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Kristin L. Retherford

Indiana University Maurer School of Law, kretherf@indiana.edu

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Regulating the Corporate Tap: Applying Global Administrative Law Principles to Achieve the Human Right to Water

KRISTIN L. RETHERFORD*

“Under the current model of globalization, everything is for sale. Areas once considered our common heritage are being commodified, commercialized and privatized at an alarming rate. Today, more than ever before, the targets of this assault comprise the building blocs of life as we know it on this planet, including freshwater, the human genome, seeds and plant varieties, the air and atmosphere, the oceans and outer space. The assault on, and defence of, the commons is one of the great ideological and social struggles of our times.”¹

INTRODUCTION

On July 28, 2010, the General Assembly of the United Nations approved a momentous resolution establishing the right to safe and clean drinking water as “essential for the full enjoyment of the right to life.”² Shortly after, on September 30, 2010, the United Nations Human Rights Council, approving a second resolution, declared that water and sanitation are human rights derived from the right to an adequate standard of living.³ The resolution held that this right is “inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”⁴ According to Catarina de Albuquerque, the U.N. Independent Expert on human rights obligations related to access to safe drinking water and sanitation, “[T]his means that for the UN, the right to water and sanitation, is contained in existing human rights treaties and is therefore legally binding. . . . [T]his landmark decision has the potential to change the lives of billions of human beings”⁵

* J.D. Candidate, Class of 2013, Indiana University Maurer School of Law. Thanks to Professor Aman for his helpful suggestions and insight on this complex issue, to the staff of the *Indiana Law Journal* for their diligent work in bringing this Note to publication, and to my family for their years of unconditional encouragement and support. Special thanks to my mother who has always taught me to believe in the pursuit of justice.

1. Maude Barlow & Tony Clarke, Recipients, Acceptance Speech at The Right Livelihood Awards 2005 (Dec. 9, 2005), *available at* http://www.rightlivelihood.org/barlow_and_clarke_speech.html.

2. G.A. Res. 64/292, ¶ 1, U.N. Doc. A/RES/64/292 (July 28, 2010). *See* MAUDE BARLOW, OUR RIGHT TO WATER: A PEOPLE’S GUIDE TO IMPLEMENTING THE UNITED NATIONS’ RECOGNITION OF THE RIGHT TO WATER AND SANITATION 4 (Council of Canadians 2011), *available at* <http://www.canadians.org/water/documents/RTW/righttowater-0611.pdf>.

3. Human Rights and Access to Safe Drinking Water and Sanitation, Human Rights Council Res. 15/9, 15th Sess., Oct. 6, 2010, U.N. Doc. A/HRC/RES/15/9 (Sept. 30, 2010). *See* BARLOW, *supra* note 2, at 4.

4. H.R.C. Res. 15/9, *supra* note 3, ¶ 3.

5. *UN United to Make the Right to Water and Sanitation Legally Binding*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (Oct. 1, 2010) (internal quotation marks omitted),

These two resolutions represent remarkable progress in the struggle for water justice, the human rights movement, and the environmental movement. The U.N. rarely recognizes new human rights; it is even rarer for a right that has become so politicized over the years to be recognized.⁶ However, these potentially powerful resolutions have only provided the countries of the world with guiding principles on how to manage and distribute their water supply, and they will only be as meaningful as the people and governments allow them to be.

One of the significant obstacles facing the realization of a right to water is the increasing occurrence of water privatization contracts in developing countries.⁷ Water privatization, which is the governmental sale of water services including the maintenance, planning, and operational responsibilities to a private company,⁸ should bring about efficiency and improvements in living conditions since specialized private companies have the knowledge and resources to expand and upgrade services that governments typically do not possess.⁹ However, the results of these contracts have not been beneficial to the people and their land in developing countries, as profit-seeking agendas prioritize shareholder expectations and quarterly earnings to the needs and values of the people they are meant to service.¹⁰

This Note argues that unregulated water privatization undermines the United Nations' recognition of a human right to water. While monitoring and regulatory oversight of water privatization still, in theory, fall within the state's purview, whether or not such monitoring is effective or even occurs is less certain.¹¹ Furthermore, international regulation is wholly ineffective, as most codes of conduct, guidelines, and compacts are merely voluntary and have little or no enforcement mechanisms.¹² Therefore, a human right to water can only be achieved through more effective governance mechanisms and public participation, and principles of global administrative law may be the best suited means to realize this right.

Part I of this Note provides background as to the great role economic globalization has played in shifting the control of water services throughout the world and introduces the concept of global administrative law. Part II discusses the emergence of powerful transnational corporations in the water sector and the current state of, or lack of, enforcement mechanisms to constrain their practices and

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10403&LangID=E>.

6. See BARLOW, *supra* note 2, at 5.

7. See *infra* Part II.B.

8. See THE AGE OF COMMODITY: WATER PRIVATIZATION IN SOUTHERN AFRICA 14 (David A. McDonald & Greg Ruiters eds., 2005).

9. See generally PETER H. GLEICK, GARY WOLFF, ELIZABETH L. CHALECKI & RACHEL REYES, THE NEW ECONOMY OF WATER: THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESH WATER (2002) (explaining the various pros and cons of water privatization contracts).

10. See *infra* Part III.

11. See *infra* Part IV.A.

12. See, e.g., Benedict Kingsbury, *The Administrative Law Frontier in Global Governance*, 99 AM. SOC'Y INT'L L. PROC. 143, 147 (2005); David Vogel, *The Private Regulation of Global Corporate Conduct*, in THE POLITICS OF GLOBAL REGULATION 151, 184 (Walter Mattli & Ngaire Woods eds., 2009).

agendas. Part III reveals the various economic, environmental, and social consequences of unregulated water privatization in the developing world, with a particular focus on the failed water privatization attempt in Cochabamba, Bolivia and the currently failing water privatization concession in Jakarta, Indonesia. Part IV concludes by conceding that privatization is an irreversible trend and argues the right to water can only be achieved through a transformation of the current state of law. By applying principles of global administrative law to various aspects of water privatization bidding processes and implementation of contracts, it may be possible for states to reconcile water as both a social and economic good.

I. HOW GLOBALIZATION CHANGED THE VALUE OF WATER

To have a real discussion of how municipalities under water privatization contracts can benefit from global administrative law, it is crucial to first explore the various effects that globalization has had on the water sector and the dominant actors within it. This Part first considers the various arguments surrounding the globalization debate, and then turns to problems that can arise when water becomes a commodity as a result of economic globalization. Finally, the effects of globalization on governance mechanisms is explored, and a new kind of law is introduced that may be best suited for the regulation of global issues such as water distribution and human rights.

A. *The Globalization Debate*

When the 1948 Universal Declaration of Human Rights was written, the right to water was not mentioned.¹³ This omission was not the result of deliberate discussion and thoughtful debate, but rather quite the opposite. At that time, no one imagined a world without clean, abundant water because the assumption was that water was self-replenishing, and that the hydrologic cycle would simply replace any water used or abused.¹⁴ With this false notion in mind, people, businesses, and governments “polluted, mismanaged, and displaced water as if it was indestructible.”¹⁵ The driving force behind this increasing disregard for the intrinsic value of water, many argue, was the direct result of globalization.¹⁶

Globalization can be described as the “expanding scale, growing magnitude, speeding up, and deepening impact of interregional flows and patterns of social interaction.”¹⁷ The term denotes a “shift or transformation in the scale of human

13. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *UN Recognises Water as a Human Right*, SOUTHCENTRE.ORG, http://www.southcentre.org/index.php?option=com_content&view=article&id=1380%3Asb50&catid=144%3Asouth-bulletin-individual-articles&Itemid=287&lang=en.

14. See BARLOW, *supra* note 2, at 6.

15. See *id.*

16. See, e.g., MAUDE BARLOW & TONY CLARKE, *BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER* 79–83 (2002); MATTHIAS FINGER & JEREMY ALLOUCHE, *WATER PRIVATISATION: TRANS-NATIONAL CORPORATIONS AND THE REGULATION OF THE WATER INDUSTRY* 2–7 (2002).

17. See David Held & Anthony McGrew, *The Great Globalization Debate: An*

social organization that links distant communities and expands the reach of power relations [across borders].”¹⁸ However, there is no *one* agreed-upon definition of globalization, and the emotions that arise when thinking about it are often quite polarized.¹⁹ It has been said that every generation has concepts that capture the public imagination, and it appears that globalization is one for this age: “The term . . . crystallizes both the hopes of some people that we will finally achieve a global society and the fears of many others that their lives and jobs are threatened by forces beyond their control.”²⁰

In theory, globalization should benefit all people because it can produce greater overall economic value. Globalization has the potential to help developing nations catch up to industrialized nations much faster through increased employment, the breakdown of trade barriers, and the advancement of technology and communication.²¹ The term itself seems to suggest integration and coordination, but globalization has clearly not resulted in a “harmonious world society or a universal process of global integration in which there is a growing convergence of cultures and civilizations.”²² Anti-globalists argue that globalization weakens national sovereignty and allows rich nations to outsource domestic jobs and businesses overseas where labor is cheaper and environmental standards are less strict.²³ These critics do not see the opportunity for prosperity, peace, and democracy claimed by globalization’s supporters. Rather, they see a greater potential for conflict, extreme self-interest, unbridled corporate power, and disregard for people and communities.²⁴

B. Economic Globalization and the Commodification of Water

The anti-globalist position becomes stronger when one considers the effect that globalization has had on the exploitation of public resources such as water.

Introduction, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 1, 4 (David Held & Anthony McGrew eds., 2d ed. 2003) [hereinafter THE GLOBAL TRANSFORMATIONS READER].

18. *See id.*

19. The World Bank has even stated that: “Amazingly for so widely used a term, there does not appear to be any precise, widely-agreed definition. Indeed the breadth of meanings attached to [globalization] seems to be increasing rather than narrowing over time, taking on cultural, political and other connotations in addition to the economic.” Michele Putko, *Defining and Quantifying Globalization 2* (Mar. 15, 2006) (strategy research project, U.S. Army War College).

20. Peter A. Hall & Sidney Tarrow, *Globalization and Area Studies: When Is Too Broad Too Narrow?*, CHRON. OF HIGHER EDUC., Jan. 23, 1998, available at <http://chronicle.com/article/GlobalizationArea/99332/>.

21. *See generally* David Dollar & Aart Kraay, *Spreading the Wealth*, in THE GLOBAL TRANSFORMATIONS READER, *supra* note 17, at 447, 447–54 (arguing that increasing globalization offers poorer economies many opportunities to improve their position in the world).

22. *See* Held & McGrew, *supra* note 17.

23. *See* *Globalization: Progress or Profiteering?*, INVESTOPEDIA (Feb. 4, 2012), <http://www.investopedia.com/articles/07/globalization.asp#axzz1ibEvrGBn>.

24. *See, e.g.*, BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* (1996); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

Through economic globalization—which is the increasing economic interdependence of national economies across the world through a rapid increase in cross-border movement of goods, services, technology, and capital²⁵—industrial production has been able to reach new levels. Such emphasis on growth, however, creates impediments for competing countries trying to make preservation or conservation a priority.²⁶ Increasing consumption and profit maximization take precedence over water use efficiency, conservation improvements, and even citizen need.

The predominant ideology that has emerged as a result of this increasing economic globalization is the Washington Consensus model, which features substantial government deregulation of trade, investment, and finance.²⁷ This model, led by the dominant economic powers and financial institutions,²⁸ argues that progress can only be achieved in a tightly-integrated global economy established on principals of “trade liberalization, privatization, and macro-stability.”²⁹ Thus, it is essential to this model that capital, goods, and services move freely across borders, undisturbed by government intervention or regulation. This means, however, that even human and environmental concerns come second to the free flow of goods.³⁰ In the global market, rectifying a depleted local resource is easy: “When the East Coast cod are depleted, we just move on to Chilean sea bass.”³¹ Businesses within this model do not view natural resources as a social good, but rather, an economic good to be managed by market forces just like any other commodity.³²

Commodification is defined as “the process of converting a good or service formerly subject to many non-market social rules into one that is primarily subject to market rules.”³³ Once a public resource becomes established as a profitable commodity to be bought and sold on the free market, the more likely it will become the target of financial markets, and the more likely it will become exploited in order to maximize that profit.³⁴ This exploitation will inevitably result in resource

25. See RAKESH MOHAN JOSHI, *INTERNATIONAL BUSINESS* 9–10 (2009).

26. See Maude Barlow, *The Fight for Liquid Assets: Transnational Corporations are Taking Control of a Basic Element of Life*, *GLOBE & MAIL*, Aug. 16, 2000, at A15, available at <http://www.commondreams.org/views/081600-106.htm>.

27. See BARLOW & CLARKE, *supra* note 16, at 82; Larry Catá Backer, *Economic Globalization Ascendant and the Crisis of the State: Four Perspectives on the Emerging Ideology of the State in the New Global Order*, 17 *BERKELEY LA RAZA L.J.* 141, 145–46 (2006).

28. These dominant powers typically include westernized countries such as the United States, United Kingdom, China, and Japan, and their complementary financial institutions consist of the World Bank and International Monetary Fund.

29. See Backer, *supra* note 27, at 145. Micro-stability, these proponents claim, will supposedly be achieved in the long run. *Id.*

30. See Barlow, *supra* note 26.

31. *Id.*

32. See *id.*

33. GLEICK ET AL., *supra* note 9, at 3.

34. See BARLOW & CLARKE, *supra* note 16, at 92. See generally NICK WILKINSON, *MANAGERIAL ECONOMICS: A PROBLEM-SOLVING APPROACH* 32–36 (2005) (discussing the basic profit-maximizing model).

scarcity, which will drive the prices of the good up even further.³⁵ Coupled with increased demand, the potential for driving service and quality down is significant. While this process is not as grave a concern for traditional goods and services that are not absolutely necessary for life, and which have viable substitutes, the stakes become much higher and the consequences much more disastrous when considering such a vital, irreplaceable public resource such as the world's water supply.³⁶

To further complicate issues, the global economy is fueled by the “financial casino,” in which investors speculate or gamble on fluctuations in the commodity prices.³⁷ Instead of buying long-term shares in corporations, investors temporarily put their money in markets that offer high-end, short-term returns, and can at any time, and for whatever reason, withdraw their money and move it to a more profitable investment.³⁸ Unfortunately, a country's economy that relies on these investments can become destabilized at the whim of the market.

There is no substitute for water; it is a necessary resource that is required for survival. Therefore, it cannot be left to the whims of the market for protection. Instead, water must be regarded as a public social good and be under the control of accountable institutions, not profit-seeking corporations. Treating water as an economic good has implications that reach far beyond the market—implications that touch the very way people live and interact with one another.³⁹

C. The Emergence of Global Governance

As globalization increasingly expands throughout the world, the question becomes, how are organizations, institutions, and markets coordinated in this increasingly globalized world? Traditional domestic law is no longer best suited to address globalized issues that transcend national borders and laws.⁴⁰ Therefore, many scholars have argued that the only way to truly address global issues such as water conservation and human rights is through some form of global governance.⁴¹

Global governance has been defined as “the complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens and organizations, both inter- and non-governmental, through which collective interests on the global plane[t] are articulated, rights and

35. See BARLOW & CLARKE, *supra* note 16, at 92.

36. See *infra* Part III.

37. See generally SUSAN STRANGE, *CASINO CAPITALISM* (1997) (introducing the term and arguing that the western financial system has begun to look more and more like a casino).

38. See BARLOW & CLARKE, *supra* note 16, at 93; STRANGE, *supra* note 37, at 163.

39. See *infra* Part III.

40. See, e.g., Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 10 (2006).

41. See, e.g., AFSHIN AKHTARKHAVARI, *GLOBAL GOVERNANCE OF THE ENVIRONMENT: ENVIRONMENTAL PRINCIPLES AND CHANGE IN INTERNATIONAL LAW AND POLITICS* (2010); 4 *GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE: HUMAN RIGHTS* (Roger Brownsword ed., 2004).

obligations are established, and differences are mediated.”⁴² Basically, global governance is the management of global processes in the absence of a global government, and today, almost all human activity is subject to some form of global regulation.⁴³

Much of global governance is regulatory administration, and regulatory administration is organized and shaped by principles of administrative law.⁴⁴ Therefore, globalization brings with it an increase in the importance of administrative law. Based on these observations, many scholars have claimed that a new area of law is in development—global administrative law—in which important regulatory functions are no longer exclusively domestic, but have taken on a global nature.⁴⁵ The substance of the rules created by global regulatory institutions is not the predominant concern, but rather the “actual or potential application of principles, procedural rules and . . . other mechanisms.”⁴⁶

With traditional international law, states agree to a set of norms and are free to accept or reject these norms at any time, but in order to be effective, international laws need to be ratified and implemented at the domestic level.⁴⁷ On the other hand, legislative or primarily adjudicatory bodies do not make the rules for global administrative law. Instead, global administrative law has been said to encompass the “mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies.”⁴⁸ Such accountability provides for “adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions [these bodies] make.”⁴⁹ Thus, there is more flexibility for governance of global issues under this approach than with traditional international law. And because global regulation is less and less defined in terms of agreements among states, the nature of the international legal order is changing in a way that requires such global action.

The emergence of global administrative law mechanisms are already observable in many different areas: in notice-and-comment procedures adopted by international standard-setters such as the Basel Committee or the Organization for Economic Cooperation and Development (OECD),⁵⁰ in the Inspection Panel set up

42. ARCHNA NEGI, COHERENCE IN GLOBAL GOVERNANCE: THE CASE OF TRADE AND ENVIRONMENT 3 (2008) (quoting Thomas G. Weiss & Ramesh Thakur, THE UN AND GLOBAL GOVERNANCE: AN IDEA AND ITS PROSPECTS (2006)) (presented as part of the Twelfth EADI General Conference).

43. See *What is Global Administrative Law?*, IRPA.EU, <http://www.irpa.eu/gal-section>. [hereinafter *Global Administrative Law*].

44. See Krisch & Kingsbury, *supra* note 40, at 2.

45. See, e.g., Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 25 (2005).

46. *Global Administrative Law*, *supra* note 43.

47. See Krisch & Kingsbury, *supra* note 40, at 3–4.

48. Kingsbury et. al, *supra* note 45, at 17, 27–28.

49. *Id.* at 17.

50. See James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 LAW & CONTEMP. PROBS. 189, 210 (2005).

by the World Bank to ensure its own compliance with its internal policies,⁵¹ and in U.N. responses to the hesitant engagement of domestic courts in reviewing Security Council sanctions against individuals.⁵² While presently unsystematized and somewhat fragmented as a body of law, these examples show that core principles are starting to emerge within this field of law.⁵³ These principles include both the classical administrative law conceptions of fair and legal decision making and review procedures, and more substantive “good governance” values including rules requiring greater transparency and participation and the opening of new or strengthened avenues of judicial and administrative review.⁵⁴

It is clear that globalization forces have had a tremendous effect on the water sector. With such emphasis on growth, one would assume that there would be a similar increase in the availability of water, but that is not what we have seen. Turning water into a commodity creates a market in which only those who can afford the fluctuating costs of water will have access to it. However, while globalization has contributed greatly to this problem, at the same time, it has allowed for the emergence of a new field of law in which these problems can be addressed. As the next Part will explain, the necessity of these global governance values in the water sector is becoming increasingly important.

II. WHO OWNS THE WATER?

The changing role of the state, which is one of the major characteristics of globalization, is at the core of many of the issues that underlie failed privatization schemes and human rights violations. This Part explores the increasing power transnational corporations are gaining through privatization contracts at the expense of the state, and then argues that the negative results are largely due to the lack of enforcement mechanisms to restrain the oftentimes destructive and purely profit-maximizing behavior of these corporations.

A. Changing Role of the State

As with the globalization debate, there is no clear consensus as to whether the changing role of the state is beneficial or detrimental. Some argue that while the role of the state is changing, it is not necessarily diminishing its position in the world, but rather its position in the global system is simply being transformed in new ways.⁵⁵ For example, states have more options for participation in the

51. See Krisch & Kingsbury, *supra* note 40, at 4.

52. See *id.*

53. See Benedict Kingsbury, Nico Krisch, Richard B. Stewart & Jonathan B. Weiner, *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1, 4 (2005).

54. *Id.*

55. See, e.g., Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE GLOBAL TRANSFORMATIONS READER, *supra* note 17, at 189; SASKIA SASSEN, A SOCIOLOGY OF GLOBALIZATION 45–96 (2007) (arguing against scholarship that assumes the national and the global are mutually exclusive and noting a new trend: that “the state is one of the strategic institutional domains in which critical work on the

governing of the global economy because the geography of economic globalization is strategic, and that this strategic geography is partially embedded in national territories.⁵⁶ Furthermore, because the global financial system has reached “a level of complexity that requires the existence of a cross border network of financial centers,” some argue that the state will always play a critical role in the global system.⁵⁷

Others contend that these globalization forces are causing the state to lose its sovereignty, and in the process, the power of the state is shifting and becoming concentrated in new non-governmental actors, at great expense to the state.⁵⁸ The real consequence of this transformation is that there is now a deficiency in legitimacy and public participation, because the market, by itself, “has never been able to provide . . . security against violence, stable money for trade and investment, a clear system of law and the means to enforce it, and a sufficiency of public goods like drains, water supplies, infrastructures for transport and communications.”⁵⁹ The principle characteristic of this transformation is dependence, as the state’s role becomes limited to merely carrying out the will of non-resident actors.⁶⁰ So as globalization welcomed these new actors into the world market, it failed to simultaneously provide for any protection from abuse by these actors to the land and people with whom they contract.

Global administrative law seems pertinent no matter which position is taken because it presumes a newly emerging, “multifaceted global administrative space” comprised of various types of administrative institutions and entities working together.⁶¹ In this space, the distinction between domestic and international law has become blurred as the various regulators come together in international forums to decide administrative standards and procedures.⁶² Accompanying these “top down” approaches are typically “bottom up” approaches, which include, for example, domestic courts exercising judicial oversight of global regulation.⁶³ So while it does appear that the role of the state would be transformed under global administrative law, it does not necessarily mean that its power is undermined; in fact, global administrative law could empower the states, as will be discussed later.⁶⁴ However, as the law currently stands, it is not difficult to see some truth in the concerns the

development of globalization takes place . . . does not necessarily produce the decline of the state, but neither does it keep the state going as usual, nor does it merely produce adaptations to new conditions. The state becomes the site for foundational transformations. . .”).

56. See SASSEN, *supra* note 55, at 57.

57. See *id.* at 68.

58. See, e.g., Susan Strange, *The Declining Authority of States*, in THE GLOBAL TRANSFORMATIONS READER, *supra* note 17, at 127.

59. *Id.* at 128.

60. Backer, *supra* note 27, at 146. Backer argues that it does not matter whether you focus on the Washington Consensus of private economic transactional neo-liberal globalization, a more traditionally state-centered and international relations based analytical perspective, or a moral and political critique of Western-led economic globalization—they all ultimately posit the same consequences for the state.

61. See Kingsbury et al., *supra* note 45, at 18.

62. See Krisch & Kingsbury, *supra* note 40, at 11.

63. See Andrew D. Mitchell & John Farnik, *Global Administrative Law: Can It Bring Global Governance to Account?*, 37 FED. L. REV. 237, 253 (2009).

64. See *infra* Part IV.B.1.

pessimistic perspective raises when considering the enormous power and influence these new unregulated actors have obtained.

B. The Rise of the Transnational Corporations

The most prominent new actors in the water sector are non-governmental organizations (NGOs)⁶⁵ and transnational corporations (TNCs).⁶⁶ These actors have become partners of international organizations, which together, have started forming new governance mechanisms.⁶⁷ The primary focus of this Note, however, is the emerging power of TNCs.

TNCs, simply put, are corporations that operate in more than one nation at a time. TNCs have a tremendous impact on the global economy—in 2000, an estimated 63,000 were in existence, and in 1993, seventy percent of the world's trade activities were related to them, and half of that trade was simply intra-firm.⁶⁸ While globalization arguably gave rise to the formation of these cross-border corporations, it is fair to say that TNCs have grown to the point where they are now actively driving the process.⁶⁹

In the global water sector, there are actually very few TNCs as a result of various mergers and acquisitions over the past couple of decades.⁷⁰ Through this process, the power of production and marketing has become concentrated in the hands of fewer and fewer corporations and as a result, the “Water Barons” have emerged, consisting primarily of Suez Lyonnaise des Eaux (“Suez”), Vivendi Environment, and Thames Water.⁷¹ The World Bank and the International Monetary Fund, the financial institutions that drive the global economic market, have further helped the Water Barons accumulate their tremendous economic and political power. These powerful and resourceful institutions have not only provided

65. NGOs are legally constituted organizations that operate independently from any government, and typically take the form of social action that encompasses political messages. See Jessica T. Mathews, *Power Shift*, in THE GLOBAL TRANSFORMATIONS READER, *supra* note 17, at 204. Some of the active NGOs in this sector are the World Development Movement (WDM) and the Coalition Against Water Privatization (CAWP). However, not all NGOs are against globalization or privatization. In fact, some of the most prominent NGOs, such as Greenpeace, support water privatization. Therefore, even within the environmental NGOs, there is great tension on this subject.

66. See BARLOW & CLARKE, *supra* note 16, at 83; FINGER & ALLOUCHE, *supra* note 16, at 9–11.

67. See FINGER & ALLOUCHE, *supra* note 16, at 9.

68. See *id.* at 10. Intra-firm trade occurs between two subsidiaries of a company, which means that normal trade laws do not apply, and therefore, can proceed without any interference. *Id.*

69. The top 200 transnational corporations are so large and powerful that their combined annual sales are greater than the sum total of the economies of 182 of the 191 countries in the world, and of the largest 100 economies, fifty-three are transnational corporations rather than nation-states. See *id.*

70. See generally FINGER & ALLOUCHE, *supra* note 16, at 105–49 (explaining how mergers and acquisitions have affected TNCs in the water sector).

71. See BARLOW & CLARKE, *supra* note 16, at 129; BLUE GOLD: WORLD WATER WARS (Purple Turtle Films 2008).

the financial assistance that is required to build such a global water market, but also the necessary legal leverage.⁷² By conditioning loans to weak, developing countries on agreements to privatize their water services—contracts that almost inevitably go to these Water Barons—the financial institutions undoubtedly put massive pressure on developing governments to sign contracts with these private corporations that otherwise may have never been considered.⁷³

Pessimistic about the changing role of the state, Maude Barlow, an influential water justice advocate, argues that over the past few decades TNCs have successfully managed to reinvent government in their own image, and the previous model of governance has been replaced by a new model—the corporate security state.⁷⁴ Barlow argues that in this age of economic globalization, the state’s primary role is to maintain a “secure place and climate for profitable transnational investment and competition,” and the priority of this form of governance is to “provide security for corporations, not citizens.”⁷⁵

Increasing involvement and power of TNCs in the water sector is problematic because of their lack of corporate responsibility to the municipalities with whom they contract, including responsibilities pertaining to human rights and environmental standards. There have been attempts to regulate transnational corporate behavior through the OECD Guidelines for Multinational Enterprises,⁷⁶ the United Nations Global Compact,⁷⁷ the UN Human Rights Commission Norms for Transnational Corporations,⁷⁸ and the Technical Committee 224 of the International Organization for Standards (ISO),⁷⁹ but these “soft law” attempts have been wholly inadequate largely due the fact that they are purely voluntary, and enforcement mechanisms are either weak, or in some cases, nonexistent.⁸⁰

72. See BARLOW & CLARKE, *supra* note 16, at 156.

73. These financial institutions will be discussed in much greater detail *infra* Parts III.A. & IV.B.3.

74. See BARLOW & CLARKE, *supra* note 16, at 99.

75. *Id.*

76. The Guidelines are recommendations that “provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.” *Guidelines for Multinational Enterprises*, OECD, www.oecd.org/daf/investment/guidelines.

77. The UNGC is a “strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.” *What is the Global Compact?*, UN GLOBAL COMPACT, <http://www.unglobalcompact.org/aboutthege/>.

78. These norms are a set of ethics guidelines bringing together a range of legal obligations for companies drawn from existing human rights, labor, and environmental standards. U.N., Econ. & Soc. Council [ECOSOC], Comm. on Human Rights: Norms of the Responsibilities of Transnational Corporations and other Business Enterprises, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *available at* <http://www.unhchr.ch/huridocda/huridocda.nsf/%28Symbol%29/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument>.

79. This committee was formed with the objective of developing standards on services related to water distribution. See *Standards Development*, ISO, http://www.iso.org/iso/iso_technical_committee?commid=299764.

80. See Kingsbury, *supra* note 12, at 147; Vogel, *supra* note 12, at 184.

Because TNCs lack responsibility, they are free to act as they will, without considering their effect on the land or people they are contracted to service. Despite the fact that states retain the ultimate responsibility to monitor these corporations to assure no clear abuses are occurring, as the case studies will show, governments in developing countries often lack the power, influence, and resources to adequately regulate these powerful corporations.⁸¹ An alternative form of regulation must therefore be utilized in order to protect struggling governments from the abusive practices of these powerful corporations.

What makes the situation even worse for these developing countries is that TNCs are actually protected under international law. Through bilateral investment treaties (BITs), TNCs have legally enforceable rights and entitlements as foreign investors.⁸² These protections are highly controversial because they give TNCs the ability to actually trump national regulatory protection and to sue the state for compensatory damages if its behaviors are constrained by the state, even if by reasons of human welfare and environmental concerns.⁸³ Thus, the protections under the current system are wholly one-sided, with the state and its people on the losing side.

By selling or leasing long-term water services to TNCs, governments essentially hand over control of a vital public resource to noncompetitive, unaccountable, profit-seeking corporations that have no other real tie to the country with whom they are contracting. Significantly, this relinquishment of control limits public input into the operation of water services and removes a fundamental, legitimate service from the government. Money is not necessarily the issue. The real concern is the unrestrained power these corporations obtain in the process. Principles of global administrative law and the emergence of a global space would allow for new forms of participation and transparency that encourage public participation and restrain the behaviors of these corporations. But as the law currently stands, these goals are not likely to be achieved.

III. EFFECTS OF PRIVATIZATION IN DEVELOPING COUNTRIES

The lack of regulation of these TNCs in water privatization contracts has led to dire consequences in developing countries around the world. While the economic consequences are often easy to discern, these contracts also have great social and environmental consequences that touch upon the very way people live and interact with one another.

81. See *infra* Part IV.A.

82. See *What Are BITs?*, UNCTAD, Aug. 17, 2004, http://www.unctadxi.org/templates/Page_1006.aspx; *ICSID Database of Bilateral Investment Treaties*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main> (searchable collection of bilateral investment treaties).

83. See Bronwen Morgan, *Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law*, 17 EUR. J. INT'L L. 215, 222–24 (2006); SARAH ANDERSON & SARA GRUSKY, CHALLENGING CORPORATE INVESTOR RULE 3 (2007).

A. Economic Consequences

TNCs often claim to be in business for altruistic reasons—to make clean and affordable water available for more people in the world.⁸⁴ Indeed, privatization should, in theory, improve the living and working conditions of a people since specialized corporations have the experience, knowledge, and resources to expand and upgrade services that governments typically do not share.⁸⁵ However, closer examination of these corporations' practices reveals quite a different result: increased customer rates, extraordinary corporate profits, lower quality service, limited access, corruption and bribery, overuse, and exploitation. As Suez CEO Gerard Mestrallet once said, "Water is an efficient product. It is a product which normally would be free, and our job is to sell it."⁸⁶

The Cochabamba and Jakarta water privatization contracts are two clear examples of the economic consequences felt by the governments and people under these contracts. While the Cochabamba case study provides a clear example of past water privatization failure and what led to the eventual revocation of the contract, the failing water privatization attempt in Jakarta, Indonesia provides an example of an ongoing struggle that could greatly benefit from principles of global administrative law.

1. Bolivia Water Wars

In 1998, the World Bank refused to guarantee a \$25 million loan to Bolivia to refinance its water services in the city of Cochabamba unless the local government privatized its water services.⁸⁷ The World Bank further recommended that there be no public subsidies to hold down the increases in the price of water service, and in great deference to the corporations, the contract even dollarized the water payments, which meant that if the value of the boliviano decreased against the dollar, the Bolivians' water bill would increase to the equivalent in U.S. dollars.⁸⁸

Oscar Olivera, one of the central leaders in the Cochabamba protest movement, argues that the World Bank's actions were the direct result of a western perspective that completely ignored the conditions of the Bolivian people.⁸⁹ Whereas a \$30 increase in a westerner's monthly water bill is typically not a very substantial increase, for many Cochabamban families, living where the official minimum wage was only about \$41 per month, such an increase would have been catastrophic.⁹⁰ Regardless of this knowledge, and without any public input or comment, the

84. See Barlow, *supra* note 26.

85. See GLEICK ET AL., *supra* note 9.

86. See BARLOW & CLARKE, *supra* note 16, at 88 (internal quotations removed).

87. See POLARIS INST., GLOBAL WATER GRAB: HOW CORPORATIONS ARE PLANNING TO TAKE CONTROL OF LOCAL WATER SERVICES 9 (2003), available at <http://www.ratical.org/globalize/GlbH20grab.pdf>.

88. OSCAR OLIVERA, ¡COCHABAMBA! WATER WAR IN BOLIVIA 9 (2004).

89. *Id.* at 8.

90. *Id.*

Bolivian government privatized its water system with a forty-year contract to Aguas del Tunari, a corporation virtually unknown to the people of Bolivia.⁹¹

At that time, only half of the population was connected to the central water system; others obtained water from cooperative water houses.⁹² Members of the community built these cooperative systems in a variety of ways; often, local neighborhoods contributed what they could, and sometimes NGOs assisted.⁹³ Under the privatization contract, however, such systems were deemed illegal because only the contracted company had the authority to distribute water.⁹⁴

The uninformed and ill-equipped corporation realized very quickly that in order to make the investments it had promised in the contract, it would have to raise consumer prices, and almost immediately rates increased an average of 35%,⁹⁵ and, in the worst of the reported cases, some residents saw their water bills climb as high as 300%.⁹⁶ However, residents did not see any immediate, noticeable improvements in their water services or quality to justify such an increase. As frustration mounted, thousands of protestors took to the streets and organized strikes that halted the Bolivian economy for days; as a result, the government was forced to revoke the contract.⁹⁷ The people of Bolivia viewed this revocation as a great success, but the government was then faced with a long and grueling legal battle against Aguas del Tunari.⁹⁸

Under the Netherlands-Bolivia Bilateral Investment Treaty,⁹⁹ Bolivia agreed to settle all disputes through the International Centre for the Settlement of Investment Disputes (ICSID), an international arbitration tribunal that is part of the World Bank.¹⁰⁰ While such a tribunal is an example of the emergence of global governance,¹⁰¹ it is also an example of how beneficial and effective global administrative law could be for the realization of human rights.

For example, the main problems with the ICSID encompass many of the major inadequacies that almost all international institutions face: transparency, public participation, and legitimacy. In this case, the proceedings were done almost

91. *Id.* at 9–10.

92. *Id.* at 8–9.

93. *Id.* at 9.

94. *Id.* at 10.

95. Evo Morales, *From Coca To Congress*, ZNET (Nov. 11, 2002), <http://www.zcommunications.org/from-coca-to-congress-by-evo-morales>.

96. OLIVERA, *supra* note 88, at 10.

97. *Id.* at 33–46.

98. Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, *Decision on Respondent's Objections to Jurisdiction*, 20 ICSID REV./FOREIGN INVESTMENT L.J. 450 (2005), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC629_En&caseId=C210.

99. Agreement on Encouragement and Reciprocal Protection of Investments, Bol.-Neth., art. IX, Mar. 10, 1992, available at http://www.sice.oas.org/Investment/BITSbyCountry/BITs/BOL_Netherlands.pdf.

100. See *International Centre for Settlement of Investment Disputes*, WORLD BANK, <http://icsid.worldbank.org/ICSID/Index.jsp> (“The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes”).

101. See Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121 (2006).

entirely behind closed doors, and the ICSID refused to accept any amicus briefs or any other involvement by individuals or NGOs.¹⁰² The government further argued that the practices of the ICSID were essentially unfair because it allows TNCs to bring charges against the government, but it does not permit governments or affected social groups to take any similar action against corporations.¹⁰³ To make matters worse, there is no effective process to challenge or appeal an ICSID decision.¹⁰⁴ Under these conditions, governments face potentially great financial penalties for revising or revoking these privatization contracts, even if the revision or revocation is based on human welfare and environmental concerns. If a right to water is to be achieved, principles of global administrative law could greatly enhance the ability of these tribunals to assist in that realization.¹⁰⁵

While the scale of the Cochabamba protests was extraordinary, the experience is not an isolated one. All around the world people have tried to fight back against what they see as a widening socio-economic gap that is accelerated by neoliberal agendas.¹⁰⁶ The claim is that while the service might be improving for some, it is usually at the expense of no access or poor quality to the poor because in order to maximize profits and please their shareholders, corporations will prioritize access and quality in the profitable areas rather than the marginal ones.¹⁰⁷ The story of the Bolivia Water Wars provides such an example. While the Bolivian protests were effective at influencing the government to revoke the contract, similar social protests do not always guarantee protection as the next case study will show, and thus, it cannot be the only solution.

2. The Present Fight: Jakarta, Indonesia

The story of Jakarta is similar to that of the Cochabamba experience. It began when the World Bank and International Monetary Fund required water privatization in exchange for a \$46 billion loan.¹⁰⁸ Under great financial pressures, the government accepted the loan's conditions and, in 1998, divided its water

102. Kingsbury, *supra* note 12, at 143–48. This was not an unusual practice for the ICSID, as, at the time, out of the 110 cases it had resolved, only two included public hearings and only four allowed interested parties to present letters for consideration. *Id.*

103. *Why Bolivia Quit the ICSID*, ASEED.NET (Jan. 23, 2008), http://www.aseed.net/index2.php?option=com_content&do_pdf=1&id=491.

104. *Id.*

105. *See infra* Part IV.B.4.

106. *See generally* *Patterns of Global Inequality: UNDP Report 1999*, in *THE GLOBAL TRANSFORMATIONS READER*, *supra* note 17, at 423 (producing evidence to show that the number of people living in absolute poverty has increased over the last decades and that the gap between the rich and the poor is now at historic levels); *but see* Dollar & Kraay, *supra* note 21 (arguing that globalization has actually promoted economic equality and has reduced poverty).

107. *See* Barlow, *supra* note 26.

108. HENI KURNIASIH, WATER NOT FOR ALL: THE CONSEQUENCES OF WATER PRIVATIZATION IN JAKARTA, INDONESIA 1–2 (July 1–3, 2008), *available at* <http://artsonline.monash.edu.au/mai/files/2012/07/henikurniasih.pdf> (presented at the 17th Biennial Conference of the Asian Studies Association of Australia).

system into two service areas.¹⁰⁹ The two private companies awarded the twenty-five year contracts were none other than Suez and Thames Water.¹¹⁰

The government approved these contracts, despite the provision in the Indonesian Constitution declaring that “the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.”¹¹¹ Furthermore, Indonesia’s foreign investment laws excluded water from the sectors in which foreign companies could invest.¹¹² In an attempt to provide legal justification for the transaction, however, the government created new laws and applied them retroactively.¹¹³ In addition to these great legal problems, the government directly appointed the private companies without competition and without any input from the public.¹¹⁴

As a result of these political and legal issues, the government was eventually replaced by a more legitimate power. However, the new government was still too reluctant to revoke the contracts due to the potential legal action that would be taken by these powerful corporations and the tremendous financial penalty it may have to pay; instead, the new government attempted to renegotiate the contracts.¹¹⁵

However, there remain deep flaws in the new contract: there are low penalties for the private sector’s failures; there are unclear investment targets; and, most importantly, consumer protection has been neglected altogether.¹¹⁶ Important aspects of the contract, such as the amount and priorities of investment, are still left solely with the company.¹¹⁷

As a result of these flaws, the TNCs have been unable to achieve the target goals, and the amount of actual investment has been even lower than before the renegotiation.¹¹⁸ Residents currently criticize the quality and reliability of the service as they must still boil their water to avoid contamination and must often guess as to what times service will be available. Even now, the piped-water supply is not available to all populations in Jakarta.¹¹⁹ Despite these failures, the water tariff has increased significantly.

109. *Id.* at 4; IRFAN ZAMZAMI, *JAKARTA WATER PRIVATIZATION TODAY: DRIED WATER TAP, OR CHANGE* (2012), available at http://www.waterjustice.org/uploads/attachments/dried%20water_eng_for%20web.pdf.

110. As noted *supra* Part II.B., these are two of the Water Barons, and this case study exemplifies how concentrated the private water sector has become: these contracts are almost inevitably awarded to the same few corporations.

111. *INDON. CONST.* art. 33, § 3.

112. KURNIASIH, *supra* note 108, at 7.

113. See *GOV’T REGULATION 22/1982 (Indon.)*; *WATER RESOURCES LAW 11/1974 (Indon.)*. See generally Suharto Sarwan, Tjoek Walujo Subijanto, & Charles Rodgers, *Development of Water Rights in Indonesia*, in *WATER RIGHTS REFORM: LESSONS FOR INSTITUTIONAL DESIGN* 237, 240–41 (Bryan Randolph Bruns, Claudia Ringler, & Ruth Meinzen-Dick eds., 2005).

114. KURNIASIH, *supra* note 108, at 7.

115. *Id.*

116. *Id.* at 8.

117. *Id.*

118. *Id.*

119. *Id.* at 2–3, 9 (stating that in 2007, only sixty-one percent of Jakarta residents had access to this system while the rest rely on the informal water supply, which is made of

B. Environmental Effects

The effect of transnational corporate control of water has had an environmental impact on communities as well. While the corporations focus on profit maximization, as they are designed to do, they neglect to concern themselves with environmental management and conservation efforts.¹²⁰ As a result, they often exploit the land for short-term profit without considering the long-term consequences that such actions have on the land and its resources.¹²¹

A region could be suffering from unhealthy, drought-like conditions, but these corporations will proceed to bottle their water supply and ship it across seas to sell in vending machines to people in no real need—people who usually only have to walk a few feet to find their water for free from a drinking fountain.¹²² The corporations can do this because they are not accountable to the interests of the citizens or the maintenance of the surrounding environment. However, water distribution through pipe systems, which is the predominant method because it is cheap and fairly simple, can be extremely land and water intensive, and the very methods of extracting water from the land without considering its limitations can have grave consequences.

In Jakarta, for example, a decade of exploitation of groundwater sources has resulted in a rapidly-declining groundwater supply and increasing subsidence, which occurs when large amounts of groundwater are withdrawn from the land within a short amount of time.¹²³ The effects of the current water extraction are becoming clear, as Central Jakarta alone experienced more than a three-foot drop over a twelve-year period.¹²⁴ Such overexploitation and subsidence has the potential to cause many environmental consequences, such as increased risks of flooding, as evidenced by the 2007 flood that sent over 450,000 Indonesians fleeing their homes.¹²⁵

When TNCs can just pick up and move their investments when disaster occurs, there is little motivation to take these environmental consequences into account when they are making their agendas.¹²⁶ As discussed, the current voluntary codes of conduct and guidelines are simply too weak to ensure that these corporations consider the environmental effects and adopt practices that prevent such abuses.

water vendors, private wells, bottled water, and bore water). *See also* Dofa Fasila, *Cilincing Residents Blame Dirty Tap Water for Spate of Health Problems*, JAKARTA GLOBE (Apr. 4, 2011), <http://www.thejakartaglobe.com/home/cilincing-residents-blamedirty-tap-water-for-spate-of-health-problems/433469>.

120. *See* Barlow, *supra* note 26.

121. *Id.*

122. *See generally* VANDANA SHIVA, *WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT* (2002) (arguing that in order to combat environmental crises such as drought and desertification, corporations must be limited in how much water they are permitted to extract for trade purposes).

123. *See* Deden Rukmana, *Jakarta's Vulnerability to Global Warming*, *INDON. URB. STUD.* (Apr. 14, 2007, 7:06 PM), <http://indonesiaurbanstudies.blogspot.com/2007/04/global-warming-and-jakarta.html>.

124. *Id.*

125. *Id.* But of course it is the government, and not the private companies, that must pay the costs of flood management and cleanup.

126. *See* Barlow, *supra* note 26 and accompanying text.

Considering that the global population has reached over seven billion, it is now more important than ever to be cognizant of the consequences these actions have on the limited resources that remain on this planet. There can be no realization of a human right to water if the environment is so diminished that it cannot provide an adequate water supply to the people.

C. Social Consequences

Often overlooked when exploring the consequences of TNCs on developing countries is the social impact these corporations have on a people and their traditional practices. Oftentimes, TNCs will come into local villages that have long-practiced water distribution methods, which are sometimes very creative and efficient. These corporations will then cap their village well or replace old methods with prepaid water meters.¹²⁷ Not only does this take away a very crucial function of that community, but as already discussed, it also comes at a high cost to its residents.¹²⁸

The impact is especially felt by communities that view the commons as a good for the whole community to share and do not perceive water as something to be bought or sold. Olivera explains that the Cochabamba people believe that the *social* character of water must be preserved and the accrued rights of the local water committees that have worked together to establish and maintain autonomous water distribution methods must be protected.¹²⁹ It is offensive to these cultures' people, who view water as something sacred, to be told they must pay for their water. This brings up all sorts of issues concerning the westernization of the developing world.¹³⁰

When corporations come into these villages and make water difficult to obtain, the community is broken up in a sense—people stop gratuitously sharing water with their neighbors because they know that if they did, they may not have enough for themselves or for their families.¹³¹ The lack of reliability of these services to these poor communities intensifies the problems. There are many stories of fights in these communities over mere buckets of water. To a westerner, this might not make much sense, but, to those who depend on this water for survival, the priorities of life become much different.¹³²

There is one story that encompasses so many of the social consequences from these water privatization schemes that is truly hard to forget. In many of these communities where prepaid meters are installed, parents and heads of households often take their tokens to work with them to ensure they are not stolen during the day, but this means that the children are left home without any water for the entire

127. See OLIVERA, *supra* note 88, at 9.

128. See *supra* Part III.

129. OLIVERA, *supra* note 88, at 11.

130. See generally, Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006) (explaining why we should be critical of any westernized system that attempts to intervene into traditional affairs because of the fear of forcing western values and principles onto these cultures).

131. BLUE GOLD, *supra* note 71.

132. *Id.*

day.¹³³ One day, a shack caught fire in one of the local villages, but there was no water available to stop the fire. The neighbors refused to use their tokens to help put the fire out because that would mean they would be left without water.¹³⁴ Without any fire services available in the area, the shack burned to the ground; to the community's dismay, two little girls were in the shack and died.¹³⁵ Communities that at one point would never have even hesitated to help out their fellow neighbors now have to consider the economic consequences of their every decision. As one local said, "these corporate projects are taking away our humaneness."¹³⁶

IV. HOW TO RECONCILE WATER AS AN ECONOMIC AND SOCIAL GOOD

The current forms of privatization that are dominating the global water sector are incompatible with the recognition of a human right to water. Corporations are not created for social purposes to provide services to those in need—they are designed solely with the goal of profit maximization. However, the private sector's failure to provide better water services does not just reflect the flawed principles of corporate water privatization. It also reflects the failure to protect the people's interests through effective regulations and governance mechanisms. In this era of globalization, the traditional governance structures are no longer best suited to regulate transnational corporate behavior and complex global issues. Because of the power and influence TNCs have obtained in the water sector, the state should not be the only one burdened with the obligation to protect human rights.

A. The Need for Global Governance

Economic globalization is an irreversible phenomenon. Therefore, we must adopt new laws and principles in order to make the right to water meaningful within the current system. However, it is important to first recognize that while the state does need to play a significant role in the effective monitoring and regulation of these corporations, there is also a strong need for some form of global governance in the water sector. These corporations are especially difficult to monitor, as they lack direct accountability to the public and have no real ties to the country with which they contract, and therefore have no reason to restrain their destructive behaviors.¹³⁷ This unchecked corporate power cuts off the traditional channel of democratic accountability and leaves the public completely out of the decision-making process of a one-time public good.

The Jakarta case study provides one example of the ineffectiveness of state regulation of TNCs. Upon privatizing its water services, the government established the Jakarta Water Regulatory Board to monitor the corporations. However, it had very little real power to function effectively because, as a weak government, it ended up on the wrong side of a one-sided contract that left out clear

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *See supra* Part II.B and III.

mechanisms for independent audits and monitoring devices and was ultimately unable to adequately fund the Board.¹³⁸ After prices increased substantially, with no apparent justifications, the TNCs denied the public any access to the company's financial reports and never even made an attempt to justify the increases.¹³⁹ Consequently, the government and the public were left with no real viable options to contest the price hikes.

However, even greater concerns arose because there was no public input or participation into the selection of these companies to begin with, nor any open competition, to ensure a fair bid.¹⁴⁰ Instead, the government was the sole decision maker, and there are convincing arguments that particular governmental officials stood to gain greatly from the agreements.¹⁴¹ Therefore, even the states themselves need to be monitored to ensure that they would work for the best interests of their citizens.

While the Jakarta protests have not seen the same success the Bolivian people were able to achieve, this is not for a lack of trying. Individuals, communities, NGOs, and trade unions have organized international petitions and gathered in the streets of Jakarta and at city hall to protest against a government they feel is putting the interests of its citizens second to the interests of the corporations.¹⁴² Political resistance to privatization is a "formidable obstacle to municipalities looking to explore a sale of their water assets to a private company."¹⁴³ However, as the Jakarta protests exemplify, change is not a guarantee.

B. How to Apply Global Administrative Law Principles

There are numerous ways in which global administrative law could be applied to the global water sector to assure the right to water is achieved. First, the struggle for participation, transparency, and legitimacy in the decision-making process is one of the central strands of administrative law. Therefore, it is possible that such administrative law at the global scale could help fill this democratic deficit. However, in order to assure that these principles are achieved, there is a need for a global regulatory monitor, which could be found in the ISO, World Bank, or International Monetary Fund, after some reform of these institutions' current practices. Lastly, judicial review and the recognition of these principles could provide the legal authority and bases for governments and TNCs to guide their behaviors.

138. KURNIASIH, *supra* note 108, at 8–9.

139. *See supra* Part III.A.2.

140. *See* KURNIASIH, *supra* note 108, at 12.

141. *Id.* *See also* Nila Ardhianie, *Questioning ADB's Loan to Palyja*, NGO FORUM ON ADB, <http://www.forum-adb.org/inner.php?sec=13&ref=extras&id=107>.

142. *See, e.g.,* *Jakarta Water Privatization*, PUB. SERVS. INT'L (Sept. 10, 2011), <http://www.world-psi.org/en/jakarta-water-privatization>; *Protestors Call for Terminating Jakarta Water Privatization: The International Petitions to the Jakarta Governor*, WATER JUSTICE (June 10, 2011), http://www.waterjustice.org/?mi=1&res_id=300.

143. FOOD & WATER WATCH, TRENDS IN WATER PRIVATIZATION: THE POST-RECESSION ECONOMY AND THE FIGHT FOR PUBLIC WATER IN THE UNITED STATES 5 (2010) (citation omitted).

1. Good Governance Principles and Values

The first way to implement global administrative law into regulation of the water sector is through the principles of transparency and participation in the privatization bidding process and selection. In both the Cochabamba and Jakarta case studies, the public had absolutely no input and was not even informed about the water privatization contract.¹⁴⁴ This allowed the corporations to gain contracts under almost no scrutiny, which arguably led to many of the complications with each contract's implementation. The lack of public participation and transparency also intensified the public's frustration and growing resentment toward the Bolivian government. If individuals and NGOs were more involved in the process and were given the ability to participate in notice-and-comment periods as these contracts were being negotiated, collusive practices or ill-equipped investment strategies would be more likely to be uncovered and prevented, and citizens would be less inclined to take their dissatisfaction to the streets, as this is typically saved as a last resort for many.

These principles would also be helpful in realizing more efficient contracts and services by requiring corporations to produce evidence of reasoned decision making in accordance with administrative fairness and rationality. This could require consultation or simply open procedures such as investment targets. As shown in the Jakarta case study, citizens were never even told why prices were increased, and all requests to the information were denied.¹⁴⁵ This transparency could easily be improved through a requirement, enforced by global administrative bodies, that significant price increases be accompanied by financial statements upon request. Requiring informed reasoning and capabilities to take on a large project such as water privatization could have prevented many of the price hikes experienced in Cochabamba and Jakarta, as these companies were unprepared to make the investments required to fulfill their contracts.

2. The Use of Global Monitors

The argument is that corporations are restrained to act in an efficient manner through market mechanisms,¹⁴⁶ but this could only be true if the corporations really are subject to the market consequences. As mentioned earlier, these contracts are typically one-sided; the Jakarta contract, for example, included profit guarantees to the corporations regardless of the market processes.¹⁴⁷ Furthermore, privatization does not automatically increase competition. In the water sector, this is especially clear, as there are very few companies actually competing, and often colluding together, for these contracts.¹⁴⁸

Fair contracts and healthy competition would help ensure the best services and prices for the people. One way to achieve this goal is through the use of a global

144. *See supra* Part III.A.

145. *See supra* Part III.A.2.

146. *See, e.g.,* Jennifer Naegele, *What Is Wrong With Full-Fledged Water Privatization?*, 6 J.L. & SOC. CHALLENGES 99, 100–02 (2004).

147. KURNIASIH, *supra* note 108, at 13.

148. *See supra* Part II.B.

monitor. International organizations, such as the ISO, could be used to act as anti-trust regulators, reviewing and investigating contracts before they are implemented to make sure there is no collusion or coercive activities occurring.¹⁴⁹ Such a regulator could also encourage governments to be assertive by requiring beneficial conditions for the people such as price ceilings based on income or compensation for the confiscation of self-sufficient water distribution systems. No longer should struggling governments be compelled to sign contracts that discourage public subsidies to hold down price increases or that protect corporate profits by dollarizing water payments, as seen in the Cochabamba privatization contract.¹⁵⁰

The ISO could also be useful in strengthening and giving meaning to their current codes of conduct for these corporations in order to ensure that they take into account the effects they have on the people and the environment in which they contract with. The past attempts to compel these corporations to follow the codes of conduct and guidelines have failed because there is no real authority that monitors these corporations and compels them to adopt them into their procedures.¹⁵¹ The Jakarta case study shows the consequences of the lack of penalties for the failure of the private sector.¹⁵²

Other international organizations, such as the World Bank and the IMF, could also be utilized as global monitors in this system of global governance. However, before we can even consider such an option, there must be a real discussion on significant institutional reform to assure that the same problems with the state are not simply transferred to the global level.

3. Institutional Reform

The World Bank and the International Monetary Fund, as two of the most powerful financial institutions in the global economy, have been at the center of the major economic issues of the past few decades.¹⁵³ As this Note has illustrated, these powerful organizations can have great impact on the countries they lend to and supervise, so it is important to examine their agendas and the impacts of their actions before giving them more authority and power as global monitors.

As the U.N. was established “on the belief that there was a need for collective action at the global level for political stability,” the World Bank and International Monetary Fund were established “on the belief that there was a need for collective action at the global level for economic stability.”¹⁵⁴ Initially recognizing that the markets were not perfect, these institutions now seem to endorse market supremacy.¹⁵⁵ Even in the face of failed privatization attempts and mass citizen protests, they continue to assume that what has worked in one country shall work

149. FINGER & ALLOUCHE, *supra* note 16, at 230–33.

150. *See supra* Part III.A.1.

151. *See* Kingsbury, *supra* note 12, at 147; Vogel, *supra* note 12, at 184.

152. *See supra* Part III.

153. *See* Joseph Stiglitz, *The Promise of Global Institutions*, in THE GLOBAL TRANSFORMATIONS READER, *supra* note 17, at 477.

154. *Id.* at 478 (emphasis omitted).

155. *Id.*

everywhere in the world, but that is clearly not the reality, as the case studies have revealed.¹⁵⁶

However, it has been argued that the real problem is one of governance: “who gets to decide what they do” and how they do it.¹⁵⁷ Dominated by the wealthiest industrial countries, most of their lending and activities take place in the developing world; even the countries’ own representatives do not have the people’s interest in mind, as they are typically chosen behind closed doors and closely tied to the global financial community.¹⁵⁸

These institutions are clearly not representative of the countries they are meant to serve. They are publicly funded by taxpayers’ money, yet, they remain unaccountable to the public, and their procedures are set without any input from the people.¹⁵⁹ One way to resolve this problem is to leave elections of the country’s financial representatives to the people. While the initial voter turnout would probably be low, the electoral motive, and also special elections for removal, could ensure that these representatives keep the interests of the public as the top priority, thus, more adequately representing these developing countries in the global economy.

It is important that these organizations do not pressure struggling governments into privatizing a vital public resource as a condition for a chance to better their position in this globalizing world. Rather, these institutions need to explore more alternatives to corporate privatization, such as leasing services to nonprofit organizations or creating some type of meaningful public-private partnership where the state retains ultimate policy-setting authority, but still allows for a specialized business to run the day-to-day operations for which they are best suited in the first place. However, privatization is not necessary, or even appropriate, everywhere, and these institutions need to recognize that in their lending practices.

4. Judicial Review and Recognition of Principles

Judicial assistance is crucial in the effort to make this right meaningful. If courts are willing to set precedent to act as guidelines for how governments should treat their water supply, then conservation and fair use will be more likely. Legislatures and courts must also work together to ensure that certain flexibilities are allowed in order to best reconcile corporate control of such a vital resource, such as removing the power of corporations to sue governments if their activity is constrained due to health or environmental concerns, such as was the case in Cochabamba. At the very least, judicial action should be guided by the principles of transparency and review, particularly in international arbitration settlements.¹⁶⁰ TNCs could actually benefit from a functioning global administrative law that generates a global governance entity in order to support, rather than undermine, the legitimacy of these tribunals.¹⁶¹

156. *See supra* Part III.

157. Stiglitz, *supra* note 153, at 479.

158. *Id.*

159. *Id.* (arguing that the current system amounts to “taxation without representation”).

160. *See supra* Part III.A.1.

161. *See* Kingsbury, *supra* note 12, at 153.

Judicial recognition of this right in domestic courts is another way a “top down” approach could be useful, and a recent High Court Ruling in Johannesburg provides such an example.¹⁶² In 2006, the Kalahari Bushmen took the Botswana government to court when the government prioritized its land and water access to mining companies and tourism after diamonds were discovered and attempted to evict the Bushmen by capping their only major water borehole.¹⁶³ While the court decision allowed the Bushmen to return to their land, it did not include the right to their water sources, so the Bushmen appealed to gain back this access.¹⁶⁴

One week before the U.N. voted to recognize the right to water, a High Court ruling again denied the Bushmen their water rights.¹⁶⁵ However, in January 2011, Botswana’s Court of Appeals unanimously held that the Bushmen not only had the right to use their old boreholes but also had the right to sink new boreholes.¹⁶⁶ Noting the U.N.’s recognition of the rights, the Court called the Bushmen’s treatment by the government “degrading.”¹⁶⁷ The Court further stated that it is “entitled to have regard to international consensus on the importance of access to water.”¹⁶⁸

Most countries have a rule that they have to interpret domestic law in light of international obligations such as the U.N. declaration of the right to water, and therefore, the recognition by the Botswana Court of Appeals should set an example for the courts of the rest of the world to exercise this power and make this right meaningful within the current system.

CONCLUSION

“When the United Nations recognized the human right to water and sanitation, humanity took a collective step forward in its evolution. But this alone is not enough.”¹⁶⁹—Maude Barlow

No acknowledgment of this right by itself can distribute water to the billions of people in need so long as the current system of economic globalization and unregulated corporate control remains unchallenged. The case studies provided illustrate just some of the dire consequences developing countries face within the current system, and they will continue to experience these detrimental effects

162. *See* Sesana v. Attorney General (2006) AHRLR 183 (BwHC 2006), *rev’d*, Moseithanyane v. Attorney General, No. CACLB-074-10 (BwCA Jan. 27, 2011).

163. Claudine Renaud, *Botswana’s Bushmen Return Home, With Rights But Little Water*, NAMIBIAN (Mar. 14, 2012), <http://www.namibian.com.na/news/full-story/archive/2012/march/article/botswanas-bushmen-return-home-with-rights-but-little-water/>.

164. *See* John Simpson, *Botswana Bushmen Win Back Rights to Kalahari Water*, BBC (Jan. 27, 2011), <http://www.bbc.co.uk/news/world-africa-12300285>.

165. Emma Lui & Anil Naidoo, *Moving From Recognition to Realization: Botswana Court Upholds Kalahari Bushmen’s Right to Water*, CANADIAN PERSPECTIVES, Summer 2011, available at <http://canadians.org/publications/CP/2011/summer/right-to-water.pdf>.

166. BARLOW, *supra* note 2, at 18; *see also* Moseithanyane v. Attorney General, No. CACLB-074-10 (BwCA Jan. 27, 2011).

167. BARLOW, *supra* note 2, at 18.

168. *Id.*

169. *Id.* at 21.

unless and until the current state of law is transformed. Because globalization is an irreversible phenomenon, in order to truly implement this right, the current economic system must be confronted, and new policies based on transparency, participation, and sustainability must be encouraged.

This Note explains that, through the use of global governance mechanisms, the right to water can be meaningful, even within corporate privatization regimes. Global administrative law principles offer various ways to help realize this right through the implementation of good governance values, institutional reform, and judicial recognition. Through the collective efforts of representative financial institutions, global monitors, NGOs, and citizens of the world, these global administrative principles make it possible to achieve this momentous right—the protection of the world’s remaining water resources.