

*The Linkage between International Economic Law  
and  
Access to Water and Water Scarcity*

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through a project of the Spanish Ministry of Science and Education (n° SEJ2005-06113).  
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Paper prepared for the workshop entitled 'Legal Aspects of Water Sector Reforms'  
to be organised in Geneva from 20 to 21 April 2007 by the International  
Environmental Law Research Centre (IELRC) in the context of the  
Research partnership 2006-2009 on water law sponsored by the  
Swiss National Science Foundation (SNF)

## **Abstract**

This paper aims to examine the relationship between international economic law and water-related issues. In particular, it analyses the impact of international investment law and international trade law on, respectively, State's capacity in ensuring universal access to water services and fighting against water scarcity. The main objective of the paper is to define State's rights in relation to water supply and how these rights can be protected and enforced within the international investment and/or trade regime. First, the analysis focuses on certain features of the investment system that may affect the balance between State's right to regulate for strengthening access to water and foreign investments' protection. The dispute settlement mechanism, which allows private investors to challenge regulatory measures directly before an international arbitral tribunal, and the uncertain definition of basic substantive provisions are the elements considered in this regard. The second part of the paper examines whether and how the international trade regime based on the World Trade Organization may deal with water transfers. In particular, the goal is to assess the relationship between water exporting and water importing countries, which are not always balanced should a strict interpretation of WTO norms and exceptions be adopted. The paper concludes that the application of international economic rules to water-related issues requires the development of a flexible approach to strike a fair balance between the economic interests and the fundamental social needs at stake in this field.

## **Keywords**

International law, trade law, investment law, access to water, water scarcity.

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## 1. INTRODUCTION

Water cannot be replaced and water is crucial for human and animal life on the earth. These two simple statements clearly highlight the importance of water for the international community and its unique *nature* among other natural resources. The fact that more than a billion people lack adequate *access to water* should give a picture of the gravity of the problem we are facing.<sup>1</sup> Furthermore, while the total quantity of water is not expected to change significantly over the next years, the amount of clean fresh

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<sup>1</sup> World Health Organisation, *The Right to Water*, Health and Human Rights Publications Series no. 3, (2003), p. 12; available at [http://www.who.int/water\\_sanitation\\_health/rightowater/en/](http://www.who.int/water_sanitation_health/rightowater/en/); see also the recent 2<sup>nd</sup> UN World Water Development Report (WWDR): *Water, a shared responsibility*, Chapter 4 (Paris: UNESCO, 2006); available at <http://unesdoc.unesco.org/images/0014/001454/145405E.pdf>.

water will not be as abundant as it used to be.<sup>2</sup> This, linked with the tremendous increase in the world population, is likely to cause serious *water scarcity* problems,<sup>3</sup> further exacerbated by current climate change trends that are leading to severe droughts and reduced rainfall worldwide.<sup>4</sup> Water is thus leading to a new geopolitical classification of countries, which can be divided into water scarce, water stressed and water abundant countries.<sup>5</sup>

Against this background the paper begins by studying how water can be brought there where it is lacking (2.). Two options will be discussed: access to water can be enhanced through foreign direct investments (2.1.) and water scarcity can be dealt with through international trade (2.2.).<sup>6</sup> Then, the analysis moves to consider what happens when access to water is hampered either by the behaviour of the foreign investor, or because the flow of water has been interrupted. What can the country that suffers water shortage do? Does it enjoy any right? And can it enforce these rights? The paper explores this issue under both the international investment regime (3.) and the international trade regime (4.). In conclusion, this paper deals with the relationship between access to water and water scarcity, on the one hand, and international economic law regimes, on the other. The main objective of the paper is to define States' rights in relation to water supply, and how these rights can be protected and enforced within the international investment and/or trade regime.

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<sup>2</sup> See Paul J.I.M. de Waart, 'Securing Access to Safe Drinking Water through Trade and International Migration' in Edward H.P. Brans et al. *The Scarcity of Water: Emerging Legal and Policy Responses* 101 (London - The Hague - Boston: Kluwer Law International, 1997).

<sup>3</sup> Water scarcity is already a reality, but it will become a major global problem in the near future. By 2025 48% of the projected population will suffer from serious water shortages and by the same year more than thirty countries will have to deal with severe water scarcity problems. See CIEL, 'Going with the Flow: How International Trade, Finance and Investment Regimes Affect the Provision of Water to the Poor', July 2003, available at [http://www.ciel.org/Publications/Waterbrief\\_3Sept03.pdf](http://www.ciel.org/Publications/Waterbrief_3Sept03.pdf) and Katsumi Matsuoka, 'Tradable Water in GATT/WTO Law: Need for New Legal Frameworks?' 1, paper presented at the August 6-8 AWRA/IWLRI - University of Dundee International Specialty Conference 2001, available at <http://www.awra.org/proceedings/dundee01/>.

<sup>4</sup> See IPCC, *Third Assessment Report, Climate Change 2001: Impacts, Adaptation and Vulnerability*, Ch. 4.3.2 Precipitation, 2001, available at [http://www.grida.no/climate/ipcc\\_tar/](http://www.grida.no/climate/ipcc_tar/); see also 2<sup>nd</sup> UN WWDR 18, note 1 above.

<sup>5</sup> In 1990 5 billion people were living in water abundant countries and only 0,5 where water scarcity or water stress was present. If the world population continues to grow at current standards, the projections are that in 2050 more than 7.9 billion people will be living in countries suffering water scarcity. The future water geopolitical scenario clearly outlines the possibility of tensions between countries rich in water and those who do not have enough water. This data is taken from de Waart, note 2 above, 101.

<sup>6</sup> In our paper we are approaching the access to water and water scarcity problems by taking into account those options whose goal is to bring drinking water to the people. There is a third possible position, which focuses on bringing the people to the drinking water. This option has been explored by de Waart, note 2 above, 109-114.

## **2. HOW TO COPE WITH ACCESS TO WATER & WATER SCARCITY?**

If access to water and water scarcity cannot be solved domestically, two international options may be pursued. On the one hand, foreign investments can foster domestic capacities through transfer of technology and improved management of water resources. The question here is to analyze how privatization of water services is being dealt with in the international investment protection system. However, if the country lacks water resources, or if these have been hindered by serious environmental problems, then another option must be found. Water must be brought to the country and this can be done through international trade. These two ways to cope with access to water related problems and water scarcity will be dealt with in the following sections.

### **2.1 Coping with Access to Water through Foreign Direct Investment**

For years, privatization<sup>7</sup> of water services and infrastructures has been advocated as the main, and sometimes the only, viable solution for the failures of public authorities in ensuring universal access to water services. Results have not always lived up to these expectations,<sup>8</sup> with limited improvements in terms of both infrastructures and access.<sup>9</sup> In certain cases these two targets were even found to contradict each other. In Buenos Aires, for instance, post-privatization connection fees remained high, and in fact unaffordable to poor households, because of the “infrastructure charge” that was added to finance the expansion of secondary water distribution and sewer networks.

Private investments in water utilities pose unique challenges for both the State and the investor, as water is not a normal commodity, its value going well beyond the economic dimension. Access to an adequate amount of drinking water is crucial to maintain basic health and the fulfilment of other rights, while urban water, drainage and sanitation provide important public benefits, such as protection from infectious diseases, and they

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<sup>7</sup> The term is used to refer to a wide array of different phenomena. In this paper, it will indicate processes that increase the participation of formal private enterprises in water and sanitation provision but do not necessarily involve the transfer of assets to the private operator.

<sup>8</sup> Today some 1.1 billion people in developing countries have inadequate access to water and 2.6 lack basic sanitation. For further data see *Beyond Water Scarcity: Power, Poverty and the Global Water Crisis*, Human Development Report 2006 (Geneva: UNDP, 2006), chapter 1.

<sup>9</sup> Naren Prasad, ‘Privatisation Results: Private Sector Participation in Water Services After 15 Years’, 24 *Development Policy Review* 669 (2006).

are widely considered as impure public goods.<sup>10</sup> States have thus the duty,<sup>11</sup> and not just the right, to adopt all the necessary measures to prevent the privatization process from restricting access to water services. Public infrastructure investments entail high risks also for private investors. These projects are characterized by massive sunk costs that require long amortization periods, thus making private operators particularly vulnerable to eventual changes of attitude by host governments.<sup>12</sup>

States and foreign investors seek to prevent reduction in social welfare as well as to guarantee a sufficient return for the investment by agreeing terms and conditions under which the service has to be provided. Although very detailed, these legal devices are often inadequate to solve the political problems arising between the parties. The case of tariffs represents an outstanding example in this regard, as their regime is normally regulated by complex contractual arrangements that seek to ensure both the affordability of the service and the profitability of the investment. This notwithstanding, the item represents by far the main cause for conflict in water privatization projects. The reason is that a short-term consequence of the privatization process is an increase in water rates if compared with those charged under public management. This dynamics usually fuel angry reactions by the population, which, in turn, put further pressure on the relationship between the investor and the State. Under these conditions, contract's renegotiation is often beyond reach, as the private party refuses to yield the favourable conditions contained in the original terms of the agreement, while host governments cannot soften their negotiating stance for fear of losing political support.<sup>13</sup> Considering such a troublesome context, it is hardly surprising that several water related projects have recently ended in failure.<sup>14</sup>

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<sup>10</sup> UN ECOSOC, *General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Culture Rights)*, United Nations Committee on Economic, Social, and Cultural Rights, 29th Sess., 27 UN Doc. E/C.12/2002/11 (2002), § 1-6. *Impure public goods* are goods that provide important public benefits but, unlike public goods, they are either rival or exclusive in consumption.

<sup>11</sup> Although far from settled, there is a growing consensus in the international community that access to water can be considered as a human right, see, *inter alios*, Pierre-Marie Dupuy, 'Le droit à l'eau, un droit international?', (Florence: EUI Working Paper no. 2006/06, 2006).

<sup>12</sup> Thomas Wälde and Stephen Dow, 'Treaties and Regulatory Risk in Infrastructure Investment. The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment', 34 *Journ. World Trade* 1, 1 (2000).

<sup>13</sup> These dynamics are often explained by referring to the *obsolescing bargain* model. On this point see Eric J. Woodhouse, 'The "Guerra del Agua" and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure', 39 *Stanford J. Int'l L.* 295, 297-299 (2003).

<sup>14</sup> For further information, documents and awards on concluded and ongoing water disputes are available at the ICSID website: <http://www.worldbank.org/icsid/cases/cases.htm>.

## **2.2 Coping with Water Scarcity through Trade**

Water export is rising and “bulk transfers of water occur between different kinds of actors and in different modes”.<sup>15</sup> Almost any kind of water export has been foreseen, from private companies shipping water by tankers from one continent to the other,<sup>16</sup> to iceberg trading.<sup>17</sup>

Now, two questions must be posed: is water a tradable good, thus falling under the realm of the WTO legal regime? And, are all water related international transfers covered by the multilateral trading system?

Without going into the discussion of water as a the common heritage of mankind,<sup>18</sup> as a human right,<sup>19</sup> or as an instrumental right for the fulfilment of other human rights, such as the right to life, one cannot deny that water in itself cannot be considered like any other product. Water is essential for life; while other goods are not.<sup>20</sup>

What does the multilateral trading system have to say about water? The WTO deals with trade in goods through the General Agreement on Tariffs and Trade (GATT), but the latter does not include any definition of what a good is. The presence of water in the World Customs Union’s Harmonizing Commodity Description and Coding System, which is used in the GATT for classification purposes, has been seen by some authors as a first element in favour of considering water as a good under trade law.<sup>21</sup> However,

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<sup>15</sup> Edith Brown Weiss, ‘Water Transfers and International Trade’, in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder eds., *Fresh Water and International Economic Law* 61-89 (Oxford: Oxford University Press, 2006). The author highlights government-to-government transfers by treaty (Lesotho – South Africa), government-to-government contractual transfers (Turkey – Israel), transfers between government and foreign private party (Bolivia), and transfers between private parties in different countries (Canada – US).

<sup>16</sup> See Edith Brown Weiss, note 15 above, 76.

<sup>17</sup> Antoinette Hilderling, *International Law, Sustainable Development and Water Management* 111 (Delft: Eburon Academic Publishers, 2004)..

<sup>18</sup> Dannielle Morely ed., *NGOs and Water – Perspectives on Freshwater, Issues and Recommendations of NGOs* 1 (London: United Nations Environmental and Development Forum, 2000).

<sup>19</sup> Recently on the topic Salman M.A. Salman, *The Human Right to Water: Legal and Policy Dimensions* (Washington: World Bank, 2004), Enrico Fantini, ‘The Human Rights to Water: Recent Positive Steps and the Way Ahead’, *2 Pace Diritti Umani* 123 (2005), and Stephen C. MacCaffrey, ‘The Human Right to Water’, in Brown Weiss, Boisson de Chazournes and Bernasconi-Osterwalder eds., note 15 above, 93.

<sup>20</sup> Some authors stress that water is like oil, see William M. Turner, *The Commoditization and Marketing of Water* 3, paper presented at the Annual Meeting of the Council of Candians Vancouver, Canada, July 5 - 8, 2001, available at <http://www.waterbank.com/Newsletters/nws35.html> , but then it is self-evident that human and animal life can continue without it. Oil is a fungible resource natural that can, and should be replaced in modern economies.

<sup>21</sup> See *World Customs Organization, Harmonized Commodity Description and Coding System: Explanatory Notes*, 186 (3<sup>rd</sup> ed, 2002) Heading 22.01: “waters, including natural or artificial mineral and aerated waters, not containing added sugar or other sweetening matter not flavoured; ice and snow.” Headings 20.02, 20.9 cover other kinds of waters and Heading 25.01 covers “sea water”.

the latter just tells us where water would be classified, should it be considered a good,<sup>22</sup> but it does not convert its content into a good.<sup>23</sup> Furthermore, in the WTO there is no tariff binding on water and other regional trade agreements go as far as to exclude water in its natural state from their scope of application.<sup>24</sup>

This last consideration deserves further attention. It seems to imply that water can take different forms and it may well be that these deserve different legal treatment.

Our position is that there are two main kinds of water transfers can be identified, each of those calling for different treatment under international trade law. The first kind of water transfers takes place through the diversion of the river flow from one country to another. In these cases two arguments play against any application of trade law regulations: the water has not been captured, it is still in its natural state and, therefore, it is not apt for commerce.<sup>25</sup> Furthermore, such water transfers are normally regulated by bilateral international treaties, which are the only instruments that should deal with any issue arising from the use of the water in the river.<sup>26</sup>

The second kind of water transfers includes bulk water transfers through complex systems of dams and pipelines (Lesotho-South Africa treaty) or via tankers bringing water to the thirsty country (Turkey-Israel agreement). With regard to these commercial transactions, international trade law can only play a subsidiary role. We agree with E. Brown Weiss' conclusion that "the precautionary approach in international law as developed and applied to fresh water makes it important to exclude them [bulk water transfers] from the reach of trade law, at least for now until more experience is gained with them."<sup>27</sup> However, trade law may step in if the export of water does not fall under a bilateral international treaty or contracts. In this case, the WTO Dispute Settlement

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<sup>22</sup> Steven Shrybman, *Water Export Controls and Canadian International Trade Obligations* 3, Legal Opinion Commissioned by the Council of the Canadians, 1999, available at [http://www.canadians.org/water/publications/Trade\\_Shrybman.html](http://www.canadians.org/water/publications/Trade_Shrybman.html); and Matsuoka, note 3 above, 2-3.

<sup>23</sup> See on this point Brown Weiss, note 15 above, footnote 30

<sup>24</sup> 1993 Statement by the Governments of Canada, Mexico and the United States: "Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement." This statement does not appear to have a formal name or number.

<sup>25</sup> We agree on this point with Matsuoka, note 3 above, 3.

<sup>26</sup> See Brown Weiss, note 15 above, 70.

<sup>27</sup> See Brown Weiss, note 15 above, 67.

Body (DSB) should take into account the particular nature of the good that is being traded, water.<sup>28</sup>

### **3. ACCESS TO WATER AND INVESTMENT LAW**

#### **3.1 The international protection system and State's right to regulate: overview of some key issues**

The international legal framework for the protection of foreign investments currently consists of more than 2500 bilateral treaties, few multilateral treaties with regional or sector-specific coverage, some recent free trade agreements with investment protection provisions,<sup>29</sup> but no multilateral treaties having universal scope. Notwithstanding such a scattered background, there is an undeniable convergence between all these instruments, so that it is possible to speak about an international system for the protection of foreign investments.<sup>30</sup> BITs, regional agreements and FTAs are indeed commonly concluded on the basis of “model agreements” elaborated by both OECD and emerging countries<sup>31</sup>

A key feature in this regard is the overall objective of the system that is enhancing the stability of the legal framework to better protect foreign investments.<sup>32</sup> This investor-friendly purpose sets the tone of the whole protection system, as it informs the interpretation of treaty clauses,<sup>33</sup> which, when in doubt, “should be interpreted *in favorem* investors”.<sup>34</sup> Arbitrators follow the rule by adopting expansive readings of some key provisions,<sup>35</sup> downplaying the negative effects of such interpretations on

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<sup>28</sup> Furthermore, once the water has entered into the importing country, the access to the water by its population may fall under the realm of the GATS. This is a very important point, but it falls out of the scope of this article. For more information see Francesco Costamagna, ‘L’impatto del GATS sull’autonomia regolamentare degli stati membri nei servizi idrici ed energetici’, 19 *Diritto del commercio internazionale* 501 (2005).

<sup>29</sup> See the UNCTAD Database available at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx).

<sup>30</sup> Convergence of substantive provisions is not the only relevant element to this regard. Investor-State arbitration is another pillar of the system.

<sup>31</sup> On the approaches taken by these different groups of States see Konrad Von Moltke, ‘An International Investment Regime? Issues of Sustainability’, *IISD Paper* 16 (2000).

<sup>32</sup> Rudolph Dolzer, ‘The Impact of International Investment Treaties on Domestic Administrative Law’, 27 *NY Univ. Journal of Int’l Law & Pol.* 953, 953 (2005) and Thomas Wälde and Abba Kolo, ‘Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law’, 50 *Int’l & Comp. Law Quarterly* 811, 825 (October 2001).

<sup>33</sup> Art. 31 of the Convention on the Law of Treaties, Vienna, 23 May 1969, 1155, UNTS 331, 340

<sup>34</sup> Rudolph Dolzer, ‘Indirect Expropriations: New Developments?’, 11 *NY Univ. Env. L. J.* 64, 73 (2003)

<sup>35</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No ARB/01/8, Final Award of 12 May 2005, 44 ILM 1205 (2005), § 274.

States' regulatory autonomy or other competing interests.<sup>36</sup> This could deter States, especially less powerful ones, from adopting regulatory measures for fear of violating treaty clauses and being, thus, obliged to pay compensation for that. According to this view, the system has the potential to freeze States' willingness to intervene, despite compelling welfare objectives would require them to do so. Conversely, other scholars<sup>37</sup> categorically reject the chilling effect hypothesis, on the basis that international agreements are flexible enough to leave national public authorities free to choose their course of action.<sup>38</sup>

The need to strike a balance between legislative stability and protection of the right of access to privatized water services calls for careful consideration of two elements that may impinge on State's regulatory autonomy: the dispute settlement mechanism and the uncertain definition of basic substantive provisions.

### **3.2 Access to water and public interest concerns in investor-State arbitration**

Most investment treaties provide foreign investors with a unique mechanism for dispute resolution, allowing them to challenge State's regulatory measures directly in front of an international arbitral tribunal.<sup>39</sup> The mechanism departs from traditional international law principles, which did not give individuals a direct cause of action against a State for violations of international law that affected their rights.

Granting direct standing to private investors greatly enhances the effectiveness of the system in promoting the stability of the investment environment. Investment arbitration is meant to bring both parties on a level playing field, providing private investors with

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<sup>36</sup> Stuart G. Gross, 'Note, Inordinate Chill: Bits, Non-NAFTA MITS, and Host-State Regulatory Freedom—An Indonesian Case Study', 24 *Mich. J. Int'l L.* 893, 899 (2003) and Howard Mann, 'Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights, *IISD Paper* (2001).

<sup>37</sup> Joe J. Coe and Noah Rubins, 'Regulatory Expropriation and the *Tecmed* case: Context and Contributions, in Todd G. Weiler ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 599 (London: Cameron May, 2005).

<sup>38</sup> Jan Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?', in 3 *Trans. Dispute Management* 1, 12 (April 2006).

<sup>39</sup> The most relevant one is that administered by the International Centre for the Settlement of Investment Disputes, established by the *Convention on the Settlement of Investment Disputes between States and nationals of Other States*, Washington, 18 March 1965, 575 UNTS 159; 4 Int'l Leg. Mat. 532 (1965).

an effective mean to balance State's sovereign powers<sup>40</sup>. Several of its procedural features are drawn from the commercial arbitration model, but it is debatable whether such a transplant is suitable in the context of non-commercial disputes that entail significant public policy considerations.<sup>41</sup>

The first aspect to be considered is the authorization of individual claims. This allows the private investor to bypass allegedly partisan domestic courts<sup>42</sup> and to avoid his litigation being restrained by foreign relations considerations.<sup>43</sup> Consequently, the mechanism increases investors' bargaining power<sup>44</sup> and it is sometimes used by private parties to put pressure on host governments.<sup>45</sup> In *Azurix*, a case concerning the privatization of the Buenos Aires Province's water distribution system, the US water firm threatened to resort to the mechanism when discussions to find a new agreement with Argentina were still underway, just to gain a leverage in the negotiations.<sup>46</sup>

The deterrent effect of the threat is strengthened by the use by international arbitrators of damages as main form of remedy. The feature may possibly deter States, especially poorest ones, from adopting regulatory measures that could negatively affect the investment, for fear of being forced to pay compensation. This is particularly the case for disputes concerning privatized water services, because of the large amounts of money involved. Suffice to say that in the *Azurix* case the US water firm sought US\$ 600 million in compensation and the Tribunal awarded it US\$ 165 million, although it rejected most of the investor's claims. In another pending case, concerning the distribution of potable water in the city of Dar es Salaam,<sup>47</sup> *Biwater Gauff Ltd.* has claimed that Tanzania's termination of the contract caused losses in the region of US\$ 20 to 25 million.

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<sup>40</sup> Nathalie Bernasconi-Osterwalder, 'Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field? The Lauder/Czech Republic Legacy', in 6 *Journ. World Investm. & Trade*, 69, 69-71 (2005).

<sup>41</sup> Guus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 *Europ. J. Int'l L.* 121, 121-150 (2006) and Howard Mann and Konrad Von Moltke, 'NAFTA's Chapter 11 and the Environment', *IISD Paper* 5 (1999).

<sup>42</sup> Giorgio Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection', 269 *RdC* 251, 413-414 (1997)

<sup>43</sup> Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', 73 *Fordham J. Int'l L.* 1521, 1538 (2005).

<sup>44</sup> Charles H., Brower II, 'Investor-State Disputes Under NAFTA: The Empire Strikes Back', 40 *Columbia J. Transn. L.* 43, 73 (2001).

<sup>45</sup> Thomas Wälde, 'Law, Contract and Reputation in International Business: What Works?', 3 *CEPMLP Internet Journal* (1998) observes that "[t]he impact of the arbitration clause is.. less in its actual use, as its implicit threat to both parties".

<sup>46</sup> *Azurix Corp. v. The Argentine Republic*, ICSID CASE No. ARB/01/12, Award of July 14, 2006. It represents the only dispute related to privatized water services that has been decided on the merit so far.

<sup>47</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

Privacy and confidentiality of the process are other features that, although legitimate in a purely commercial context, seem much less acceptable when matters of basic public interest are at stake.<sup>48</sup> The need to find a new balance between the integrity of the arbitral process and the protection of the public interest<sup>49</sup> has emerged in two ongoing cases arising out of disputed water privatizations.

In the *Aguas Argentinas* case,<sup>50</sup> a dispute arising from the privatization of the water distribution and sewerage system of the city of Buenos Aires, the ICSID arbitral panel held that it has the power to entertain participation of non-disputant parties as *amici curiae* because of ‘the particular public interest’ of a dispute that can potentially affect the operation of systems ‘provid[ing] basic public services to millions of people’.<sup>51</sup> Some months later, in the *Biwater Gauff* case, the water firm asked the tribunal to forbid Tanzania from disclosing documents related to the dispute. Although conceding the ‘need for greater transparency in this field’,<sup>52</sup> the panel held that controls and restrictions on the disclosure of documents are warranted to protect the integrity of the procedure and avoid the aggravation the dispute. Unlike in the *Aguas Argentinas* case, the eminent public character of the interests at stake was not deemed strong enough for displacing the traditional secretive character of arbitration proceedings. The conclusion is far from convincing, as any decision affecting the water distribution system of a large metropolitan area, such as that of Dar es Salaam, is a matter that cannot be discussed behind closed doors, but calls for a high degree of transparency and accountability.

### **3.3 Access to water and the uncertain definition of key substantive provisions**

Uncertainty regarding key investment protection provisions is another element that may undermine States’ capacity to ensure universal access to privatized water services.

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<sup>48</sup> Loukas A. Mistelis, ‘Confidentiality and Third Party participation. *UPS v. Canada* and *Methanex Corp. v. United States*’, in Todd G. Weiler ed., *Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* 169-199 (Ardsley: Transnational Publishers, 2004).

<sup>49</sup> Jeffery Atik, ‘Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process’, in Weiler ed., note 46 above, 140.

<sup>50</sup> *Aguas Argentinas, S.A., Suez, Sociedad General de Agua de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, Order in response to a petition for transparency and participation as *amicus curiae* of 19 May 2005.

<sup>51</sup> *Aguas Argentinas*, note 50 above, § 19.

<sup>52</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural order n. 3 of 19 September 2006, § 133.

Unclear rules ‘obscure the boundaries of appropriate conduct’<sup>53</sup> and, according to someone, unduly restrict States’ sovereignty.<sup>54</sup> Two concepts are particularly controversial in this regard: the notion of regulatory expropriation and the fair and equitable treatment standard.

### 3.3.1. Regulatory expropriation

Regulatory expropriation is a form of indirect expropriation, taking place when a State’s regulatory action infringes upon the economic value of the investment without any formal transfer of the property’s title. This said, it is still to be determined whether any regulatory measure affecting the investment is to be compensated or if some measures can be exempted. The arbitral practice has dealt with the issue in a highly casuistic fashion, but, although a case-by-case evaluation seems somehow inevitable,<sup>55</sup> its potential impact on States’ regulatory autonomy calls for the adoption of a more principled approach. Concerns are strong especially in those sectors, such as privatized water services,<sup>56</sup> where regulation now represents the main instrument at States’ disposal to satisfy basic social needs. An excessively broad interpretation of regulatory expropriation could indeed jeopardise universal access to water by unduly tying the hands of national authorities.<sup>57</sup> On the other side, there is the need to avoid that ‘a blanket exception for regulatory measures [could] create a gaping loophole in international protection against expropriation’.<sup>58</sup>

Even a cursory look to the international arbitral case-law clearly indicates that the decisive criterion to define regulatory expropriation is the measure’s impact on the investment,<sup>59</sup> while the purpose of State’s action is less important<sup>60</sup> or even utterly

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<sup>53</sup> Franck, note 43 above, 1585. See also Vaughan Lowe, ‘Regulation or Expropriation?’, 55 *Curr. Leg. Prob.* 447, 453 (2002).

<sup>54</sup> Andrew J. Shapren, ‘NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward in Democracy?’, 17 *Temp. Int’l & Comp. L.J.* 323, 347 (2003).

<sup>55</sup> Andrew Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’, 20 *ICSID Review – FILJ* 1, 6 (2005). For a sharp critique of “hadocism”, Susan Rose-Ackermann. and Jim Rossi, ‘Disentangling Regulatory Takings’, 86 *Virginia L. Rev.* 1435, 1444-1448 (2000).

<sup>56</sup> Wälde and Kolo, note 32 above, 813.

<sup>57</sup> David A. Gantz, ‘The Evolution on FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement’, 19 *Am. Univ. Int’l L. Rev.*, 679, 684 (2004); Howard Mann, ‘The Rights of States to Regulate and International Investment Law, in UNCTAD, *The Development Dimensions of FDI: Policy and Rule-Making Perspectives*, 211-223 (Geneva-New York: UNCTAD, 2003).

<sup>58</sup> *Pope & Talbot Inc. v The Government of Canada*, Interim Award of 26 June 2000, UNCITRAL, 40 *Int’l Leg. Mat.* 258 (2001), § 99.

<sup>59</sup> For a detailed overview of the international case-law see Christoph H. Schreuer, ‘The Concept of Expropriation under the ECT and other Investment Protection Treaties’, 2 *Trans. Dispute Management* 1, 28-39 (November 2005).

irrelevant.<sup>61</sup> However, an exclusively effect-oriented approach does not allow for adequate consideration of States' duty, and not just right, to regulate. The problem has been expressly recognised in *Azurix*, where the Tribunal observed that: '[i]n the exercise of their public policy function, governments take all sorts of measures that may affect the economic value of the investments without such measures giving rise to a duty to compensate.'<sup>62</sup>

Problems arise when it comes to determine how measures not entailing the duty to compensate can be identified. International lawyers have traditionally relied upon the police powers exception<sup>63</sup> to this end, but the doctrine is a rather controversial tool,<sup>64</sup> as its scope is yet to be clearly defined in international law.<sup>65</sup> Moreover, the relationship between the exception and international customary law, which requires compensation also for measures enacted in the public interest,<sup>66</sup> is far from clear. The *Azurix* Tribunal sought to complement this approach by looking at the proportionality between the regulatory measure and the aim to be achieved.<sup>67</sup> The proportionality test may represent a promising development in the definition of regulatory expropriation, ushering a more nuanced approach than the classical *effect doctrine/police powers exception* dichotomy.<sup>68</sup> If properly applied, such tool does not indeed put into question 'the due deference owing to the State when defining the issues that affect its public policy or the

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<sup>60</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-US C.T.R. 219.

<sup>61</sup> *Metaclad Corporation v United Mexican States*, ICSID Case no. ARB(AF)/97/1, Award of August 30, 2000, 40 Int'l Leg. Mat. 36 (2000), § 111.

<sup>62</sup> *Azurix Corp. v The Argentine Republic*, note 46 above, § 310.

<sup>63</sup> The concept, drawn from the US jurisprudence, can be understood as encompassing the basic power vested in the state/government to regulate, restrict or limit the private rights in interest of the public welfare, law and order and security.

<sup>64</sup> This notwithstanding Mann and Von Moltke, note 41 above, 18 consider it as a principle of customary international law.

<sup>65</sup> Newcombe, note 55 above, 26 maintains that the exception 'allows the state to protect essential public interests from certain types of harms' while Kevin Banks, 'NAFTA's Article 1110 – Can Regulation Be Expropriation?', 5 *NAFTA L. Bus. Rev. Am.* 499, 510 (1999) takes the concept as covering not just public health, safety, morals or welfare, but also anti-trust, consumer protection, securities, environmental protection and land planning.

<sup>66</sup> To be lawful any expropriation must be in the public interest, non-discriminatory, consistent with due process and against the payment of full compensation.

<sup>67</sup> *Azurix Award*, note 46 above, § 312. The proportionality test is widely used by the European Court on Human Rights to deal with cases arising under the ECHR First Protocol, but *Azurix* represented only the second investment case where the test has been applied, the first being *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, 43 Int'l Leg. Mat. 133 (2004).

<sup>68</sup> Another element considered in *Azurix* was whether the Argentine measures frustrated the investor's legitimate expectations. The criterion is playing an increasingly important role not just in the context of regulatory expropriation, but also with regard to the fair and equitable treatment and, hence, it will be dealt with in the next section of the paper.

interests of society as a whole [...],<sup>69</sup> while allowing for adequate protection of investor's rights. Similar balancing tests have been recently incorporated in international investment treaties to provide further guidance to prospective arbitrators.<sup>70</sup> The shift toward more flexible approaches to define regulatory expropriation can help to find a better balance between States' regulatory discretion for the protection of vital interests, such as access to water, and foreign investment protection.

### 3.3.2. Fair and equitable treatment

The definition of fair and equitable treatment (FET) is 'somewhat vague',<sup>71</sup> as its precise nature, scope and meaning continue to remain beyond reach.<sup>72</sup> Fairness and equity are inherently flexible concepts that are bound to continuously evolve and cannot 'be frozen in time'.<sup>73</sup> The lack of a clear definition has not prevented it from becoming 'the most important standard in investment disputes',<sup>74</sup> being used to articulate a variety of rules necessary to achieve the treaty object and purpose.<sup>75</sup> The standard has indeed become a sort of catch-all formula,<sup>76</sup> covering any regulatory measure that upsets the stability of the investment environment.<sup>77</sup>

Although dictated by international customary norms, such a purposive reading has greatly broadened the scope of the standard, giving it a 'potentially very considerable impact on the freedom of a government to regulate its economy'.<sup>78</sup> The risk that an expansive interpretation may tilt the balance between the respect for State's sovereignty

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<sup>69</sup> *Tecmed Award*, note 67 above, § 122

<sup>70</sup> See, for example, 2004 Canadian Model BIT, Annex B 13(1) on the clarification of in direct expropriation, available at [www.naftalaw.org](http://www.naftalaw.org) and 2004 US Model BIT, Annex B available on [www.ustr.org/Trade\\_Sectors/Investment/Model\\_BIT/Section\\_Index.html](http://www.ustr.org/Trade_Sectors/Investment/Model_BIT/Section_Index.html). See also OECD, 'Indirect Expropriation and the Right to Regulate in International Investment Law', *Working paper on international investment no. 2004/4*, 10 (September 2004).

<sup>71</sup> *CMS Award*, note 35 above, § 274.

<sup>72</sup> Barnali Choudhury, 'Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law', 6 *Journ. World Investm. & Trade* 297, 298 (April 2005).

<sup>73</sup> *ADF Group Inc v United States*, ICSID Case No. ARB/(AF)/00/1, Award of January 2003, 18 *ICSID Review – FILJ* 195, (2003), paras 179-181. See also *Azurix Award*, note 44 above, para. 361 and Peter Muchlinski, "'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Standard', 5 *Int'l & Comp. L. Quarterly* 527, 532-533 (July 2006).

<sup>74</sup> Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', 6 *Journ. World Investm. & Trade* 357, 357 (June 2005). Rudolph Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', 39 *The International Lawyer* 87, 87 (Spring 2005) observes that '[...] hardly any lawsuit [...] is filed these days without invocation of the relevant treaty clause requiring fair and equitable treatment.'

<sup>75</sup> *Brower II*, note 44 above, 56.

<sup>76</sup> Dolzer, note 74 above, 88.

<sup>77</sup> See, in regard to the water sector, *Azurix Award*, note 46 above, 372

<sup>78</sup> Lowe, note 53 above, 455. Dolzer, note 32 above, 964 observes that the standard has 'wide-ranging repercussions for the sovereignty of the host state'

and the protection of investor's rights too in favour of the latter has already prompted some governments to adopt normative and interpretative acts that aim at limiting the scope of the obligation<sup>79</sup>.

The trend can be better appreciated by looking at one of the FET components that is highly relevant for investments in the water sector: the protection of investor's legitimate expectations.<sup>80</sup> The notion derives from the customary principle of good faith<sup>81</sup> and, in investment law, it requires States not to unfairly upset basic conditions that have been taken into account by the investor to make the investment. It has become 'the dominant element'<sup>82</sup> of the FET and even 'an independent basis for a claim' under this heading.<sup>83</sup> Furthermore, in privatized water services investments, like in most public infrastructure undertakings, expectations of the private operator usually arise from legal and contractual provisions. The formality of the source determines the legitimacy of the expectations, i.e. their strength.<sup>84</sup> Accordingly, reliance upon a detailed regulatory framework reinforces investor's claims and, hence, it could narrow down States' regulatory space. Should the rule be interpreted as a sort of stabilization clause, this could prevent host governments from imposing universal access obligations upon the private operator, if this was not expressly provided for in the original agreement. However, it is widely accepted that the duty not to alter the investment's regulatory framework cannot be taken as an absolute principle requiring the State to freeze its legal system for the investor's benefit.<sup>85</sup>

Interestingly enough, the existence of a detailed regulatory framework may also help States to avoid liability for changes that affected foreign investments. This flows from the emerging awareness that the FET imposes duties also upon the investor, 'given the

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<sup>79</sup> See, for instance, the Note of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, at [www.dfait.maeci.gc.ca/tna-nac/NAFTA-interpr-e.asp](http://www.dfait.maeci.gc.ca/tna-nac/NAFTA-interpr-e.asp) which state that the fair and equitable treatment does not require treatment beyond that required by customary international law. Similar interpretative provisions have been included in other US FTAs with Singapore, Chile, Australia, Dominican Republic-Central America, Morocco. Arguing for a narrower interpretation of FET Graham Mayeda, 'Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties', 41 *Journ. World Trade* 273, 287-288 (2007).

<sup>80</sup> On the principle, see *International Thunderbird Gaming v The United Mexican States*, UNCITRAL (NAFTA), Separate Opinion (Professor T. Wälde) of 26 January 2006. See also Francisco Orrego Vicuña, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society', 5 *Int'l Leg. FORUM du droit int.* 188, 193-195 (2003).

<sup>81</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 137 (Cambridge: Grotius, 1987).

<sup>82</sup> *Saluka Investment BV (The Netherlands) v The Czech Republic*, UNCITRAL, Partial Award on Jurisdiction and Liability of 17 march 2006, § 301.

<sup>83</sup> *Thunderbird Separate Opinion*, note 80 above, § 37.

<sup>84</sup> *Thunderbird Separate Opinion*, note 80 above, § 31.

<sup>85</sup> Schreuer, note 74 above, 374 and Dolzer, note 74 above, 105.

inherent balancing process that lies at his heart'.<sup>86</sup> Among them, the duty to conduct the business in a reasonable manner requires any operator to be aware of the legal environment which he is entering in. Accordingly, the decision to invest in highly regulated sectors, such as water public utilities, would entail the implicit acceptance of the risk that public authorities will further intervene to adapt the rules to society's evolving needs.<sup>87</sup> In these circumstances, the modification of the regulatory environment could not constitute a valid basis for a claim under the FET, as investor's expectations for a fixed legislative framework are not legitimate. Any other solution would turn investment treaties into insurance policies covering all sorts of risk, an outcome that goes clearly beyond their scope.

#### **4. WATER SCARCITY AND INTERNATIONAL TRADE LAW**

Water transfers can take place in two ways: trade in water through the diversion of the river flow from one country to another and bulk water transfers. We have argued that just the latter may be dealt with through WTO law, and even in this case just if the water transfer is not covered by any other specific agreement or if such agreement is not strong enough. The goal of this section is to determine whether a water importing country can bring a claim to a WTO Panel against restrictive trade measures adopted by a water exporting country in bulk water transfers operations.<sup>88</sup> The objective here is to see whether Articles XI and XX can help bridge the gap between these competing positions.

##### **4.1. The compatibility of water export bans with WTO law**

If we agree that water can be considered a good in some circumstances and that water transfers may fall under the realm of the WTO, a country that suffers an export ban on water may bring a dispute before the DSB and argue that the country applying the trade

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<sup>86</sup> Muchlinski, note 70 above, 542.

<sup>87</sup> The principle was made explicit, albeit with regard to expropriation, in *Methanex Corp. v United States*, UNCITRAL, Final Award on Jurisdiction and Merits of 3 August 2003, Part IV – Ch. D – Page 5, §§ 9-10

<sup>88</sup> See the situation in Canada where in 1999 the federal government announced a strategy to protect Canadian water. This strategy was based on an accord for the prohibition of bulk water removal from Drainage Basins that clearly provided for the possibility to restrain water exports in order to protect the environment. *Accord for the Prohibition of Bulk Water Removal from Drainage Basins*, available at <http://www.scics.gc.ca/pdf/accord.pdf>.

measure has violated Article XI GATT, which provides for the elimination of quantitative restrictions.

Against this background, can a State ban water exports, and how can this be balanced with the needs of the importing country?

According to Article XI, a country can temporarily prohibit exports in order to “prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.”<sup>89</sup> Does water fall under the category of essential product? Can the lack of water cause a critical shortage of food? It is evident that this is the case with water and that, therefore, a water export ban taken by a country suffering a serious water crisis would be WTO compatible.

However, the scenario provided for in Article XI does not seem to reflect the characteristics of those countries that most likely may consider water export bans as policy options. Now, has the multilateral trading system taken into account the fact that, if trade in water is happening, this is because some countries are in desperate need of water? Usually water crisis that lead to critical shortages of food occur in water importing countries. Does the WTO acknowledge the consequences of export bans on importing countries? The Agreement on Agriculture (AoA) contains a provision, which is explicitly linked to Article XI.2.a):

Where any Member institutes any new export prohibition or restriction on *foodstuffs* in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions: the Member instituting the export prohibition or restriction shall give *due consideration to the effects of such prohibition or restriction on importing Members' food security*;<sup>90</sup>

We consider this to be a crucial provision, as it may help to balance the interests of exporting countries that are applying the trade measure and those of importing countries that may be suffering the consequences thereof.

In order for this provision to be applicable, it must be first determined whether water qualifies as foodstuff. We consider that, once again, this is self-evident. Furthermore, there is a growing literature on virtual water trade that argues that water is essential in

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<sup>89</sup> GATT, article XI.2.a).

<sup>90</sup> AoA, article 12.

the production of most food products.<sup>91</sup> If water stands for foodstuff, a country adopting a water export ban must take into account the effects of the measure on the water importing countries' food security.

In sum, Article XI must be read together with Article XI AoA in order to strike a balance between water exporting developed countries and water importing developing countries. The linkage between these two provisions may provide a pathway to deal in a sustainable manner with water export bans. However, more work is needed in order to clarify the requirements of this sustainable approach.<sup>92</sup>

#### **4.2. Can water export bans be justified under Article XX GATT?**

Should water export bans be considered a violation of Article XI, Article XX could be invoked to justify the measure, as it entitles WTO Members to deviate from the Agreement's rules for legitimate non-commercial goals, such as the conservation of natural resources. The general exception entails a double layered analysis that deals with the *content* and the *application* of the measure.<sup>93</sup>

In relation to the former, the first point is to see whether water export bans are "necessary to protect human, animal or plant life or health".<sup>94</sup> On the one hand, water export bans fulfil this condition because water is crucial for both human life and for the conservation of the biodiversity. On the other hand, one must also see if the water export ban is actually *necessary* to secure domestic health. According to current jurisprudence the importance of the non commercial goal pursued by the trade restrictive measure, the effectiveness of the measure in fulfilling it and the restrictive effects of the measure on international trade are the parameters taken into consideration

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<sup>91</sup> Trade in virtual water can be considered as a further kind of water transfer. Its coverage under the WTO realm and further issues exceed from the scope of this paper. For more information see Ashok K. Chapagain, Arjen Y. Hoekstra and Huub H.G. Savenije, *Saving Water through Global Trade*, UNESCO Value of Water Research Report Series No. 17 (Delft: UNESCO-IHE, 2005), available at <http://www.waterfootprint.org/Reports/Report17.pdf>.

<sup>92</sup> A first condition has already been written down and it obliges the country that intends to adopt an export ban in foodstuff to notify affected Parties in advance; *AoA*, article 12.1.b). Further conditions, such as monetary compensation, enhanced international cooperation, may be developed and discussed within the WTO Committee on Agriculture.

<sup>93</sup> The analysis must start from the paragraphs of Article XX; see WT/DS58/AB/R, 1998, Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, § 119-120.

<sup>94</sup> Article XX b).

to evaluate the necessity of the measure.<sup>95</sup> A clear-cut water export ban would be necessary only having regard to the first of these parameters.

The second issue in relation to the content of a water export ban is whether it is “related to the conservation of exhaustible natural resources [and] if the measure is made effective in conjunction with restrictions on domestic production or consumption”.<sup>96</sup>

Three points must be addressed. First, in some countries water can be a scarce resource and it may be deemed as an exhaustible natural resource. Second, the measure must be reasonably related to the conservation purpose,<sup>97</sup> a requirement that is easier to meet than the necessity test.<sup>98</sup> Third, the export restriction must to be taken together with similar restrictions at a domestic level and such criterion is likely to be crucial.

The next step is to determine if the *application* of the water trade related measure meets the requirements provided for in the chapeau of Article XX. The first one is that the measure must not constitute an arbitrary and unjustifiable discrimination. This requirement will be met if the adopting country demonstrates sufficient flexibility and prior negotiation efforts. The latter entails that a State must take action internationally before adopting a water export ban. A unilateral trade restrictive measure should be the last policy option, once all international efforts have failed.<sup>99</sup> However, a State does not have to wait until the international negotiations succeed, but it can adopt unilateral actions in the meanwhile.<sup>100</sup>

The last requirement provided for in the chapeau of Article XX is that the measure must not be a *disguised* restriction of international trade. The latter will be revealed by the structure of the measure, which must be thus carefully analyzed.<sup>101</sup>

In sum, current trade and environment case law on Article XX does not seem to fully protect a State that wishes to include a water export ban in its domestic water conservation policy. Despite the fact that so far no dispute has arisen on a similar

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<sup>95</sup> WT/DS161/AB/R, 2000, Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, § 164.

<sup>96</sup> Article XX g).

<sup>97</sup> Doc. WT/DS58/AB/R, 1998, Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, §141.

<sup>98</sup> The difference between *necessary* and *related to* has been underlined already in the old GATT dispute settlement system; *Canada — Measures affecting exports of unprocessed herring and salmon*, Panel Report (Doc. L/6268 - 35S/98, 22 March 1988), § 4.6.

<sup>99</sup> *Canada — Measures affecting exports of unprocessed herring and salmon*, Panel Report, § 172.

<sup>100</sup> WT/DS58/AB/RW, 2001, Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia*, § 122-123.

<sup>101</sup> Doc. WT/DS135/R, 2000, Report of the Panel, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, § 8.236.

situation, the adopting State may face problems related both to the content and to the application of the measure.

### **4.3. Bridging the gap between the WTO and international water law**

A new *institutional* and a new *normative* setting are needed in order to bridge the gap between international trade and water law. Water scarcity related problems can be dealt with through trade, but not through the current WTO legal regime. From an institutional point of view three options have been proposed: to strengthen international water agreements, to reform the multilateral trading system or a *status quo* situation.

The first option is to strengthen international water governance. Usually water transfers are dealt with by bilateral international treaties (Lesotho – South Africa) or other kind of international bilateral agreements (Turkey – Israel). These must contain a mechanism that the parties therein may resort to in case a dispute arises. Furthermore, a global international water agreement dealing with trade in water could deal comprehensively with water trade related disputes.<sup>102</sup> Again, the presence of a strong dispute settlement mechanism is crucial. Global water governance must be enhanced in order to counterbalance the power of the WTO and, in particular, of the DSB. A consequence, and some would argue a risk, of strengthening of international water agreements, be they bilateral or multilateral, is the possibility of forum shopping between trade and water courts, which could lead to a conflict of jurisdictions.<sup>103</sup> In order to prevent it, bilateral and international water agreements dealing with trade should include an explicit prevailing clause over the WTO. The DSB should then refrain itself from accepting water disputes that can be solved through international water agreements.

The second option is to reform the WTO. A wide array of solutions in relation to the overall trade and environment relationships has already been proposed.<sup>104</sup> Three possibilities seem to enjoy higher consideration. First, a waiver could be proposed to exempt water export bans from certain specific WTO provisions.<sup>105</sup> Second, an amendment of the GATT could be sought in order to either exclude water export bans

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<sup>102</sup> See Shrybman, note 22 above, 15.

<sup>103</sup> See Brown Weiss, note 15 above, 82-83 and Laurence Boisson de Chazournes, 'Water and Economics: Trends in Dispute Settlement Procedures and Practice', in Brown Weiss, Boisson de Chazournes and Bernasconi-Osterwalder eds., note 15 above, 333-335.

<sup>104</sup> See for example Frank Biermann, 'The Rising Tide of Green Unilateralism in World Trade Law Options for Reconciling the Emerging North-South Conflict', 35.3 *Journal of World Trade* 421 (2001).

<sup>105</sup> Waivers must be decided by consensus according to Article IX.3 of the *Marrakech Agreement Establishing the WTO (Marrakech Agreement)*.

from the WTO discipline or include it as a specific exception in the framework of Article XX.<sup>106</sup> The last option would be an authoritative interpretation either by the WTO Ministerial Conference or by the General Council that clarifies if and how the WTO regime should deal with trade in water and serves as a basis on which the DSB would decide any dispute arising from a water trade restrictive measure.<sup>107</sup> The 1993 Statement regarding the application of NAFTA to water could serve as a precedent.<sup>108</sup> The third option is doing nothing. A *status quo* option would imply that the current multilateral trading system already balances environmental and trade interests in the best possible way and that there is no reason to modify the WTO or to strengthen the international water governance system.

From a normative point of view, what is needed is a new paradigm in the relationship between water scarcity and international trade. This new approach must be linked to any of the above mentioned institutional settings. The balance between water exporting states' interests and water importing states' interests must be put at the centre of the debate, as Article XI AoA is able to do with Article XI. There must be a bridge between the environmental concerns of the water exporting country that wants to retain its water for conservation purposes and the development concerns of importing countries whose need of water may vary depending on sociological, geographical and political factors.<sup>109</sup> Our approach wishes to combine the much needed anticipatory caution suggested by E. Brown Weiss with the developing needs of a water scarce country. The key to establish this linkage is *Comment 15 to the United Nations Committee on Economic, Social, and Cultural Rights (Comment 15)* that enshrines access to water as a right;<sup>110</sup> or even a human right.<sup>111</sup> This means that in those cases in which a water importing country is facing serious water scarcity, water is not just a commodity but it becomes a right. According to *Comment 15* "international cooperation and assistance [must] take joint and separation action to achieve the full realization of the right to water."<sup>112</sup> A strict interpretation of this provision may lead water exporting countries to have obligations

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<sup>106</sup> See Brown Weiss, note 15 above, 86. The procedures to amend the WTO are provided for in Article X of the *Marrakech Agreement*.

<sup>107</sup> Brown Weiss, note 15 above, 87 considers it the best option if States decide to reform the WTO.

<sup>108</sup> 1993 Nafta statement, note 24 above.

<sup>109</sup> A different balance is required if we are dealing with a water export ban between Canada and the US or a ban imposed by Canada on a developing country that is suffering a water crisis.

<sup>110</sup> General Comment No. 15, note 10 above.

<sup>111</sup> See Amy Hardberger, 'Whose Job Is It Anyway?: Governmental Obligations Created by the Human Right to Water', 41 *Texas International Law Journal* 553, 541-542 and 545 (2006).

<sup>112</sup> General Comment No. 15, note 10 above, § 30.

towards water importing countries that suffer water scarcity rather than just commercial rights. This position is clearly not in line with the current trade regime, but it is worth to be supported as it helps to find a fairer balance between the competing interests of the two countries.

In sum, if the goal pursued by the water exporting state through the water export ban is an environmental objective, and the goal undermined by the measure in the importing country is related with the life and health of its citizens, a sustainable development issue arises. Despite the difficulties of translating the politics of sustainable development into legally binding principles, this is the realm where the solution is to be searched,<sup>113</sup> since, as rightly emphasised by A. Hildering, “an economic approach to water... is not necessarily compatible with sustainable development.”<sup>114</sup>

## **5. CONCLUDING REMARKS**

Water access and water scarcity have been dealt with by International Economic Law just recently and still in a rather limited fashion. However, international investment and trade law are posed to play a greater role in regulating water-related issues in the near future, although in these contexts water is not considered as a natural resource, but only as an economic good that may be provided as a service or traded. However their compliance mechanisms have proven to be highly effective and, hence, they are likely to further displace other tools for global water governance. Against this framework, it becomes even more compelling to stress that water is not just a commodity, as its value goes well beyond the economic dimension.

The inextricable relationship between all these dimensions is to be fully considered when international economic law rules are applied in this field. Both legal frameworks considered here would already allow for such a special treatment, provided that great care is exercised in the use of enforcement mechanisms as well as in the interpretation of key substantive provisions. Flexibility is key to find a fair balance between the economic and social interests at stake. States must be free to choose their course of action in guaranteeing universal access to water services or fighting against water scarcity. Consequently, international economic rules are not to be applied in a way that

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<sup>113</sup> See Francesco Sindico, *Unravelling the Trade and Environment Debate Through Sustainable Development Law Principles*, ESIL Inaugural Conference Agora Paper 2005, available at <http://www.esil-sedi.org/english/pdf/Sindico.PDF>.

<sup>114</sup> Hildering, note 17 above, 122.

could hamper such efforts, but only to avoid these issues being abused by domestic authorities to pursue protectionist ends. More intrusive approaches would not just undermine the protection of fundamental social needs, but they could also damage the credibility of both international legal regimes.