

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

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INTRODUCTION .....	423
I. COMMON GOOD VS. PRIVATE INTERESTS .....	427
A.	

governments have condemned many as unfit for human use.

is the action of a government selling one of its assets to a private party, usually a corporation.<sup>14</sup> 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 (•PPPsŽ or •P3Ž).<sup>15</sup> Privatization is inseparably linked to other neoliberal, free-market principals such as deregulation and liberalization.<sup>16</sup>

Margaret Thatcher,<sup>17</sup> the godmother of privatization,<sup>18</sup> began pushing for neoliberal<sup>19</sup> reforms during the nineteen eighties in the United Kingdom as a means to raise state revenue and reduce government intrusion in the economy.<sup>20</sup> Thatcher's program was politically popular because it encouraged widespread ownership of private property in the form of shares.<sup>21</sup> The U.K. government, starting with the de-nationalization of already profitable industries, namely telecommunications<sup>22</sup>, subsequently passed the Water Act that privatized

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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 Context* 3 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.margareththatcher.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. •NeoliberalŽ 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*

water delivery in 1989.<sup>23</sup> Following the U.K.'s example, many countries have adopted legal schemes that support water privatization.<sup>24</sup>

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).<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> The commodification of water is in direct conflict with the

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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](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#.cky0tqmx> (We recently redid the utilities on Pamona and we pulled wooden pipe out of the ground there.

65.

See Craig

idea that water is held in •the commons,Ž or as a social good, due to

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 Environment<sup>31</sup> solidified the idea that water is an economic good.<sup>32</sup> 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.<sup>33</sup> Many economists and water managers maintain that these qualities make water's economic good characterization a foregone conclusion.<sup>34</sup> 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 price<sup>35</sup> for its value.<sup>36</sup>

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."<sup>37</sup> The existence of the bottled water industry suggests that water markets exist effectively. However, the bottled water

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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](http://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 *W.M. & 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.<sup>38</sup> 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.<sup>39</sup>





business decisions is the prime objective of modern publically traded corporations.<sup>56</sup>

The global water industry is worth an estimated 591 billion dollars.<sup>57</sup> For every one U.S. dollar spent on water systems, the economic return can be as high as twenty-eight dollars.<sup>58</sup> Additionally, some market analysts contend that the water business sector is one of the best current investments, the economic version of a "sleeping hit."<sup>59</sup> Ten major corporations dominate the water industry.<sup>60</sup> The two water-giants, Vivendi Universal and Suez, operate in at least 130 countries.<sup>61</sup> Private water companies, even the smaller ones, are in control of tremendous capital.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> One such term allowed Aguas Argentina to file for a rate increase if its costs became too high.<sup>65</sup> 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-

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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*



trol water delivery in 1998.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> Furthermore, Aguas Argentina never built the sewage treatment plant it agreed to construct.<sup>78</sup> When the private water deal eroded, 95 percent of the city's sewage was dumped directly into the Rio de la Plata River.<sup>79</sup> 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.<sup>80</sup> 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

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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.* (JUut ties with Unit0e6/F4 1 Tf 2 0 TD .1 Tw55 Tm j /Fa5G).

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.<sup>81</sup>

## 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<sup>82</sup>). Although there is no single definition of a public good, public goods often have "spillover" effects.<sup>83</sup> 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.<sup>84</sup> Availability of clean and affordable water

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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 Naeyele, *supra* note 14, at 114; see also Craig Anthony Arnold, Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship, 38 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\\_summary\\_of\\_82](http://pacinst.org/app/uploads/2013/02/new_eco_summary_of_82).

confers benefits on the individual user as well as the population at large.<sup>85</sup>

In addition to having social, cultural and religious significance, water is essential to life itself.<sup>86</sup> More than two billion live without access to sanitation service<sup>87</sup>. Potable water systems greatly reduce instances of water-borne illnesses, saving millions of lives per year.<sup>88</sup> 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."<sup>89</sup>

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.<sup>90</sup> The process of supplying water must be accountable to the larger public interest.<sup>91</sup> 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.<sup>92</sup> Though access to this information may be lacking in public water systems, private con-

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85. See Arnold, *Water Privatization Trends*,



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

For example, Bolivia and the Netherlands signed a BIT that facilitated Bechtel Corporation's legal action against the Bolivian government.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> Unlike the judicial proceedings of many countries that are open to the public, these proceedings are adjudicated in secret.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> One of these criteria is the determination that the municipality's water infrastructure has suffered material damage.<sup>107</sup> Although the exact condition of New Jersey's water infrastructure is unknown, it is well

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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 at 155, 17-39.30141 Tf 2.5001 502 See *id.* at 171.

known that America's water infrastructure is crumbling,<sup>108</sup> such that the American Society of Civil Engineers assigned a "D" grade to America's water pipes.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

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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 ENGRS*, <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.<sup>115</sup> The General Agreement on Tariffs and Trade (GATT) was seminal in the advancement of a global economy.<sup>116</sup> In-

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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.Ž).

116. See *id.* at 83.

stituted in 1947, GATT was a multilateral treaty that established international investment rules between twenty-three nations.<sup>117</sup> Importantly, in 1994, a round of GATT negotiations created the World Trade Organization (WTO), which assumed control over the regulation of international trade.<sup>118</sup> GATT is still an operational

are the World Bank and the International Monetary Fund (IMF);<sup>124</sup> 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).<sup>125</sup> These institutions also insist on full cost recovery,<sup>126</sup> which means that governments are forbidden from offering subsidies to financially insolvent individuals that cannot afford the private water company's increased rates.<sup>126</sup> 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.<sup>127</sup> 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<sup>128</sup> and indispensable for leading a life in human dignity.<sup>128</sup> 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.<sup>129</sup> Violations of these rights in private water regimes are unfortunately too common.

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124. See Nancy Alexander, *The Roles of the IMF, the World Bank, and the WTO in Liberali-*

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.<sup>130</sup> One of the loan conditions required Bolivia to sell its public enterprises, including the water delivery system.<sup>131</sup> The Bolivian parliament quickly legalized the privatization of water.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> If water bills were not paid, access to water was shut off.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> 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,

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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](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.* *supra*



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.