

# RECIEL

## Review of European Community & International Environmental Law

### ***Focus on:***

### ***Freshwater and Wetlands in International Law***

The Emergence of an 'Ecosystem Approach' to the Protection of International Watercourses under International Law

*Owen McIntyre*

Trading Water: The Human Factor

*Jona Razzaque*

The EC Water Framework Directive – An Instrument for Integrating Water Policy

*David Grimeaud*

Developments under the Ramsar Convention: Allocation of Water for River and Wetland Ecosystems

*Alejandro Iza*

The Case of Vuotos: Interplay Between International, Community and National Environmental Law

*Timo Koivurova*

Major Infrastructure Projects, Biodiversity and the Precautionary Principle: The Case of the Yacyretá Dam and Iberá Marshes

*Juan Rodrigo Walsh*

# Trading Water: The Human Factor

Jona Razzaque

## SETTING THE SCENE

The truth sounds clichéd, but out of six billion people in the world, one billion have no access to safe drinking water and over two billion lack access to sanitation.<sup>1</sup> There is no doubt that access to adequate amounts of clean water, for both consumption and sanitation, is a prerequisite for a healthy life. Yet, the Third World Water Forum (March 2003)<sup>2</sup> in Japan failed to play a major role in determining the future of the world's freshwater resources and rejected attempts to establish access to clean water as a human right.

Chapter 18 of Agenda 21 of the 1992 United Nations Conference on Environment and Development<sup>3</sup> deals with freshwater resources, especially the application of integrated approaches to the development, management and use of water resources. There were seven proposed programmes regarding freshwater, including water resource assessment, drinking water supply and impacts of climate change on water resources. The 2002 Millennium Development Goals (MDGs)<sup>4</sup> set three targets related to freshwater. They aim (i) to

halve the proportion of people in the world without access to safe drinking water by 2015; (ii) to halve the proportion of people in the world who have no access to basic sanitation by 2015; and (iii) for each country to develop integrated water resources management and water efficiency plans by 2005.

Similar to the Millennium goals, the 2002 World Summit on Sustainable Development (WSSD)<sup>5</sup> reiterated the aim to halve the proportion of people without access to safe drinking water. It urged national governments to develop national programmes for sustainable development and to empower local communities. At the same time, it talked about increasing access to public services and institutions such as water, education and health. In order to combat desertification and mitigate the effects of drought and floods, it prioritized integrated land, water and natural resources management. The Water, Energy, Health, Agriculture and Biodiversity (WEHAB) Initiative,<sup>6</sup> proposed by the United Nations Secretary-General prior to the WSSD, also plays an important role in achieving the MDGs and the newly agreed targets of the WSSD. The WEHAB initiative serves as a conceptual framework for action in the implementation of the outcomes of the WSSD, as well as a mechanism to provide direction to the realization of the MDGs. Both WEHAB and the MDGs offer a unique opportunity to coordinate efforts and combine resources of a range of diverse development partners to achieve sustainable development and poverty reduction in the developing countries.

<sup>1</sup> *A Framework for Action on Water and Sanitation* (WEHAB Working Group, August 2002), at 7, available at <[http://www.un.org/esa/sustdev/sdissues/water/wehab\\_water\\_sanitation.pdf](http://www.un.org/esa/sustdev/sdissues/water/wehab_water_sanitation.pdf)>.

<sup>2</sup> Around 24,000 delegates from 182 countries focused on the escalating global water crisis. See Third World Water Forum Ministerial Declaration (Kyoto, 23 March 2003), available at <[http://www.world-water-forum3.com/jp/mc/md\\_final.pdf](http://www.world-water-forum3.com/jp/mc/md_final.pdf)>.

<sup>3</sup> According to Agenda 21, Chapter 18: 'Water is needed in all aspects of life . . . The multi-sectoral nature of water resources development in the context of socio-economic development must be recognized, as well as the multi-interest utilization of water resources for water supply and sanitation, agriculture, industry, urban development, hydropower generation, inland fisheries, transportation, recreation, low and flat lands management and other activities'. See Agenda 21, *1992 Report of the UNCED, I* (UN Doc. A/CONF.151/26/Rev. 1, Rio de Janeiro, 14 June 1992), Chapter 18 (Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources), paras 18.2 and 18.3.

<sup>4</sup> This is an ambitious agenda for reducing poverty and improving lives that world leaders agreed on at the Millennium Summit in September 2000. For each goal, one or more targets have been set, most for 2015, using 1990 as a benchmark. Goal 7 dealt with environmental sustainability. This goal was re-emphasized in the WSSD Summit. Around 191 countries have signed the United Nations Millennium Declaration. See United Nations Millennium Declaration, UNGA Resolution 55/2 (UN Doc. A/RES/55/2, 8 September 2000), available at <<http://www.un.org/millennium/declaration/ares552e.pdf>>.

<sup>5</sup> Water-related issues are mentioned in Chapter II on poverty eradication and Chapter IV on protecting and managing the natural resource base of social and economic development. It includes supporting developing countries and countries with economies in transition in their efforts to monitor and assess the quantity and quality of water resources. See Plan of Implementation of the World Summit on Sustainable Development, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August–4 September 2002 (UN Doc. A/CONF.199/20), Resolution 2, Annex, para. 6 available at <[http://www.johannesburgsummit.org/html/documents/summit\\_docs/131302\\_wssd\\_report\\_reissued.pdf](http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf)>.

<sup>6</sup> The WEHAB Initiative focuses on five key thematic areas of crucial global importance and was proposed by the United Nations Secretary-General Kofi Annan to bring additional impetus on action at the WSSD. The WEHAB Initiative seeks to provide impetus to action in these five key thematic areas of crucial global importance and particularly for poor people throughout the developing world. See *A Framework for Action on Water and Sanitation*, n. 1 above, at 5.

The level of global freshwater consumption rose six-fold in the last century, which is over twice the population growth rate, and the rate of increase is still rising.<sup>7</sup> Reasons for this include the rising demand on water for irrigation and industrial processes, and increasing use of water by people as their incomes rise. The level of population growth is higher in Asia and Africa, and so is the shortage of freshwater. In order to upgrade water supplies and sanitation to meet basic human needs in developing countries, the United Nations estimates that more than US\$20 billion per year is needed for more than a decade to provide a minimum of clean water and sanitation to the poorest.<sup>8</sup> And that is just in the developing world. Thousands of cities around the world have failed to keep up with their growth and old water systems are cracking up. Up to 70% of all water and sanitation projects fail within a few years, in most cases due to lack of money to maintain them.<sup>9</sup>

This article briefly explores the status of water as a human right. It outlines the international commitments under the international and regional conventions, and judicial decisions outlining the nature of the right to water. It deals with the commodification of water and the potential impact of the General Agreement on Trade in Services on water resources. It also discusses the influence of corporations and various international financial institutions on the development of the water sector and water-related services. The question is whether the commodification or the privatization of water services will ensure that adequate safe drinking water reaches the poor and the marginalized sections of the community. Is water only an economic good or is it both a social *and* economic good?

## DISCUSSION ON WATER AS A HUMAN RIGHT

### EXPRESS RIGHT

Several international instruments refer to water as a human right. These instruments include the following:

- Article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women (1979) stipulates that State parties shall ensure to women the right to 'enjoy adequate living conditions, particularly in relation to . . . water supply'.<sup>10</sup>
- Article 24, paragraph 2, of the Convention on the Rights of the Child (1989) requires State parties to combat disease and malnutrition 'through the provision of adequate nutritious foods and clean drinking-water'.<sup>11</sup>
- Article 10 of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (1997) explicitly addresses basic human needs, including food. In the event of a conflict between uses of water in an international watercourse, special regard shall be given 'to the requirements of vital human needs'.<sup>12</sup>
- The Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (1997)<sup>13</sup> declared that, in determining vital human needs in the event of conflicts over the use of watercourses, 'special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation'.
- Articles 11 and 12 of the International Covenant for Economic, Social and Cultural Rights (1966) formalizes the right to food and minimum quality of life.<sup>14</sup> The Committee of Economic, Social and Cultural Rights believes that the right to water falls within the category of guarantees under Article 11 that are 'essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival'.<sup>15</sup> In 1995, the

<sup>7</sup> United Nations Environment Programme, *Global Environment Outlook* (UNEP, 2000), at chapter 2.

<sup>8</sup> The World Commission on Water estimates that the current level of investment of about US\$70 billion per year needs to increase to US\$180 billion per year to ensure water security by 2025. See World Bank, *Water Sector Resources Strategy: Strategic Directions for World Bank Engagement* (World Bank, February 2003), available at <<http://www.inweb18.worldbank.org/ESSD/ardext.nsf/18ByDocName/Strategy>>.

<sup>9</sup> J. Vidal, '10 questions the west must answer', *The Guardian* (23 August 2003).

<sup>10</sup> United Nations Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), available at <<http://www.un.org/womenwatch/daw/cedaw/>>. This convention entered into force on 3 September 1981.

<sup>11</sup> United Nations Convention on the Rights of the Child (New York, 20 November 1989), available at <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>. The convention entered into force on 2 September 1990.

<sup>12</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses (New York, 21 May 1997), available at <<http://www.un.org/law/ilc/texts/nonnav.htm>>.

<sup>13</sup> Statements of Understanding Pertaining to Certain Articles of the Convention, *Report of the Sixth Committee convening as the Working Group of the Whole, Convention on the Law of the Non-Navigational Uses of International Watercourses* (UN Doc. A/51/869, New York, 11 April 1997), para. 8, available at <<http://www.un.org/law/cod/watere.htm>>.

<sup>14</sup> International Covenant on Economic, Social and Cultural Rights (UNGA Resolution 2200A (XXI), New York, 16 December 1966), available at <[http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm)>.

<sup>15</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No 15, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (Doc. E/C.12/2002/11, Twenty-Ninth Session, 26 November 2002), at para. 3, available at <<http://www.unhchr.ch/html/menu2/6/gc15.doc>>.

Committee recognized that water is a human right contained in Article 11(1).<sup>16</sup> The right to safe drinking water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is the most fundamental condition for survival.

### ECOSOC Comment on the Right to Water

The 145 countries that have ratified the International Covenant on Economic, Social and Cultural Rights are now obligated progressively to ensure access to clean water 'equitably and without discrimination'. The declaration of the United Nations Economic and Social Council's (ECOSOC) Committee on Economic, Social and Cultural Rights is in the form of a 'General Comment' and acts as the mechanism for providing interpretation of the covenant. In General Comment No 15<sup>17</sup> on the implementation of Articles 11 and 12, the Committee noted that 'the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights'. In summary, the right to water puts an obligation on governments progressively to extend access to sufficient, affordable, accessible and safe water supplies and to safe sanitation services. The Committee states that 'water should be treated as a social and cultural good, and *not primarily as an economic good*' (emphasis added).<sup>18</sup>

**Obligation on Government** Under the General Comment, there is a specific obligation for the parties to the covenant to improve access to safe water. The express right to water obliges governments to put in place plans to improve access to safe, affordable and sufficient water supplies. The Member States are not obliged to secure immediate access to water for all their populations, but they should progressively seek to improve access. This express right could limit the risks confronted by vulnerable communities when their rights to water are denied or drastically impinged upon.

Enjoyment of the right to safe drinking water is dependent upon the realization of other human rights, particularly the rights to housing, health, work, social security and education, as well as freedom of expression, freedom of association, freedom of residence and participation in public decision making. The Committee, in its General Comment, notes the importance of adequate sanitation, as an integral part of the rights to

adequate housing and health, in ensuring the protection of water sources and supplies.<sup>19</sup>

Whereas the right to safe drinking water applies to everyone, State parties need to give special attention to those individuals and groups who have traditionally faced difficulties in exercising the right, including women, children and indigenous peoples. The report specifically mentions those who face difficulty in physically accessing adequate drinking water, including people with disabilities, older persons, persons living in disaster-prone areas or on small islands.

The General Comment on the right to water imposes three types or levels of obligations on State parties, including the obligations to respect, to protect and to fulfil the right to safe drinking water. The obligation to *respect* requires that State parties refrain from interfering directly or indirectly with the enjoyment of the right to drinking water. The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to safe drinking water. Third parties include individuals, corporations and other entities, as well as agents acting under their authority. State parties need to ensure that third parties operating or controlling water services and resources, for example piped water networks, water tankers, water vendors and wells, do not threaten or compromise the sufficiency, safety, affordability or accessibility of the right. It adds that privatization of water services should be deferred until:

an effective regulatory system is in place, that is in conformity with the Covenant and this General Comment and that includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.<sup>20</sup>

The obligation to *fulfil* requires State parties to adopt the necessary measures directed towards the full realization of the right to safe drinking water. State parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.<sup>21</sup>

**Violations of the Right to Water** To demonstrate compliance with their general and specific obligations, States should establish that they have taken necessary

<sup>16</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No 6, Economic, Social and Cultural Rights of Older Persons (UN Doc. E/C.12/1995/16/Rev.1, Thirteenth Session, 24 November 1995), at paras 5 and 32.

<sup>17</sup> See General Comment No 15, n. 15 above.

<sup>18</sup> *Ibid.*, para. 11.

<sup>19</sup> See Committee on Economic, Social and Cultural Rights, Sixth Session, General Comment No 4, The Right to Adequate Housing (Article 11(1) of the Covenant), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (UN Doc. HRI/GEN/1/Rev.1, 1994), at 53. Also see General Comment No 14, The Right to the Highest Attainable Standard of Health, Committee on Economic, Social and Cultural Rights (UN Doc. E/C.12/2000/4, 2000).

<sup>20</sup> *Ibid.*, para. 24.

<sup>21</sup> *Ibid.*, paras 25–29.

and feasible steps towards the realization of the right to safe drinking water. In accordance with international law, a failure to act in good faith amounts to a violation of the right. Article 26 of the Vienna Convention on the Law of Treaties (1969) states that '[e]very treaty in force is binding upon parties to the treaties and must be performed by them in good faith'.<sup>22</sup> Article 27 states that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. A number of typical examples of violations relating to the levels of obligations, emanating from the Committee's work, have been identified in the General Comment. For example, violations of the obligation to *respect* include disproportionate or discriminatory increases in the price of water and pollution, and diminution of water resources affecting human health. Violations of the obligation to *protect* include failure to enact or enforce laws to prevent the contamination and inequitable extraction of water, and failure to regulate effectively and control water service providers. Violations of the obligation to *fulfil* include failure to adopt or implement national strategies, policies and laws designed to ensure the right.

States are obliged, as stated in the General Comment, to monitor effectively the realization of the right to safe drinking water. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. The work of human rights advocates and other members of civil society who assist in the realization of the right, particularly for vulnerable or marginalized groups, should be respected, protected, facilitated and promoted by the State party.<sup>23</sup>

## IMPLIED RIGHT

The right to safe drinking water has been implicitly recognized in a wide range of international documents, including treaties, declarations and other standards.<sup>24</sup>

<sup>22</sup> Vienna Convention on the Law of Treaties (Vienna, 22 May 1969), printed in 1155 UNTS (1969), 331, entered into force 27 January 1980, available at <<http://www.un.org/law/ilc/texts/treaties.htm>>.

<sup>23</sup> See General Comment No 15, n. 15 above, para. 59.

<sup>24</sup> See, for example, Universal Declaration of Human Rights (UNGA Resolution 217A (III), New York, 10 December 1948), Article 25; International Covenant on Economic, Social and Cultural Rights, n. 14 above, Articles 11 and 12; Declaration on the Right to Development (UNGA Resolution 41/128, New York, 4 December, 1986), Article 8. The status of water rights under international law has been examined by J. Scanlon, A. Cassar and N. Nemes, *Water as Human Right*, presented at the Seventh Conference on Environmental Law (Sao Paulo, Brazil, June 2003), at 3–8.

These instruments cover the rights to life, to the enjoyment of a standard of living adequate for health and well being, to protection from disease and to adequate food. Access to clean water and sanitation is a precondition to many of these rights. The question is whether the right to water can be considered as a derivative right, that is, a human right, which can be implied by these provisions. If these provisions are examined, it is evident that an expressed right, such as the right to adequate food, human health and development, cannot be attained without also guaranteeing access to clean water.

Some recent environmental treaties also deal with water resources. The International Convention to Combat Desertification (1992), Article 2 (objective) states that long-term integrated water strategies are required in affected areas.<sup>25</sup> These are intended to improve productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level. Articles 13 and 14 also talk about an integrated approach and the exchange of technical know-how. The Eighth Conference of the Parties to the Convention on Wetlands (1971)<sup>26</sup> adopted a resolution on the use of groundwater compatible with the conservation of wetlands.<sup>27</sup> These guidelines recognized the importance of the whole water cycle, and the existing link between ground and surface water for their use and management. They took account of the urgent need to decrease the loss and degradation of aquatic ecosystems through policies of sustainable development and conservation of biodiversity. They also urged the promotion of initiatives, supported by both the public and private sectors, for the participation of civil society in the management of groundwater, within the framework of integrated management of water resources.

## REGIONAL DOCUMENTS

Article 11 of the Additional Protocol to the American Convention of Human Rights (1988) in the area of economic, social and cultural rights provides that 'everyone shall have the right to live in a healthy

<sup>25</sup> United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 17 June 1994), entered into force in 1996, available at <<http://www.unccd.int/convention/menu.php>>.

<sup>26</sup> COP-8 was held in November 2002 in Valencia, Spain. For more information, see the website available at <[http://www.ramsar.org/key\\_res\\_viii\\_index\\_e.htm](http://www.ramsar.org/key_res_viii_index_e.htm)>.

<sup>27</sup> See Resolution VIII.40, Guidelines for Rendering the Use of Groundwater Compatible with the Conservation of Wetlands (26 November 2002).

environment and to have access to basic public services'.<sup>28</sup> Article 2 of the European Convention on Human Rights (1950) also requires States to take positive, proactive steps to support the right to life.<sup>29</sup>

There are a few European regional documents that address the link between human rights and water.<sup>30</sup> Regional documents such as the United Nations Economic Commission for Europe (UNECE) Convention on Environmental Impact Assessment in a Transboundary Context (1991),<sup>31</sup> UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992) and its 1999 Protocol on Water and Health,<sup>32</sup> and the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) (Aarhus Convention)<sup>33</sup> peripherally talk about water in relation to groundwater abstraction, impact assessment of water-related projects, such as dams and pipeline, and access to information. These documents, however, do not create any specific right to water.

## OTHER DOCUMENTS

The First International Conference on Water and the Environment (1992) in Dublin provided input on freshwater issues for the 1992 Rio Declaration.<sup>34</sup> It

outlined the importance of involving stakeholders in the decision-making process and asked for the economic value of water to be recognized 'in all its competing uses'. The Ministerial Declaration of the Second World Water Conference (2000) stated that business as usual is not an option.<sup>35</sup> Water resources and the related ecosystems are under threat from pollution, unsustainable use, land-use changes, climate change and many other forces. The link between these threats and poverty is clear, for it is the poor who are hit first and hardest. Their recommendations include ensuring that freshwater, coastal and related ecosystems are protected and improved; sustainable development and political stability are promoted; every person has access to enough safe water at an affordable cost to lead a healthy and productive life; and the vulnerable are protected from the risks of water-related hazards.

Acknowledging that water resources continue to be public goods, the International Conference on Freshwater (2001)<sup>36</sup> focused on practical ideas and identified positive ways forward relating to a wide range of water-related issues. It reviewed the role of water in sustainable development and took stock of progress in the implementation of Agenda 21. Participation of local people, workers, non-government organizations and the private sector in 'new partnerships', joint action, shared knowledge, and effective regulation and monitoring were recognized as essential for improving the management of water resources.<sup>37</sup>

After much hype and expectations,<sup>38</sup> the Third World Water Forum in 2003 failed to produce a definite programme of action and the Ministerial Declaration advocated the building of public-private partnerships for water projects.<sup>39</sup> At the heart of the debate in the Third World Water Forum 2003 was how to address the issue of the growing shortages of adequate quantities of clean water, particularly for drinking and sanitation. The Ministerial Declaration omitted to mention the

<sup>28</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988), available at <<http://www.oas.org/juridico/english/Treaties/a-52.html>>.

<sup>29</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), available at <<http://www.hri.org/docs/ECHR50.html#C.Art2>>.

<sup>30</sup> See J. Scanlon *et al.*, n. 24 above, at 7–8.

<sup>31</sup> Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), available at <<http://www.unece.org/env/eia/>>.

<sup>32</sup> See UNECE Convention on the Protection and Use of Transboundary Watercourses (Helsinki, 17 March 1992), entered into force 6 October 1996; and UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999), not yet entered into force.

<sup>33</sup> Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), available at <<http://www.unece.org/env/pp/>>.

<sup>34</sup> The Dublin Conference Report expresses an holistic, comprehensive, multi-disciplinary approach to water resource problems worldwide. It is based on four principles that cover environmental, social, political and economic issues: (i) freshwater is a finite and vulnerable resource, essential to sustain life, development and the environment; (ii) water development and management should be based on a participatory approach, involving users, planners and policy makers at all levels; (iii) women play a central part in the provision, management and safeguarding of water; and (iv) water has an economic value in all its competing uses and should be recognized as an economic good. See International Conference on Water and the Environment (Dublin, January 1992), available at <<http://www.water-2001.de/documents/conferences.asp>>.

<sup>35</sup> Ministerial Declaration of The Hague on Water Security in the Twenty-First Century (The Hague, 22 March 2000), available at <[http://www.thewaterpage.com/hague\\_declaration.htm](http://www.thewaterpage.com/hague_declaration.htm)>.

<sup>36</sup> International Conference on Freshwater: Water – A Key to Sustainable Development (Bonn, Germany, 3–7 December 2001). For more information, see the website available at <<http://www.water-2001.de/>>.

<sup>37</sup> *Ibid.*, Ministerial Declaration.

<sup>38</sup> Expectations were created as the Forum met after the ECOSOC General Comment No 15 recognized 'water as a human right' and it was held during the International Year of Freshwater. See Joint Statement by Three Rapporteurs of the United Nations Commission on Human Rights at the Third World Water Forum, UN Press Release (Kyoto, 17 March 2003).

<sup>39</sup> Third World Water Forum Ministerial Declaration (Kyoto, Shiga and Osaka, 23 March 2003), available at <[http://www.world.waterforum3.com/jp/mc/md\\_final.pdf](http://www.world.waterforum3.com/jp/mc/md_final.pdf)>.

need for a global mechanism to monitor the progress being made to solve water-related problems. Although the declaration recognized the need for community-based approaches in managing water, it also encouraged greater private sector involvement in water services in developing countries.<sup>40</sup>

At the upcoming review session of the Commission on Sustainable Development, to be held in 2004,<sup>41</sup> the Commission will review the implementation of the WSSD Plan of Implementation and the MDGs, with a more focused review of progress achieved in the implementation of the thematic clusters of water, sanitation and human settlements. This review process may provide an opportunity for civil society to promote concrete action to build capacity in these areas, and to emphasize that participation and transparency would be a way forward to ensure access to clean water and basic sanitation for all.

## JUDICIAL DECISIONS

There are some international cases that deal with right to life and, in an indirect manner, take account of the right to water. For example, in the International Court of Justice, Judge Weeramantry in the *Gabcikovo-Nagymaros Case* noted that:

[t]he protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself . . . [D]amage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>42</sup>

In a regional context,<sup>43</sup> the American Commission on Human Rights, in its *Report on the Human Rights Situation in Ecuador*,<sup>44</sup> found that inhabitants were exposed to toxic by-products of oil exploitation in their drinking and bathing water, which jeopardized

their human rights to life and health.<sup>45</sup> The European Court of Human Rights in *Zander v. Sweden*<sup>46</sup> dealt with potential pollution of a drinking-water well from a nearby dump and held that there had been a violation of Article 6(1) of the European Convention on Human Rights (1950).

There are quite a few examples of national level implementation of the right to water.<sup>47</sup> In some African and Asian countries, the right to clean water and sanitation is part of the fundamental right to life under their constitutions. For example, Section 27(1)(b) of the Constitution of the Republic of South Africa<sup>48</sup> guarantees the right of everyone to have access to sufficient food and water. Access to water and sanitation facilities are connected, and without proper water facilities many sanitation facilities cannot operate properly. Environmental rights place duties on the State to prevent pollution and ensure conservation of water resources. One of the central goals of the government's water policy is to ensure equitable access by all South Africans to the nation's water resources and to end discrimination in access to water on the basis of race, class or gender.<sup>49</sup> The South African National Water Act 1998<sup>50</sup> and Water Services Act 1997<sup>51</sup> deal with water policies and principles. The aims of the National Water Act are to meet the basic human needs of present and future generations, promote equitable access to water, facilitate social and economic

<sup>40</sup> *Ibid.*, paras 3, 5 and 6.

<sup>41</sup> Commission on Sustainable Development, Twelfth Session (New York, 14–30 April 2004). For more information see the website available at <<http://www.un.org/esa/sustdev/csd/csd12/csd12.htm>>.

<sup>42</sup> ICJ 25 September 1997, *Hungary v. Slovakia (Gabcikovo-Nagymaros Case)*, [1997] ICJ Rep. 6, separate opinion of Justice Weeramantry, available at <<http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/>>.

<sup>43</sup> For more examples related to the relationship between human rights and the environment, see J. Scanlon *et al.*, n. 24 above, at 10–11. See also Inter-Am Ct HR 31 August 2001, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (2001) Ser. C, No 79. See also ECHR 9 December 1994, *Lopez Ostra v. Spain*, Series A, No 303-C, (1995) 20 EHRR 277.

<sup>44</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador* (OEA/Ser.L/V/II.96, Doc. 10 Rev. 1, 1997).

© Blackwell Publishing Ltd. 2004.

<sup>45</sup> D. Shelton, 'Human Rights and the Environment: Jurisprudence of Human Rights Bodies', 32:3–4 *Environmental Policy and Law* (2002), 158, at 161. The Commission stated that 'where environmental contamination and degradation pose a persistent threat to human life and health', the rights to life, to physical security and integrity are implicated. See Inter-American Commission on Human Rights, n. 44 above, at 88.

<sup>46</sup> ECHR *Zander v. Sweden* (1993) Series A, No 279B. The applicants' claim was directly concerned with their ability to use the water in their well for drinking purposes.

<sup>47</sup> Some case studies of several African countries are available at <<http://www.thewaterpage.com/documents.htm>>.

<sup>48</sup> Constitution of the Republic of South Africa 1996, Act 108 of 1996 was adopted by the Constitutional Assembly on 4 December 1996 and took effect on 4 February 1997. Section 11 of the Act deals with the right to life and Section 24 affirms that everyone has the right to an environment that is not harmful to health or well being. It adds that the Government must act reasonably to protect the environment by preventing pollution, promoting conservation and securing sustainable development, while building the economy and society.

<sup>49</sup> The policy states at para. 2.1.4 that '[i]n the context of the reform of the water law, the right to equality requires equitable access by all South Africans to, and benefit from the nation's water resources, and an end to discrimination with regard to access to water on the basis of race, class or gender'. See White Paper on Water Policy for South Africa (Pretoria, 1997). This paper represents the policy of the South African Government, as approved by Cabinet on 30 April 1997. It is available at <<http://www.thewaterpage.com/wp3.htm>>.

<sup>50</sup> National Water Act 1998, Republic of South Africa, Act No 36 of 1998.

<sup>51</sup> Water Services Act 1997, Republic of South Africa, Act No 108 of 1997.

development, and reduce and prevent pollution of water resources. It establishes the national government as public trustee of the nation's water resources. This means that the government must ensure that water resources are conserved and used so that the public's water needs will be met now and in the future.

In India, several court decisions arising from public-interest litigation have decided the status of the right to water over the last few years. For example, courts in India have established a right to clean water. The Supreme Court of India, in *Charan Lal Sahu*,<sup>52</sup> explicitly linked environmental quality and right to life, and held that the right to life includes the 'right to pollution-free air and water'. However, the Supreme Court did not place any absolute duty on the State and merely asked the State to 'take effective steps to protect this right'. Later, in *Subash Kumar*, the Bihar High Court observed that:

[The right to life guaranteed by Article 21] includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the *pollution of water* or air which may be detrimental to the quality of life.<sup>53</sup> (emphasis added)

Through this case, the Court recognized the right to a wholesome environment as part of the fundamental right to life. Therefore, the municipalities and a large number of other concerned governmental agencies can no longer rest content with unimplemented measures for the abatement and prevention of pollution. Moreover, they may be compelled to take positive measures to improve the environment. This was reaffirmed in the *M.C. Mehta Case*,<sup>54</sup> which dealt with the deterioration of the world environment and the duty of the State to adopt all measures conferred on it by the Indian Constitution. The Supreme Court ordered that the Indian Government should show the steps it has taken to achieve this goal through national policy and the steps taken to restore the quality of the environment to the level existing before 1977, together with a timeframe for the implementation of such a programme. In *F.K. Hussain*,<sup>55</sup> the Kerala High Court held that the right to water is an integral part of right

to life, and added that effective regulation and monitoring is required for water resources management.

## RESULTS

The optimistic messages from the WSSD Plan of Implementation and the MDGs are echoed in the ECOSOC General Comment No 15 on the right to water. It establishes an obligation on governments to provide safe, clean and affordable water to people. Governments are duty-bound to prevent third parties from interfering in any way with the enjoyment of drinking water, and to defer any attempt of privatization until there is effective regulation, monitoring and penalties. Moreover, governments would be in breach of these obligations if there is a disproportionate increase in the price of water or if they fail to enforce laws to prevent inequitable extraction of water and control water service providers. In addition, the Aarhus Convention offers a roadmap of participatory and representative democracy, and requires increased public participation and access to information in decision-making processes to make public consultation more effective.<sup>56</sup> Although outcomes of various international conferences on water urge developing countries to involve financial resources from the private sector for sustainable management of water resources, they also prioritize the necessity of effective regulation and monitoring. Examples from judicial decisions illustrate that there is an inclination to apply the right to safe water as part of right to life. The judicial decisions in national courts demonstrate that governments, as trustees, are required to provide clean, safe and affordable drinking water to people and can be compelled to take positive measures. Water, as a public resource, should be inexpensive, free from pollution and there should equitable access for all. Are we committed enough to fulfil these obligations?

## WATER: A COMMODITY OR PUBLIC RESOURCE?

At the WSSD, governments were urged to facilitate access to public information and participation at all levels, in support of policy and decision making related to water resources management and project implementation.<sup>57</sup> The WSSD Plan of Implementation

<sup>52</sup> *Charan Lal Sahu v. Union of India*, AIR (1990) SC 1480, at 1495. This case dealt with the validity of the 1985 Bhopal Gas Disaster (Processing of Claims) Act. This Act was passed by the Government of India to permit claims of the victims of Bhopal Gas Disaster, which caused death and injury to people and severe toxic contamination to soil and water. The Act was held valid by the Supreme Court.

<sup>53</sup> *Subhash Kumar v. State of Bihar* (1991) 1 SCC 598, at 608.

<sup>54</sup> *M.C. Mehta v. Union of India* (1998) 9 SCC 589, at 607.

<sup>55</sup> *F.K. Hussain v. Union of India* AIR (1990) Kerala 321, at 340. The case dealt with shortages in freshwater supply and unplanned use of water pumps.

<sup>56</sup> The Aarhus Convention elaborates Principle 10 of the 1992 Rio Declaration on Environment and Development. See Aarhus Convention, n. 33 above, Principle 10 asks States to facilitate wider access to environmental information and encourage involvement of citizens at the national decision-making process. See *Report of the UN Conference on Environment and Development* (UN Doc. A/CONF.151/26, Vol. I, Rio de Janeiro, 3–14 June 1992).

<sup>57</sup> Plan of Implementation, n. 5 above, Resolution 2, Annex, Part IX (Other Regional Initiatives).

urged governments to support efforts and programmes for energy-efficient, sustainable and cost-effective desalination of seawater, and water recycling in developing countries, through such measures as technological, technical and financial assistance and other modalities.<sup>58</sup> At the same time, the Plan of Implementation opted for the promotion of public-private partnerships and other forms of cooperation that give priority to the needs of the poor, within stable and transparent national regulatory frameworks provided by governments, while respecting local conditions, involving all concerned stakeholders, and monitoring the performance and improving accountability of public institutions and private companies.<sup>59</sup>

The privatization of water services has become a precondition for developing countries who want to access International Monetary Fund and World Bank funds for water and sanitation programmes.<sup>60</sup> It could be argued that the main consequence of water services privatization is that water will become a privilege only of those who can pay high prices, thus excluding the poor.<sup>61</sup> Studies suggest that water privatization in developing countries generally has been led by foreign multinational companies.<sup>62</sup> Although a privatized water industry could lead to increased efficiency, it should be taken into account that it needs effective regulation,<sup>63</sup> which is not a common characteristic in many developing countries. Therefore, the responsibility for water services should rest with governments, and democratic and accountable systems of governance must be made a prerequisite for an equitable approach to water services.

<sup>58</sup> Ibid., para. 26(f).

<sup>59</sup> Ibid., para. 26(g). The influence of big business in shaping some of the outcomes of the WSSD caused serious concern. Through corporate lobby groups, such as the Business Action for Sustainable Development, transnational corporations presented themselves as viable partners in the delivery of sustainable development programmes, especially in the key areas of water, energy, health, agriculture and biodiversity. See D. Graymore and I.D. Bunn, 'A World Summit for Business Development?', *Christian Aid* (August 2002), available at <<http://www.christian-aid.org.uk/indepth/0208wssd/>>.

<sup>60</sup> In May 2002, the World Bank Director for Water and Power declared that water and sanitation loans would not be awarded to African countries unless they allowed for the participation of private companies. In 2000, the International Monetary Fund's loan agreements with at least 12 developing countries included conditions imposing water privatization or cost-recovery requirements. See E. Tuerk and N. Bernasconi-Osterwalder, *Water Traded: A CIEL Issue Brief for the Third World Water Forum*, CIEL Briefing Document (March, 2003), at 1.

<sup>61</sup> G. Aegisson, 'The Great Water Robbery', *One World Action* (August 2002); C. Denny, 'Private droughts', *The Guardian* (23 August 2003); C. Tan, *Johannesburg Watch: Why Trade and Finance Groups Should Get Involved in the World Summit Process* (Third World Network, July 2002), available at <<http://www.twinside.org.sg/title/wssd1.htm>>.

<sup>62</sup> A. Earle, 'International Water Companies', *The Water Page* (September 2001), available at <[http://www.thewaterpage.com/int\\_companies1.htm#proportion](http://www.thewaterpage.com/int_companies1.htm#proportion)>.

<sup>63</sup> See General Comment No 15, n. 15 above, at paras 23 and 24.

## GATS AND COMMODIFICATION OF WATER

The General Agreement on Trade in Services (1994) (GATS) applies to all services, from banking to transport and telecommunications, to health, education and prisons.<sup>64</sup> GATS aims to promote international trade in services and to remove barriers to such trade. Article II(1) of GATS requires that most favoured nations (MFN) status is to be extended to all World Trade Organization (WTO) members.<sup>65</sup> Under GATS rules, a government cannot give better treatment to local service companies than to foreign service companies in the service areas it has listed in the agreement.<sup>66</sup> This is known as 'national treatment',<sup>67</sup> which is a specific obligation for Member States to apply the principle only to those services listed under a member's schedule. Governments cannot limit the access of companies by limiting their numbers or requiring them to have local content or train local people.<sup>68</sup> GATS rules are legally binding on governments and can be enforced through the WTO dispute system.

Article XIX of GATS requires that all countries' service markets must be progressively liberalized.<sup>69</sup> The WTO Doha Ministerial Meeting in 2001<sup>70</sup> made a general

<sup>64</sup> GATS has three pillars. The first is a framework agreement containing basic obligations, which apply to all member countries. The second concerns national schedules of commitments containing specific further national commitments, which will be the subject of a continuing process of liberalization. The third is a number of annexes addressing the special situations of individual service sectors. GATS is divided into 12 broad service sectors, each of which has a number of subcategories. See GATS, The Final Act and Agreement Establishing the World Trade Organization, Uruguay Round (Marrakesh, 15 April 1994), available at <[http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf)>.

<sup>65</sup> However, GATS, Article II(2) offers some possibilities for Member States to maintain measures inconsistent with MFN. See *ibid.*

<sup>66</sup> F. Macmillan, *WTO and the Environment* (Sweet and Maxwell, 2001), at 201.

<sup>67</sup> Article XVII contains the national treatment principle that prohibits discrimination between domestic and 'like' imported products under internal regulations. See GATS, n. 64 above.

<sup>68</sup> The national treatment rule relates to market access provision under Article XVI. It restricts Member States to adopting measures that might restrict market access and discourages discrimination against foreign goods and services. While members can place limitations on the extent of their market access commitment in a specified sector, the commitment in GATS to progressive liberalization must be kept in mind.

<sup>69</sup> Article XIX states that, in order to achieve higher levels of liberalization in services, members of the WTO should enter into successive rounds of negotiations within 5 years of its entering into force in 1995. In 2000, the WTO Council for Trade in Services adopted a set of guidelines, including a timetable by which each stage should be completed. See GATS, n. 64 above.

<sup>70</sup> The Doha Declaration obliged participants in the GATS negotiations in 2000 to submit initial requests for specific commitments by 30 June 2002 and initial offers by March 2003. See Doha WTO Ministerial Declaration (WT/MIN(01)/DEC/1, Doha, 20 November 2001), available at <[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm)>.

commitment to remove all barriers to trade in environmental services<sup>71</sup> and agreed to launch a new round of negotiation on global trade liberalization, including services. The European Community (EC), along with a few other developed countries,<sup>72</sup> have proposed that water be included as an 'environmental service' under GATS. The EC proposed seven categories that are each related to different environmental media, such as air, water, solid and hazardous waste, noise, soil and landscape. The EC classification is based on what it considers 'pure' environmental services.<sup>73</sup> Such services would be the subject of a cluster negotiation so that they would fall within various sections of GATS.<sup>74</sup> Although no country has yet committed to water supply services, commitments have been made to include other water-related services, such as wastewater and sewage treatment, construction for waterways and dams, engineering and project management services for water supply and sanitation works, technical testing and analysis services.

<sup>71</sup> There is no specific reference to the term 'environmental services' in the GATS. Instead 'environmental services' are included as the sixth sector category among the 12 broad sectors in the Services Sectoral Classification List (W/120), which is based on the United Nations Provisional Central Product Classification (CPC) (WTO Doc. MTN/GNS/W/120, July 1991). These services are divided into four categories: sewage systems; refuse disposal; sanitation and similar services; and other environmental services. It is assumed that 'other' environmental services include other CPC service categories such as cleaning of exhaust gases, noise abatement services, nature and landscape protection services and other environmental protection services not included elsewhere. See *Environmental Services, Background Note by the Secretariat, Council for Trade in Services* (WTO Doc. S/C/W/46, 6 July 1998), at para. 6. This classification is mutually exclusive, i.e. services in one sector cannot be covered by another sector (para. 10). This has implications for the cross-sectoral approach to the design and delivery of integrated environmental services.

<sup>72</sup> See *Communication from the United States to the Council for Trade in Services* (WTO Doc. S/CSS/W/25, 18 December 2000); *Communication from Switzerland to the Council for Trade in Services* (WTO Doc. S/CSS/W/76, 4 May 2001); and *Communication from Australia to the Council for Trade in Services* (WTO Doc. S/CSS/W/112, 1 October 2001).

<sup>73</sup> *Communication from the European Communities and their Member States to the Council for Trade in Services* (WTO Doc. S/CSS/W/38, 22 December 2000). The proposal also covers all sectors and sub-sectors of the environmental services 'cluster' or 'checklist' described in the EC Communication (WTO Doc. S/CSC/W/25, 28 November 2000).

<sup>74</sup> The communication from the EC covers, *inter alia*, water for human use and wastewater management; water collection, purification and distribution services through mains except steam and hot water; potable water treatment, purification and distribution, including monitoring; and wastewater services (including removal, treatment and disposal of household, commercial and industrial sewage and other wastewaters, monitoring, removal and treatment of solid waste). See *Communication from the European Communities*, n. 73 above. This proposal, if accepted, means that water would be included in the WTO negotiations regarding 'the reduction or as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services'. See Doha Ministerial Declaration, n. 70 above, para. 31(iii), available at <[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm)>.

Once GATS opens up the water sector by removing trade barriers and tariffs, large industrialized countries may request market access to the water sector. Under GATS, it would be difficult for a developing country to resist that move and market access commitments 'could impose restraints on local and national authorities' ability to effectively regulate water extraction to protect the environment'.<sup>75</sup> In addition, 'market access commitments could limit the right of the governments to restrict quantities of water that companies are allowed to collect from lakes, rivers and groundwater sources'.<sup>76</sup> Moreover, GATS does not allow governments to use conservation of natural resources as a ground to restrict rights of foreign service providers.<sup>77</sup>

## CORPORATE INFLUENCE

The entire water sector, including wastewater treatment, is estimated to be worth US\$200 billion each year. According to the Organization for Economic Cooperation and Development (OECD), water utilities account for US\$73.2 billion, out of the total global environmental market of US\$453 billion for goods and services.<sup>78</sup> This business attracts multinational companies in developing countries. Large corporations are also a powerful vested interest group within the WTO decision-making process.<sup>79</sup> Most private investment in water and sanitation infrastructure projects has taken the form of public-private partnerships. These partnerships involve joint ventures between multinational water companies and local governments, in which the former contracts to design, build and operate water treatment and supplies for a pre-determined period.<sup>80</sup> There are ten major corporate players now delivering freshwater services for profit. Suez (formerly Suez Lyonnaise des Eaux) and Vivendi Universal, two of the water companies from France, control more than 50% of the global water market.<sup>81</sup> There are several cases of privatized water services

<sup>75</sup> T. Concannon, *Stealing our Water: Implications of GATS for Global Water Resources*, Friends of the Earth Briefing (FOE, 2002), at 3, available at <[http://www.foe.co.uk/resource/briefings/gats\\_stealing\\_water.pdf](http://www.foe.co.uk/resource/briefings/gats_stealing_water.pdf)>.

<sup>76</sup> *Ibid.*, at 4.

<sup>77</sup> S. Shrybman, 'Thirst for Control', *Blue Planet Project* (Council of Canadians, January 2002), at 4, available at <[http://www.blueplanetproject.net/cms\\_publications/TFC\\_E.pdf](http://www.blueplanetproject.net/cms_publications/TFC_E.pdf)>.

<sup>78</sup> OECD Joint Working Party on Trade and Environment, *Future Liberalization in Environmental Goods and Services* (COM/TD/ENV(98)37/FINAL, OECD, 3 March 1999).

<sup>79</sup> M. Khor, *WTO Hijacked by Big Corporations, South – The Victims* (Third World Network, 1999), available at <<http://www.twinside.org.sg/title/victims-cn.htm>>.

<sup>80</sup> See S. Shrybman, n. 77 above, at 4.

<sup>81</sup> See A. Eark, n. 62 above. For more information, see the website available at <[http://www.thewaterpage.com/int\\_companies1.htm#where](http://www.thewaterpage.com/int_companies1.htm#where)>.

where water prices have risen without any consultation with the public and without monitoring whether the service was satisfactory.<sup>82</sup>

Bilateral investment treaties (BITs) are another route for multinationals to expand their businesses, which covers goods and services, in developing countries.<sup>83</sup> BITs can play a role in preventing companies registered in the territories of the countries involved to violate the rights of people in other countries.<sup>84</sup> The effect of privatization and BITs related to water services can be seen in Bolivia.<sup>85</sup> In 1998, the International Monetary Fund approved a US\$138 million loan for Bolivia and wanted structural reforms for the nation. The Bolivian Government agreed to sell various public enterprises, including oil refineries and a local water agency in the Province of Cochabamba. In 1999, the World Bank, in its Bolivia Public Expenditure Review, discouraged water subsidies.<sup>86</sup> In the same year, the Bolivian Government granted a 40-year contract to supply water to Cochabamba to Aguas del Tunari, a subsidiary of the UK-based company International Water Limited, which was itself a subsidiary of Bechtel, the biggest US-based water multinational. Aguas del Tunari was the only bidder with a bid worth US\$2.5 billion. The company gained the rights not only to supply water to the municipalities' network, but also for industrial, agricultural and residential

uses throughout the Cochabamba Province. In effect, all rights to access water in Cochabamba were transferred to Aguas.<sup>87</sup> Within 3 months, Aguas del Tunari increased water tariffs by between 30% and 300% in different parts of the province.<sup>88</sup>

In Bolivia, where the minimum wage is US\$100 per month, the new tariff accounted for a quarter of the monthly wages of working class families. Before Aguas del Tunari took over, around 45% of people in Cochabamba did not have access to piped water supplied by the municipality.<sup>89</sup> These people traditionally considered lakes, ponds and other local sources of water as the property of the community. However, after Aguas took over, these people were not allowed to collect water from these sources and water was no longer a collectively owned resource. It had become a commodity owned by a private monopoly. The first people to protest were engineers and environmental activists in Cochabamba. As tariffs increased, a coalition, known as the Coalition for the Defence of Water and Life, grew. Their protest succeeded in persuading the Government to reverse the deal with Aguas del Tunari within 4 months.<sup>90</sup> In October 2001, Aguas del Tunari filed a petition before the International Centre for Settlement of Investment Disputes (ICSID), which is part of the World Bank Group.<sup>91</sup> The company invoked the provisions of a BIT signed between

<sup>82</sup> For example, in Manila, water prices increased by over 50% after months of bitter dispute. Mynilad Water Services Inc. (MWSI), partially owned by Suez (formerly Suez Lyonnaise des Eaux), was given permission to increase rates in August 2001, despite the fact that the privatization missed a key target of providing 24-hour water supply to all connections. See T. Concannon, n. 75 above, at 5.

<sup>83</sup> Investment liberalization has always been controversial. So far, attempts to negotiate a multilateral agreement on investment at the WTO or the OECD have failed to come up with a binding agreement. An example of this is the OECD's unsuccessful attempt in 1998 to create a multilateral agreement on investment (MAI). Generally, the 'NAFTA' model is used as a blueprint for BITs. See International Centre for Settlement of Investment Disputes, *Bilateral Investment Treaties (1959–1996)*, available at <<http://www.worldbank.org/icsid/treaties/treaties.htm>>.

<sup>84</sup> Under the General Comment No 15, each Member State has a national obligation 'to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries'. See General Comment No 15, n. 15 above, at paras 33 and 36.

<sup>85</sup> The detail of the matter can be found in V. Sridhar, 'Water War', 20:3 *The Frontline* (1–14 February 2003), internet edition, available at <<http://www.frontlineonnet.com/fl2003/stories/20030214000206000.htm>>.

<sup>86</sup> In the Executive Summary of the Report, the World Bank stated that 'No subsidies should be given to ameliorate the increase in water tariffs in Cochabamba', arguing that all water users should have bills that reflect the full cost of proposed expansion of the local water system. See World Bank Report, *Bolivia Public Expenditure Review*, Green Cover No 19232-BO (14 June 1999), at 7, available at <<http://www-wds.worldbank.org>>.

© Blackwell Publishing Ltd. 2004.

<sup>87</sup> The Bolivian Government passed Law 2029 (the Drinking Water and Sanitation Law) in 1999, enabling the privatization of drinking water services, aimed at 'full cost recovery' of all water-related services. See K. Slattery, 'What Went Wrong? Lessons From Cochabamba, Manila, Buenos Aires, and Atlanta', *Annual Privatization Report 2003* (Reason Public Policy Institute, 2003), available at <<http://www.rppi.org/apr2003/whatwentwrong.html>>.

<sup>88</sup> See V. Sridhar, n. 85 above.

<sup>89</sup> *Ibid.*

<sup>90</sup> The demand of the coalition (La Coordinadora de Defensa del Agua y de la Vida) was the repeal of the Cochabamba concession, a ban on privatization and citizen participation in the formation of a new water resources law. In April 2000, government representatives and the coalition signed an agreement to end the water protests in Cochabamba. Following the departure of Aguas del Tunari in April 2001, management of the local water company was turned over to its employees and the citizens of Cochabamba. Since that time, the coalition has retained an active role in promoting participatory approaches to water management. See K. Slattery, n. 87 above.

<sup>91</sup> International Centre for Settlement of Investment Disputes, *Aguas del Tunari S.A. v. Republic of Bolivia*, Case No ARB/02/3. There are several examples where the companies challenged the decisions of governments concerning water or water services. For example, Compania de Aguas del Acoquija (CAA), an affiliate of a subsidiary of Vivendi, sued Argentina for US\$300 million arising from a water and wastewater privatization deal. The claim alleged that public health orders, mandatory service obligations and rate regulations all offended its investors' rights. See International Centre for Settlement of Investment Disputes, *Compagnia de Agua del Aconquija S.A. & Compagnie General des Eaux, Claimants v. Argentine Republic, Respondent*, Case No ARB/97/3, available at <<http://www.worldbank.org/icsid>>.

Holland and Bolivia in 1992<sup>92</sup> and sought compensation of US\$25 million from the Bolivian Government for cancelling the Cochabamba contract. The matter is still pending before the tribunal.<sup>93</sup>

## INSTITUTIONAL INFLUENCE

One of the main sources of financing of private water services in developing countries comes from the International Monetary Fund, which demands the use of private water services in exchange for debt relief.<sup>94</sup> The World Bank is another powerful institution that promotes the commodification of water.<sup>95</sup> The World Bank can withhold project funds unless a country cooperates, and the same approach is applied by a myriad of regional banks, such as the European Investment Bank, the Inter-American Development Bank, the Asian Development Bank and the African Development Bank.

The World Bank has relentlessly spearheaded a campaign to push for water to be considered an economic, rather than a social, good. On the plea of improving access and sustainability of dwindling supplies, water trading and promotion of private water rights have been pushed onto developing countries.<sup>96</sup> In countries where water industries are not making any profit, the World Bank is 'unlikely to approve a water sector loan

without the explicit or implicit condition of water privatization, as concessions, leases, or management and service contracts'.<sup>97</sup> The proportion of the water sanitation services that are projected to be privatized by 2010 are as follows: Western Europe 20% in 1997 and will increase to 35% in 2010; in Latin America 4% in 1997 and will increase to 60% in 2010; Africa 3% in 1997 and will increase to 33% in 2010; Asia 1% in 1997 and will increase to 20% in 2010.<sup>98</sup>

In 1999, the World Bank awarded debt relief to Mozambique only after the country agreed to privatize the water supply in Maputo and also agreed to eliminate obstacles for private sector participation in, *inter alia*, water services.<sup>99</sup> In 1999, the World Bank suspended a US\$46 million loan to Paraguay for not privatizing its water sector.<sup>100</sup> However, for accepting its precondition to raise water tariffs by 95%, the World Bank approved a similar loan of US\$110 million to Ghana in July 2001.<sup>101</sup> Higher tariffs for water mean the poor have to use less or go without. In Ghana, where privatization has been in full swing, price increases have already forced many people to cut down water consumption drastically,<sup>102</sup> and in South Africa, high tariffs for water have led people to consume polluted river water.<sup>103</sup>

## CONCLUSION

Recognizing a human right to water is an important step towards holding decision makers accountable. Although there is no recognized fundamental human right to water, international conventions have taken account of the vital importance of water and established it as part of the right to life. The right to water is mentioned in various regional and non-binding documents, and the ECOSOC General Comment on the right to water has established clear obligations on Member States. Moreover, within the last decade, the focus of various international conferences has shifted towards more sustainable use of water and underlined that water is not merely an economic good.

<sup>92</sup> In November 2000, Bechtel created new holding companies in Holland, which allowed Bechtel/Agua del Tunari to apply for jurisdiction under the ICSID and challenge Bolivia. The ICSID tribunal has not been viewed as a neutral body by a number of Bolivian non-government organizations. See L.E. Peterson, *Research Note: Emerging Bilateral Investment Treaty Arbitration and Sustainable Development* (International Institute for Sustainable Development, August 2003), available at <[http://www.iisd.org/pdf/2003/trade\\_bits\\_disputes.pdf](http://www.iisd.org/pdf/2003/trade_bits_disputes.pdf)>.

<sup>93</sup> See the list of pending cases on the ICSID website, available at <<http://www.worldbank.org/icsid/cases/pending.htm>>.

<sup>94</sup> Under the International Monetary Fund (IMF) Poverty Reduction and Growth Facility (PRGF), many developing country governments have agreed to have their loans conditional on the privatization of their water sectors. See 'Countries with IMF: Water Privatization and Cost Recovery Conditions: Bearing the Burden of IMF and World Bank', 22:9 *Multinational Monitor* (September 2001), available at <<http://www.multinationalmonitor.org/hyper/list.html>>.

<sup>95</sup> General encouragement towards privatization can be found in World Bank, *Private Sector Development Strategy Directions for the World Bank Group* (World Bank, 9 April 2002). The 2003 Water Sector Resources Strategy of the World Bank emphasizes the need to (i) decentralize water services; and (ii) achieve full cost recovery which can act both 'as an incentive to private investment and as a disincentive to waste'. See P. Street, 'Global Water Markets and the General Agreement on Trade in Services', 13:4 *Water Law* (2002), 259, at 265. Also see, World Bank, *Water Sector Resources Strategy: Strategic Directions for World Bank Engagement* (World Bank, February 2003), available at <<http://www.inweb18.worldbank.org/ESSD/ardext.nsf/18ByDocName/WaterResourcesManagement>>.

<sup>96</sup> BBC News, *World Bank Pushes Private Water*, UK edition (14 August 2003), available at <<http://www.news.bbc.co.uk/1/hi/world/africa/3148837.stm>>.

<sup>97</sup> See S. Shrybman, n. 77 above, at 4.

<sup>98</sup> See A. Earle, n. 62 above, available at <[http://www.thewaterpage.com/int\\_companies1.htm#where](http://www.thewaterpage.com/int_companies1.htm#where)>.

<sup>99</sup> Jubilee 2000 Coalition, 'Mozambique gains an extra \$28 million per year from HIPC', *Debt in the News* (1 July 1999), available at <<http://www.jubilee2000uk.org/jubilee2000/news/mozamb0107.html>>.

<sup>100</sup> A. Islam, 'World Water Commission Tries to Fill All Glasses', 7:149 *TERRA Inter Press Service Daily Journal* (6 August 1999), at 3.

<sup>101</sup> S. Sharma, 'Water Privatization – Torrent of Trouble', *The Hindu Business Line* (30 May 2002), internet edition, available at <<http://www.blonnet.com/bline/2002/05/30/stories/2002053000030800.htm>>.

<sup>102</sup> *Ibid.*

<sup>103</sup> S. Grusky, 'Privatization Tidal Wave: IMF/World Bank Water Policies and the Price paid by the Poor', 22:9 *Multinational Monitor* (15 September 2001), available at <<http://www.multinationalmonitor.org/mm2001/01september/sep01corp2.html>>.

Privatization could pose problems with the ownership of water.<sup>104</sup> Generally, a State has the full jurisdiction and control over water resources. Privatization means that the State can transfer the right to natural resources to the benefit of only a small (wealthy) segment of society. The public sector must manage these natural resources and should not transfer the right to private entities with profits in mind. However, municipalities in developing countries are not able to provide the service and depend on the investment from the private sector. The private companies work on a profit-making basis and governments either see them as an instrument to raise profit or to raise efficiency. Under the MDGs, everyone should have access to safe water. If safe water comes at a price, the poor will not be able to pay. The price of water supply increases if the related costs of sewage and drainage are added to it. Therefore, the tariff must be fully transparent regarding the full cost of treating and delivering water and waste.

The International Monetary Fund and the World Bank need to rethink their 'privatization' agendas related to private sector participation in the water sector when many developing countries and the least developed countries do not have appropriate regulatory frameworks and public consultation processes.<sup>105</sup> There is also a need to provide financial and technical support for building the necessary capacity for the public sector to perform the tasks required. In most cases, crucial decisions about water privatization and cost recovery are made without the knowledge and consent of citizens. Therefore, an inclusive system of governance, and local community participation and partnership

between local government, community-based organizations and water utilities could offer some solutions to make safe drinking water accessible to all.<sup>106</sup> Principle 10 of the 1992 Rio Declaration and Aarhus Convention model of participatory mechanisms can provide useful guidelines for national governments for early public participation when all options are open.<sup>107</sup>

It is possible for community-based management to work involving grass-roots community, governments and companies in managing water.<sup>108</sup> The ownership of water should be given back to stakeholders to develop and manage their own water supply systems. This reduces the cost of the water supply to the public exchequer and gives ownership back to communities. The answer to privatization is not 'full cost recovery', but political decentralization and empowerment.<sup>109</sup>

Jona Razzaque is a staff lawyer at the Foundation for International Environmental Law and Development (FIELD) where she works on cross-themed environmental projects and is involved in all three of FIELD's programme areas related to trade, biodiversity and climate change. She holds a Ph.D. in public interest environmental litigation in India, Pakistan and Bangladesh from the University of London. She is a member of the Commission on Environmental Law, IUCN.

The author would like to thank Beatrice Chaytor for her comments on an earlier version of the article.

<sup>106</sup> The World Bank's *Water Resources Sector Strategy*, Part I (Introduction and Development Context) has touched upon this. See n. 95 above. However, according to the International Union for Conservation of Nature and Natural Resources (IUCN), participatory decision-making issues have been discussed generally and more emphasis is needed on the 'development of infrastructures'. See IUCN, *The World Bank's New Water Strategy – Disengagement from the Poor and the Environment* (IUCN, 2003), available at <<http://www.iucn.org/themes/wetlands/pdf/WBWaterStrategyIUCNAnalysisMay2002.pdf>>.

<sup>107</sup> See Aarhus Convention n. 33 and n. 56 above. Under Article 6 of the Aarhus Convention parties are obliged to provide for public participation if activities are listed in the annex to the convention or any non-listed activity that may have a significant effect on the environment. See J. Ebbesson, *Information, Participation and Access to Justice: the Model of the Aarhus Convention*, Joint UNEP–OHCHR Expert Seminar on Human Rights and the Environment (Geneva, 14–16 January 2002), available at <<http://www.unhchr.ch/environment/bp5.html>>.

<sup>108</sup> An example of this could be La Coordinadora de Defensa del Agua y de la Vida Coalition mentioned in n. 90 above.

<sup>109</sup> At the Second World Water Forum and Ministerial Conference in 2000, the main challenges for the next century were stated as the empowerment of people and greater participation in decision making; the promotion of peaceful cooperation regarding transboundary watercourses; the provision of security from floods, droughts, pollution and other water-related hazards; and good governance. See Ministerial Declaration of The Hague on Water Security in the Twenty-First Century, n. 35 above, para. 3.

<sup>104</sup> V. Shiva, *Water Wars* (South End Press, 2002) at 20–24.

<sup>105</sup> The 2001 International Conference on Freshwater concluded this as well in Sections 16 and 17 of the Bonn Recommendations for Action. It further noted that 'private sector participation should not be imposed on developing countries as a conditionality for funding'. See International Conference on Freshwater, Bonn Recommendations (Bonn, 7 December 2001), available at <[http://www.water-2001.de/outcome/BonnRecommendations/Bonn\\_Recommendations.pdf](http://www.water-2001.de/outcome/BonnRecommendations/Bonn_Recommendations.pdf)>.