

THE CHALLENGES OF WATER GOVERNANCE (AND
PRIVATIZATION) IN CHINA; NORMATIVE TRAPS, GAPS, AND
PROSPECTS

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TABLE OF CONTENTS

I. INTRODUCTION	49
II. WATER PRIVATIZATION	55
<i>A. Key Water Companies in China</i>	56
<i>B. Opportunities for the Investors</i>	59
III. WATER PRIVATIZATION AND CONSUMER PROTECTION.....	63
<i>A. Domestic Perspective</i>	65
<i>i. Right to Water</i>	66
<i>ii. Water Price</i>	66
<i>iii. Water Quality</i>	67
<i>iv. Consumer Protection</i>	68
<i>v. Contractual Operation and Consumer Protection</i>	69
<i>B. International Perspective</i>	76
<i>i. Right to Water and Consumer Protection</i>	79
<i>ii. Consumer Protection Under the Investor-state</i> <i>Arbitration</i>	81
IV. CASE ANALYSES: URBASER V. ARGENTINA	83
<i>A. Applicable Law</i>	83
<i>B. Jurisdiction Issue</i>	84

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C. Merits on State's Counterclaim 85

V. CONCLUSION90

I. INTRODUCTION

China encompasses almost 20% of the world's population but contains only 7% of the world's fresh water supply.¹ In total, China's per capita availability is low compared with most other countries.² Due to the growing population, increasing urbanization, rapid industrialization, pollution and climate change, China is currently facing a severe shortage of fresh water supply.³ The scarcity and poor quality of water supply drastically hinders the pace of China's economic growth.⁴ China's mounting water crisis is at its extreme in the rural areas, given that wastewater treatment and sewerage services are incredibly insufficient.⁵ According to the latest report released by China's Briefing in 2017, "300 million rural residents do not have access to safe drinking water," and more than 90% of villages lack proper sewerage services, given only 3% enjoy wastewater treatment services.⁶ Moreover, the uneven

¹ Daniel Shemie & Kari Vigerstol, *China Has a Water Crisis – How Can It Be Solved?* WORLD ECON. FORUM (Apr. 29, 2016), <https://www.weforum.org/agenda/2016/04/china-has-a-water-crisis-how-can-it-be-solved/>; *Water Governance*, WORLD WILD FUND FOR NATURE https://en.wwfchina.org/en/what_we_do/freshwater/water_governance/ (last visited Oct. 27, 2018); Jeffrey Hays, *Water Shortages in China*, FACTS AND DETAILS, <http://factsanddetails.com/china/cat10/sub66/item390.html> (last updated Jan 2014) ("It is estimated that every year China has a water supply shortfall of 40 billion cubic meters. . . . The UN considers China one of the 13 countries most affected by water scarcity.").

² Hefa Cheng et al., *Meeting China's Water Shortage Crisis: Current Practices and Challenges*, 43 ENVTL. SCI. & TECH. 240, 240–44 (2009).

³ Vaclav Smil, *China's Past, China's Future: Energy, Food, Environment*, DRAGON REPORT 163 (2004), http://www.dragon-report.com/Dragon_Report/Corp_China_files/China%27s%20Past,%20China%27s%20Future.pdf; Lijin Zhong et al., *Public-Private Partnerships in China's Urban Water Sector*, 41 J. ENVTL. MGMT. 863, 863–64 (2008).

⁴ Yong Jiang, *China's Water Scarcity*, 90 J. ENVTL. MGMT. 3185, 3189 (2009); Eleanor Albert & Beina Xu, *China's Environmental Crisis*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/chinas-environmental-crisis> (last updated Jan. 18, 2016) ("Approximately two-thirds of China's roughly 660 cities suffer from water shortages. . . . Industry along China's major water sources has polluted water supplies: In 2014, groundwater supplies in more than 60 percent of major cities were categorized as 'bad to very bad,' and more than a quarter of China's key rivers are 'unfit for human contact.' And lack of waste removal and proper processing has exacerbated problems. . . . Water scarcity, pollution, and desertification are reducing China's ability to sustain its industrial output and produce food and drinkable water for its large population.").

⁵ Jake Liddle, *Don't Waste Investment Opportunity in Wastewater*, CHINA BUS. REV. (Feb. 22, 2017), <https://www.chinabusinessreview.com/dont-waste-investment-opportunity-in-wastewater/>.

⁶ Jake Liddle, *China's Wastewater Treatment Industry: Opportunities for Foreign Investors*, CHINA BRIEFING (Jan. 5, 2017), <http://www.china-briefing.com/news/2017/01/05/chinas-wastewater-treatment-industry.html>.

distribution of water resources and dispersed population undoubtedly aggravate the challenges associated with water scarcity.⁷ At the current stage, lack of drinking water infrastructure and wastewater treatment facilities remains one of the toughest challenges faced by the Chinese government.⁸ There are fewer government barriers to market entry into the water sector compared to other market sectors such as infrastructure, manufacturing or energy.⁹ However, unlike transportation and telecommunication infrastructure investment, the average investment size in water and sanitation services is much smaller.¹⁰

At the international level, in 2015, countries adopted a set of goals to "end poverty, protect the planet, and ensure prosperity for all as part of a new sustainable development agenda."¹¹ The Sustainable Development Goals (SDGs), especially SDG 6, include a dedicated goal on clean water and sanitation that sets out to "[e]nsure availability and sustainable management of water and sanitation for all."¹² The water issue is at the very core of development, which has strong connections with all the other SDGs needed to achieve

⁷ Jiang, *supra* note 4, at 3186; *The Water Sector in China*, EU SME CENTRE (Apr. 3, 2013), <http://www.eusmecentre.org.cn/report/water-sector-china>.

⁸ Lucy Carmody, *Issues for Responsible Investors: Water in China*, RESPONSIBLE RES. 9 (2010), https://www.longfinance.net/media/documents/rr_waterchina_2010.pdf.

⁹ EU SME CENTRE, *supra* note 7.

¹⁰ Carmody, *supra* note 8. "[A]s of the end of 2008, the six most influential foreign water service companies (Veolia, Sino-French Water Works, Hong Kong and China Gas, Golden State Environment, China Water Company Limited and the Western Water Corporation) had collectively signed concessions in China for over 50 water supply projects." These projects account for "8% of the total national water supply." For the empirical analysis of the performance of private participation in the urban water and waste water sector in China, see generally Hongwei Wang et al., *An Econometric Analysis of Private Sector Participation in China's Urban Water Supply*, 19 UTIL. POL'Y 134 (2011).

¹¹ *The Full Picture – A Holistic Water Goal*, UN WATER (July 7, 2016), <http://www.un-water.org/full-picture-holistic-water-goal/>.

¹² United Nations Dep't of Econ. & Soc. Affairs, *Goal 6: Ensure Availability and Sustainable Management of Water and Sanitation for All*, UNITED NATIONS STATISTICS DIVISION, <https://unstats.un.org/sdgs/report/2017/goal-06/> (last visited Dec. 12, 2018); United Nations, *Sustainable Development Goal 6 and Its Targets and Global Indicators*, UN WATER, <http://www.sdg6monitoring.org/indicators/> (last visited Dec. 12, 2018) (SDG 6 seeks to expand the Millennium Development Goal's (MDG), "focus on drinking water and basic sanitation to include water, wastewater and ecosystem resources, and together with target SDG 11.5 on water-related disasters, all the main aspects related to freshwater in the context of sustainable development are covered."). As we know, SDGs are not legally binding; however, governments are expected to seek ownership and establish national frameworks for the achievement of the seventeen goals. This means that countries have the primary responsibility to follow up and review the progress of SDG implementation. SDG6, serves as the integrated monitoring guide for targets and global indicators, international cooperation and capacity building. It states:

"6.a.1 Amount of water- and sanitation-related official development assistance that is part of a government-coordinated spending plan. 6.b.1 Proportion of local administrative units with established and operational policies and procedures for participation of local

the 2030 Agenda.¹³ Therefore, the sufficient provision of water and sanitation services and the achievement of sustainable water security must be approached together on a particular scale.¹⁴ Nonetheless, the scale is complicated as it involves not only the projects at a community level, but also requires significant changes in the policies and the behaviors of individual market actors, institutions and sectors.¹⁵

To overcome the challenges, there are urgent steps that the government has to take to obtain private service providers who can update the old systems and satisfy the increasing demand for better or expanded services.¹⁶ The private sector brings in the know-how and capital, and correspondently the government needs to investigate the options to manage this capital and ensure the maximum value of money.¹⁷ “The scope of such arrangements can range from a part of the utility’s activities (such as leakage reduction) through to delegated management and investment for service delivery to a whole city.”¹⁸

communities in water and sanitation management.” United Nations, *Step-by-Step Methodology for Monitoring International Cooperation* (6.a.1), UN WATER (Dec. 30, 2016), <http://www.unwater.org/publications/step-step-methodology-monitoring-international-cooperation-6-1/>. See generally Namit Agarwal et al., *Raising the Bar: Rethinking the Role of Business in the Sustainable Development Goals*, OXFAM (Feb. 2017), https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/dp-raising-the-bar-business-sdgs-130217-en_0.pdf.

¹³ *Monitoring Water and Sanitation in the 2030 Agenda for Sustainable Development: An Introductory Guide*, WORLD TOILET ORG. 2 (Jan. 5, 2016), <http://worldtoilet.org/wp-content/uploads/2016/02/Monitoring-Water-and-Sanitation-in-the-2030-Agenda-for-Sustainable-Development-%E2%80%93-An-introductory-guide-1.pdf>; Guy Hutton & Claire Chase, *The Knowledge Base for Achieving the Sustainable Development Goal Targets on Water Supply, Sanitation and Hygiene*, 13 INT’L J. ENVTL. RES. & PUB. HEALTH 536 (2016).

¹⁴ JULIEN CHAISSE ET AL., ASIA’S CHANGING INTERNATIONAL INVESTMENT REGIME: SUSTAINABILITY, REGIONALIZATION, AND ARBITRATION 2 (Julien Chaisse et al. eds., 2017).

¹⁵ JULIEN CHAISSE, THE REGULATION OF THE GLOBAL WATER SERVICES MARKET 12–41 (Julien Chaisse ed., 2017); JULIEN CHAISSE, CHARTING THE WATER REGULATORY FUTURE: ISSUES, CHALLENGES AND DIRECTIONS 7 (Julien Chaisse ed., 2017); Giulio Boccaletti, *Water for People or Nature is A False Choice. We Need to Think Bigger to Protect the World’s Water*, WORLD ECON. FORUM (July 11, 2017), <https://www.weforum.org/agenda/2017/07/water-for-people-or-nature-is-a-false-choice-we-need-to-think-bigger-to-protect-the-worlds-water/>.

¹⁶ Iain Menzies, *Delivering Universal and Sustainable Water Services: Partnering with the Private Sector*, WATER & SANITATION PROGRAM (Mar. 2016), <http://documents.worldbank.org/curated/en/169471468194986954/pdf/104503-WPS-Box394877B-PUBLIC-Add-series-WSP-K8693.pdf>.

¹⁷ CHOUDHURY BARNALI, PUBLIC SERVICES AND INTERNATIONAL TRADE LIBERALIZATION: HUMAN RIGHTS AND GENDER IMPLICATIONS 136 (2012).

¹⁸ *FAQ - World Bank Group Support for Water and Sanitation Solutions*, THE WORLD BANK (Feb. 3, 2016), <http://www.worldbank.org/en/topic/water/brief/working-with-public-private-sectors-to-increase-water-sanitation-access>; see also *OECD Principles on Water Governance*, OECD 1 (2015), <https://www.oecd.org/gov/regional-policy/OECD-Principles-on-Water-Governance-brochure.pdf> (“Since 2010, the OECD has provided evidence on the main governance gaps hindering water policy design and implementation,

In short, leveraging the knowledge and skills to improve the performance and efficiency to consumers is the shared goal both for the public sector and private contract operator.¹⁹

For consumers in China, like in other emerging water markets, people are used to low water fees.²⁰ Policymakers will inevitably find themselves confronted with three main challenges: the debate over the legality of water privatization;²¹ the revision of water tariffs to externalise infrastructure investment, delivery and waste treatment costs; and the implementation of fragmented water regulation at local levels.²² Notably, in 2010, the United Nations General Assembly recognized access to water and basic sanitation services as a human right.²³ This poses difficulties for states, especially with how to strike a proper balance between the rights of foreign investors allowing them to recoup their investments and the interests of their citizens as consumers.²⁴ Legally speaking, the need to access clean water and sanitation services is protected both at the international law level and domestic law level. The latter should be broad enough to include all laws and regulations relevant to the operation of water facilities in the host state. In this respect, in China, the

and suggested a set of policy responses and good practices for overcoming them. The 'OECD Multi-level Governance Framework: Mind the Gaps, Bridge the Gaps' was developed as an analytical framework and tool for policymakers to identify and bridge governance challenges that affect, to a greater or lesser extent, all countries, regardless of their institutional setting, water availability or degree of decentralization.").

¹⁹ THE WORLD BANK, *supra* note 18; *see also Private Sector Participation in Water Infrastructure: OECD Checklist for Public Action*, OECD (2009), <https://www.oecd.org/env/resources/42350657.pdf>; Sheila M. Olmstead, *The Economics of Managing Scarce Water Resources*, 4 REV. ENVTL. ECON. & POL. 179 (2010).

²⁰ EU SME CENTRE, *supra* note 7.

²¹ Antonio Estache & Caroline Philippe, *The Impact of Private Participation in Infrastructure in Developing Countries: Taking Stock of About 20 Years of Experience* (ECARES, Working Paper No. 043, 2012).

²² EU SME CENTRE *supra* note 7.

²³ Since 2002, a patchwork of UN documents has been developed in respect of the right to water. These declarations have given new force to the idea that human rights to water cannot be fully realized without access to clean and safe drinking water. *See, e.g.*, U.N. Economic and Social Council, *General Comment No. 15, The Right to Water*, ¶ 1, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter GC 15].

²⁴ Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy Over-Privatization*, 31 BERKELEY J. INT'L L. 89, 109 (2013); *see also* Attila Tanzi, *Public Interest Concerns in International Investment Arbitration in the Water Service Sector: Problem and Prospects for an Integrated Approach*, in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS (Tullio Treves et al. eds., 2014); Owen McIntyre, *Emergence of the Human Right to Water in an Area of Globalization and Its Implications for International Investment Law*, in GLOBALIZATION, INTERNATIONAL LAW, AND HUMAN RIGHTS 175 (Jeffery F. Addicott et al. eds., 2011); Susan L. Karamanian, *Human Rights Dimensions of Investment Law*, in HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN LAW 236 (Erika De Wet & Jure Vidmar eds., 2012).

legal framework for water is primarily embodied in constitutional law,²⁵ environmental law,²⁶ foreign investment law,²⁷ contract law²⁸ and consumer protection law.²⁹ However, domestic policies are also affected by international investment law, given that water concession contracts can leverage the

²⁵ XIANFA art. 33, (2004) (China) (stipulating citizens' fundamental rights and state's obligation to respect and preserve human rights).

²⁶ (全国人民代表大会常务委员会关于修改《中华人民共和国水污染防治法》的决定)[Decision of the Standing Committee of the National People's Congress on Revising the "Law of the People's Republic of China on Prevention and Control of Water Pollution"] (promulgated by Nat'l People's Cong., effective Jan. 1, 2018); (中华人民共和国水法)[Water Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Jan. 21, 1988, effective July 2, 2016); (中华人民共和国水土保持法)[Soil and Water Conservation Law of the People's Republic of China] (promulgated by Nat'l People's Cong., June 29, 1991, effective Dec. 25, 2010).

²⁷ Since 2015, the Ministry of Commerce ("MOFCOM") has launched the revision of the Law on Sino-foreign Equity Joint Ventures, the Law on Foreign-invested Enterprises and the Law on Sino-foreign Cooperative Joint Ventures and formed the Foreign Investment Law of the People's Republic of China (Draft for Comments); *see also* (外商投资产业指导目录)[Catalogue for the Guidance of Foreign Investment Industries], (promulgated by China's National Dev. & Reform Comm. and Ministry of Commerce, June 28, 2017).

²⁸ (基础设施和公用事业特许经营管理办法)[Administrative Measures for Infrastructure and Public Utility Concession] (promulgated by Nat'l Dev. and Reform Commission et al., Apr. 25, 2015, effective June 1, 2015); *see also* (中华人民共和国合同法)[Contract Law of the People's Republic of China] (promulgated by Nat'l People's Cong., effective Mar. 15, 1999).

²⁹ (中华人民共和国消费者权益保护法)[Law of the People's Republic of China on the Protection of Consumer Rights and Interests] (promulgated by Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994); *see also* (最高人民法院关于《审理消费民事公益诉讼案件适用法律若干问题的解释》的解释)[Interpretations of the Supreme People's Court on Certain Issues concerning the Application of Law in the Trial of Consumer-Related Civil Public Interest Actions] (promulgated by the Sup. People's Ct. Feb. 1, 2016, effective May 1, 2016); *and* (取水许可和水资源费征收管理条例)[Regulations on the Administration of Water Abstraction Licensing and Collection of Water Resources Charges] (promulgated by the St. Council Jan. 24, 2006). *See also* (财政部、国家税务总局关于公共基础设施项目和环境保护节能节水项目企业所得税优惠政策问题的通知)[Notice of the Ministry of Finance and the State Administration of Taxation on the Preferential Policy on Enterprise Income Taxes Concerning Projects on Public Infrastructure Facilities and Projects on Environmental Protection and Energy and Water Conservation] (promulgated by Ministry of Fin., effective Jan. 1, 2008); *and* 国家税务总局关于环境保护节能节水 安全生产等专用设备投资抵免企业所得税有关问题的通知[Notice of the State Administration of Taxation on Issues Concerning Deduction and Exemption of Enterprise Income Taxes by Investing in Special Equipment for Environmental Protection, Energy and Water Conservation, and Production Safety] (promulgated by St. Admin. of Tax'n, effective June 2, 2010); *and* (国家发展改革委、住房城乡建设部关于做好城市供水价格管理工作有关问题的通知)[Notice of the National Development and Reform Commission and the Ministry of Housing and Urban-Rural Development on Issues Concerning

breach of agreements to the violation of treaties.³⁰ This Article investigates the interactions between consumer policies, international economic law, and consumers' access to water. The shift from national law to an international level itself is a major development, as the recent *Urbaser v. Argentine Republic*³¹ water award allowed tribunals to balance public concerns against investor protection by examining non-economic aspects of water services including consumer rights.³² Therefore, this Article examines the influence of international investment law and arbitration in expanding the dimension of transnational consumer protection and its near-term ramifications for China's governance of water privatization.

This Article first provides an overall review of the current situation of the water investment market in China. Section 2 explains who the key players are and identifies the opportunities for investment in China's water market. Section 3 demonstrates and analyses the triangular relationship among the utility owner, the contract operator, and the consumer, from both the domestic and international perspectives. By doing so, this section illustrates the interactions between the domestic regime and the international investment regime. The fundamental analysis will be complemented by the mechanism of state counterclaim (Section 4). Section 4 will draw on the recent International Centre for Settlement of Investment Dispute ("ICSID") arbitral award in *Urbaser v. Argentine Republic*, to provide a detailed analysis regarding the right to water and consumer protection. Finally, policy lessons will be drawn by way of conclusion (Section 5).

the Administration of Price of Urban Water Supply] (promulgated by Nat'l Dev. & Reform Comm. and Ministry of Housing and Urb.-Rural Dev., effective Nov. 2, 2015); and (环境保护部关于进一步加强饮用水水源安全保障工作的通知) [Notice of Ministry of Environmental Protection of the People's Republic of China on Further Strengthening the Work of Ensuring the Safety of Drinking Water Sources] (promulgated by Ministry of Env'tl. Protection, effective Mar. 12, 2009); and (水利工程项目招标投标审计办法) [Auditing Measures for Tendering and Bidding Concerning Water Conservancy Construction Projects] (promulgated by Ministry of Water Resources Dec. 29, 2007, effective Apr. 1, 2008).

³⁰ MICHAEL J. ROUSE, INSTITUTIONAL GOVERNANCE AND REGULATION OF WATER SERVICES: THE ESSENTIAL ELEMENTS 201 (2d ed. 2013). Concession contracts are the most widely used type of contract for whole systems in the construction and management of water services. "A true concession contract involves the operation refurbishment of existing assets and investment and operation of new assets." See also Julien Chaisse & Marine Polo, *Globalization of Water Privatization: Ramifications of Investor-State Disputes in the "Blue Gold" Economy*, 38 B.C. INT'L & COMP. L. REV. 1, 3-4 (2015).

³¹ *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

³² Fabrizio Marrella, *On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration*, 12 INT'L COMM. L. REV. 335, 342 (2010); Meshel Tamar, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. INT'L DISP. SETTLEMENT 277 (2015).

II. WATER PRIVATIZATION

In the thirteenth five-year plan, the government is keen on seeking social funds and looking toward the Public Private Partnerships (PPP), which are both in line with the previous more relaxed rules used to make inward investments easier.³³ The Chinese government is expected to spend an additional RMB 4 trillion to improve water infrastructure and household supply.³⁴ The government's keen support for this effort means that China's water supply and wastewater treatment market is huge.³⁵ See Chart 1 below:

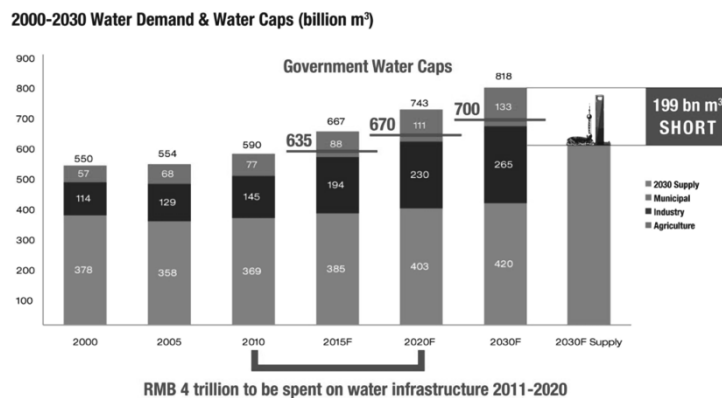
³³ Zhou Xuewen, *The 13th Five-Year Plan for Water conservancy Reform and Development* (Dec. 27, 2016), http://www.mwr.gov.cn/ztpd/2016ztbd/qgslsswgh/bzft/201612/t20161227_782949.html

In 2014, NDRC and the Ministry of Finance plans to set aside RMB 50 billion National Environmental Fund to provide loans with zero or low interest to deal with pollution issues. During the 12th five-year plan, the major developments for water issues are as follows: The water administrative examination and approval system was further promoted and the number of examination and approval issues was reduced from 48 to 22; Encouraging the innovative water conservancy investment and improving the financing mechanisms; Issuing special construction funds and loans to increase financial support and encourage and attract social capital to participate in major water conservancy construction and operation projects.

See Julien Chaisse & Mitsuo Matsushita, *China's 'Belt and Road' Initiative – Mapping the World's Normative and Strategic Implications*, 52 J. WORLD TRADE 163, 171–79 (2018).

³⁴ Debra Tan, *China Water Investments: 3 Thoughts*, CHINESE WATER RISK (Dec. 10, 2014) <http://www.chinawaterrisk.org/opinions/china-water-investments-3-thoughts/> (“China set aside RMB4 trillion in 2011 for water infrastructure to ensure water supply can meet rising water demand by 2020.”).

³⁵ (中国人民银行; 国家发展和改革委员会; 财政部; 水利部; 中国银行业监督管理委员会; 中国证券监督管理委员会; 中国保险监督管理委员会) [Opinions on Further Improving Financial Services for Water Conservancy Reform and Development] (promulgated by The People's Bank of China, Nat'l Dev. and Reform Comm., Ministry of Fin., Ministry of Water Resources, China Banking Reg. Comm., China Securities Reg. Comm., and China Ins. Reg. Comm., effective Feb. 29, 2012).



Source: *China Water Risk* ³⁶

A. Key Water Companies in China

Since 2012, China put aside RMB 2 trillion. Over half of the funds were reserved for water pollution. And in 2015, the government published the *Water Pollution Prevention and Control Action Plan*, primarily targeting the heavily polluting sectors from contaminating the water resources.³⁷ In 2014, the central government's water budget was RMB 76.7 billion—a 7% increase from the previous year. However, the funding is still inadequate for the water projects, and much more efforts are needed to attract additional financial funding.³⁸ Table 1 reveals the key international and Asian water companies (except Chinese companies) in the Chinese market:

³⁶ *Quotas Limit GDP – China's Waters Caps Dampen GDP Growth*, CHINA WATER RISK, <http://www.chinawaterrisk.org/the-big-picture/quotas-limit-gdp/> (last visited Nov. 1, 2018).

³⁷ *China Announces Action Plan to Tackle Water Pollution*, ST. COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 16, 2015), http://english.gov.cn/policies/latest_releases/2015/04/16/content_281475090170164.htm.

³⁸ Dawn McGregor, *2014 Investments in Chinese Waters*, CHINA WATER RISK (October 10, 2014), <http://chinawaterrisk.org/resources/analysis-reviews/2014-investments-in-chinese-waters/>.

Table 1: KEY INTERNATIONAL AND ASIAN WATER COMPANIES IN THE CHINA MARKET

Company	Technology strength	Operation and management in China	Operation type
SUEZ Water Technologies & Solutions (previously known as GE water)	Membrane technologies and reuse, cooling and chemical management	Design and build player in China	No assets acquisition
ITT Corporation	Pumps, valves and fluid management	Design and build player in China	No assets acquisition
Kurita Water Industries	Ultra-pure water and chemical management	Design and build player in China and chemical management	No assets acquisition
Nalco Holding Co	Chemical supplier and management solution	Chemical management	No assets acquisition
SAUR	Operations and management specialise with a design and build division	Almost 3.5 million inhabitants served	JV with local water companies. Bid to acquire the assets
Siemens AG(DE)	Reverse osmosis, ultraviolet lights, Membrane bioreactors and reuse technologies	Design and build player in China	No assets acquisition
Sino-French Water Development Co	Degremont specialised engineering sister company	Almost 21 million inhabitants served	JV with local water companies. Bid to acquire the assets

Suez Environmental	Degremont specialised engineering sister company	Design and build player in China	No assets acquisition
Veolia Environment	Veolia water system specialised engineering sister company	Almost 22 million inhabitants served	JV with local water companies. Bid to acquire the assets
Asia Environmental Holdings Ltd	Design and build; operation and maintenance	Almost 4 million inhabitants served	EPC and JV with local companies for BOT
Cathay International Water	No public information available	Almost 4 million inhabitants served	EPC and JV with local companies for BOT
Guangdong Investment Ltd	Utilities and construction conglomerate	Almost 6 million inhabitants served	JV with local companies for BOT and OM
Hong Kong & China Gas and light	Utilities conglomerate	Almost 2 million inhabitants served	JV with local companies for BOT and OM
Hyflux Ltd	Membrane technologies and desalination	Almost 2 million inhabitants served	EPC and JV with local companies for BOT
Kerry Utilities	conglomerate	Almost 1 million inhabitants served	EPC and JV with local companies for BOT
PBA Holdings Bhd	Design and build; operation and maintenance	Almost 2.25 million inhabitants served	EPC and JV with lo-

			cal companies for BOT
Salcon Bhd	Design and build; operation and maintenance	Almost 2.6 million inhabitants served	EPC and JV with local companies for BOT
Sembcorp Industries	Multi-utilities specialists	Almost 4.4 million inhabitants served	Establishing JV with industrial perk to operate centralized WWTP (2 in Jiangsu, 1 in Liaoning, 1 in Tianjin)

Source: Global Water Intelligence, big water companies January 2011, Pinstent Masons Water Year Book 2010-2011, relevant water companies' websites, China Water Risk

B. Opportunities for the Investors

Since the 1990s, foreign investors have entered the Chinese market and signed contracts with local governments for the provision of drinking water and wastewater treatment services. Table 2 indicates the major foreign-invested PPP projects.

Table 2: MAJOR FOREIGN-INVESTED PPP WATER PROJECTS (1992-2011)

Location	Awarded Company	Year	Project	Duration in years	Population served
Zunyi	<i>Hyflux</i>	2011	BOT of Waste Water Treatment Plant	30	800,000
Chongqing, Yueli	Sino-French	2009	Water Management and Distribution	40	1.2 Million
Suzhou	Sino-French	2009	Wastewater Treatment	30	610,000
Tianjin	Sino-French	2009	Renovation and Operation of a Drinking Water Facility	30	1.5 Million
Zhumadian	Sembcorp	2008	Water Management and Distribution	30	400,000
Yancheng	Sembcorp	2008	Water Management and Distribution	30	716,000
Nanan, Fujian	Salcon	2008	Water Management and Distribution	30	1 Million
Wuhan, Huangpi	Asia Water Technology	2008	BOT of Water Treatment Plant	30	1.1 Million
Huangshi, Kaidi	Asia Water Technology	2008	BOT of Wastewater Treatment Plant	27	1 Million
Tianjin	Veolia	2007	Water Management and Distribution	30	3 Million
Haikou	Veolia	2007	Water and Wastewater Management and Distribution	30	800,000
Lanzhou	Veolia	2007	Water Management and Distribution	30	3.2 Million

Changshu	Sino-French	2006	Water Management and Distribution	30	1.8 Million
Liuzhou	Veolia	2006	Water Management and Distribution	30	1 Million
Bengbu	FCC	2005	BOT of Wastewater Treatment Plant	25	2 Million
Changzhou	Veolia	2005	Water Management and Distribution	30	1.2 Million
Kunming	Veolia	2005	Water Management and Distribution	30	2.5 Million
Handan	Veolia	2005	BOT of Wastewater Treatment Plant	25	800,000
Urumqi	Veolia	2005	Renovation and Operation of a Wastewater facility	23	1.14 Million
Hohhot	Veolia	2004	Renovation and Operation of a Drinking Water Facility	30	1 Million
Sanya	Sino-French	2004	Water Management and Distribution	30	280,000
Shenzhen	Veolia – Beijing Capital Co	2004	Wastewater and Water Management Distribution	50	7.61 Million
Beijing Baoji	Veolia – Beijing Capital Co	2003	Water Management and Distribution	25	500,000
Qingdao	Veolia	2003	BOT of Wastewater Treatment Plant	25	820,000
Chongqing	Sino-French	2002	Water Management and Distribution	50	1 Million

Qingdao	Sino-French	2002	Water Management and Distribution	25	2.5 Million
Shanghai - Pudong	Veolia	2002	Water Management and Distribution	50	2.22 Million
Zhuhai	Veolia	2002	BOT of Wastewater Treatment Plant	30	330,000
Shanghai	Shanghai Fengshian Saur	2001	Concession for Drinking Water	28	700,000
Zhengzhou	Sino-French	2001	Water Management and Distribution	30	N/A
Chengdu	Veolia	1998	BOT of Water Treatment Plant	18	2.66
Tianjin	Veolia	1997	Renovation and Operation of a Drinking Water Facility	20	1.85
Shenyang	Hong Kong Huijin	1996	BOT of Water Treatment Plant	20	N/A
Harbin	Shanghai Fengshian Saur	1996	BOT and OM of Wastewater Treatment Plant	28	2.8
Shanghai	Thames	1995/2002	BOT of Water Treatment Plant	20	2
Zhongshan	Sino-French	1992	Water Management and Distribution	35	170,000

Source: Pinsent Masons Water Yearbook 2010-2011, China Water Risk

As shown in Table 2, the average duration of the contract is more than twenty years, which means that the risks inherent in the respective operation contracts are high.³⁹ The public partner must ensure that when the PPP ends, the assets returned to them are in a condition that will allow them to continue

³⁹ See generally William Schreiber, *Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations*, 48 Nat. Resources J. 451 (2008) (discussing the reason for the length of the contract).

to serve their consumers without interruption.⁴⁰ For the investors, “[t]he degree of certainty with which water is supplied is an important factor in determining the benefit that water users derive from the service and strongly influences their willingness to pay.”⁴¹ This raises a question of risk, which is associated with uncertainty and changes.⁴² Therefore, the contract should be adaptable to address the possible changes and ensure that a properly designed procedure is available to materialize the allocated risks between the parties.⁴³

III. WATER PRIVATIZATION AND CONSUMER PROTECTION

China has made significant efforts and prominent progress in terms of developing and reforming water policies and regulations. Over the course of developing and amending the water law and other related regulations, China has incorporated relative legislation and legal approaches from other countries to serve as a useful reference.⁴⁴ Since 2012, a series of statutory arrangements were introduced, including “water right, water extraction licensing and a legal system that mandates the combination of basin-specific water resources management and administrative region-based water resources management.”⁴⁵

⁴⁰ GEORGE A. RAFTELIS, *WATER AND WASTEWATER FINANCE AND PRICING: THE CHANGING LANDSCAPE* 328 (4th ed. 2014).

⁴¹ *Meeting the Challenge of Water and Sanitation: Tools and Approaches*, OECD 1, 35 (2011), https://www.pseau.org/outils/ouvrages/ocde_meeting_the_challenge_of_financing_water_and_sanitation_2013.pdf.

⁴² ROUSE, *supra* note 30, at 202–03 (identifying the three main risks, namely, political/governmental, legislative and currency changes and physical assets); *see also* SHOU SHUANG LI, *THE LEGAL ENVIRONMENT AND RISKS FOR FOREIGN INVESTMENT IN CHINA* (2007); Jae-ho Choi & Seungho Lee, *Risk Perception Analysis: Participation in China's Water PPP Market*, 28 INT'L J. PROJECT MGMT. 580 (2010).

⁴³ Pierre Thielborger, *The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 504–05 (Pierre-Marie Dupuy et al. eds., 2009).

⁴⁴ *The Water Sector in China*, EU SME CENTRE (2013), <http://www.eusmecentre.org.cn/report/water-sector-china> (“In developing these reforms reference has been made to water management practice and institutions in other parts of the world, in particular to the EU approach and the Water Framework Directive, but the approach China is taking is nonetheless distinctive in its characteristics.”).

⁴⁵ *Water Policies, Laws and Regulations in China*, MINISTRY OF WATER RES. OF THE PEOPLE'S REPUBLIC OF CHINA (2016), <http://www.mwr.gov.cn/english/mainsubjects/201604/P020160406508815936744.pdf>.

In accordance with the stipulations of the State Council of the People's Republic of China, the Ministry of Water Resources is given the following mandates: ensuring rational development and utilization of water resources, formulating water resources development strategies, plans and policies, providing draft legislations, promulgating water administrative rules and regulations, undertaking integrated water resources management and supervision, taking charge of water resource

The sophisticated regulatory framework includes four pieces of legislation, nineteen pieces of administrative regulations, fifty-five ministerial rules and seven hundred or so subnational regulations and government rules.⁴⁶ These regulations contain the procedural and substantive requirements relative to water management, water resource preservation, and pollution prevention.

The significant number of water laws and regulations nevertheless requires more legislative incorporation to reconcile various stakeholders' interests. More importantly, the main challenge is how to establish a robust institutional framework to implement water laws and regulations and monitor that implementation.⁴⁷ A sound legal framework is very much needed to provide "a comprehensive and coherent water law system, an effective enforcement system . . . a stringent supervision system . . . and a strong assurance system for the rule of law in the water sector."⁴⁸

protection and water conservation, organizing, coordinating and supervising the work of flood control and drought relief, and be responsible for control of soil and water losses.

Ministry of Water Resources of the People's Republic of China, PEOPLE'S DAILY ONLINE (Aug. 22, 2012), <http://en.people.cn/102759/205143/7920437.html>. Apart from this leading ministry, there are also other ministries that can play a role in the related areas, such as the Ministry of Environmental Protection, which is responsible for water quality control, water quality monitoring and the evaluation of EIA. Ministry of Housing, Urban and Rural Construction is responsible for urban water supply and urban waste water treatment. Ministry of Health is responsible for drinking water quality. National Development and Reform Commission is responsible for approval of water infrastructure, water pollution control plans, river basin plans, water and waste water treatment pricing policies, and energy policies. Ministry of Finance is responsible for the approval of use of water resources fees and pollution levies and approval of water-related fiscal policies.

⁴⁶ MINISTRY OF WATER RES., PEOPLE'S REPUBLIC OF CHINA, *supra* note 44. Major water-related laws and administrative regulations in China are as follows: Water Law of the People's Republic of China; Law of the People's Republic of China on Water and Soil Conservation; Law of the People's Republic of China on Prevention and Control of Water Pollution; Law of the People's Republic of China on Water and Soil Conservation; Detailed Rules for the Implementation of Law of the People's Republic of China on Prevention and Control of Water Pollution; Regulations for the Implementation of Law of the People's Republic of China on Water and Soil Conservation; Regulations on Urban Water Supply; Regulations on the Administration of Reservoir and Dam Safety; and Provisions on the Administration of Water-Saving in Urban Areas.

⁴⁷ XIANGBAI HE, LEGAL METHODS OF MAINSTREAMING CLIMATE CHANGE ADAPTATION IN CHINESE WATER MANAGEMENT 21 (2016); Kerstin Mechlem, *Groundwater Governance: The Role of Legal Frameworks at the Local and National Level—Established Practice and Emerging Trends*, 8 WATER 347 (2016).

⁴⁸ MINISTRY OF WATER RES., PEOPLE'S REPUBLIC OF CHINA, *supra* note 45.

A. Domestic Perspective

By relaxing the rules and simplifying the registration procedures for foreign investment, China is continuously encouraging the participation of social capital in the water market to attract more investors to invest in this area. Due to the high risk associated with the contract, the legal framework and the stability of the state plays an essential role for the decision makers before they enter the market.⁴⁹ The operational contract will contain a provision that stipulates that the contract operator must provide the required services needed to meet the entire existing regulatory framework.⁵⁰ The changes in the regulations during the operation of the contract may lead to the re-negotiation and amendment of the contract, if the changes can be justified as changed conditions.⁵¹ The applicable law, changes in law, and emergency circumstances are integral to balance the risks between the contractual parties.⁵² The service agreement is a performance-based agreement. In the contractual relationship between the utility and investor, the applicable law usually captures all the existing laws and regulations that relate to the operation of water facilities in the host state.⁵³ The consequences for failure to comply with these obligations include the payment of penalties and may eventually result in the termination of the contract.⁵⁴ From a domestic perspective, this section discusses some key elements in a water and sanitation operation contract and helps to identify the roles of the contractual parties for consumer protection. The key elements reflected in the triangular relationship are the right to water, water price, and water quality.

⁴⁹ See SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL LAW IN THE BIT GENERATION (2009); and Anne Van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT'L ECON. L. 507 (2009).

⁵⁰ For a detailed analysis on water concession contracts, see Julien Chaisse, *Foreign Investment in Water: Privatization, Globalization and the Law*, in CHARTING THE WATER REGULATORY FUTURE: ISSUES, CHALLENGES AND DIRECTIONS (Julien Chaisse ed., 2017); JOSE ESTEBAN CASTRO & LEO HELLER, WATER AND SANITATION SERVICES: PUBLIC POLICY AND MANAGEMENT (2009).

⁵¹ See RAFTELIS, *supra* note 40, at 332.

⁵² See generally Claude Crampes & Antonio Estache, *Regulating Water Concession: Lessons from the Buenos Aires Concession*, WORLD BANK GROUP (1996), https://openknowledge.worldbank.org/bitstream/handle/10986/11610/multi_page.pdf?sequence=1&isAllowed=y; Judith A. Rees, *Regulation and Private Participation in the Water and Sanitation Sector*, 22 Nat. Resource F. 95 (1998).

⁵³ See RAFTELIS, *supra* note 40, at 376.

⁵⁴ See CHAISSE ET AL., *supra* note 14.

i. Right to Water

China's constitutional law specifies citizens' fundamental rights as well as the state's obligation to respect and preserve human rights. In addition, The State Council Information Office of the People's Republic of China issued the National Human Rights Action Plan of China (2016-2020). According to Section I(2): Right to Basic Living Standards, full efforts shall be made to provide clean water:

Ensuring access to safe water. A total of 27 billion cu m of water supply capacity will be added nationwide on the current basis, and all urban water-supply sources shall meet the required standards. Efforts shall be made to improve drinking water security in rural areas, where 80 percent of the population shall have access to tap water, and 85 percent to centralized water supply.⁵⁵

Moreover, under Section 8, China intends to promote the legislation for water pollution prevention and the controls needed to protect citizen's environmental rights. The possible environmental system requires the involvement and cooperation of the government, enterprises, and the general public. Excessive exploitation of groundwater shall be put under strict control.⁵⁶ Water is a fundamental human right, and this statement highlights the role of the government in the water market to regulate water services and ensure people's access to water. Yet it is still unclear about how to combine the administrative means and market means together theoretically, especially how to coordinate the relationship between the government and the market to optimize the allocation of water resources.⁵⁷

ii. Water Price

The use of water is regulated under Art. 49 of the Water Law of the People's Republic of China (the Water Law). A "system shall be applied under which a fee shall be charged on the basis of the amount of water used and a progressive higher price shall be charged for the amount that exceeds the quota."⁵⁸ This article should be read together with Article 55 of the Water

⁵⁵ State Council Info. Office of the People's Republic of China, *National Human Rights Action Plan of China (2016-2020)*, CHINADAILY.COM, § I(2), http://m.chinadaily.com.cn/en/2016-09/30/content_26944836.htm (last updated Sept. 30, 2016).

⁵⁶ *Id.* § I(8).

⁵⁷ YAHUA WANG, ASSESSING WATER RIGHTS IN CHINA 10 (2017).

⁵⁸ Water Law of the People's Republic of China, art. 49 (promulgated by Nat'l People's Cong. Jan. 21, 1988, last amended and effective July 2, 2016).

Law, which states that when the service is provided by waterworks, the user shall pay charges to the water supply unit. Article 55 reads: “The price of water supply shall be fixed in accordance with the principle of compensating for the cost, gaining reasonable benefits, paying good money for good quality and fair sharing of the cost. . . . The specific measures shall be formulated”⁵⁹ An efficient and effective water pricing policy can provide incentives for efficient water use and at the same time generate funds which are necessary for water infrastructure investment.⁶⁰ However, for China, there is still a long way to go in motivating all the segments of society to engage in the investment and development of water infrastructure. In reality, the potential of water pricing in improving resource allocation, conservation, and protection has yet to be fully tapped. At the price bureaus, the necessity for water price increase is reviewed independently from the investment injection and return demand.⁶¹ Because the water industry remains one of the critical politically sensitive areas, an increase in the water tariff could be a key risk for both contractual parties.⁶² The current way in which society manages water resources remains inadequate to protect the water ecology and environment effectively, and the price incentive for the conservation of water resources has yet to be fully developed.⁶³

iii. *Water Quality*

“Drinking water is at the end of the water supply chain.”⁶⁴ Achieving high drinking water quality requires meticulous planning and logistics. To govern the entire supply chain from source-to-tap, a set of comprehensive standards, policies and regulations need to be put in place.⁶⁵ Water source protection was included in China’s ambitious plan to safeguard drinking water, and since 2007 China has introduced the new drinking water standard.⁶⁶ In addition, Article 51 of the revised Law of the People’s Republic of China on Prevention

⁵⁹ *Id.* at art. 55.

⁶⁰ Elnaboulsi Jihad, *An Incentive Water Pricing Policy for Sustainable Water Use*, 42 ENVTL. & RESOURCE ECON. 451 (2009).

⁶¹ ASIAN DEVELOPMENT BANK, PUBLIC-PRIVATE PARTNERSHIP HANDBOOK 82 (2005).

⁶² Okke Braadbaart et al., *Managing Urban Wastewater in China: A Survey of Build-Operate-Transfer Contracts*, 23 WATER & ENV’T J. 46 (2008); Chuan Chen & Hemanta Doloi, *BOT Application in China: Driving and Impeding Factors*, 26 INT’L J. PROJECT MGMT. 388 (2008).

⁶³ *The Ministry: About MWR*, MINISTRY OF WATER RESOURCES THE PEOPLE’S REPUBLIC OF CHINA, <http://www.mwr.gov.cn/english/aboutmwr.html> (last visited Oct. 8, 2018).

⁶⁴ Hongqiao Liu, *China’s Drinking Water Safety Faces Scrutiny in 2015*, CHINA DIALOGUE (Feb. 13, 2015), <https://www.chinadialogue.net/article/show/single/en/7722-China-s-drinking-water-safety-faces-scrutiny-in-2-15>.

⁶⁵ *Id.*

⁶⁶ *Id.* In China’s 12th five-year plan, targets were set for both 2015 and 2020.

and Control of Water Pollution, which came into force on January 1, 2018, reads:

An article is added as Article 92 which shall read: “Where the quality of the water supplied by an entity supplying drinking water fails to conform to the standards prescribed by the State, the department in charge of water supply under the people’s government at the level of city or county where the entity is located shall order the entity to make correction and impose on the entity a fine ranging from RMB 20,000 to RMB 200,000; if the circumstance is serious, the entity may be ordered to suspend business for rectification upon approval by the people’s government with power of approval; sanction shall be imposed on the person directly in charge and other persons who are directly liable in accordance with the law.”⁶⁷

For water treatment and main-pipe network management, China is locked into a ‘technology-focused’ path and is looking at high-tech innovation and infrastructure investment to ensure water quality and delivery.⁶⁸ However, the most severe problem remains the deficiencies of the water supply, which has a direct negative impact on the end user.⁶⁹ One of the major concerns is that the current unified drinking water quality standards which aim to protect human health do not consider the regional differences. Although many efforts are put towards addressing this, in short, there is no perfect solution.

iv. Consumer Protection

In 2013, the Law of the People’s Republic of China on the Protection of Consumer Rights and Interests (Consumer Rights Protection Law), which serves as the basic legislation for consumer protection was promulgated by the NPC for the protection of the legitimate rights and interests of consumers.⁷⁰ On August 5, 2016, China’s State Administration of Industry and Commerce (SAIC), sought public comments on the Draft Implementation

⁶⁷ (全国人民代表大会常务委员会关于修改《中华人民共和国水污染防治法》的决定) [Decision of the Standing Committee of the National People’s Congress on Revising the “Law of the People’s Republic of China on Prevention and Control of Water Pollution”] (promulgated by the Standing Comm. Nat’l People’s Cong., June 27, 2017, effective Jan. 1, 2018).

⁶⁸ See MINISTRY OF WATER RESOURCES THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 63.

⁶⁹ Paul R. Hunter et al., *Water Supply and Health*, 7 PLoS MED. (2010).

⁷⁰ (中华人民共和国消费者权益保护法) [Law of the People’s Republic of China on the Protection of Consumer Rights and Interests] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 31, 1993, effective Jan. 1, 1994).

Regulations of the Law on Protection of Consumer Rights and Interests (Draft Implementing Regulations). The Draft Implementing Regulations are expected to implement China's amended Consumer Rights Protection Law. The Draft Implementation Regulations would impose new obligations on some service providers (the contract operators) with failure to comply, resulting in administrative penalties and reduced civil liabilities.⁷¹ The seventy-article Draft Implementation Regulations is comprised of eight chapters,⁷² and the proposed dispute settlement measures are complemented with strong consumer reaction.⁷³ Meanwhile, the Draft Implementation Regulations further rationalizes and improves the mechanism for coordinating the protection of consumer rights and interests and specifies the protection of consumers' rights in some service fields. As such, the operators engaged in water supply shall not increase the fees without legal basis; the failure of some consumers to pay the fees on time shall not result in the whole suspension of the service supply to other consumers.⁷⁴ The Draft Implementation Regulation also enables the consumers' associations and organizations to better function,⁷⁵ and strengthens related legal liabilities for the protection of consumers' rights.⁷⁶

v. *Contractual Operation and Consumer Protection*

Article 3 of the Administrative Measures for Infrastructure and Public Utility Concession regulates the definition of infrastructure and public utility concession.⁷⁷ Article 18 includes the content of the concession contract, such

⁷¹ See generally Ashwin Kaja & John Balzano, *China Releases Draft Implementing Regulations for Consumer Rights Protection Law*, GLOBAL POL'Y WATCH (Aug. 26, 2016), <https://www.globalpolicywatch.com/2016/08/china-releases-draft-implementing-regulations-for-consumer-rights-protection-law/>.

⁷² The eight chapters are: the General Principles, the General Provisions for the Consumer Rights and Obligations of Business Operators, the Special Provisions for the Consumer Rights and Obligations of Business Operators, the Administrative Protection of Consumer Rights and Interests, the Social Protection of Consumer Rights and Interests, the Settlement of the Consumption Disputes, Legal Liabilities, and the Supplementary Provisions.

⁷³ Kaja & Balzano, *supra* note 71.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ (基础设施和公用事业特许经营管理办法) [Administrative Measures for Infrastructure and Public Utility Concession] (promulgated by St. Dev. & Reform Comm., May 15, 2015, effective June 1, 2015). Article 3 states:

For the purposes of these Measures, "infrastructure and public utility concession" shall mean that the governments authorize the legal persons or other organizations inside and outside the territory of China on a competitive basis in accordance with law, and reach agreement, which specify rights and obligations as well as risk sharing, with the aforesaid legal

as the quality standards for service providers, the methodologies to calculate the charges, the government commitment and the risk allocation between the parties.⁷⁸ Article 19 asserts that the contract operator can get revenue by charging the end users: "It may be agreed in the concession agreement according to the provisions of relevant laws, administrative regulations and national rules that; concession operators get revenues by charging the users and other methods."⁷⁹ In addition, the consumer's willingness to pay and the capacity to pay is part of the evaluation for user-pay items: "The feasibility assessment of the franchise shall mainly include the following contents: . . . (3) The willingness and ability of the public to pay for the user's paid project."⁸⁰ In order to further protect the end users, Article 52 stipulates the continuous obligation of both parties to guarantee the stability of the public services: "In the event of a dispute over the duration of the franchise agreement, the parties shall continue to perform their franchise agreement obligations during the dispute resolution process to ensure the continuity and stability of the public goods or public services."⁸¹

Therefore, from the domestic perspective, the contract operation involves three major stakeholders in the provision of water and wastewater services. To be more specific, when the utility owner enters into a contract with a pri-

persons or other organizations which shall invest in the construction and operation of infrastructure and public utilities and can obtain earnings within certain time limit and scope and provide public products or public services.

Id.

⁷⁸ *Id.* at art. 18. Article 18 states:

(1)Project name and content; (2) Concession method, region, scope and term; (3) Project company's business scope, registered capital, shareholders' ways of investment, ratio of contributions, equity transfer, etc.; (4) Quantity and quality of and standards for products or services provided; (5) Ownership of facilities and corresponding maintenance as well as transformation and renovation; (6) Monitoring and evaluation; (7) Term and ways of investment and financing; (8) Ways of getting revenues, and methods to determine prices and charging standards and adjustment procedures; (9) Performance bond; (10) Risk sharing in the term of concession; (11) Government commitment and guarantee; (12) Contingency plan and temporary takeover plan; (13) Project and assets handover ways, procedures and requirements upon expiration of the term of concession; (14) Change, early termination and compensation; (15) Default liability; (16) Ways of dispute settlement; and (17) Other matters that shall be specified.

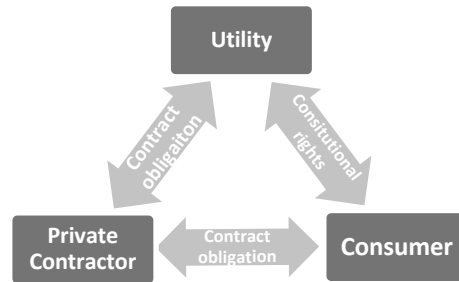
Id.

⁷⁹ *Id.* at art. 19.

⁸⁰ *Id.* at art. 12.

⁸¹ *Id.* at art. 52.

vate partner for the operation and maintenance of one or more than one component of the utility system, private investors will have the right to use the facilities and the government remains the title holder of the facilities.⁸² However, investors need to pay the concession fee to the government, and at the end of the concession contract, the facilities will be returned to the possession of the authority.⁸³ Chart 2 sets out this triangular relationship:



Source: elaboration by the author

From this triangular chart, under the concession contract, the private contractor (the concessionaire) is responsible for paying the annual concession fee to the utility, together with the rental fee for lease of the assets. And the concessionaire will collect the revenue. Although in the initial phase, the council (utility owner), will be billing in its name for a period of time according to the contract.⁸⁴ The local government has the power to set tariffs and the concessionaire has the exclusive right to deliver the services.⁸⁵ In setting the tariffs, the council and concessionaire will negotiate the methodologies for the calculation and set out the circumstances where there is need to modify the charges.⁸⁶ The water price shall cover the initial investment, the maintenance fee and certain profits under the contract to ensure the rights and interests of the investors.⁸⁷ The investor, as the project operator, should ensure the drinking water service they deliver meets the requirement of the state's drink-

⁸² See RAFTELIS, *supra* note 40, at 329.

⁸³ *Private Participation in Infrastructure Projects Database*, WORLD BANK, <https://ppi.worldbank.org> (last visited Oct. 7, 2018).

⁸⁴ World Bank has worked on providing the sample contracts for the provision of water and wastewater services. See World Bank Group, *Water and Sanitation Concession Agreement - Example 1*, PUB.-PRIVATE-PARTNERSHIP LEGAL RES. CTR., <https://ppp.worldbank.org/public-private-partnership/library/water-and-sanitation-concession-agreement-example-1> (last updated Dec. 11, 2016).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

ing water standard, and that the waste water disposal meets relative environmental regulations. At the same time, the State as a party to the contract has the obligation to monitor and set the drinking water quality; meanwhile, it is also important to consider the consumer's capacity to pay. Under these circumstances, ideally, consumers can be protected under the contract, both from the local government and the contract operator.

Another regulation issued recently for better protection of consumers' interest is *the Interpretations on Several Issues Concerning the Application of Law in the Trial of Civil Public Interest Actions Concerning Consumer Rights and Interests* (the Interpretations). The Interpretations were published by the PRC Supreme People's Court (the SPC), with effect from May 1, 2016.⁸⁸ Other than the clarification of uncertain issues, the Interpretations are far-reaching, as they highlight the role of public interest actions in the lawsuit. The Interpretations enlarge the scope of plaintiffs, expand the scope of actions and separate the public and private interest actions.⁸⁹ Notably, Article 47 of the new Consumer Law empowers the China Consumers' Association (CCA) to launch litigation against that which harms the legitimate interests of many consumers. It reads: "The China Consumers' Association and the consumer associations established in all provinces, autonomous regions and municipalities, directly under the Central Government may bring lawsuits to the people's courts against activities detrimental to the legitimate rights and interests of a large number of consumers."⁹⁰

Article 16 of the Interpretations, which is read together with Article 119 of the Civil Procedure Law, stipulates the facts ascertained by the effective ruling of a consumer-related civil public interest action and this provision.⁹¹ This

⁸⁸ (最高人民法院关于审理消费民事公益诉讼案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Public Interest Actions regarding Consumption] (promulgated by Supreme People's Court, April 24, 2016, effective May 1, 2016) [hereinafter Interpretation]. See general comment, Falk Lichtenstein & Nabao Zhang, *Recall and Public Interest Litigation - Two New Regulations Protect Consumers' Rights*, CMS CHINA INSIGHT (May 26, 2016).

⁸⁹ *Id.*

⁹⁰ (中华人民共和国消费者权益保护法) [Law of the People's Republic of China on the Protection of Consumer Rights and Interests] (promulgated by Standing Committee of the National People's Congress, October 25, 2013, effective date March 16, 2014) art. 47.

⁹¹ Interpretation, *supra* note 88, at art. 16. Article 16 of the Interpretations reads:

Regarding the facts ascertained by the effective ruling for a consumer-related civil public interest action, if a consumer suffering damage due to the same act of infringement institutes a lawsuit in accordance with Article 119 of the Civil Procedure Law, neither the plaintiff nor the defendant is required to present evidence therefor, unless a party concerned has objection to such facts and present evidence to the contrary sufficient to overturn such facts. Where the effective ruling for a consumer-related public interest action determines that the business operator

development further set the stage for the kind of litigation initiated by the CCA, which is highly relevant for consumers in the drinking water and sanitation services.⁹² In addition, a counterclaim is not allowed under consumer related public interest litigation.⁹³ Article 11 reads as follows: “The people’s court shall refuse to accept the counterclaim filed by the defendant during the trial of a consumer-related public interest action.” By contrast, it is worth mentioning that under the investor–state arbitration regime, the investment tribunal has the competence to hear the counterclaim, which will be discussed in detail in section 4.

According to Article 284 of the ICPL,⁹⁴ if the CCA is willing to bring such claims on behalf of the drinking water consumers that are adversely affected by the poor performance of the contract operator, the CCA needs to prove that “there is preliminary evidence that the public interests are damaged.”⁹⁵ This

has committed illegal act and the plaintiff in the lawsuit instituted by a consumer suffering damage due to the same act of infringement in accordance with Article 119 of the Civil Procedure Law claims application of such determination, the people’s court may uphold such claim, unless the defendant presents evidence to the contrary sufficient to overturn the determination. Where the defendant claims direct application of the determination favorable thereto, the people’s court shall not uphold such claim and the defendant shall bear appropriate burden of proof.

⁹² The notion of public interest litigation (PIL) originated from the United States of America during the late 19th century. For general development of PIL, see BURTON ALLEN WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 43 (1978). PIL is relatively new to China. Since 2005, various proposals have been brought in terms of calling for an establishment of “Environmental Public Interests Litigation.” Alex L. Wang, *Environmental Courts and Public Interest Litigation in China*, 43 *CHINESE L. & GOV’T* 6 (2010); Tao Bie, *Public Interest Environmental Litigation* 1 (2007); Jie Gao & Alex Wang, *Environmental Courts and the Development of Environmental Public Interest Litigation in China*, 3 *J. CT. INNOVATION* 37 (2010). For a comparative analysis between the U.S. PIL and Chinese PIL, see Tseming Yang & Xuehua Zhang, *Public Participation in Environmental Enforcement...with Chinese Characteristics?: A Comparative Assessment of China’s Environmental Complaint Mechanism* (Vermont Law School Faculty, Working Paper No. 11-21, 2011).

⁹³ Interpretations, *supra* note 88, at art. 11.

⁹⁴ (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释)[Interpretations of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China] (promulgated by the Supreme People’s Court, January 30, 2015, effective date February 4, 2015)[hereinafter ICPL].

⁹⁵ (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretations of the Supreme People’s Court on the Application of the “Civil Procedure Law of the People’s Republic of China”] (promulgated by the St. Dev. & Reform Comm., Jan. 30, 2015, effective Feb. 4, 2015).

requirement may pose difficulties for the CCA, given the huge number of consumers affected, and it could be very costly to collect the evidence.⁹⁶ However, no such case has been brought under the consumer related public interest theory. Although the exact practice of CAA is yet to be built up,⁹⁷ this kind of lawsuit paves the way for the increasingly important role of CCA in protecting consumer's right to water and sanitation services at the domestic level.

In respect of access to justice under the new interpretations, consumers in the water supply sector can initiate the proceedings against the companies both under consumer-related public interest litigation and environmental public interest litigation. The environmental public interest litigation has largely developed since 2015 with the revision of the Environmental Protection Law ("EPL");⁹⁸ several NGOs have been actively participating in environmental public interest litigation, and at the end of 2016 nearly 100 lawsuits had been filed.⁹⁹ One worth mentioning here is the water contamination case filed against Lanzhou Veolia Water Company in Lanzhou, Gansu Province in 2015.¹⁰⁰ As shown in table two, in 2007 the Lanzhou government and Veolia signed a 30-year contract for water management and distribution, and Veolia acquired 45% of the shares in Lanzhou Water Group and formed the Joint Venture, Lanzhou Veolia Water Company.¹⁰¹ The citizens had complained about the water quality provided, and the new Joint Venture had failed to upgrade the old water pipelines which were built in 1955.¹⁰² The company, Lanzhou Veolia Water Co (Veolia Water), supplies tap water to over 3 million residents in Lanzhou.¹⁰³ According to Beijing Review, "local authorities an-

⁹⁶ See Richard W. Wigley, *Trends in Class Action-Type Public Interest Litigation in China*, CHINA L. INSIGHT (May 29, 2015), <https://www.chinalawinsight.com/2015/05/articles/intellectual-property/trends-in-class-action-type-public-interest-litigation-in-china/>.

⁹⁷ Yang Cui & Michael Tan, *Protecting the People: China's Consumer Law*, LEXOLOGY (June 15, 2016), <https://www.lexology.com/library/detail.aspx?g=bb1fd060-4d78-4a9f-9521-d753ffb9cf29>.

⁹⁸ There are also some cases filed before 2015, *see generally* Dimitri de Boer & Douglas Whitehead, *Opinion: the Future of Public Interest Litigation in China*, CHINA DIALOGUE (Nov. 8, 2016), <https://www.chinadialogue.net/article/show/single/en/9356-Opinion-The-future-of-public-interest-litigation-in-China>.

⁹⁹ *Id.*; for the development of public interest litigation in China, *see* Fu Hualing & Richard Cullen, *The Development of Public Interest Litigation in China*, in PUBLIC INTEREST LITIGATION IN ASIA (Yap and Lau eds., Routledge 2010).

¹⁰⁰ Xinhong Wang & Aubié Hermann, *Fighting the Water Giant: Lawsuits Against Veolia in China*, CHINA POL'Y INST. (Mar. 21, 2015), <https://cpianalysis.org/2015/03/21/fighting-the-water-giant-lawsuits-against-veolia-in-china/>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

nounced that benzene, a cancer-inducing chemical, had been found in tap water at 20 times above national safety levels.”¹⁰⁴ It was the second water related incident in Lanzhou in 2014. In ensuring investigation showed that “the benzene came from a crude oil leak from a pipeline owned by a unit of China National Petroleum Corp., the country’s largest oil company.”¹⁰⁵ As the only supply company in the city, Lanzhou Veolia was widely criticized. The case is still pending, and this Benzene incident is not unique. Since 2007, thirteen cases concerning water pollution were filed against Veolia.¹⁰⁶

However, it is still an open question of which means can provide better protection for the consumers to initiate their rights. This area has not generated legal concerns among scholars. For the scope of the dispute, if it is about water quality and water contamination, both CCA and environmental NGOs can file the claim. Under Article 55 of the ICPL “Relevant bodies and organizations prescribed by the law may bring a suit to the people’s court against such acts as environmental pollution, harm of the consumer’s legitimate interests and rights and other acts that undermine the social and public interest.”¹⁰⁷

For the environmental public interest litigation, only the intermediate court has the competence to hear the claim.¹⁰⁸ If it is about water price, the CCA

¹⁰⁴ Zhou Xiaoyan, *Unclean Water Flushes Reputation*, BEIJING REV. (Apr. 28, 2014), http://www.bjreview.com.cn/business/txt/2014-04/28/content_615669.htm.

¹⁰⁵ Bloomberg News, *CNPC Blamed for Contaminating China City’s Water*, *Xinhua Says*, BLOOMBERG (April 12, 2014), <https://www.bloomberg.com/news/articles/2014-04-12/china-city-says-water-safe-to-drink-after-benzene-contamination>.

¹⁰⁶ *Id.*

Ever since July 2007, when Veolia’s joint venture in Qingdao was accused of transferring wastewater to drinking water, the company was allegedly responsible for 13 water supply or wastewater disposal incidents, including five in Shanghai, two in Beijing, two in Qingdao, one in Zhuhai of Guangdong, one in Haikou of Hainan Province, one in Urumqi of Xinjiang Uygur Autonomous Region and one in Lanzhou.

Id.

¹⁰⁷ (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by the standing Committee of the National People’s Congress, Aug. 31, 2012, effective Jan 01, 2013).

¹⁰⁸ Zuìgāo Rénmín Fǎyuàn Guānyú Shěnlǐ Huánjìng Mínhì Gōngyì Sùsòng Ànjiàn Shìyòng Fǎlǜ Ruògān Wèntí De Jiěshì (最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释) [The Supreme People’s Court Interpretation on Several Issues Regarding the Application of Law in Environmental Civil Public Interest Litigation] (promulgated by Adjudication Committee of the Sup. People’s Ct., Dec. 8, 2014, effective Jan. 7, 2015). Art. 6 reads:

An environmental civil public interest litigation shall be under the jurisdiction of the people’s court at or above the intermediate level at the place where the conduct that pollutes the environment and damages the

falls in the scope of plaintiff. Apart from the lack of comparative analysis for possible judicial remedies for water consumers, the common point which is absent under both mechanisms is the rejection of a counterclaim. However, a counterclaim is generally accepted under U.S. public interest litigation to prevent environmental malicious litigation.¹⁰⁹ It is possible to envisage that public interest litigation can act as a shield for malicious litigation.¹¹⁰

B. *International Perspective*

Under the water concession contracts, water tariffs, investors' commitments responsibilities, and returns are regulated in detail. There is no specific international regime for regulating the investment in water and sanitation services.¹¹¹ For investors, their investments are protected both under the contract and the Bilateral Investment Treaty (BIT).¹¹² Under certain circumstances, when the investor's investment is adversely affected by the government, the breach of the contract can be escalated to the level of a breach of the treaty based on the respective BIT.¹¹³ Water-related investment disputes have demonstrated this problem in a number of jurisdictions, and countries are facing a common dilemma of water liberalization and state's sovereignty.¹¹⁴ As

ecology takes place, the place where the damage occurs or the place of domicile of the defendant as the court of first instance.

Id.

¹⁰⁹ MARY CLIFFORD, ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY, AND SOCIAL RESPONSIBILITY 210 (1998).

¹¹⁰ RACHEL E. STERN, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE 220 (2013).

¹¹¹ See generally Julien Chaisse & Chistian Bellak, *Navigating the Expanding Universe of International Treaties and Foreign Investment—Creation and Use of Critical Index*, 18 J. INT'L ECON. L. 79 (2015) (explaining the lack of a general theory to analyze the expanding patchwork of international foreign investment).

¹¹² For a critical account of the investment arbitration regime as it stands nowadays, see Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627 (Stephan W. Schill ed., Oxford University Press 2010). See also Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225 (2015); Giorgio Sacerdoti, *BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defense of Necessity*, 28 ICSID REV. 351, 382 (2013); Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause as a Forced Perspective*, 39 AM. J.L. & MED. 332, 358–59 (2013).

¹¹³ Julien Chaisse, *Renewables Re-energized? The Internationalization of Green Energy Investment Rules and Disputes*, 9 J. WORLD ENERGY L. & BUS. 269 (2016) (treaty obligations only apply to “investments” of “investors,” as defined in the treaty).

¹¹⁴ JULIEN CHAISSE, THE REGULATION OF GLOBAL WATER SERVICES MARKET 5 (Julien Chaisse ed., 2017).

of December 2017, sixteen investment disputes related to water and sanitation services have been filed under ICSID rules or United Nations Committee for International Trade Law (“UNCITRAL”) Arbitration Rules.¹¹⁵ One case is still pending,¹¹⁶ four cases are discontinued,¹¹⁷ two cases are settled,¹¹⁸ eight

[T]his is intended to ensure that all players in the market (historical operators, new entrants, consumers, etc.) are not adversely affected by liberalization If it is difficult to offer an authoritative definition of regulation, it is nevertheless possible to agree at least on the objectives assigned to it in the field of water services: these objectives are to take into account the multiplicity of the interests present in the liberalized markets and to ensure that a balance is established between, on the one hand, the economic concerns that govern some of these interests (e.g. those of the historical operator and new entrants) and, on the other hand, the non-economic requirements that already preside over the operation of the former monopoly, and continue to be present after the liberalization phase (and the concern for social justice, which leads to preserving a minimum of services which benefit the entire population, including the disadvantaged social categories).

Id.

¹¹⁵ Note that *AWG Group Ltd. v. The Argentine Republic* was brought under the UNCITRAL Arbitration Rules but was administrated by ICSID together with the case of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (Apr. 9, 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw4365.pdf>.

¹¹⁶ *United Utilities (Tallinn) B.V. and Aktiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24 (Oct. 24, 2014), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f14%2f24#>.

¹¹⁷ *Gelsenwasser AG v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/32 (Feb. 27, 2015), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f12%2f32#>; *Georg Nepolsky v. Czech Republic* (filed under the UNCITRAL Arbitration Rules); *Branimir Mensik v. Slovak Republic*, ICSID Case No. ARB/06/9 (Dec. 9, 2008), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f06%2f9>; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30 (June 18, 2012), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f03%2f30>.

¹¹⁸ *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/18 (Jan. 24, 2007), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f03%2f18>; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 (Mar. 28, 2006), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f02%2f3>.

cases have reached their final awards,¹¹⁹ and one case's outcome from its original proceedings is not available.¹²⁰

The applications and interpretations of the investment treaties and contracts by the investment tribunals have to some extent, shaped the domestic regime. States have perceived that their regulatory measures in the domestic regime may have a cooling effect on the obligations under international investment treaties.¹²¹ For example, in some water disputes,¹²² host states have decided to freeze water tariffs to face the financial crisis and have encouraged the consumers not to pay the water bill, which results in investment disputes based on respective BITs. In those cases, host states have frequently used the

¹¹⁹ *Impregilo S.P.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 Award (June 21, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0418.pdf>; *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26 (Dec. 19, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf>; *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Award (May 24, 2014), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f04%2f4>; *AWG Group Ltd. v. The Argentine Republic*, Award (Apr. 9, 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw4365.pdf>; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010) <https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf>, Award (Apr. 9, 2015); *Azurix Corp.*, ICSID Case No. ARB/01/12; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>.

¹²⁰ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Award (Dec. 4, 2015), <https://www.italaw.com/sites/default/files/case-documents/ita0813.pdf> (the award is just based on the costs, information related to the substantial breaches of the treaties is unavailable).

¹²¹ JONATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES, A LEGAL AND ECONOMIC ANALYSIS 7 (2014); Lorenzo Cotula, *Do Investment Treaties Unduly Constrain Regulatory Space?*, 9 QUESTIONS INT'L L. 19, 20 (2014); J. PEDRO MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA 8-9 (2015); William Schreiber, *Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations*, 48 NAT. RESOURCES J. 431-71 (2008); Howard Mann, *Implications of International Trade and Investment Agreements for Water and Water Services: Some Responses from Other Sources of International Law*, 5 TDM (2006); Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 TRADE, L. & DEV. 19, 19-33 (2010).

¹²² *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, <https://www.italaw.com/cases/1048>; *Impregilo S.P.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, <https://www.italaw.com/cases/554>.

human right to water as a defence to argue the state's regulatory space to protect and promote the right to water.¹²³ For water and sanitation investment disputes, Fair and Equitable Treatment (FET) and expropriation are the main breaches of investment treaties along with full protection and security.¹²⁴

In short, "private investors increasingly perceive the water sector as offering good business opportunities and they seek to secure their capital by investing in water resources when possible."¹²⁵ Therefore, the respective rights claimed by both parties are likely to grow in terms of investment protection and human rights protection.¹²⁶ Besides the human right to water, it is not difficult to envisage that environmental concerns, such as the issues related to the water quality and waste water treatment can also be raised under water related investment disputes. For instance, a host state who is willing to incorporate new or higher standards for compliance with new international environmental agreements in terms of waste water treatment, imposes higher obligations for investors. Or if the host state introduces new drinking water standards that may place excessive burden on the investor. Both measures could have negative effects on the investment and may result in disputes

i. Right to Water and Consumer Protection

General Comment No. 15 of the United Nations Committee on Economic, Social and Cultural Rights (GC 15), provides substantial content for the right

¹²³ In *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, the government of Argentina did not explicitly refer to the human rights as a defence, or use the term 'human right to water', instead it sets out its obligation to safeguard public health and the well-being of the population by referring to access to clean water as 'a fundamental human needs.' However, in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, the tribunal gives further insights and direction to an emerging human rights based analysis to water disputes. Further, the recently decided case, *Urbaser S.A.*, ICSID Case No. ARB/07/26, was the first time the tribunal accepted a human rights counterclaim raised by the host state in the water disputes.

¹²⁴ See Chaisse & Polo, *supra* note 30. See also Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment: How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, 15 J. INT'L ECON. L. 51 (2012).

¹²⁵ Aline Baillat, *International Investment Agreements and Water Resources Management*, in *THE REGULATION OF THE GLOBAL WATER SERVICES MARKET* 91 (J. Chaisse ed., 2017).

¹²⁶ Moshe Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* 323, 324–25 (T. Broude and Y. Shany eds., 2008); Ursula Kriebaum, *Privatizing Human Rights: The Interface Between International Investment Protection and Human Rights*, in *THE LAW OF INTERNATIONAL RELATIONS* 165 (A. Reinisch and U. Kriebaum eds., 2007).

to water.¹²⁷ General comments serve as the non-binding but authoritative interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). According to paragraph 2 of GC 15: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”

Thus, GC 15 coincides with the ICESCR and confirms the existence of an independent right to water, which is implied in Article 11, paragraph 1 (right to an adequate standard of living) and 12, paragraph 2(b) (right to health).¹²⁸ Jorge Viñuales argues that “[a] systematic reading of GC 15 suggests that the position of companies is not one of holders of rights but one of subjects of indirect obligations.”¹²⁹ According to paragraph 23 of GC 15, the obligation to protect requires states to “prevent third parties from interfering in any way with the enjoyment of the right to water”, and includes “adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.”¹³⁰ In line with paragraph 24 “States parties must prevent [third parties] from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.”¹³¹ In these circumstances, states are required to adopt “the necessary and effective legislative and other measures”¹³² needed for the full realization of the right to water.

¹²⁷ Office of the High Comm’r For Human Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), ¶ 23, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment No. 15].

¹²⁸ JORGE VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 165-66 (2012).

[I]n this connection, two main points must be noted. The first is that, despite the relative diversity of angles and scopes of the instruments concerning the right to water, they all share a focus on personal uses of water. The right to water for other uses, either (large-scale) irrigation or industrial processes is not covered by these instruments. The second point is that, within the protected use, GC 15 makes a distinction between ‘core obligations’, with ‘immediate effect’, and other obligations, which can be progressively fulfilled. Taking into account this brief characterisation of the right to water, the potential points of collision with investment disciplines are easily discernible.

Id.

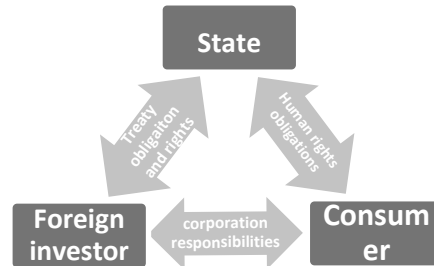
¹²⁹ *Id.* at 166.

¹³⁰ General Comment No. 15, *supra* note 127, at ¶ 23.

¹³¹ *Id.* at ¶ 24 (alteration in original).

¹³² *Id.* at ¶ 23.

Chart 3: THE TRIANGULAR RELATIONSHIP IN THE INTERNATIONAL INVESTMENT LAW CONTEXT



Source: elaboration by the author

The states have the positive obligation of ensuring the right to water and protecting the consumer's interests, which includes ensuring that water is affordable and monitoring the safeness of the water supply. For the investors, their negative obligations indicate they should not engage in any activities that aim at denying or harming the enjoyment of consumer's right to water.¹³³

ii. Consumer Protection Under the Investor-state Arbitration

In *Azurix*, the respondent raised the issue of compatibility with human rights treaties in the submission of amicus curiae.¹³⁴ However, this issue was not fully elaborated as the tribunal found difficulty in understanding why the human rights treaties, and in the current case, the right to water and the investment protection are incompatible.¹³⁵

The Respondent has also raised the issue of the compatibility of the BIT with human rights treaties. The matter has not been

¹³³ Edward Guntrip, *Ubaseer v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EJIL: TALK! (Feb. 10, 2017), <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>.

¹³⁴ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, ¶ 261 (July 14, 2006), <https://www.italaw.com/documents/AzurixAwardJuly2006.pdf>; For the comment on the compatibility issue between investment law and the human right to water see MIHARU HIRANO & SHOTARO HAMAMOTO, CHARTING THE WATER REGULATORY FUTURE, 145-66 (Julien Chaisse ed., 2017)

¹³⁵ *Azurix Corp.*, ICSID Case No. ARB/01/12, ¶ 261.

fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case. The services to consumers continued to be provided without interruption by ABA during five months after the termination notice and through the new provincial utility after the transfer of service.¹³⁶

In *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, *Suez v. Argentina*, the tribunal looked at the consumer protection issue in interpreting the FET standard. It interpreted the obligation as requiring states to protect investors' objective, reasonable, and legitimate expectations, taking into account all relevant circumstances.¹³⁷ In *Compañía De Aguas Del Aconquija S.A. v. Argentine Republic*, the court was considering the investor's contractual rights to decide whether the measures undertaken constituted direct or indirect expropriation of the investor's property rights. The tribunal concluded that even without the deprivation of the ownership rights under the contract, the right to use, enjoy, and benefit from these rights are subject to deprivation.¹³⁸ In this case, the principal right to invoice the consumers and pursue the payment for water and sewage services are provided in accordance with the tariff and terms in the concession contract.¹³⁹

Moreover, there is strong evidence that Argentina might have employed more flexible means that would have protected both its interests and those of the Claimants. For example, if Argentina's concern was to avoid an increase in tariffs during a time of crisis, it might have relieved AASA, at least temporarily, of investment commitments that were placing a crippling burden on the Concession so long as tariffs did not increase. If Argentina's concern was to protect the poor from increased tariffs, it might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor, a solution

¹³⁶ *Id.*

¹³⁷ *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, ¶ 236 (July 30, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf>; see generally Julien Chaisse & Ruby Ng, *The Doctrine of Legitimate Expectations: International Law, Common Law and Lessons for Hong Kong*, 48 *Hong Kong L. J.* 79, 79-104 (2018).

¹³⁸ *Compañía De Aguas Del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, ¶ 7.5.19 (Aug. 20, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>.

¹³⁹ *Id.*

clearly permitted by the regulatory framework. There is evidence that governmental agencies were among the consumers with the largest unpaid invoices owing to AASA.¹⁴⁰

Therefore, the consumer protection issue has been dealt with in the context of *amicus curiae*, and in interpreting the substantial protection for investors. From the consumer protection perspective, the current investor-state arbitration practice is not against consumer protection. The tribunal confirms the positive role of the state in taking measures to implement the right to water and ensures the regulatory space for states to change the regulations in reaction to certain circumstances. However, the tribunal found that the states breached the treaty on the basis of abuse of such power in the name of consumer protection.

IV. CASE ANALYSES: URBASER V. ARGENTINA

The claimant and investor, *Urbaser*, was a shareholder in a concessionaire who provided water and sewerage services for the duration of 30 years in the Province of Buenos Aires, Argentina.¹⁴¹ The concession was granted to the claimant's subsidiary, AGBA.¹⁴² In early 2000, Argentina faced financial crisis and the state took a series of emergency measures.¹⁴³ In the process, the claimant's concession was terminated in 2006 by Buenos Aires due to the termination of the water concession contract and the claimant has been prevented from increasing the tariffs.¹⁴⁴ The claimant suffered severe financial loss that led to its insolvency. After persistent neglect of the claimant's interests, the claimant initiated the proceeding before ICSID and alleged violations of the BIT.¹⁴⁵

A. *Applicable Law*

In general, can the Tribunal consider norms that are beyond the applicable BIT (particularly, human rights instruments), especially in the context of a (responding state's) counterclaim? More specifically, is human rights law applicable to investment disputes? In addition, can Argentina invoke human rights as a reaction to an investor claim? These are the main concerns in deciding whether the tribunal has the jurisdiction and what the applicable laws

¹⁴⁰ Suez, ICSID Case No. ARB/03/19 at ¶ 235.

¹⁴¹ *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, ¶ 53 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

¹⁴² *Urbaser S.A.*, ICSID Case No. ARB/07/26 at ¶ 34.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

are. The *Urbaser v. Argentine Republic* Award found that the ICSID Convention and BIT do not provide for any restriction in respect to the “applicable rules of international law,” which are not circumscribed by the applicable BIT only.¹⁴⁶ The “applicable rules” necessarily include all such rules which according to their self-determined scope of application cover the legal issue arising in the particular case, including peremptory norms of general international law.¹⁴⁷

One of Claimants’ main objections is that Respondent’s Counterclaim has no connection with Claimants’ claims under the BIT. The Tribunal observes that the factual link between the two claims is manifest. Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. This would be sufficient to adopt jurisdiction over the Counterclaim as well. The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only.¹⁴⁸

B. Jurisdiction Issue

Tribunals have jurisdiction over the application and interpretation of the investment treaties due to the parties’ consent to the dispute resolution clauses included in investment treaties. In addition, according to Article 25 of the ICSID convention, the jurisdiction of ICSID relates to “any legal dispute arising directly out of an investment”.¹⁴⁹ There was an issue about whether the tribunal should accept Argentina’s counterclaim. Nevertheless, the tribunal accepted it since consent to arbitration had been implicitly limited to exclude counterclaims. There is a manifest connection between Argentina’s counter-

¹⁴⁶ *Urbaser S.A.*, ICSID Case No. ARB/07/26 at ¶ 1202.

¹⁴⁷ *Id.*

¹⁴⁸ *Urbaser S.A.*, ICSID Case No. ARB/07/26 at ¶ 1151.

¹⁴⁹ Int’l Ctr. for Settlement of Inv. Disputes, *ICSID Convention, Regulations and Rules*, WORLD BANK 18 (Apr. 2006) <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf>.

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Id.

claim and the Claimants' claims, as they were both based on the same investment in relation to the same concession; there is a "legal connection" in the form of the counterclaim not being alleged as a matter of domestic law only.¹⁵⁰ In this regard, human rights concerns and environmental concerns may not fall within the scope of ICSID jurisdiction. As recognized by Peterson and Gray, "[a]rbitral Tribunals in investment disputes will not be able to hear direct claims of violations of human rights. These Tribunals must restrict themselves to considering allegations of violations of the instruments over which they have jurisdiction."¹⁵¹ This tribunal opens the door to greater flexibility. This case is significant as an unusual example of a tribunal's willingness to take account of and apply international legal principles. This tribunal goes beyond the international investment legal principles typically considered by tribunals in this context by accepting state's counterclaim.

C. *Merits on State's Counterclaim*

The tribunal first examined the alleged asymmetric nature of BIT, stating that:

[T]he question is then whether any host State's rights under the BIT shall be denied because of the very nature of BITs deemed to constitute investment law in isolation, fully independent from other sources of international law that might provide for rights the host State would be entitled to invoke and to claim before an international arbitral tribunal.¹⁵²

The tribunal rejected the claimant's statement that investment treaties just serve the purpose of restraining the host states and providing mere protections to investors by a set of rules.¹⁵³ Rather the BIT is not framed in isolation and should be placed in the overall system of international law.¹⁵⁴

[A]rticle 42(1) of the ICSID Convention confirms this understanding. Pursuant to this provision, the Tribunal shall decide a dispute "in accordance with such rules of law as may be agreed by the parties." Article X(5) of the BIT constitutes such

¹⁵⁰ *Urbaser S.A.*, ICSID Case No. ARB/07/26 at ¶ 1153-54.

¹⁵¹ Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 2003), https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf.

¹⁵² *Urbaser S.A.*, ICSID Case No. ARB/07/26.

¹⁵³ *Id.* at ¶ 1201.

¹⁵⁴ *Id.*

an agreement. This rule of the BIT does not contain any exclusion in respect of international law. Therefore, Article X(5) is in harmony with Article 42(1) of the ICSID Convention, stating that in the absence of an agreement on the choice of applicable rules of law, the Tribunal shall apply the law of the host State “and such rules of international law as may be applicable.” The ICSID Convention does not provide for any restriction in respect of these “applicable rules of international law,” which are not circumscribed by the applicable BIT only; they necessarily include all such rules which according to their self-determined scope of application cover the legal issue arising in the particular case.¹⁵⁵

[I]nterpretation must serve the goal of providing provisions with a meaning. As stated in the Decision on Jurisdiction (para. 52), when considering the purpose either of the BIT as a whole or of a particular provision, the Tribunal has to give such purpose an understanding that comports with the equally important principle of effectiveness (or principle of *effet utile*). Any treaty rule is to be interpreted in respect of its purpose as a rule with an effective meaning rather than as a rule having no meaning and effect. This principle is one of the main features of the law of treaties and a standard of continuous application for ICSID Tribunals. It is given effect within Article 31(1) of the Vienna Convention by virtue of the requirement to interpret in good faith. Effectiveness of a treaty rule denotes the need to avoid an interpretation which leads to either an impossibility or absurdity or empties the provision of any legal effect.¹⁵⁶

The tribunal then relied on a range of human rights instruments and corporate social responsibility principles (such as the Universal Declaration of Human Rights, the UN Guiding Principles on Business and Human Rights and UN General Assembly resolutions)¹⁵⁷ to explain the role of human rights in the BIT.

[T]he Tribunal further retains that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of May 23, 1969, and that Article 31 § 3 (c) of that Treaty indicates that account is to be

¹⁵⁵ *Id.* at ¶ 1202.

¹⁵⁶ *Id.* at 1190.

¹⁵⁷ *Id.* at 1198-99, 1201-02.

taken of “any relevant rules of international law applicable in the relations between the parties.” The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT’s special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.¹⁵⁸

[I]t is not disputed that the human right to water and sanitation is recognized today as part of human rights and that this right has as its corresponding obligation the duty of States to provide all persons living under their jurisdiction with safe and clean drinking water and sewage services. For Claimants, this is accepted but this is also the end of the matter. For Respondent, the same human right is incumbent upon any private party in charge with providing for drinking water and sewage services as this was AGBA’s and therefore its shareholders’ obligation under the Concession.”¹⁵⁹

[H]owever, this does not answer the question whether Claimants’ as investors were bound by an obligation based on international law to provide the population living on the territory of the Concession with drinking water and sanitation services... Respondent does not state that such obligation is based on international law... Respondent also states that Claimants had violated human rights obligations clearly applicable to international companies.¹⁶⁰ This argument does not reference any particular international law obligation but relies only on AGBA’s obligations based on the Concession Contract.¹⁶¹

The tribunal further explained that the human right to water is a state obligation under international law and that states should take all necessary measures to implement this obligation.¹⁶² The investors’ obligations under the human right to water are, in this instant case arising out of the concession

¹⁵⁸ *Id.* at 1200.

¹⁵⁹ *Id.* at 1205.

¹⁶⁰ *Id.* at 1206.

¹⁶¹ *Id.* at 1206.

¹⁶² *Id.* at 1212.

contract instead of international law, as no such obligations existed before they entered the BIT.¹⁶³

[R]espondent does not explain the basis of such obligations under international law other than by emphasizing Claimants' duty to ensure AGBA's performance in providing water and sewage services as if such duty were based on the human right to water and thus on international law. This is incorrect. The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services."¹⁶⁴

This obligation, as all others retained in the Covenant referred to above, "imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible."¹⁶⁵ This includes establishing "accountability mechanisms to ensure the implementation of the strategy."¹⁶⁶ The necessary step is therefore that a host State, accepting investments in the domain of the provision of water, relies on the BIT to have the investor participating to its obligation under international law. It thus complies with the conclusion of the UN Committee on Economic, Social and Cultural Rights that "States parties should ensure that the right to water is given due attention in international agreements."¹⁶⁷ This includes the possibility to consider matters related to the human right to water in the dispute resolution mechanisms provided for in such agreements.¹⁶⁸ However, the investor's obligation is to ensure the population's access to water is not based on international law. This obligation is framed by the legal and regulatory environment under which the investor is

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1208.

¹⁶⁵ Office of the High Comm'r for Human Rights, The Right to Water, U.N. Doc. E/C.12/2002/11, ¶ 45 (2003).

¹⁶⁶ *Id.* at ¶ 47.

¹⁶⁷ *Id.* at ¶ 35.

¹⁶⁸ *Id.* at ¶ 58 (noting that "Judges, adjudicators and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to water in the exercise of their functions.").

admitted to operate on the basis of the BIT and the host State's laws.¹⁶⁹

The tribunal failed the counterclaim on its merits, in the instant case. The investor's obligations had their source in domestic law, and the tribunal did not find it grounded in international law. However, the tribunal did provide some guidance in discussing the obligation to abstain.¹⁷⁰

[I]ndeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law. The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case.¹⁷¹

In addition, the situation would be different if the investors' activities were aimed at destroying the enjoyment of citizens' human right to water. Under this situation, the investor has the negative obligation as opposed to the positive obligations of the host state.

[A]t this juncture, it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, mandating public and private parties, not to engage in activity aimed at destroying such rights.¹⁷²

¹⁶⁹ *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, ¶ 53 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

¹⁷⁰ *Id.* at 132 (supplying further comments on the counterclaim); Caroline Richard & Elliot Luke, *Human Rights in International Investment Law: Where to After Urbaser?*, FRESHFIELD BRUCKHAUS DERINGER (Dec. 21, 2017), <http://humanrights.freshfields.com/post/102enaj/human-rights-in-international-investment-law-where-to-after-urbaser> (discussing the future of the field).

¹⁷¹ *Urbaser S.A.*, ICSID Case No. ARB/07/26 at ¶ 1210.

¹⁷² *Id.* at 1199.

V. CONCLUSION

This Article is based on a review of China's domestic regulations and international regulations on the right to water in the context of investor-state arbitral decisions. Under the domestic regime, the regulations for the water and sanitation services remain ambiguous. It might cause a problem for international companies who traditionally rely on a clear and legal process to evaluate the major financial risks and who are less worried about the complex relationship with the local government. The contractual process is implemented by different levels of government, according to a variety of laws, regulations and policies. Sometimes, their duties are overlapping and sometimes there are gaps in the water management process. It is not always clear who is responsible for enforcing the laws and regulations regarding water pollution. The department of water resources, the department of agriculture, the department of housing and urban-rural development all have a role to play. For access to justice, the practical role of CCA in the water consumer related public interest litigation is promising and challenging at the same time. The different means to initiate the claims, either through consumer related public interest litigation or environmental public interest litigation, might affect the final outcomes.

At the international level, this Article draws on the recent ICSID arbitral award in *Urbaser v. Argentine Republic*, to demonstrate two important findings for contemporary consumer policy. First, water privatization is not contradictory to consumers' interests. Second, water services privatization is not against consumers' or people's human right to water if the "ability to pay" and "reasonable recovery of cost" can be pursued at the same time. The recent *Urbaser v. Argentine Republic* award contributes to the strengthening of consumer protection at least in the expanding sector of water services. This decision is significant for two reasons. For the first time, an arbitral tribunal recognized the human right to water as a valid counterclaim. Second, to some extent the award indicates the host's efforts in regulating the non-economic issues, such as human rights in investment treaties. This development may also reflect on the new negotiations for investment treaties.

If one makes the analogy or comparison between the role of CCA and environmental NGOs in public interest litigation and the role of the host state in the investor-state arbitration, the *Urbaser* case adds another layer of protection for consumers. Considering China's domestic regime, the submission of a counterclaim is not allowed in consumer's public interest litigation. This 'precedent' will allow tribunals to balance public concerns against investor protection by examining the non-economic aspects of water services including consumer rights. Therefore, investor-state disputes in the water services economic sector may open the way for tribunals to protect the right to other public utilities like energy. This will in turn provide an impetus for examining

international investment law and arbitration as an expanding dimension of transnational consumer protection.