

Julien Chaisse (Ed.), Charting the Water Regulatory Future: Issues, Challenges and Directions



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Contents

1	Overview	515
2	Key Lessons	517
3	Contribution to the Literature	519

1 Overview

This book, examining the issues, challenges and directions in water regulation, is very timely. Indeed, works that engage with this complex and endless topic are always opportune. One need not elaborate at length on how critical water is for human existence or how dramatic water-related problems have become of late. As this review goes into print, Cape Town, struck by a historic drought, is bracing for ‘Day Zero’ – the day it cuts off running water for four million people. In South Africa and elsewhere, the magnitude of the problem goes well beyond the daily provision of a commodity – it includes water shortage and quality problems, growing demands from industries and urban areas amid population growth, the intricate nexuses between water, food and energy security, etc. All of these predicaments call for a re-assessment of water management models.

In this interesting book, several authors engage with the issues and challenges facing governments, private companies, international organisations, and citizens (i.e., all of us humans who cannot possibly survive without water) through an interdisciplinary prism. Countless problems are examined from a myriad of perspectives that are, in the end, deeply intertwined. While many have emphasised the need for a holistic approach to water issues, that goal is not always achieved: scholars tend to work in scientific silos and practitioners seldom convey their know-how in academic outlets. In this book, Professor Julien Chaisse gathers contributions from

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515

a number of leading academic experts with varied professional backgrounds (trade and investment lawyers, human rights lawyers, environmental lawyers) but also practitioners with a background in public administration, disaster governance, public finance, or international relations. Rather than looking at water-related problems merely from a legal perspective (discussing domestic and international legal frameworks and assessing arbitral awards and judicial judgements), the book analyses other dimensions such as the economic drivers of the water market, and presents several case studies that add a 'real-life' flavour to the discussion.

Three major issues (and related challenges) are discussed in the book: the challenges that water services pose to public international law frameworks; the protection and promotion of the much-discussed human right to water, and the economic determinants of global water markets.

The first two chapters examine the impact of WTO Law on the regulation of water services. International trade rules can be used to improve the management of water, but that has not happened thus far. Furthermore, low levels of transparency regarding subsidies given to the sector result in the unsustainable management of a precious resource (Ahmad). The private sector is playing an ever-central role in the supply of water and sanitation services, but the application of the General Agreement on Trade in Services to this sector remains controversial. The characterisation of these services as a human right requires special attention in their regulation (Bates).

The next three chapters focus on the interplay between international investment law and water services. Over the last decades there has been an explosion in the number of water and sanitation contracts awarded to foreign companies. Disputes between host states and foreign investors have resulted in multiple arbitration proceedings, producing a sprouting body of jurisprudence. In deciding these disputes, arbitral tribunals are shaping the contours of an international water services regime, filling the void left by the inexistence of a global organisation to supervise the sector. While this can be seen as a step towards greater regulation of water markets, it also highlights the need for a global, holistic approach to the field (Chaisse). One of the hottest topics within this emerging case load is the delimitation of host states' right to regulate water services. States are striving to limit the interpretative freedom of arbitral tribunals by invoking their right to pursue public policies. What standard should arbitral tribunals employ to strike an appropriate balance between the protection of investors and domestic public concerns (Titi)? According to Hirano and Hamamoto, arbitral awards have acknowledged the host State's regulatory power. Investment arbitral tribunals function as a watchdog for disguised 'regulatory' measures and only abusive uses of regulatory powers are considered incompatible with investment treaties.

The analysis of the public international law landscape is completed by two further contributions. Turrini discusses the role of the notion of virtual water (a concept also alluded to by Ahmad). This concept raises awareness about the scarcity of water resources and the need to exploit them rationally, for instance, as regards food security and environmental protection. Tassin adds two new perspectives: terrestrial and maritime viewpoints. In her opinion, the tendency for a sectorized and fragmented approach to terrestrial and marine uses of water affects the understanding and regulation of water issues.

A second group of contributions addresses the much-discussed ‘human right to water’ from different perspectives. Tassin examines the notion as part of a ‘terrestrial and human’ approach to water issues. Hirano and Hamamoto focus their attention on human rights considerations by investment arbitral tribunals. Shah contributes to the discussion by offering a case study on the legal protection and judicial enforcement of water rights in Pakistan. He concludes that the country continues to fail in meeting its water-based obligations, due to governmental deficiencies and lack of resources. Another case study is offered by Emeziem, this time focusing on Nigeria. In his opinion there is a gap between the perception of water as a human right and the reality of access to clean water and sanitation. The realization of this right lies essentially at the local level, hence the need to act locally while thinking globally. The contribution of the private sector in implementing this right is discussed by Mahadevan. Transnational corporations play a major role in this regard because of their global presence. Finally, De Barcellos discusses how public law litigation has been used to advance human rights in Brazil, examining in particular lawsuits involving water and sanitation public policies.

A third group of chapters discusses the economic drivers and determinants shaping the global market for water services in the future. Water and sanitation services are operated through vast physical networks. The operation of these grids requires substantial technical expertise, maintenance, and investment. All over the world governments are faced with deteriorating water systems and the scarcity of capital to maintain and improve networks. Mukherjee and Chakraborty estimate the demand for investment in water services infrastructure to achieve the universal access to improved water supply and sanitation by 2019. Different regions are at different levels of achievement in securing universal access to safe drinking water and sanitation. McDonnell analyses residential water charges in Ireland, discussing the multiple policy objectives pursued by water funding models (environmental sustainability, financial sustainability, economic efficiency and social concerns, including affordability), concluding that there are trade-offs between each of these policy objectives. Ancev, Azad, and Hernandez-Sancho discuss the role of multinational companies in providing water services, examining their efficiency, testing the productivity and efficiency of water utilities in different countries. Finally, Lassa and Yu-Hung Lai look at microfinance in water and sanitation services and identify best practices, focusing on a community-based sanitation micro-finance initiative in Indonesia.

2 Key Lessons

The multifarious problems discussed in this book call for a global vision of water markets. All authors take on the challenge of formulating proposals and offering recommendations; their views can be distilled into three overarching propositions.

First, WTO Rules can play a greater role in promoting efficient water markets. The regulatory framework should be reformed with the goal of promoting water-use efficiency (Ahmad). Bearing in mind the essential role of water and sanitation,

greater certainty must be provided to ensure the effective operation of trade laws, the validity of national legislation and the protection of consumers' interests. The inclusion of a new subcategory specifically related to water services could afford greater certainty in the implementation of the General Agreement on Trade in Services (Bates).

Second, looking beyond the WTO framework, it is necessary to ensure that the human right to water receives consideration in investment arbitration. Governments must design water-related policies that comply with investment treaties because their contribution is decisive to improve and expand networks (Chaisse). In some cases host states may retain the ability to regulate water services without having to compensate investors. However, they should not be able to forego their investment commitments for reasons that do not involve the public interest (Titi). Future arbitral tribunals dealing with water-related cases will have access to materials such as General Comment no. 15 on the right to water which they can invoke when assessing the conformity of State measures with investment treaties. Still, it is not likely that the deference accorded to states will increase (Hirano and Hamamoto). A further challenge for International Law is to move the concept of virtual water from a practical elaboration into a practicable policy option. It is necessary to devise meaningful ways to incorporate virtual water in existing concepts of law and policy, such as the right to water (Turrini).

Several potential avenues can be used to promote and protect the human right to water. A social justice approach can be applied as a key tool towards realizing the human right to water (Emeziem). While multi-stakeholder initiatives are important, they do not address all problems arising out the interaction between the human right to water and corporate activities. It is necessary to include state actors in these initiatives in order to ensure effective compliance standards through state mechanisms (Mahadevan). Public law litigation can also be used to foster public health policies. However, it is necessary to reach the most disenfranchised communities, as the worse-off communities remain the least represented in judicial cases (De Barcellos).

Third, looking into the future, investment is crucial to expand and maintain water networks. Encouraging private investment in this field is a key part of long-term solutions. It is necessary to improve the political-legal framework for facilitating private sector involvement (Mukherjee and Chakraborty). Different water charging models have diverse advantages and disadvantages, and water affordability is an important concern. A system that combines a volume-based pricing structure with a system of income-related water credits may be a good solution to reconcile the four main policy objectives pursued by water funding models (McDonnell). Private management of water services is not necessarily more efficient than state-run utilities. Ancev, Azad, and Hernandez-Sancho conclude that the argument for opening up a domestic sector to multinational corporations based on expected productivity and efficiency gains may not be as strong as sometimes advocated. In the community-based context, micro-finance can be useful if the conditions for sustainability are controlled by local actors (Lassa and Yu-Hung Lai).

3 Contribution to the Literature

Innumerable books have been published over the last decades on the management of water resources, both at the national, regional, and global level. Authors have examined the economic and political reasons underpinning the liberalisation of water services in many countries. Studies have also been published on the interplay between trade rules, investment laws, and water services. Finally, a growing body of literature examines the emergence of the human right to water, and how to protect it at the national and international level, both before national courts and international arbitration panels. There is an endless ‘sea’ of questions flowing from different fields of knowledge. An interdisciplinary approach is necessary to understand current threats and devise sustainable solutions. This entails bringing together policymakers, managers, technicians, lawyers, economists, and other experts. Chaisse’s *Charting the Water Regulatory Future* takes on that challenge, offering suggestions for action at the national and international level, both in the design of legal frameworks and in the application of legal standards, taking into account the legal framework but also the surrounding economic and social context. Such broad, complex issues could not realistically be fully examined in a single work. However, this book contributes to this gigantic endeavour by identifying some of the most pressing legal and economic issues and challenges, and pointing toward some possible future directions. It is written in a technically accurate yet accessible language and will surely prove useful to scholars, policymakers, and practitioners alike.

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