102. *Id.* at 155, 177.

103. *See id.* at 177. As a result, the company gained "the right to sue Latin America's poorest country at the World Bank's International Centre for Settlement of Investment Disputes." *Id.*

104. *See id.* at 171; *see also* Julien Chaisse & Marine Polo, *Globalization of Water Privatization: Ramifications of Investor-State Disputes in the "Blue Gold" Economy*, 38 B.C. INT'L & COMP. L. REV. 1, 15, 20 (2015). Not only does the tribunal meet in secret, it is comprised of officials from the World Bank. This is significant because the World Bank was an instrumental part of Aguas del Tunari's presence in Bolivia in the first place. *See* BARLOW & CLARKE, *supra* note 29, at 176. The World Bank's involvement in global water privatization will further be discussed *infra* Part III.A.

105. *See* Assemb. B. 3628, 2014 Leg., 216th Sess. (N.J. 2014), http://www.njleg.state.nj.us/2014/Bills/A4000/3628_R1.htm; *see also* Nicholas Huba, *Law May Give Residents No Say on A.C. Water Utility's Future*, PRESS OF ATL. CITY (Nov. 20, 2015), http://www.pressofatlanticcity.com/communities/atlantic-city_pleasantville_brigantine/law-may-give-residents-no-say-on-a-c-water/article_329e91c6-8fe7-11e5-8c0c-1bafc7ef5395.html.

106. *See* N.J. STAT. ANN § 58:30 (West 2016).

107. *See id.*

known that America's water infrastructure is crumbling,¹⁰⁸ such that the American Society of Civil Engineers assigned a "D" grade to America's water pipes.¹⁰⁹ It seems that America's water delivery is already materially damaged. Not only have New Jersey residents lost the ability to participate in water privatization decisions, it stands to reason that privatization of water systems in the future will be streamlined.

Many states do not even have a vote-requirement to privatize water systems. Groups across the country have worked to introduce ballot initiatives that give the public a voice in the decision to privatize water delivery. For example, in 2003, the mayor and city council of Stockton, California announced a plan to privatize the city's water delivery.¹¹⁰ With democratic accountability being one of the main focuses, those opposed to the plan organized a ballot initiative and gathered enough signatures to qualify for a public vote on the privatization issue.¹¹¹ Despite this victory, the vote was unsuccessful; Stockton sold off its water system to a multi-national water consortium, OMI-Thames, for a 600 million dollar contract.¹¹² Although private water proponents had urged that Stockton citizens would not be negatively affected by the decision to privatize, in 2008, citing a lack of transparency, rate hikes and sewage spills, the city council resumed control over Stockton's water system.¹¹³ State and local legislative bodies that repeal public accountability procedures—or that simply do not have them in the first place—contribute to a lack of democratic oversight in private water systems. Indeed, a goal of privatization is to reduce political "interference" in the allocation of water.¹¹⁴

108. See, e.g., Benjamin Preston, *Taking a Road Trip This Summer? Enjoy America's Crumbling Infrastructure*, GUARDIAN (July 27, 2015, 7:00 AM), <http://www.theguardian.com/travel/2015/jul/27/america-infrastructure-roadways-highways-funding> ("Few things are more American than hitting the open road—the problem is, so many of those roads suffer from underfunding."); see also Rosabeth Moss Kanter, *What It Will Take to Fix America's Crumbling Infrastructure?*, HARV. BUS. R. (May 11, 2015), <https://hbr.org/2015/05/what-it-will-take-to-fix-americas-crumbling-infrastructure>.

109. See 2013 Report Card for America's Infrastructure, AM. SOC'Y OF CIVIL ENG'RS, <http://www.infrastructurereportcard.org/water-infrastructure> (last visited Feb. 1, 2017) (stating that, "[e]ven though pipes and mains [in the U.S.] are more than 100 years old and in need of replacement, outbreaks of disease attributable to drinking water are rare.").

110. See JOANNA L. ROBINSON, *CONTESTED WATER: THE STRUGGLE AGAINST WATER PRIVATIZATION IN THE UNITED STATES AND CANADA* 1 (2013).

111. See *id.* at 3.

112. See *id.*

113. See *id.* at 3–4.

114. See Nicholas McMurry, *Water Privatisation: Diminished Accountability*, 5 HUM. RTS. & INT'L LEGAL DISCOURSE 233, 238 (2011).

Democratic control of water delivery systems is necessary to ensure public accountability and citizen-centered water management. Internationally, private arbitration—a central feature of BITs—works to remove democratic transparency in water administration. Domestically, local governments that pass legislation removing public accountability measures, or that do not enact such measures in the first place, strip the privatization process of democratic oversight. Private arbitration and actions (or inactions) by legislatures that diminish transparency erode the public accountability necessary in water management. Less democratic oversight allows water corporations to pursue profits without adequate checks and balances. Often, this lack of safeguards allows corporations to commit violations of human rights laws and escape liability for doing so.

III. HUMAN RIGHTS

This section argues that international trade agreements historically encourage water companies to enter new markets, but serious problems regarding the enforcement of international human rights law allow water corporations to escape punishment for human rights violations in those markets. Part A contends that the current international trade framework facilitates global corporate water investment, providing increased revenue to water corporations. Part B argues that water corporations often commit significant human rights violations in the pursuit of profits. Part C asserts that water corporations often escape punishment for human rights abuses because enforcement of human rights laws, if any even exists at all, is lax. Private water companies have an incentive to commit human rights violations if such violations will result in higher earnings for the company and its shareholders.

A. *Economic Globalization*

The current international trade rules aid global corporate water investment, facilitating corporations' entrance into new private water delivery markets. The dismantling of trade barriers by international trade rules to facilitate a single global economy is referred to as economic globalization.¹¹⁵ The General Agreement on Tariffs and Trade (GATT) was seminal in the advancement of a global economy.¹¹⁶ In-

115. See BARLOW & CLARKE, *supra* note 29, at 81 (“In this global market economy, everything is now up for sale, even areas of life once considered sacred, such as health and education, culture and heritage, genetic codes and seeds, and natural resources, including air and water.”).

116. See *id.* at 83.

stituted in 1947, GATT was a multilateral treaty that established international investment rules between twenty-three nations.¹¹⁷ Importantly, in 1994, a round of GATT negotiations created the World Trade Organization (WTO), which assumed control over the regulation of international trade.¹¹⁸ GATT is still an operational treaty under the WTO framework, but it is no longer the primary international investment agreement.¹¹⁹

The WTO has an active hand in facilitating the privatization of water delivery services in all corners of the world. Under the WTO's trade rules, water is identified as a tradable commodity—an economic good.¹²⁰ The WTO's rules mandate that any constraint on the trade of goods (water being included in this definition) is a “trade restrictive measure” that is subject to adjudication by a WTO tribunal.¹²¹ These lawsuits can be worth billions of dollars.¹²² Thus, the WTO's classification of water makes it incredibly difficult for nations to place restrictions on the trade of water, even if such restrictions are enacted for valid and compelling ecological or social reasons.¹²³ WTO rules serve to remove trade barriers so that private water corporations are able to seek profits in new markets.

The policies of major international financial institutions build upon these free-trade rules, explicitly promoting privatization and ensuring the success of private water providers. The two most important

117. See *The General Agreement on Tariffs and Trade (GATT 1947)*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited Feb. 1, 2017).

118. Also known as the “Uruguay round.” See *A Summary of the Final Act of the Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#General (last visited Feb. 1, 2017).

119. There are several main treaties under the WTO, including: umbrella (the Agreement Establishing the WTO); goods and investment (the Multilateral Agreements on Trade in Goods including the GATT 1994 and the Trade-Related Investment Measures (TRIMS)); services (General Agreement on Trade in Services (GATS)); intellectual property (Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)); dispute settlement (Dispute Settlement Understanding (DSU)); and reviews of governments' trade policies (Trade Policy Review Mechanism (TPRM)). See *Understanding the WTO – Overview: A Navigational Guide*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Feb. 1, 2017).

120. See BARLOW & CLARKE, *supra* note 29, at 165.

121. See *id.* at 170 (“Although the WTO cannot directly command a member nation-state to change its laws, the threat of economic sanctions creates . . . a ‘chill effect’ that compels governments to review and revise their legislation for fear of being targeted by a WTO tribunal.”).

122. See *id.* at 177.

123. See *id.* at 165 (“This means that if a water-rich country placed a ban or even a quota on the export of bulk water for sound environmental reasons, that decision could be challenged under the WTO as a trade-restrictive measure and a violation of international trade rules.”).

are the World Bank and the International Monetary Fund (IMF);¹²⁴ they provide large private loans to developing nations. When extending aid to foreign countries, the World Bank conditions loan proceeds on a requirement that the receiving nation privatize its national industries (including its water delivery system).¹²⁵ These institutions also insist on “full cost recovery,” which means that governments are forbidden from offering subsidies to financially insolvent individuals that cannot afford the private water company’s increased rates.¹²⁶ Full cost recovery ensures maximization of profits for corporate water providers and often finds its way into privatization agreements themselves.

B. Violations

Backed by international financial institutions and a friendly system of trade rules, the pursuit of revenue by corporations goes beyond advantageous contract terms—many commit egregious human rights violations in the pursuit of profits. The human right to water has been established in a variety of international agreements. The most powerful statement was issued by the United Nations Committee on Economic, Social and Cultural Rights in 2002.¹²⁷ *General Comment Number 15, The Right to Water*, states that the right to potable water is an essential part of the right to an adequate standard of living; it is a “prerequisite for the realization of other human rights” and “indispensable for leading a life in human dignity.”¹²⁸ The right to water captures not just the necessity of clean water, but also its affordability, availability in sufficient quantities, and physical accessibility for domestic uses.¹²⁹ Violations of these rights in private water regimes are unfortunately too common.

124. See Nancy Alexander, *The Roles of the IMF, the World Bank, and the WTO in Liberalization and Privatization of the Water Services Sector*, CITIZENS’ NETWORK ON ESSENTIAL SERVS. 3 (Oct. 21, 2005), <http://docplayer.net/24212101-The-roles-of-the-imf-the-world-bank-and-the-wto-in-liberalization-and-privatization-of-the-water-services-sector-1.html>.

125. See *id.* at 7. This is referred to as a “structural adjustment program.” *Id.*

126. See *id.* at 9–10. Like the so-called “boil the frog method” . . . [the structural adjustment program] assumes that, just as a frog will not jump out of water if it comes to a boil gradually, so too, water users will not rebel if full cost recovery is introduced gradually over several years.” *Id.* at 10.

127. See Arnold, *Water Privatization Trends*, *supra* note 82, at 815.

128. U.N. ESCOR, Comm’n on Econ., Soc. & Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 1, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

129. *Id.* ¶ 2.

The situation of Cochabamba, Bolivia provides a provocative illustration. In 1998, the IMF lent the government of Bolivia 138 million dollars to aid in the country's economic growth.¹³⁰ One of the loan conditions required Bolivia to sell its public enterprises, including the water delivery system.¹³¹ The Bolivian parliament quickly legalized the privatization of water.¹³² Water company Aguas del Tunari was the sole bidder for the contract in one of Bolivia's largest cities: Cochabamba. In the subsequent months, Aguas del Tunari dramatically raised water prices in order to finance updates to the city's water infrastructure—in some cases by 100 to 200 percent.¹³³ Even though water bills could be about twenty five percent of the monthly income for a working-class family, IMF policy mandated that Bolivia could not provide subsidies to these citizens.¹³⁴ If water bills were not paid, access to water was shut off.¹³⁵ Even those who had built wells on their land before privatization were charged for water withdraws; the contract granted Aguas del Tunari complete and exclusive rights to supply water.¹³⁶ The citizens opposed the hikes immediately. Protests evolved into a series of violent riots in Cochabamba and surrounding cities, injuring 175 people, including a young boy was shot by the police.¹³⁷ Aguas del Tunari's outrageous price increases were violations of the human rights to water and life; potable water was neither affordable, nor accessible.

Another story tainted of flagrant human rights violations by a water corporation takes place in South Africa. In 1999, a concession contract was awarded to a British water company, Biwater, for a 30-year term. Not only were the water bills "grossly inflated," but residents also paid for water even when it did not flow into their homes. Home meters, installed by Biwater, started tallying how much a customer uses once the tap was turned on; however, most taps do not dispense water for up to ninety minutes after it has been turned on—

130. Malgosia Fitzmaurice, *The Human Right to Water*, 18 *FORDHAM ENVTL. L. REV.* 537, 564 (2006).

131. *Id.*

132. *Id.* at 565.

133. See *PUB. CITIZEN*, *supra* note 72, at 5.

134. See Naegele, *supra* note 14, at 109 (citing Kristie Reilly, *Not a Drop to Drink*, IN THESE TIMES (Oct. 11, 2002), http://inthesetimes.com/article/131/not_a_drop_to_drink). A policy against subsidization in this context appears in private-public water contracts as "full cost recovery." *Id.*

135. See William Finnegan, *Leasing the Rain*, NEW YORKER (Apr. 8, 2002), <http://www.newyorker.com/magazine/2002/04/08/leasing-the-rain>.

136. See *PUB. CITIZEN*, *supra* note 72, at 5.

137. *Id.*

the concession contract required users in the poorest segments of society to pay for this “air time.”¹³⁸ Though taps were turned on and customers were paying, there was no water flow provided to thirsty residents.

C. *No Punishment*

Water corporations often escape punishment for human rights abuses because enforcement of human rights law is lax, if any exists at all. Notwithstanding the fact that *General Comment 15* is contained in a nonbinding legal instrument, international human rights framework is constructed to hold nations responsible for rights violations suffered by their citizens.¹³⁹ The United Nations has declared that “the prime responsibility and duty to promote and protect human rights lie with the State”¹⁴⁰ Thus, the state has a duty to take action to protect citizens from human rights violations committed by private corporations.¹⁴¹ Often, nation-states are forced into privatization agreements, or seek them out in order to fulfill their own human rights obligations to provide clean water to citizens. Many academics criticize the current responsibility-paradigm in international human rights law.¹⁴² It plainly fails to provide satisfactory redress for violations committed by corporations, but nations are limited in the measures that they can take to hold such corporations accountable because private water contracts limit democratic involvement as a central feature.¹⁴³

The current international trade rules facilitate global investment by water corporations, allowing them to maximize revenue. Transnational water corporations often commit violations of human rights in pursuit of revenue. These corporations can escape liability for human rights violations because there are no significant international legal mechanisms to hold them accountable. International trade laws encourage water companies to enter new markets, but serious problems regarding the enforcement of international human rights law allow water corporations to escape punishment for human rights violations in those markets. Private water companies have an incentive to com-

138. Nick Mathiason, *Turning Off the Tap for Poor*, GUARDIAN (Aug. 18, 2002, 6:01 PM), <https://www.theguardian.com/business/2002/aug/18/theobserver.observerbusiness10>.

139. See Fitzmaurice, *supra* note 130, at 549–51.

140. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, Annex pmbl., U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

141. See Fitzmaurice, *supra* note 130, at 559.

142. See, e.g., McMurry, *supra* note 114, at 236, 238.

143. See Chirwa, *supra* note 13, at 222–28.

mit human rights violations if those violations will result in higher earnings for the company and its shareholders.

CONCLUSION

Experience demonstrates that private water regimes subordinate the public good in favor of private corporate interests due to corporations' fiduciary duties to shareholders. Additionally, experience has revealed that private arbitration and legislative actions (or inaction) work to erode the accountability and transparency required for democratic water management. Moreover, experience shows that international trade agreements encourage water companies to enter new markets, but serious problems regarding the enforcement of international human rights law allow those companies to escape punishment for human rights violations in those same markets. The legal procedures that proponents of private water delivery deploy in the construction and maintenance of private water regimes are the same instruments that make private water so damaging to the public good, to democratic government, and to the sanctity of human rights.

As drought continues to devastate not only California, but also communities around the world, it is only natural for citizens to engage the question of how water will be managed in order to provide for future needs. The debate surrounding water privatization is not new, but with technological advancements such as desalination, the debate is brought into new focus. Because large corporations have the capital required to invest in expensive desalination projects, private corporations may control the delivery of more water than ever. Though water is essential to humans and the life of the planet, transnational corporations prefer to focus on other considerations—namely, their bottom line. Corporations are essentially guaranteed immunity for acts they commit in pursuit of profits, even acts as egregious as human rights violations. Thus, the legal armor available to proponents of water privatization makes a government's decision to privatize water delivery systems difficult to reverse without suffering collateral damage—monetary or otherwise.