

## **Recap: Managing the Globalization of Sanitation and Water Services ‘Blue Gold’ Regulatory and Economic Challenges**

### **An international conference hosted by, The Chinese University of Hong Kong, Faculty of Law**

The Conference started with the opening remarks of the Dean of the Faculty of Law, Prof. Christopher Gane who welcomed the diverse pool of participants and congratulated the organizers. He highlighted the importance of the topic for the Hong Kong and the relevant role that Hong Kong can play in the region.

Then Prof. Julien Chaisse, as principal investigator introduced the project since its beginning stressed the emerging role of international economic law to water services. He also focused on the particular importance of the topic for the region and especially the Peoples Republic of China where six large cities have already resorted to foreign investment in the area of water supply and water services.

Prof. Tihomir Ancev commented on the interdisciplinary research on water supply and management and on the role of the industry and state actors. He noted that at the present stage the research is only scratching the surface of the problem.

Prof. Leïla Choukroune talked about the multi-disciplinary aspects of the topic and diversity of the participants. She also described the process how and then need to put together such a diverse team researchers.

### **Keynote Speech**

After the welcoming words Prof. Laurence Boisson de Chazournes delivered the keynote speech. She started her speech focusing on the multifaceted nature of the notion of water as a commodity, a public good, a human right and a common heritage of mankind. She stressed the main challenges to water nowadays such as the problem of water pollution and the need to access improved water sources. She identified three strands Economization, Humanization and Environmentalization.

The Economization strand develops into two directions international trade and international investment law. With respect to international trade law she highlighted the lack of a clear and direct approach towards water as an object of commercial transactions. She referred to China – Measures Related to the Exportation of Various Raw Materials in relation to the conservation of an exhaustible natural resource. On the other hand with respect to international investment law she firstly draw attention to problem of confidentiality of concession contracts, agreements to transfer water source rights, concessions for hazardous waste landfill operations, agreements for the exploitation of

minerals or oil. Then she focused on the increasing role that international investment law both with the case law and the inclusion of water in the ongoing negotiations that are developing a new trend of emerging water related commitments.

The Humanization strand concerns the access to safe drinking water and sanitation and there is an increasing number of international conventions that define the right to water. “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” (UN Committee on Economic, Social and Cultural Rights, General Comment No. 15). The humanization strand is under the particular influence of health strategies aimed at improving the quality and quantity of water access, corporate social responsibility rules and also international tribunals decisions such as *Methanex v United States* (NAFTA), *Pulp Mills* (ICJ) and *Tâtar v Romania* (ECHR) that has developed the principles of effective public participation and environmental impact assessment.

On the Environmentalization, Prof. Laurence Boisson de Chazournes focuses on the role of international environmental law (a number of multilateral environmental agreements) and its key principles such as a) precautionary principle, b) polluter pays principle c) environmental impact assessments are playing in the protection and management of water. She also draw attention to the evolutionary approach in interpretation in the absence of explicit norms on the protection of the environment citing the *Iron Rhine* arbitration:“(e)merging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate, such harm”

In conclusion Prof. Boisson de Chazournes indicated that even though intertwined and complex the above mentioned strands are discernable. The goal for scholars and lawyers is to pursue coherence among the strands and achieve sustainability.

With her speech Prof. Boisson de Chazournes anticipated some the challenges and difficulties that the researchers were going to deeply analyze during the conference.

### **Panel 1: International Trade Governance of Sanitation and Water Services**

- Mr. Manzoor Ahmad: International Trade Rules for Promoting Global Water-use Efficiency
- Ms. Rebecca Bates: The Trade in Water Services -- How Does GATS Apply to the Water and Sanitation Services Sector?

- Mr. Bryan Mercurio: Intellectual Property Rights and Access to Clean Water: Friends, Foes or Something in Between?
- Discussants: Mr. William Marshall and Mr. Danny Friedmann
- Chaired by Mr. Jesus Seade

**Manzoor Ahmad** provides a mapping of the rules of international economic law that pertain to the regulation of sanitation and water services. His analyses was focused on the on the fragmented WTO regime with respect to water drawing attention to the impact of WTO rules such as the Agreement on Agriculture, the rules on subsidies and Countervailing Measures to address the problem of water waste in agriculture. He called for more effective WTO regime, enhancing the Doha and Trade Facilitation Agreement.

**Rebecca Bates** explored the potential impact of the General Agreement on Trade in Services ('GATS') on the water and sanitation services sector. She focused on the GATS rules (market access, national treatment, transparency and exceptions) and the GATS case law to assess the impact of GATS schedules of commitments on the water and sanitation services. She argued that given 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 water consumers.

**Bryan Mercurio** analyzed the implications for intellectual property rights for water treatment/purification and water desalination as two potential solutions to the problem of future water shortages. Both require technological advancements to reduce costs and energy use and expand the potential market. The presentation evaluated the role that patents under the TRIPs agreement play in promoting technological advancements with a view to determining whether such rights accelerate or hinder access to clean water.

## **Panel 2: Foreign Investment Governance of Sanitation and Water Services**

- Mr. Jansen Calamita: Are Investments in Water Different? A Legal and Economic Exploration of Specialized Regimes for Utilities in International Investment Treaty Arrangements
- Mr. Shintaro Hamanaka: Foreign Governmental Suppliers' Investment: Profit or Aid?
- Mr. Fernando Dias Simões: The Erosion of the Concept of Public Service in Water Concessions.
- Discussants: Mr. Timothy Franklyn and Mr. Bryan Mercurio,

- Chaired by Ms. Leila Choukroune

**Jansen Calamita** focused on the existing investment case law in water services and the treaty making issues. He classified the sources of disputes into three main categories: a) inability of governments and contracts to address external shocks, b) governmental misadministration of contract and c) regulatory mismanagement-change of policy on privatization. He ascertained that these disputes are handled through the uniform mechanisms leading investor state arbitration and that there is a lack of specialization of tribunals. On the treaty making perspective he called for the drafting of specialized chapters for water and water services like the NAFTA ch.14 on financial services and the use of non investor-state dispute mechanisms. He assessed the role that “essential security” provisions can play.

**Shintaro Hamanaka** looked at the policies of waterworks bureaus of Japanese prefectures such as Tokyo Metropolitan Government Waterworks Bureau and Kitakyushu that are exporting “water system” know-how and management techniques to developing countries in Cambodia. He saw that as an alternative to privatization and a good way for the transfer of expertise especially in situations where funds are more limited. He analysed the legal challenges that they were facing while operating abroad and also assessed the how water bureaus were seeking profit through the sale of machineries through tied aid.

**Fernando Dias Simões** discussed the use of concession contracts in association with foreign direct investment in the water services industry. Due to the peculiarities of the sector the provision of the service should be subject to compliance with certain fundamental principles such as universality, equality, continuity, impartiality, adaption to the needs of users. The compliance with these principles entails the recognition of special rights to the users of such services and the imposition of some restrictions to the parties’ freedom of contract. The protection of citizen-users, the third-party beneficiaries to such concession contracts, is essential for the success of these partnerships. He looked at the level of inclusion of citizens’ interests in these contracts in order to draw lessons for improvements in future negotiations.

### **Panel 3: Regional Developments in the Regulation of Water Services**

- Mr. Sufian Jusoh: Fragmentation of Water Policies as a Source of Disputes in Asia-Pacific
- Ms. Debra Tan: Development of China’s Water Markets to Hold the Three Red Lines

- Mr. Panagiotis Delimatsis: Integrating Water Services Markets -- The regulation of water services in the EU internal market
- Mr. Christoph Herrmann: External Competences of the EU in the Field of Water Services Trade and Regulation
- Discussants: Mr. Shintaro Hamanaka and Mr. Markus Krajewski
- Chaired by Mr. Gonzalo Villalta Puig

**Sufian Jusoh** presentation focused on the water disputes in the Mekong river basin between Malaysia - Singapore and the Inter Malaysian water claims. He analyzed the existing treaties between the different countries involved and drawing lessons from the past experiences he assessed the need for finding a common venue to solve the raising disputes on the use of water sources. With respect to ASEAN and regional investment law in water and water services he called for an inclusion of water and water services in the ongoing ASEAN services negotiations.

**Debra Tan** discussed China's limited water and rampant water pollution analyzing the Chinese government released the "Three Red Lines" policy to protect its water resources in 2011. She described the multiple policies that have been put in place to control water use, improve water efficiency and tackle water pollution. Efforts to hold the Red Line on water pollution are obvious with Premier Li Keqiang declaring "war on pollution" last year. Also new and more stringent industrial and wastewater discharge standards have been implemented. She highlighted the challenges for the future and said that due to the irregular water distribution in the Chinese territory the China's water policy will shape the ASIAN region.

**Panagiotis Delimatsis** analyzed the EU approach to the freshwater as an exhaustible natural resource. The EU is driven by environmental and access to water to clean water consideration. Less attention has been paid on the regulation of access to and distribution of water as yet another service with noteworthy public good characteristics. The presentation linked the water sector in the discussion relating to services of general interest (SGI) within the European Union. After a review of the relevant EU internal market rules and its level of harmonization, Prof. Delimatsis discussed the application of the current framework relating to SGI to the water sector, discussed the scope of public service obligations (PSOs), and the relevant rules on government procurement.

**Christoph Herrmann** discussed the normative framework of the EU and EU's role as a key actor in international economic governance. He focussed on the exact scope of competences in relation to water services trade and water governance, on the role of the guiding principles and on the effects of the limitations to the use of EU powers and the

role the EU is playing in shaping the global policy in relation to water and water services. He concluded suggesting the negotiation of a Water Charter Treaty discussing briefly the public international law challenges for the EU and its member states in case of such negotiations.

#### **Panel 4: Funding of Sanitation and Water Services: Emergence of a Global Market**

- Mr. Tihomir Ancev, Mr. Samad Azad and Mr. Francesc Hernandez-Sancho: The Role of Multinationals in Providing Water Services: Are they more efficient?
- Mr. Sacchidananda Mukherjee (presented) and Mr. Debashis Chakraborty: Demand for Infrastructure Investment for Water Services: Key Features and Assessment Methods
- Mr. Allen Lai and Mr. Jonatan Lassa: Microfinance in Water and Sanitation Services: Identifying best practices
- Discussants: Mr. Zhaodong Jiang and Mr. Chao Xi
- Chaired by Mr. Manzoor Ahmad

**Tihomir Ancev** presented the first economic study that measure efficiency of water utilities along the domestic vs. multinational distinction. He started from testing the empirical validity of the assumption that opening up the market for water services to foreign corporations will bring much needed infrastructure investment as well as best international practice that will ultimately result with an efficient water sector that will provide services to the public at acceptable cost. He then thoroughly explained the methodology and presented the findings. He said that there is no empirical evidence to suggest that multinational corporations are not running water utility operations that are more or less efficient than the rest of the water sector in individual countries and that findings indicate that there is no difference in total factor productivity of the water sectors across countries, with respect to the presence of multinational corporations or not. He concluded that the argument that multinationals bring increased efficiency and productivity does not hold.

**Sacchidananda Mukherjee** presentation explored various methods of estimation of demand for water services infrastructure and identifies the most appropriate one based on an extensive literature review. Investment in maintenance of water services is as crucial as investment in greenfield projects. The presentation estimated the demand for investment in maintenance separately. Finally the analysis also explored possible sources of financing the infrastructure in water services with special reference to developing countries and LDCs. He concluded proposing: a) improvements in public expenditure b)

the creation of efficient delivery services, c) proper pricing of water d) bolster the governance sector and e) the leverage of public resources to attract private finance

**Mr. Allen Lai** presented a case study of a community based microfinance project in Kemijen Village in Eastern part of Semarang City, Indonesia in the sanitation sector. He spoke about the possibility of a community based micro-finance mechanism as a way to address problems of risk management. The participation of local community to the design of ‘sanitation credit’ mechanism suggests promising result. Such mechanisms allow local community to find ‘best fit’ approach in solving immediate problems such as water access and community sanitation. They may be seen also as a possibility for increasing awareness of the community to climate change generating small-scale behavioral change.

### **Panel 5: The Rise of International Disputes**

- Mr. Julien Chaisse: Mapping the ‘Blue Gold’ Investment Disputes: Recurring Issues and Common Thread
- Ms. Catharine Titi: The Right of the Host State to Regulate Water Services
- Mr. Rahul Donde: Mechanisms to Protect Public Interest in Water Disputes in International Investment Arbitration
- Mr. Shotaro Hamamoto: A Critical Approach to Investment Awards on Water related Issues
- Discussants Mr. Christoph Herrmann and Mr. Timothy Hughes
- Chaired by Ms. Yuhong Zhao

**Prof. Julien Chaisse** presented a detailed analysis of the 21 public investment disputes related to water issues. This case law, developed in the last ten years, elucidate the meaning of key provisions such as indirect expropriation, fair and equitable treatment and full protection and security. It also establishes an embryonic jurisprudence in water services and shed light on the significance of the concession contracts. At the same time this case law indicates the lack of a global holistic approach in regulating water services and access to water and a possible need to relativize some of the protection’s standards in relation to water and water services. One of the options to address these problems is a new process of rule-making.

**Catharine Titi** discussed the extent to which a host state is able to adopt measures relating to water services affecting, inter alia, the economic value of an investment without violating an international investment agreement to which it is party and, significantly, without incurring financial liability vis-à-vis the foreign investor. She analyzed the presence of the right of the host state to regulate water in conventional law

paying attention to the EU-Canada FTA, to customary international law, and looked into the potential impact of soft law instruments, such as the OECD Guidelines of Multinational Enterprises.

**Rahul Donde** expounded the tenets of investment arbitration highlighting the increasing number of water disputes, and the growing public interest in these disputes. He then focused on the mechanisms through which this public interest may be protected and reviewed the relevant investment disputes that have considered these mechanisms and pointed to as-yet unexplored avenues which may be used in the future. He concluded that the right to water may be vindicated in the investment arbitration context in several ways, which may serve to eliminate the perceived tensions between investment guarantees and the right to water.

**Shotaro Hamamoto** presentation examined how arbitral tribunals have dealt with the failure of contracts to manage privatized water supplies by focusing on economic cases of water privatization. He analyzed seven investment awards and examined how arbitral tribunals have dealt with the failure of contracts to manage privatized water supplies by focusing on how public interest can be taken into consideration. He called for new wording to be used in the treaties; *ex abundanti cautela*.

#### **Panel 6: Balancing economic and non-economic policy objectives: Potentials and Limits of international law II**

- Mr. Bryan Druzin: The Parched Earth of Cooperation: Solving the Tragedy of the Commons in Global Water Conservation
- Mr. Chien-huei Wu (presented) & Ms. Helen Huang: Right to Water in the Shadow of Trade Liberalization
- Mr. Paolo Davide Farah: Water Control and Climate Change: Promises and Pitfalls of Shale Gas
- Discussants: Mr. Anatole Boute and Mr. Emmanuel Gillet,
- Chaired by Mr. Jansen Calamita

**Bryan Druzin** spoke about the tragedy of the commons in relation to the management of the world's water reserves that are facing a profound crisis. A tragedy of the commons exists where group actors behaving rationally according their self-interest undermine the entire group's long-term interests by depleting a common resource. The cause of this tragedy is that no-one can trust that other group members will honor their commitment to not deplete the resource, which causes a race to the bottom. Actors otherwise willing to conserve the resource are driven by rational self-interest to 'grab what they can.' The

standard solution to this social dilemma is administrative law. However, the problem is that the global community is a polycentric collage of legal authorities lacking a centralized government. He proposed, as a possible solution, the creation of a Commons Management Fund that can reinforce the compliance of existing and new treaties through ex-ante and ex-post compliance mechanisms.

**Chien-huei Wu** traced the development of human right to water from the perspective of human rights law and explore how this right may serve as a safeguard in case of the liberalization of water services. His presentation focused on the dual nature of right to regulate under trade rules, in particular in GATS context. The right to regulate should be used as a channel for WTO Members to fulfill their obligation to promote and protect right to water in the liberalization of water services. He emphasized that the ‘right to regulate’ under trade rules is indeed the ‘obligation to regulate’ under human rights law with a view to guaranteeing right to water. He referred to the Appellate Body in China-Audio Visual Services that considers the right to regulate an inherent power enjoyed by Members rather than a right bestowed by international treaties. He concluded by saying that treaty interpreters should define the minimum scope of the right to regulate on a case-by-case basis respecting the regulatory autonomy of the Members

**Paolo Davide Farah** presented on the developments of the shale gas focusing on China. The creation of fracking fluid entails the mixing of millions of gallons of fresh water with thousands of gallons of chemicals; it is crucial to assess how harmful the fracking process might be to the environment. Principal concerns include groundwater contamination with fracking chemicals, gasification, water usage risks, surface water and soil risks spills and blow-outs. Shale gas development entails the danger to create an additional demand for water. Critical concerns about the fresh water management vis-à-vis unconventional gas exist. These two natural resources are intricately associated because the extraction, treatment, and distribution of fresh water entails considerable energy while the production of fossil fuel energy involves fresh water. He emphasized the lack of legislation addressing the potential environmental hazards of shale gas production and the legislative and institutional fragmentation in this area.

#### **Panel 7: Balancing economic and non-economic policy objectives: Potentials and Limits of international law II**

- Mr. Markus Krajewski: Protecting the Human Right to Water through the Regulation of Multinational Enterprises
- Paulo Canelas de Castro: A New Development in International Water Law: Towards the Harmonization of the Human Right to Water and the Protection of Investment Rights in the Water Sector?

- Ms. Leila Choukroune: The Liberalization of Water and Sanitation Services and International Law -- For a Holistic Rights Based Approach
- Discussant: Mr. Samuli Seppänen
- Chaired by Mr. Tihomir Ancev

**Markus Krajewski** contribution assessed the two main international instruments of regulating multinational enterprises, the OECD Guidelines on Multinational Enterprises and the UN Guiding Principles on Business and Human Rights “Protect, Respect and Remedy” in order to explore how these instruments specifically protect the human right to water. He looked at the practical application of these instruments focusing on case studies. He then compared with domestic law approaches regulating multinational enterprises through tort or criminal law. He concluded that further OECD Guidelines could establish best practice regarding implementation of corporate responsibility to respect right to water.

**Paulo Canelas de Castro** presentation started with the analysis of the normative development and the interplay of different legal fields in the concept of human right to water highlighting the relevance of ICESCR General Comment 15 and the Millennium Development Goals. However he pointed out the lack of comprehensive and binding agreements on water. The intersection of the human right to water international economic law is becoming a catalyst for new research. Four ICSID cases related to the privatization of water services are generating lessons for the better understating of the specific dimension of water services such as the recognition of the public dimension, the use of human rights arguments in thorough manner in investment cases, the balancing of human rights to water with the investment obligations. He concluded praising the role that tribunals were playing in balancing the human right to water with investment protections contributing at the same time at the understanding and strengthening of International Law.

**Leila Choukroune** talked about the need to approach the issue of hyper fragmentation of international law that is leading to disputes and legitimacy crisis in a more integrated manner relying on a number of core normative principles. In adopting a human –rights based and cross disciplinary legal approach to water and sanitation services liberalization, the presentation identified common issues in international law and case law while proposing a series of conceptual approaches and concrete avenues to reconcile public and private rights, interests and obligations.

## General Report of the Conference Rapporteur

Mr. Pierre Sauvé had the difficult task to keep attention high after two days of intensive discussions. He started with jokes about the difficulties of being a conference rapporteur and the organizers but then he immediately turned serious focusing on the nowadays relevance access to water, water and sanitation services in relation to international economic law, human rights law, environmental law, economy and global governance. He focused on the main challenges related to the water services and the multiplicity of the disciplines involved. Law, economics, political science, public health and others disciplines are intertwined in the sector of water services and there is a need for an ecumenical approach towards a global governance response.

The special features of water are at the foundation of the unique structure of its market structure. It generates difficulties and complexities in how to include water in the negotiation of investment treaties. He also focused on the lack of binding environmental and human rights norms pointing to the problem that international trade and investment law have trumped these two fields. Mentioning the presentations also he remarked: a) the need of more balanced and fair regulations between the countries and the areas of law; b) the role of judicial activism on water and the lessons that can be drawn, c) the need for better protection for intellectual rights in water industry, d) the need better protection for investors in the water services, e) the need for more transparency in concession contract, f) the duty for States to regulate, g) the problems of funding the water services, h) the need to anticipate the market failures

He concluded calling for further research on a) the privatization vs. marketization of the water services industry analyzing which is the role that treaties and concession contracts can play and the possibility of a *lex specialis* for water c) the role of soft law that is leading to compliance in water and water services inviting for more conferences, PhD thesis and books on the topic.

The conference was concluded by Professor Chaisse who thanked every one for the contribution and echoed Pierre Sauvé on the need of more research.