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# Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law

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## Abstract

*This article explores the development of a cross-border dimension to the delivery of urban water services as an arena for the social construction of global administrative law. When companies from one country deliver water services in another country under decades-long concession contracts, the ensuing political and legal struggle engages one of the central strands of administrative law traditionally understood: the question of participation in decision-making processes that affect vital individual interests. Moreover, it does so in an arena that embeds public and private actors in hybrid routines of both formal and informal participation at multiple levels of governance. Using Argentinian and South African case studies, the article teases out in detail the interplay between international and domestic levels of the forms and processes (both formal and informal) that facilitate participation in transnational urban water services governance. The process of socially constructing global administrative law is centred in iterative interaction between formal legal and informal political modes of participation, especially social protest and political negotiations. It is a process with two modes, political and technical, and the political salience of global administrative law is shaped first by differential capacities to deploy both modes, and secondly by the capacity to switch between national and international levels of governance.*

## Preamble: Four Vignettes

The provision of urban water services is an essential service which provides a basic good that is critical to life. Urban water services also tend to be capital-intensive

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natural monopolies. For these and other reasons they have, at least since industrialization, typically been provided by the state, and today some 95 per cent of water service provision still remains in public hands, institutionalized within the nation-state. In recent times, however, urban water service provision has developed a cross-border dimension and 'global governance' is penetrating the sector, unlikely as this seems by comparison with more untethered goods such as coffee or banking services. The transnational dimensions of legal and regulatory politics in relation to water have re-injected an intensified appreciation of the limits of state responsibility *vis-à-vis* the provision of basic goods and essential services.<sup>1</sup> Private-sector participation from outside national borders in the provision of basic goods makes urban water services a fascinating case study for exploring the potential ambit of what scholars have provocatively called 'global administrative law'.<sup>2</sup> The political and legal struggle over this growing trend engages one of the central strands of administrative law traditionally understood: the question of participation in decision-making processes that affect vital individual interests. If one interprets the phrase 'global administrative law' by analogy with understandings of its national sibling, it conjures images of a world state and the legal principles governing the exercise of power by that state's bureaucrats. But the case of urban water service delivery generates altogether different images: hybrid blends of public and private actors linked in routines of both formal and informal participation at multiple levels of governance. Such images are central to an understanding of the emergence and limits of global administrative law, and are distilled in four brief vignettes, sketched in this preamble, to capture the concrete dynamics of urban water service delivery in ways that will help link them to the abstractions of global administrative law.

In the first vignette, citizens in provincial Tucumán, Argentina have their tariffs raised in the wake of a 30-year private concession contract with French multinational Vivendi. They cease paying their bills and lodge administrative dispute papers to defend their position. Vivendi decides not to cut them off but protests the situation to the regulator and provincial legislature, eventually bringing a claim in an international tribunal. Eight years later, the province's water is back in public hands, but political struggles continue over whether to grant authority to the water company to disconnect water services. In the second vignette, South African township residents in Durban are disconnected from their water services for non-payment of bills stretching back over periods of years. 'Moonlight plumbers' reconnect them at midnight, constitutional claims are filed in court, and direct protest is rife. The company in question is a local public operator that has received accolades for its innovative approach to blending financial integrity and social responsibility. In the third vignette, Bolivian citizens in and around the town of Cochabamba find meters

<sup>1</sup> The role of civil society actors and private corporations in collective action in relation to basic goods has a long historical trajectory which has been cyclically important: Trentmann, 'Beyond Consumerism: New Historical Perspectives on Consumption', 39 *Journal of Contemporary History* (2004) 373, at 384–385.

<sup>2</sup> Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15.

attached to long pre-existing wells by the US-based private concessionaire that has signed a 20-year contract with the municipal government to manage and operate their water services. The meters measure their water consumption and water drawn from the well must now be paid for. The citizens turn not to the law but to the streets, in sufficiently large numbers that riots result and within six months the concession has been terminated by the government. In these three vignettes, the social protestors are aware of the other stories, and draw inspiration from the co-existence of others in analogous positions. Similarly, the foreign companies involved accumulate parallel analogous experiences: at least one holds an annual meeting for its various global subsidiaries to exchange strategies for responding to such situations. The fourth vignette tells a different story: in Chile where water services are fully privatized, rates of disconnection are minimal and social protest likewise. Commenting on this, a trade union worker wryly observes: 'here, it's not like in Argentina where electricity cut-offs have people in the streets burning things. Here in Chile, the people simply go and buy candles and lamps'.<sup>3</sup>

From this abbreviated juxtaposition, three salient observations can be drawn. First, a global politico-administrative space of a kind is created by these interlocking events and actors, both in respect of the presence of foreign investors involved in the provision of basic services and through the activist connections. Secondly, within this space, disconnection from water services affects the rights and entitlements of citizens to a basic service in ways that raise classic administrative law questions of limits of public power, and this is so, moreover, whether public or private providers are involved. Thirdly, the space is constituted not only by legal responses, but also by political protest – and importantly there is sometimes little or nothing of either. Whether this space is one of 'global administrative law' is an open question, and not one addressed in those precise terms by the actors involved. The answer depends partly on the implications of the third point: how salient law is as opposed to politics. And where law *is* salient, it depends on the extent to which it can persuasively be labelled 'global' in nature: the legal dimensions stressed by the second point may be entirely domestic.

Focusing specifically on participation – and thus bracketing the substantive issues at stake in urban water service delivery – this article asks as its principal question: What are the forms and processes (both formal and informal) that facilitate participation in, or the capacity to participate in, transnational urban water services governance? To answer this question in a way that teases out the dimensions alluded to above, the focus is further narrowed in two directions: First, what is the interplay between international and domestic levels of these forms and processes: does the former constrain or enhance the latter, and to what extent is there a reverse influence? Secondly, what is the interplay between formal legal processes and political processes such as social protest and political negotiations: do political processes prepare the ground for institutionalizing formal legal processes, or are they linked in different ways? I conclude that 'global administrative law' is constituted by iterative interaction between formal legal and informal political modes of participation – and

<sup>3</sup> Interview with Miguel Soto, Central Workers' Union, Santiago, Chile, 27 Jan. 2004.

in this sense is socially constructed. It is more importantly shaped by domestic processes than international processes, but constitutes a powerful resource for actors who have the capacity to switch between national and international levels of governance. Finally the process of social construction by which it emerges has two modes – political or technical – and the relative predominance of one or the other inflects the political salience of global administrative law in important ways.

## 1 Transnational Provision of Water Services: The Changing Configuration of Urban Water Service Delivery

Private-sector participation in domestic water service delivery reflects governance trends in other sectors, where there is a growing prominence of the corporate private sector. While water has since the 1970s been a focus of UN and other public institutions,<sup>4</sup> the 1990s heralded an increasing interest in the role of private-sector involvement in water delivery, with an important 1992 UN conference endorsing for the first time the principle that water be treated as an economic good.<sup>5</sup> A remarkable 7,300 per cent increase on 1974–1990 private-sector investment levels in water services occurred between 1990 and 1997,<sup>6</sup> and although this has since peaked, intergovernmental activities in relation to water since then have intensified<sup>7</sup> and continue to incorporate the private sector as a key partner in their vision.<sup>8</sup> The global water market is still growing, albeit more slowly than in the 1990s,<sup>9</sup> and private-sector provision,

<sup>4</sup> For example, United Nations, *Water Development and Management*, Proceedings of the United Nations Water Conference, Mar del Plata 1977, Argentina, Vol. 1, Pt. 1, (1978); the so-called 'International Drinking Water and Sanitation Decade' during the 1980s; International Conference on Water and Environment, *The Dublin Statement on Water and Sustainable Development* (1992), available at [www.wmo.ch/web/homs/documents/english/icwedec.html](http://www.wmo.ch/web/homs/documents/english/icwedec.html).

<sup>5</sup> *The Dublin Statement*, Principle No. 4. The other three principles recognize the importance of participatory approaches in water development and management, the importance of the role of women, and the status of water as a finite, essential, and vulnerable resource.

<sup>6</sup> Silva, Tynan, and Yilmaz, 'Private Participation in the Water and Sewerage Sector – Recent Trends', *147 Public Policy for the Private Sector* (1998) 1.

<sup>7</sup> The Millennium Development Goals set at the UN Millennium Summit of 2000 include a commitment to halve the 1.5 billion people in the world without access to safe drinking water. The 2002 World Summit on Sustainable Development in Johannesburg extended this goal to the 2.5 billion lacking sewage, also to be halved by 2015. The United Nations Commission on Sustainable Development has chosen water, sanitation, and human settlement as the focus of its implementation cycle for 2004 and 2005. In January 2004, the European Commission launched the EU Water Facility: [http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004\\_0043en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0043en01.pdf).

<sup>8</sup> See United Nations, *Guiding Principles for Partnerships for Sustainable Development ('type 2 outcomes') to be Elaborated by Interested Parties in the Context of the World Summit on Sustainable Development (WSSD)*, 7 June 2002 (elaborating on GA Res. 56/226 (28 Feb. 2002)), available at [http://www.un.org/esa/sustdev/partnerships/guiding\\_principles7june2002.pdf](http://www.un.org/esa/sustdev/partnerships/guiding_principles7june2002.pdf).

<sup>9</sup> See *Water Utilities: Global Industry Guide* (2003). Further, the business magazine *Fortune* has declared water to be the oil of the twenty-first century (*Fortune*, 15 May 2000); Schwab Capital Markets hosts global water conferences for investors and publishes market analyses of the sector; and the 2004 World Economic Forum in Davos launched a Water Initiative: <http://www.weforum.org/site/homepublic.nsf/Content/The+Water+Initiative>.

though small in percentage terms (globally at no more than 5 per cent), remains significant in numerical terms. Water services to more than 300 million individuals in over 200 different countries are now provided by the private sector, and by 2000, at least 93 countries had partially privatized water or wastewater services.<sup>10</sup>

Whatever one makes of the relative scope of these trends, they are politically significant. The changes are dominated by three firms in particular from France and Britain: Ondeo, Veolia and RWE-Thames, referred to hereafter by their more commonly identifiable names Suez, Vivendi and Thames.<sup>11</sup> These companies and others have been a lightning rod for considerable resistance and criticism in response to the changing configuration of urban water service delivery, particularly from non-business civil society organizations. The criticism arises in part because of the absence of structures of representation and accountability that typically characterize state institutions. But analogies with state institutions in a global context are often strained, since emerging governance institutions at this level tend to be hybrid in form and nowhere more so than in water. The World Commission on Dams,<sup>12</sup> for example, a hybrid institution tasked with generating general principles to guide the funding and building of dams, was composed of government actors, NGOs, activists and corporations on a level playing field unmoored from standard representative and accountability mechanisms. The possibility of establishing an analogous institution to guide private-sector participation in domestic water service delivery has been investigated by a Global Water Scoping Review.<sup>13</sup> And a tri-annual World Water Forum, hosted by the World Water Council, a curious amalgam of business-based NGOs and large corporations,<sup>14</sup> generates a host of principles and policy documents for guiding water governance, emphasizing such core issues as 'full cost recovery' in a heavily iterative fashion. The World Water Forum includes a formal Ministerial Meeting, despite the fact that it is not sponsored directly by the United Nations.

<sup>10</sup> G. LeClerc and T. Raes, *Water: a World Financial Issue* (2001).

<sup>11</sup> Ondeo (previously Suez and before that Lyonnaise des Eaux) serves 110 million people in more than 100 countries. Veolia (previously Vivendi Environnement and before that Compagnie Générale des Eaux) serves 96.5 million people in 90 countries: see Gleick *et al.*, *The New Economy of Water* (2002), at 24–25. Thames Water serves 22 million people: see D. Yaron, *The Final Frontier* (2000).

<sup>12</sup> World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (2000). The novelty of the WCD may be disputed if a longer historical perspective is taken that encompasses the growth of many international bodies, such as the Danube River Commission, in the late nineteenth century.

<sup>13</sup> Urquhart and Moore, 'Global Water Scoping Process: Is There A Place for a Multistakeholder Review of Private Sector Participation in Water and Sanitation?', ASSEMAE (Brazilian Association of Municipal Water and Sanitation Public Operators), Consumers International, Environmental Monitoring Group, Public Services International, RWE-Thames Water, and WaterAid, Apr. 2004, available at <http://www.wateraid.org/documents/Ful%20report%20MSR.pdf> (last accessed 11 Dec. 2004).

<sup>14</sup> Many major companies in water (including construction and engineering as well as water service delivery and management) are members of the World Water Council (the WWC), as are the major multilateral development banks. The WWC, legally incorporated in France as a UNESCO-affiliated NGO, describes itself as 'an international water policy thinktank dedicated to strengthening the world water movement for an improved management of the world's water': see <http://www.worldwatercouncil.org/about.shtml>.

These have been contentious developments, generating criticism that water is increasingly and wrongly viewed as a consumer service to be provided on a market basis rather than as a basic good, or even a fundamental human right. This debate is in direct terms orthogonal to the core focus of the article, i.e., the character of global administrative law, the processes by which it emerges, and its participatory dimensions. But it is a vital part of the substantive political context, and one which echoes political tensions within administrative law more generally, whose key contours are process, equity and efficiency. These concepts – process, efficiency and equity – appear repeatedly in governance debates at the World Water Forum and elsewhere, and strategies of global administrative law can be viewed as one avenue of diffusing, or routinizing, the substantive political conflict that underlies all three of these issues. And where global administrative law-like forms emerge in an empirical context of North – South relationships, tensions between equity and efficiency are especially acute, with the consequence that superficially neutral process mechanisms have a powerful capacity to skew significantly the playing field for future interaction.<sup>15</sup> For this reason, two case studies, in Argentina and South Africa, will be explored in some detail in Section 3 to illustrate the dynamics of the social construction of global administrative law.

The view of administrative law adopted in the process of elaborating the case studies is one that understands process, equity and efficiency not as abstract values that are promoted or undercut by different legal arrangements, but as programmatic aspects of a political opportunity structure, as ‘a tool for controlling or facilitating performance of public tasks of governance’.<sup>16</sup> Importantly, administrative law is a *contingent* opportunity structure – it shapes who wins and who loses substantive political contests, but not necessarily in predictable ways. The outcomes that flow from the application of administrative law (or law-like) doctrines to particular situations can in some circumstances bolster the powerful,<sup>17</sup> in others they provide openings for the disempowered or more vulnerable.<sup>18</sup> A classic and central instance of this ‘double face’ – its capacity both to shore up and to challenge power – is the way in which administrative law provides a forum for expanding access to, and participation in, collective decision-making. For the specific political salience of such expanded access will depend on *who* gains access, and what the results of such access are. Moreover, this ‘double face’ of administrative law is mirrored and even intensified in contexts of

<sup>15</sup> Chimni, ‘International Institutions Today: An Imperial Global State in the Making’, 15 *EJIL* (2004) 1.

<sup>16</sup> Cane, ‘Administrative Law’ in C. Parker and J. Braithwaite (eds), *Regulating Law* (2004), at 209.

<sup>17</sup> Martin Shapiro, for example, has long emphasized the ways in which administrative law serves the interests of those who govern, stressing how bottom-up challenges of official decisions are a cost-effective mechanism for keeping lower-level bureaucratic officials in check and ensuring that they do implement centrally set policies: M. Shapiro, *Who Guards the Guardians: Judicial Control of Administration* (1988); Shapiro, ‘Administrative Law Unbounded: Reflections on Government and Governance’, 8 *Indiana J Global Legal Studies* (2001) 369.

<sup>18</sup> For example, as in Richard Stewart’s classic account of administrative law as effecting a system of pluralist interest group representation: Stewart, ‘The Reformation of American Administrative Law’, 88 *Harvard L Rev* (1975) 1667.

transnational governance, due in particular to the absence of two features typically present at national level. First, extended supervisory bureaucracies are rare or non-existent, which intensifies the utility of cost-effective means of disciplining lower-level official decisions such as administrative law provides. Secondly, from the inverse political perspective, the absence of tangible institutional forms of democratic channels in global settings makes global administrative law an important forum for challenging power.

However, it is not only the contingency of administrative law's formal dynamics that must be noted, but also the limits of that formality, especially in the transnational context. In the hybrid public – private world of water service delivery, those aspects of the current situation that are most characteristically 'global' are for the most part those aspects that are least obviously formally legal. The rich dynamics of emerging global administrative law here are still very much in the process of social construction, and it is essential therefore to explore the ways in which informal modes of participation relate to formal modes. Whether through routinized political consultation and negotiations or through more unruly forms of protest, informal processes 'beyond the law' constitute and shape the more formal modes of participation. Governance is a term frequently invoked in such contexts, albeit usually with a much more technical and apolitical inflection than is intended now. But understood in an interpretive sense<sup>19</sup> as a bottom-up and actor-oriented perspective on the links between strategies of rule and the practices of actors, governance can capture the socio-political dimensions of frameworks for collective decision-making in ways that highlight the relationship between the 'technical' and 'political' aspects of those frameworks. I am thus equally interested in 'administrative law-like' opportunities for participation in the political opportunity structure of transnational urban water service delivery as in formal legal ones.

But formal initiatives provide a helpful, and in this case, trifocal lens for focusing the empirical overview that I undertake in Sections 2 and 3. In the context of water, three forms of international regulatory activity impact, or potentially impact, in a formal manner upon participation or review opportunities in national-level water governance: bilateral investment treaties, global standards for water services and a human right to water. These three forms of regulatory activity capture facets of transnational activity that are important building blocks of transnational administrative law more generally: as Martin Shapiro has argued recently, two key such building blocks are 'the growth in transnational regulation catalyzed by the extension of free trade rules' and 'mandates to defend positive rights (human rights to health care, housing, subsistence and the like) against regulatory deprivations'.<sup>20</sup> They address process, equity and efficiency in different measure, and in so doing provide 'hooks' for exploring the vertical interplay – or lack of interplay – between international initiatives and domestic forms of governance in Argentina and South Africa in relation to water services, especially regarding disconnections.

<sup>19</sup> M. Bevir and R. Rhodes, *Interpretive Governance* (2003).

<sup>20</sup> Shapiro, "Deliberative", "Independent" Technocracy v Democratic Politics: Will the Globe Echo the EU?, 68 *Law and Contemporary Problems* (2005) 341.

The details drawn from Argentina and South Africa in Section 3 are part of a larger research study which conducted fieldwork in six countries, both developed and developing.<sup>21</sup> Of the four developing country case studies in the larger project, South Africa and Argentina exhibited the most judicial or quasi-judicial activity around the governance of water services, facilitating an analysis of the interplay between formal law and grassroots activism, political negotiations or bureaucratic management. At the same time, they are contrasting cases in terms of their relative exposure to international investment claims and international human rights norms – Argentina is highly exposed to the former with South Africa much less so, while South Africa has a strong reputation as a leader in the institutionalization of socio-economic human rights, with Argentina moderately active on this front.

Section 2 provides more detail on the three international regulatory processes which impinge on national-level governance of water services. Section 3 presents a thumbnail sketch of the empirical context of each case study and narrates different points of intersection between the international forms summarized in Section 2 and national (or subnational) forms and processes of participation or review in policy-making around water services. Where there is little or no interaction with the international processes, I very briefly sketch what *does* occur. Section 4 analyses when and to what extent international forms and processes constrain or enhance domestic-level processes – or the reverse; stresses the importance of informal processes – particularly unruly protest but also routinized practices – in giving ‘bite’ to formal legal possibilities for participation and review; and explains how the ‘technical-political’ dynamic shapes emerging opportunities for participation in the transnational political-administrative space of urban water service delivery.

## 2 Three Forms of International Regulatory Activity

The three forms of international regulatory activity explored here represent a typology of three forms of articulating standards: interstate legal regulation and dispute resolution, private standard-setting, and global bureaucratic soft law. Bilateral investment protection agreements (BITS) are a form of international hard law that creates legally enforceable rights and entitlements for foreign investors investing in water services. The private standard-setting initiative, a form of international ‘soft law’, is that of Technical Committee 224 of the International Organization for Standards (the ISO), formed in 2001 with the objective of developing standards on service activities relating to drinking water supply and sewerage. The ISO process thus far has had remarkably little impact at domestic levels in developing countries: hence more detail

<sup>21</sup> The larger research project from which this article draws focuses both on the international level and on national-comparative case studies which have been carried out in South Africa, Chile, New Zealand, Bolivia, Argentina, and France. The project limits do not extend to rural water supply or – except tangentially where they have special salience for end-delivery politics – to the larger terrain of water resources. The support of the joint ESRC–AHRB Research Programme, ‘Cultures of Consumption’, for this research is gratefully acknowledged (see ESRC Grant RES-143-25-0031, [www.esrc.ac.uk](http://www.esrc.ac.uk)).



is provided in Section 2 than for the other two forms. Third comes a form of soft law that is embedded in the UN rather than in private actors: the articulation of a human right to water by the United Nations Committee on Economic, Social and Cultural Rights in General Comment No. 15 of November 2003 (GC15).

### ***A Investment Protection***

BITS are an important form of international regulatory activity that focuses primarily on legal protection of the rights of foreign investors. Framed within a liberal model that gives priority to secure property rights as an important foundation of a stable global market, BITS are controversial by virtue of their potential ability to trump national and local regulatory protection. In a typical investor – state dispute, the investor claims compensation for damage it has allegedly suffered as a result of a state measure. State measures normally include not only legislation but also regulations, policies or practices of the state. In the context of a concession to invest in water services, an investor – state claim could challenge instances of state policy such as altering the required amount or duration of the investment, applicable operational requirements such as quality standards, or the amount of authorized tariffs that an investor could charge and the methods of collection.

While as at 15 August 2005, only nine of 189 complete or pending claims at the International Centre for the Settlement of Investment Disputes (ICSID) related to water and sewerage contracts, five were filed in the last three years, and over one-third of the remaining 180 claims relate to analogous infrastructure such as energy projects, infrastructure construction (airports, dams, roads) and municipal waste disposal.<sup>22</sup> Thus, although relatively few water service arrangements end up in formal international legal arbitration, the shadow of that possibility can shape significantly the political opportunity structure for participation, as the article by van Harten and Loughlin in this issue reiterates in a more general context.<sup>23</sup> More specific to this paper, the comparative exposure of South Africa, Argentina and France is strongly differentiated: Argentina is heavily exposed in comparison to South Africa, especially since its 2001 economic crisis, and France is insulated entirely. At mid-2003, Argentina had concluded 38 BITS, South Africa 10 and France 65 (including BITS with both case-study countries); Argentina, however, was defending 11 ICSID claims, while South Africa faced none and France was prosecuting several (including the one against Argentina discussed below in Section 3) and defending none.<sup>24</sup>

<sup>22</sup> Between Feb. 2002 and Aug. 2005, 110 pending or complete ICSID claims increased to 189. 72 out of 180 of the non-water claims were energy projects (40 claims), infrastructure construction projects (28 claims), and municipal waste disposal (four claims); calculated from [www.worldbank.org/icsid/cases](http://www.worldbank.org/icsid/cases).

<sup>23</sup> Van Harten and Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 *EJIL* (2006) 121–150.

<sup>24</sup> Calculated from [www.worldbank.org/icsid/cases](http://www.worldbank.org/icsid/cases). These numbers are likely to represent only a fraction of total claims against the case study countries for two reasons: first, ICSID publicizes a claim only once it has been registered by the Secretary-General of ICSID, which can take some time, and secondly it does not take into account other fora for investor–state arbitration, such as the UNCITRAL and the International Chamber of Commerce, neither of which has an obligation to publish claims.

The chief influence of investment protection frameworks occurs by reason of the dispute settlement mechanisms provided to foreign operators, and the shadow this casts on national level trajectories of water service policy-making. Details of how this plays out at national levels will be given in Section 3, but it is worth noting at this point that this mechanism is very restricted in terms of the participation opportunities it affords. International arbitration fora are essentially private, traditionally restricting access and participation solely to the investor and the relevant state government, with little or no publicity for the relevant documentation.<sup>25</sup> As will be discussed in Section 3, however, some recent moves to make such fora more inclusive have occurred in the specific context of water disputes.

## **B ISO Standard-setting**

The hard law frameworks created by global investment protection treaties, and particularly by global free trade agreements, create secondary effects in the process of affording specific dispute resolution avenues. Because these avenues can be used to challenge at least some domestic regulatory decisions, they magnify the importance of standards that meet a criterion of being the ‘least trade-restrictive’ regulatory option. One way that a national government can ensure that it meets such a criterion in advance is to mirror international standards that represent such a consensus, and the ISO is an increasingly popular forum for developing ‘trade-neutral’ regulatory standards. It is significant that the ISO has recently ventured into the development of regulatory standards for water service delivery, since multilateral trade agreements may over time include investor protection clauses (as the North American Free Trade Agreement already has) whose impact on domestic regulatory authority will have to be reconciled with existing investor protection agreements. Although water services have not as yet been committed by any governments under the General Agreement on Trade in Services (GATS), there is strong political pressure to do so, especially from the EU.<sup>26</sup> And certain clauses of the GATS have the potential to effectively protect at least some aspects of foreign investors’ rights: for example, the requirement that domestic regulations be objective, transparent, administered in a reasonable, objective and impartial manner (even if non-discriminatory) and – an important substantive

<sup>25</sup> The International Centre for the Settlement of Investment Disputes (ICSID) publicizes the existence only of awards registered under the ICSID Convention or the ICSID Additional Facility, and the content only with the consent of the parties to the dispute (ICSID Convention, Art. 48(5)). Other fora for investor–state arbitration (e.g. UNCITRAL and the International Chamber of Commerce) have no obligation to publish claims at all. Additional materials relevant to a dispute, such as the submissions of the parties, are not normally published.

<sup>26</sup> The EU is also campaigning to add a new service classification to the accepted list of services from which states can choose when making a legal commitment not to infringe freedom of cross-border trade as defined by the General Agreement on Trade in Services: WTO, Council for Trade in Services, Communication from the European Communities and Their Member States, ‘GATS 2000: Environmental Services’, S/CSS/W/38 (22 Dec. 2000) at 2, 5–6. ‘Water for human use and wastewater management; including water collection, purification and distribution services, and wastewater services’ would be a much more sector-specific description than the current generic one of ‘environmental services’.

constraint – that they be no more burdensome than necessary.<sup>27</sup> ISO efforts in this area may therefore have significant legal relevance in the future, even if they do not presently do so.

The ISO is a private standard-setting organization based in Geneva, which is a federation of national standards bodies from 149 nations. Although national standards bodies can be either governmental or private-sector business associations, ISO is often criticized for its skew towards industry.<sup>28</sup> Its procedures preserve a large formal role for industry in standards development, and industry representatives dominate the more than 2000 technical working groups of ISO. The issue of standards for water service delivery, however, has been at the centre of a novel reorientation of ISO processes towards inclusion of both NGO observers and wider participation of developing countries.

When Technical Committee 224 (TC224) was formed by the ISO to develop water and wastewater service standards, France played a particularly significant role. The French Standards Association initiated the proposal, wrote the business plan and provides central Secretariat services,<sup>29</sup> and the French delegation includes two French consumer associations as well as Vivendi and Suez, one of whose representatives speaks for the French delegation in plenary sessions of TC224.<sup>30</sup> TC 224 has been meeting formally twice a year since September 2002, in four working groups: Terminology, Service to Users, Drinking Water, and Wastewater Systems. Early TC224 dynamics were dominated by the industrialized North. Germany, Holland, UK and USA voted against TC224's formation, a stance possibly driven at least for the first three by their links with medium-to-large corporate water service providers who are participants in the global market and could be harmed by a regulatory framework that reflected French preferences. In the working groups, where the detailed drafting occurs, Northern representation has been particularly disproportionate: the March 2003 list of experts nominated to all working groups included only one developing country expert, from Argentina. But a consistent pattern of widening inclusion of developing countries has since been established,<sup>31</sup> and between the April and September 2004 plenary meetings, three regional fora were held in Asia, Latin America and Africa to gather the input of developing countries on TC224's work. A developing countries ad hoc group has also been created to ensure the applicability of the standard in developing regions of the world.

<sup>27</sup> GATS, Art. VI.

<sup>28</sup> See, e.g., Public Citizen's letter to the American National Standards Institute protesting the formation of TTC 224, signed by 25 international organizations and 18 US NGOs, available at <http://www.citizen.org/trade/harmonization/water/articles.cfm?ID=7153>.

<sup>29</sup> The French Standards Association was founded in 1926 and is a state-approved organization under the administrative supervision of the French Ministry for Industry. It has a membership of approximately 3,000 companies.

<sup>30</sup> Simpson, 'Down and Dirty: Providing Water for the World', 24 *Consumer Policy Review* (2004) 146, at 147.

<sup>31</sup> Of 25 member country representatives, seven are now from developing countries (Argentina, Malaysia, Morocco, Nigeria, South Africa, Tunisia, and Zimbabwe), and of 18 observer representatives, six are from developing countries (Colombia, Cuba, Ecuador, Mexico, Turkey, and Zambia).

It is an open question whether this expanded participation will change the real balance of power within TC224: the regional fora held in the South functioned more to provide information than for active participation, and the agenda-setting power remains with the central Secretariat run by France.<sup>32</sup> Nonetheless, the developments do signal a very visible shift in ISO's *modus operandi*, and the public documentation of the standard-development process is particularly striking. It is a shift linked to the inclusion in TC224's deliberations of NGO observers, who cannot vote but have influenced many amendments to the standards. This inclusion was catalyzed by an International NGO Network on ISO (INNI), formed in the belief that the ISO's growing importance as a forum for developing 'trade-legal' standards could have 'a negative impact on the ability of developing country NGOs to advocate for strengthened national standards, transparency, and democratic decision-making'.<sup>33</sup> In response, INNI is, in its own words, 'committed to informing developing country NGOs about the ISO process, and empowering them to address pitfalls in ISO implementation, in order to address the tremendous potential impacts of TC224'.<sup>34</sup>

The shift is also linked to internal conflict within TC224 over substantive aspects of standards for water services. A procedural response – expanding participation and representation – has effectively finessed the resolution of two particularly contentious aspects: the appropriate role of 'cost' or 'price', and consideration of whether a 'right to water' should be incorporated into the standards. These substantive issues have also been muted by emphasizing the technical rather than political nature of the process. Thus, for example, TC224 negotiators have refused to allow public accessibility of concession contracts to consumers as a matter of course, pleading commercial confidentiality.<sup>35</sup> Moreover, in respect of matters that the UN General Comment 15 (GC15, discussed below) treats as legal entitlements, TC224 standards acknowledge only 'users' needs and expectations'. This consumerist approach indirectly shapes the texture and focus of expanded participation, as the following excerpt from TC224's founding document illustrates:

<sup>32</sup> For example, the African Forum was held on 22 Sept. 2004 and participants were asked to return comments on the standards to the secretariat by 14 Oct. 2004: *Report of African Forum on TC224*, available at <http://inni.pacinst.org/inni/WATER/AfricanForum.pdf>. However, the Argentinian national standards organization has recently initiated a drive to raise consciousness of TC224 activities in all its internal local member organizations: June 2005 letter from Instituto Argentino de Normalización y Certificación, available at [http://comelec.afnor.fr/servlet/ServletComelec/tc%20224.pdf?form\\_name=cFormCustom&session\\_id=0.6009472763669875&file\\_name=tc%20224.pdf](http://comelec.afnor.fr/servlet/ServletComelec/tc%20224.pdf?form_name=cFormCustom&session_id=0.6009472763669875&file_name=tc%20224.pdf).

<sup>33</sup> See <http://inni.pacinst.org/inni>. INNI was spearheaded by The Pacific Institute, a California-based NGO that specializes in water issues.

<sup>34</sup> The Pacific Institute, 'ISO and Water Management Standardization', Introductory section on <http://inni.pacinst.org/inni/WATER/>, no longer on the website but on file with the author. The current version of the website states INNI's aims in rather more general terms, but still process-oriented: 'to ensure that any ISO-created environmental standards serve the public interest and protect our environment. We aim to do this by providing timely information on the activities of ISO to network organizations so that they can activate their constituents, provide guidance to decision-makers, and shape public opinion'.

<sup>35</sup> Simpson, *supra* note 30.

As a result of the world consumer movement, consumers who use water services, both in the most industrialized countries and in the emerging countries, are more and more demanding concerning the quality of the water service. They are also more and more sensitive to the transparency of the management and to the quality/price ratio of these services. They are therefore very concerned about understanding their water invoice and about obtaining as low a rate as possible.<sup>36</sup>

The emphasis on technical efficacy, price levels and the like as the appropriate focus of consumer advocacy-based participation differs markedly from the more politically inflected processes envisaged by GC15's conception of a right to water, discussed below. The ISO process envisages participation, not of citizens collectively on prior questions of structural choices about service delivery, but rather of consumers in relation to the specifics of services received on an individual basis.

### C Human Right to Water

General Comment No. 15 (GC15) on the Right to Water was adopted by the UN Committee on Economic, Social and Cultural Rights (the ESC Committee) in November 2002.<sup>37</sup> The Comment provides detailed guidance on the right to water, which the ESC Committee has interpreted as an indirect obligation flowing from Articles 11 and 12 (the rights to health, and to an adequate standard of living) of the International Covenant on Economic, Social and Cultural Rights (the ICESCR). GC15 articulates a right to 'sufficient, safe, acceptable, physically accessible and affordable water', and outlines detailed expectations as to the availability, quality and accessibility of clean water for domestic uses. GC15 is not legally binding, but it does attract the obligation for states to report to the ESC Committee on progress in fulfilling the right to water.

The ESC Committee, although part of the United Nations, is only indirectly embedded in conventional representative structures. Its 18 members<sup>38</sup> are selected by the UN Economic and Social Council from a slate of names nominated by those states who have ratified the ICESCR. They serve for four-year terms, not as government representatives but in their individual, expert capacities, and GC15 – possibly because of this – reflects an approach that is somewhat ahead of international state practice in the area.<sup>39</sup> This is true not only of matters of substance<sup>40</sup> (not discussed in detail here), but also in relation to participatory guarantees. Article 48 of GC15, for example, requires that:

<sup>36</sup> AFNOR, 'ISO Proposal for a New Field of Technical Activity', 17 Apr. 2001, ISO/TS/P 194, available at <http://www.citizen.org/documents/ISOWater.pdf>.

<sup>37</sup> UN Doc. E/C.12/2002/11, 29th session of the ESC Committee.

<sup>38</sup> The Committee's current membership includes four members from developed countries and 14 from developing or transition countries (three from the former Soviet Union, three from Latin America, three from Africa, three from Asia, and two from the Middle East): [www.ohchr.org/english/bodies/cescr/members.htm](http://www.ohchr.org/english/bodies/cescr/members.htm).

<sup>39</sup> McCaffrey, 'The Human Right to Water Revisited', in E.B. Weiss *et al.* (eds), *Fresh Water and International Economic Law* (2004), at 93.

<sup>40</sup> For example, relating to affordability issues (GC15, *supra* note 37, Art. 27) or relating to access to water for those without formal land rights (GC15, Art. 16(c)).

the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water, must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.

This goes well beyond many domestic legal systems even in developed countries, particularly where concerns of commercial confidence impinge on access to information. A second example represents a reputable aspiration but one frequently not mirrored in state practice, especially where resources are highly limited. That is the requirement where domestic water systems are controlled by third parties (which occurs where concessions have been signed) that ‘an effective regulatory system must be established ... which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance’.<sup>41</sup>

The gap between state practice and the obligations of GC15 affects its potential influence, particularly because the right enunciated by GC15 is fundamentally dependent on national-level implementation and enforcement initiatives, including positive state action, for its realization.<sup>42</sup> That said, processes for monitoring GC15 may use indicators and benchmarks drawn from international documents.<sup>43</sup> Just what kind of national-international dynamics emerge in practice around GC15 and participation will be discussed in the next section.

### 3 Law, Politics and Water in Argentina and South Africa

#### A *Argentina*

In 1995 the French water company Vivendi, and its Argentine affiliate Aguas del Aconquija<sup>44</sup> entered into a concession contract with Tucumán, a province of Argentina. The concession contract contained detailed provisions about the service that Vivendi would provide, the tariffs it would charge, and the investments it would make. After the agreement was entered into, disputes arose between Vivendi and Tucumán over various issues including the method for measuring water consumption, the level of tariffs to customers, the timing and percentage of any increase in tariffs, the remedy for non-payment of tariffs, Vivendi’s right to pass through to customers certain taxes,

<sup>41</sup> GC 15, *supra* note 37, Art. 24.

<sup>42</sup> For example, GC15 ‘requires the State to take positive measures’ to assist individuals and communities to enjoy the right, and to ‘accord sufficient recognition of this right within national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right’.

<sup>43</sup> See GC15, *supra* note 37, Arts 53 and 54: ‘States parties may obtain guidance on appropriate indicators from the ongoing work of WHO, FAO, UN-Habitat, ILO, UNICEF, UNEP and UNDP and the UN Commission on Human Rights’.

<sup>44</sup> The parent company was known as Compagnie Générale des Eaux (CGE) at the time of entering into the concession and more recently as Veolia, though still more popularly recognized as Vivendi, which will be the name used here. Although Aguas del Aconquija has a separate legal personality, it is controlled in substance by Vivendi.

and the quality of the water delivered. The disputes took multiple forms at the domestic level but led ultimately to an arbitration claim lodged by Vivendi in the International Centre for the Settlement of Investment Disputes ('the ICSID process').<sup>45</sup>

In its claim, Vivendi alleged that the Tucumán government tried to frustrate operation of the concession contract. According to Vivendi, this was part of a 'concerted public attack ... which included a series of inflammatory statements and other acts encouraging customers not to pay their bills'.<sup>46</sup> There had been ongoing attempts between Vivendi and Tucumán, and in time Argentina itself, to renegotiate the concession contract. The negotiations led to a 1997 framework agreement but, according to Vivendi, the Governor of Tucumán changed the terms of the framework agreement before submitting the necessary implementing legislation to the Tucumán legislature. Further negotiations were unsuccessful and Vivendi notified the Governor of Tucumán that its Argentinian affiliate was rescinding the concession contract because of an alleged default by Tucumán. Tucumán rejected the Vivendi notice of rescission and terminated the concession contract, alleging default of performance by Vivendi. Ten months later, the Republic of Argentina assumed the responsibility for the operation of the water and sewage system from Vivendi and in 2004 a new public provincial company (*Sociedad de Aguas de Tucumán, SAT*) was formed to provide water services to Tucumán citizens.

An important aspect of the termination was the existence of mass payment boycotts by consumers. Local consumer associations played a dual role here that bridged direct and 'unruly' action with more formal legal modes of participation. On the one hand, they acted as an organizational focus for social protest via street marches and demonstrations, but they also functioned as a conduit for ensuring legal protection of boycotting consumers. Two main associations proposed various structural reforms to the government, both substantive (a ban on disconnection and a social tariff structure), and procedural – demanding, for example, a public hearing in tariff setting procedures, and the appointment of a consumer representative to the governing board of the regulator. Though these two associations differed in history and orientation,<sup>47</sup> both viewed their formation and their demands for participation in policymaking processes as uniquely catalysed by the entry of the foreign private sector.

These local trajectories, however, unfolded in the shadow of the ICSID process which shaped the larger political context. The federal government undertook the

<sup>45</sup> *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux v Argentine Republic*, Award, ICSID Case No. ARB/97/3 (12 Nov. 2000), 40 ILM (2000) 426, also available (with subsequent decisions on the same case) at <http://www.worldbank.org/icsid/cases/awards.htm#award15>. The case was originally filed on 19 Feb. 1997, relying on a 1991 BIT between Argentina and France.

<sup>46</sup> Award, *supra* note 45, at para 30.

<sup>47</sup> ADEUCOT was an umbrella organization from many different cities, focusing only on water, and supportive of direct action, street protests, and an oppositional stance, or on large-scale structural reforms such as re-municipalization. The other, DUDAS, based only in the provincial capital and concerned with essential services more broadly, was more devoted to in-depth study, negotiations with legislators, to focused reforms such as a social tariff, and more broadly to efforts to establish an alternative mode of provision once Vivendi had left.

so-called ‘Rottenberg mission’ to resolve the dispute informally, sending former President Menem of Argentina to France to negotiate there, pressuring provincial officials in Tucumán both publicly in the press and privately,<sup>48</sup> and helping prepare a new agreement between Vivendi and Tucumán Province with a Working Group of the Provincial Attorney-General, a union representative and the CEO of Vivendi.<sup>49</sup> This created significant pressure on the local dispute resolution dynamics, however subtly. The following story illustrates the effect of the uneven background distribution of power. In the summer of 1996, many thousands of users ceased paying their water bills in the wake of brown water and rising costs. The Tucumán Ombudsman advised consumers who did this to lodge an administrative dispute with the company alleging deficient rendering of services in respect of water quality and incorrectly calculated tariffs.<sup>50</sup> Non-response to this dispute letter within 15 days bounced the dispute to the regulator, ERSACT, which issued two resolutions discounting consumers’ bills in two respects.<sup>51</sup> Although only about 10 per cent of payment boycotters filed the appropriate paperwork, this still amounted to some thousands of people. Vivendi did not challenge the decrees of the Ombudsman and regulator in local courts but continued to voice its disagreement even while invoicing customers in accordance with the decrees, and then immediately filing suit against the boycotters to recover the unpaid charges once they had rescinded the contract. Before the ICSID claim was filed, however, they preferred to continue with political negotiations.

The Ombudsman took two unprecedented steps in response to Vivendi’s lawsuits against the boycotters, basing its strategy on the fact that the company was no longer the water provider. First, the Office tried to lodge a collective action lawsuit in the courts on behalf of the boycotters, but this was rejected in multiple consecutive fora by a series of different judges. Secondly, it offered individual legal assistance to consumers, having failed to secure such assistance from the local bar association.<sup>52</sup> Now it is difficult to substantiate directly the shadow of the international power dynamics, not least because of the delicate political nature of the

<sup>48</sup> The Minister of Economy at the time, Fernandez, even threatened a federal-provincial lawsuit for the damage caused to Argentina’s image in the eyes of foreign investors.

<sup>49</sup> Interview with Maria Pedicone de Valls, Provincial Attorney-General of Tucuman, Aug. 2004.

<sup>50</sup> This advice was supported by a series of resolutions issued by the Ombudsman’s Office (No. 66 and No. 67 of 1996) that highlight the details of why the invoicing was incorrect, drawing also on a public auditors’ report to the same effect (Tucuman Audit Office Report 015, on file with author).

<sup>51</sup> Resolutions No. 212 and No. 213, discounting the bills, first, by the amount of disputed taxes that Vivendi was passing through on the bill and, secondly, by the amount paid for water during the periods in which turbid, chocolate-coloured water was provided.

<sup>52</sup> Interview with Bossio, Ombudsman, Aug. 2004: ‘I went to talk [to the local bar association] and I told them: why don’t you give a commission to young lawyers, pro bono work by the bar association? We will give you all the material for you to reply but you handle the proceeding. They didn’t say yes or no. They didn’t say anything. So, we had to do it ourselves. And as I told you, this means the Ombudsman in an unprecedented action became a free consultant on the water issue for Aconquija Water Company [Vivendi’s subsidiary]. And that generated great concern, a lot of work. Well, somehow we provided a service that was not being offered and no one, no private lawyer would do it because it took five days to study this whole privatization issue, the invoicing, if it was correct or not’.



conflict.<sup>53</sup> But the somewhat extraordinary sequence of judicial evasions in response to the Ombudsman's claim is rather striking.<sup>54</sup> The first judge rejected the case on grounds of conflict of interest because 'looking through his personal belongings' he found an unpaid water invoice. The second judge pleaded incapacity to hear a collective injunction lawsuit in his residual jurisdiction. The third judge argued that his jurisdiction did not extend to the issues of contractual documentation raised by the injunction proceedings. The fourth judge suggested it belonged in the administrative courts' jurisdiction, but the fifth judge, in the administrative jurisdiction, thought the reverse. This returned the matter, after 18 months, to the first judge. The then Attorney-General's comment seems well justified: 'they passed the ball from one to the other and nobody wanted to receive us'.<sup>55</sup> The local bar association was similarly reluctant to become involved, and there were vociferous – albeit disputed<sup>56</sup> – claims that the World Bank inserted a condition around that time on a large health and education loan requiring conflicts over public service concessions to be eliminated or resolved. Overall, there was a distinct sense that World Bank and ICSID processes constrained the domestic substantive and procedural possibilities, even if the precise mechanisms of intervention were disputed or indirect.

In terms of outcomes, the legacy of this intersection of national and international developments was ambiguous. In the short term, the effects on participation opportunities were disappointing. No right to public hearings was obtained (although a precedent for this existed in electricity), and the promised consumer representation on the Board of Directors of the regulator never came to fruition. The reasons for this were at least partially purely local in nature,<sup>57</sup> but a lawsuit brought to challenge the first proposed appointee was never decided, echoing the judicial evasion in response to the ombudsman and consumer claims.<sup>58</sup> Although these process outcomes were disappointing, substantive gains were made, including legislative prohibition of water

<sup>53</sup> This sensitivity is illustrated by the fact that a lawsuit filed by the Provincial Attorney-General against Vivendi for breach of contract was later withdrawn when a change of government occurred and has never been re-filed, despite the promises of three consecutive Attorneys-General to do so (interviews with Ombudsman Bossio; Maria Pedicone de Valls, Provincial Attorney-General; Jose Domieu and Jorge Abdala, both representing consumers' associations, Aug. 2004).

<sup>54</sup> It also contrasts with the fact that the courts heard many individual claims against non-payers and issued sentences in relation to them: here, however, the legislature intervened and passed a law suspending the enforcement of these sentences for 6 months. This law became another aspect of Vivendi's claim in the ICSID process.

<sup>55</sup> Interview with Maria Pedicone de Valls, Provincial Attorney-General of Tucuman, Aug. 2004.

<sup>56</sup> Interviewees differed on the factual existence of this conditionality. But a 13 Aug. 1998 report in the local newspaper *La Gaceta* quoted Governor Bussi as saying that US\$55 million from the World Bank could not be disbursed until the federal government had taken over the concession, allowing Vivendi to leave.

<sup>57</sup> Again interviewees conflicted on the reason for this: some NGOs blocked it because the method of choosing the representative was too top-down; other NGOs refused to accept the government's choice of an environmental NGO who knew nothing about the issue; the government says the NGOs fought amongst themselves as to who to choose (interviews with Jiminez Lascano (DUDAS consumers' association), Maria Pedicone de Valls (Attorney-General) and Jorge Abdala (ADEUCOT consumers' association), Aug. 2004).

<sup>58</sup> Later the provincial government removed the Board of Directors of ERSACT so there was no body to which to appoint a consumer representative (interviews with Jiminez Lascano (DUDAS consumers' association), Maria Pedicone de Valls (Attorney-General), Aug. 2004).

cut-offs to those using less than the basic minimum, and a ‘dispute letter’ which boycotting consumers successfully used to stave off legal action by Vivendi for non-payment, even after the Ombudsman’s legal action stalled.<sup>59</sup>

The fate of participation in the transnational administrative arena of urban water service delivery improves somewhat when viewed in the light of two later Argentinian developments in the ‘big picture’. Argentina has faced further ICSID claims in the water sector since the Tucumán claim,<sup>60</sup> two of which have catalyzed successful challenges that expand participation: the first at the international level and the second at the provincial level. In a claim arising from a concession for Buenos Aires water services, a coalition of local and international NGOs<sup>61</sup> succeeded on 19 May 2005 in convincing an ICSID Tribunal for the first time that it had the power to accept *amicus curiae* briefs from civil society organizations, even in the face of objections from parties. The petition supporting this request focused explicitly on ‘transparency and public participation’.<sup>62</sup> While this is a significant opening, there are important limits too. The Tribunal declined to decide the issue of whether it would allow access to documents of private parties, and stressed that it would only accept *amicus* submissions from persons who could establish to the Tribunal’s satisfaction that they had the expertise, experience and independence to be of assistance in the case. However, the Tribunal also acknowledged the diffuse and extended public interest dimensions of water services as the catalyst for allowing *amicus* participation, even cautiously endorsing the notion that these are human rights issues.

The second challenge arose in relation to the water and wastewater services of another provincial town, Cordoba. Suez, like Vivendi, a French water multinational, has provided these services since 1997 under a 30-year concession, which is presently in dispute in ICSID. But in this case, the challenge avoided direct intersection

<sup>59</sup> Interview with Jimenez Lascano, DUDAS consumers’ association, Aug. 2004: ‘Aguas del Aconquija demanded thousands of people to pay the debt. Among these people, around five thousand go to DUDAS and tell us: “they are asking us to pay, what do we do?” So we told them: “Here you have the official reply. Go and tell them that you do not owe what they are demanding. I owe a different sum of money according to several legal arguments, a decree, the Government auditor’s report, the Ombudsman’s Office and the others. . . and therefore my debt is lower and I owe half of it. Do the adjustments and I will pay”. None of the people who presented that note have ever been sued by Aguas del Aconquija’.

<sup>60</sup> Suez lodged three cases on 17 July 2003 for arbitration relating to the concessions in Buenos Aires (which Suez operates in a joint venture with Vivendi and Agbar, a Spanish company), Santa Fe, and Córdoba: *Aguas Provinciales de Santa Fe, SA, Suez, Sociedad General de Aguas de Barcelona, SA, and Interagua Servicios Integrales de Agua, SA v Argentine Republic* (Case No. ARB/03/17), *Aguas Cordobesas, SA, Suez, and Sociedad General de Aguas de Barcelona, SA v Argentine Republic* (Case No. ARB/03/18) and *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal, SA v Argentine Republic* (Case No. ARB/03/19), a joint venture with Agbar, a Spanish company, and Vivendi.

<sup>61</sup> Composed of two local legal NGOs (Centro de Estudios Legales y Sociales (CELS); La Asociación Civil por la Igualdad y la Justicia (ACIJ)); two local consumer/public services NGOs (Consumidores Libres Cooperativa Ltda. De Provisión de Servicios de Acción Comunitaria; Unión de Usuarios y Consumidores); and an international environmental NGO (Centre for International Environmental Law (CIEL)).

<sup>62</sup> Presented on 28 Jan. 2005 in relation to the ICSID arbitration of the Buenos Aires concession, *supra* note 60. Although the defendant here is Suez and not Vivendi and the specifics of the concession differ from the Tucumán concession, the key arguments presented in the petition are entirely general.

with the ICSID process, taking the form of a lawsuit by a public interest legal advocacy organization *against the local and provincial governments*,<sup>63</sup> arguing successfully that the contamination of river water by untreated sewage infringed a human right to safe drinking water, which is implicit in the right to health.<sup>64</sup> By focusing the challenge on the domestic state, a different kind of international shadow could be invoked: that of GC15. Consistently with the approach of GC15, the plaintiffs argued that the state is the guarantor of human rights, irrespective of the internal organizational structure it might choose to adopt. The court's recognition of the human right to safe drinking water via the right to health explicitly cited GC15 and the ICESCR.<sup>65</sup> Though a substantive rather than procedural decision in direct terms, its effects have important participatory implications. Since the decision, the municipality has presented a US\$7.75 million 'integral sewage plan' for expanded investment in sewage infrastructure, and construction work connecting homes to the expanded networks is in process. The Municipal Executive has also declared that 'the Executive will not authorize new sewage connections until [the Municipality] improves the capacity of the sewage plant',<sup>66</sup> leading construction lobbies of real estate agents and engineers to pressure the executive to expand capacity even faster. Further afield, a poor neighbourhood in Buenos Aires recently invoked its right to water with the assistance of an international and a local NGO<sup>67</sup> with the result that the community was exceptionally added to the plans of the service provider to construct new networks for piped water.

Both the national right to water case and the ICSID process case have prised open the channels of 'politics as usual' for new voices. Both relied on a mix of international and national legal provisions: in the former case these included national constitutional recognition of international human rights as well as the international norms themselves; the latter relied on BIT provisions, ICSID treaty provisions and national laws guaranteeing access to information and participation. By themselves these developments look like a story of interlocking national and international law. But the political context that made such arguments persuasive is the story of unruly struggle from the mid-1990s onwards over the terms of providing essential services. It is there that the social construction of these emerging global administrative law norms took place, setting the conditions for them to become imaginable.

<sup>63</sup> Although Córdoba's water and wastewater services were managed by the Suez subsidiary, the municipal government retained responsibility for residential connections and the provincial government for a somewhat uncertain scope of infrastructure responsibilities.

<sup>64</sup> *CEDHA v Provincial State and Municipality of Córdoba*. The court also held that the government had failed in its obligation to provide a healthy environment.

<sup>65</sup> The 7 Apr. 1995 judgment of the Supreme Court of Argentina in the case of *Horacio David Giroldi* (No. 32/93) requires local courts to take account of international interpretative guidelines, such as those contained in General Comments, as a basis for interpreting domestic laws.

<sup>66</sup> Resolution D-79/04, 26 Oct. 2004.

<sup>67</sup> COHRE, a Geneva-based NGO that assisted in the drafting process of GC15, and the Centre for Legal and Social Studies, Buenos Aires.

## B *South Africa*

South Africa's experience with water service policy-making frameworks generates lessons less from looking at a single dispute with radiating effects as was the case in the examples of the previous section, but rather from gaining a sense first of the evolution of domestic regulatory frameworks over the first decade of democracy, and secondly of the patchwork of reactions by groups that have felt excluded from this trajectory. The domestic regulatory framework for water service delivery policy has oscillated between what can be called political and transactional frameworks. Transactional frameworks minimize political discretion especially over tariff-setting processes, and emphasize protection against risk (primarily for those funding infrastructure operation and investment), value for money, affordability and open procurement procedures. Political frameworks preserve political discretion on key issues such as tariffs and prioritize mechanisms for consultation with labour and consumers over the structure of water services. In the early years of democracy, South Africa's approach was locally based and political in nature: a Community Water Supply and Sanitation division of the Department of Water Affairs worked directly with communities in a participatory fashion to provide water supply, particularly in rural areas. For urban areas, the legislative framework guaranteed extensive participation and consultation, particularly for labour unions, in the event that any contracting out be contemplated by local governments.<sup>68</sup>

That political framework has, however, over the last decade, been supplemented and arguably partially displaced by a more transactionally-focused approach that reflects the government's adoption of a more market-led strategy overall.<sup>69</sup> This is reflected in the establishment of a Municipal Infrastructure Investment Unit, greater legal controls given to the Treasury,<sup>70</sup> and dilution of an initial statutory preference in favour of public provision.<sup>71</sup> This trend has largely tracked a steady increase, recently levelling-off, in the extent of private-sector participation in delivering water services, at least as measured by population coverage.<sup>72</sup> Two long-term concessions for water services were signed with global water companies in 1997 in Nelspruit and the Dolphin Coast north of Durban. But the domestic political cost of this move was high, although no contract has as yet ended in international arbitration. In the townships and peri-urban areas, citizen and consumer resistance to the accompanying move towards greater cost recovery has taken the form of severe problems of mass non-payment for services. Residents have employed a wide mixture of strategies to disrupt the policies of the government, including marches, protests, payment boycotts, illegal reconnections, political education and test-case constitutional litigation. Relations

<sup>68</sup> Municipal Systems Act 2000 (SA), s. 78.

<sup>69</sup> The African National Congress's electoral platform was known as the Reconstruction and Development Programme (RDP); its market-led successor is GEAR – the Growth, Employment and Redistribution Strategy.

<sup>70</sup> Municipal Financial Management Act 2003 (SA).

<sup>71</sup> Municipal Systems Act 2000 (SA).

<sup>72</sup> Between 1995 and 2003, 7 million (roughly 15%) of the total population came to be served by subsidiaries of foreign private sector operators in water services, from a base of 0%.

between activists and the national government are often highly adversarial and it is perhaps no accident that the forms by which the government now – more cautiously – involves the foreign private sector are ones that sidestep the legislative mandate to involve affected groups in the political process.<sup>73</sup> Over time, as the hard law framework has become more transactional, informal avenues for participation have had more traction than formal ones – for example, ongoing political negotiations, monthly dialogues between water service providers and citizen committees, or tri-sector (state, civil society, private company) partnerships. Within the sample of informal participation possibilities, though, different groups benefit from contrasting degrees of responsiveness. The example in the next paragraph shows how this flows from a complex interplay between national and international levels of governance.

Although South Africa is fiscally much less dependent on foreign aid than many other developing countries, and, as mentioned in Section 2, much less exposed to international investment treaty regimes than Argentina, international influences have played a subtle but powerful role in the shift from political to transactional frameworks. The trend for transactional regulation to be increasingly embodied in either ‘hard law’ at the national level, or powerful policy conditions at the international level, has a correlative echo. To the extent that political regulatory initiatives survive, they have increasingly been expressed in ‘soft law’ or ‘mere policy’ initiatives. Take, for example, the important power to disconnect consumers for failure to pay. The regulatory framework in the early 1990s allowed only local government authority over bill collection and disconnection. But when the Municipal Infrastructure Unit helped negotiate the first long-term transnational concession, private banks withdrew their financial support mid-negotiations as they realized the existence of this allocation of power.<sup>74</sup> Subsequently the legislative framework was amended, clarifying that water service providers (including private companies) could be directly involved in bill collection and intensifying Treasury control from the centre.<sup>75</sup> At the same time the government introduced a Free Basic Water Policy in 2001, and in its 2003 Strategic Framework a ‘credit control code’ – both animated by principles of due process and compassion to be sure, but carefully confined to the arena of ‘soft law’.<sup>76</sup> Participation opportunities were thus available both to indigent consumers and to

<sup>73</sup> For example, neither the 5-year management contract signed in 2000 between Suez and Johannesburg Water nor the voluntary partnership between Durban Metropolitan Water Services and Veolia (Vivendi) Water trigger the requirements of s. 78 of the Municipal Systems Act 2000 to carry out public and labour consultation.

<sup>74</sup> Although the correct interpretation of the Local Government Transition Act 1993 (Act 209 of 1993 (SA)) was contested, the doubt raised was still sufficient to change the banks’ position: Kriel, ‘Facing Local Government Post-Demarcation: Impact of the Regulatory Framework on the Private Sector – Case Studies and Analysis’, paper prepared for the Development Bank of Southern Africa Symposium on Risk Management, 1 Sept. 2003, 3, on file with the author.

<sup>75</sup> Municipal Systems Act 2000 (SA); Municipal Financial Management Act 2003 (SA).

<sup>76</sup> See *Free Basic Water Policy* (Government of South Africa 2001) (establishing a universal right to access 25 litres of water per person per day within 200 m of their dwelling); *Strategic Framework for Water Services* (Government of South Africa 2003), Cl. 4.5.8 (principles governing credit control include communication, fair process, warnings, compassion, restriction rather than disconnection as a last resort).

international banks, but the stability and impact of the two avenues were distinctly more advantageous for the latter. And the differential effect flows from the interpenetration of national legal provisions and international financial conditionality.

The changing patchwork of participation avenues in South African water service delivery is also shaped from a bottom-up perspective by the strategies employed by activists, particularly vulnerable end-users, many of whom have been disconnected for non-payment. As with the national framework, both 'soft' and 'hard' avenues for participation exist, though the latter take the form of lawsuits rather than legislative protection. Soft forms include marches, protests, illegal reconnections to the network, political education and schemes that involve customer service agents and community developments officers working in partnership with government and providers. Hard avenues include both constitutional test cases and more mundane forms of legal defence protection. There are many different activist groups who pursue these various avenues,<sup>77</sup> and overall the different strategies tend to co-exist in counter-productive parallel rather than interacting productively. This is because of a conflict between strategies that seek to build political agency, which have more mass support, and strategies that are aimed at embedding responsible consumer behaviour, which tend to undermine the former. This lack of integration has two roots. First, while most groups do participate in mass mobilization strategies (the prime informal example of political agency strategies), these swing between peaceful cooperation and violent adversarialism in a pattern one participant calls 'popcorn politics',<sup>78</sup> adverting to the sudden explosions of hostility that fail to build on or integrate the cooperative episodes. Secondly, there is little integration between different types of informal avenues, especially political approaches and more 'consumerist' variations, or – with one limited exception<sup>79</sup> – between 'hard law' formal strategies and either kind of informal approach. In relation to both these axes, different groups favour different types of strategies, and do not necessarily cooperate or communicate with each other.

One example of an informal consumerist approach is the young activists who work with 'consumer education' programmes run by Durban Metro Water Services in partnership with Vivendi. They work with end-users on issues such as paying bills, managing debt schedules, water conservation techniques, the proper operation of sanitation systems, and the like. The structural questions that are the concern of the more disruptive activists are part of the taken-for-granted background for this work. But these political concerns have a tendency to continually re-emerge. Indeed, this is why those doing the work were initially known as 'Customer Service Agents' but in

<sup>77</sup> For example, in Durban, at least four different networks of activists operate, combining complex strands of differing ethnicity (Indian, black, and white), political affiliations (ANC, Democratic Alliance, Zulu-affiliated IFP), and political policy commitments (RDP, GEAR, anti-globalization).

<sup>78</sup> A. Desai, *We are the Poors: Community Struggles in Post-Apartheid South Africa* (2002).

<sup>79</sup> The Concerned Citizens' Group, based in Chatsworth and mixing a moderate anti-globalization approach with civics approaches inherited from anti-apartheid struggles, relies equally on legal strategies and mass direct action. These activists are largely from the previously Indian township, and have historically voted Democratic Alliance or Minority Front rather than ANC: they include both young organizers and older members.

the second phase of the project were renamed 'Community Development Officers'. This reflects an attempt by those in the partnership to integrate the technical, problem-solving approach with a broader political agenda. Such integration, however, has no mirror across the broader terrain of the activist community.

Similar gulfs occur in relation to 'hard law' strategies. These aim to enforce access to water directly as a socio-economic right in itself, challenging disconnection for non-payment of bills on the basis that it unconstitutionally denies access to sufficient water. The results of this are mixed and limited, in effect softening the harshest effects of market-based water delivery but leaving broader questions of collective representation and responsiveness to be determined by political institutions that increasingly reinforce a transactional model of service delivery. Two cases have been decided to date at lower-court level in different states, brought by unconnected actors in a context where activists disagree on the wisdom of pursuing legal strategies. No remedy was granted in the first case, in part for technical reasons<sup>80</sup> but also (albeit indirectly) because the judge considered that the plaintiff's illegal reconnection to the system had deprived her of the benefit of the rights accorded her by the Water Services Act. The second case held that disconnection was a *prima facie* breach of the constitutional right to water, which places the onus on water providers to prove they have afforded consumers a variety of due process rights before disconnection.<sup>81</sup> The cumulative effect of the two cases is to provide some procedural protection to citizens, provided they pay what they can afford and refrain from civil disobedience in their broader demands to the political decision-makers. While this is an important gain from end-users' perspectives, it is a relatively narrow one: one that softens the impact of a cost-recovery approach by according dignity to responsible consumers rather than giving voice to political participants. In this sense, although some commentators have suggested the decision is consistent with GC15,<sup>82</sup> its impact on participation is not of the structural collective kind that the previously quoted GC15 articles envisaged.<sup>83</sup> It is also clear that the Constitutional Court of South Africa more broadly does not regard itself as bound by international law interpretations regarding the 'minimum core' of

<sup>80</sup> The plaintiffs had neglected to plead the direct constitutional obligation and were relying on the Water Services Act whose regulations specifying the minimum amount of water to which each citizen has a right had not yet been enacted: *Manqele v Durban Transitional Metropolitan Council*, 2002 (6) SA 423.

<sup>81</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, 2002 (6) BCLR 625. In the instant case, none of the due process requirements (fair and equitable procedures, reasonable notice of intent to disconnect, provision of an opportunity to make representations) had occurred, and reconnection was therefore ordered.

<sup>82</sup> Kok and Langford, 'The Right to Water' in D. Brand and C.H. Heyns (eds), *Socio-economic Rights in South Africa: International and Constitutional Law* (2004), at 191, point out the consistency with Art. 56 of GC 15: 'Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies'.

<sup>83</sup> See *supra*, text to notes 40 and 41.

social and economic rights,<sup>84</sup> and it has been quite tentative in second-guessing substantive decisions by the government on issues such as the design of cross-subsidies, capable of significant structural effect for large numbers of consumers.<sup>85</sup> Thus overall this hard law strategy fails to prise open an ‘everyday’ forum for the voice of activists who seek to assert a collective political identity, with the consequence that they turn to oppositional and unruly forms of participation that are increasingly repressed by the formal political system.

#### **4 Conclusion: The Political Salience of Socially-constructed Global Administrative Law**

To bring together the threads of this article, I return to the guiding questions. The overriding question was: What are the forms and processes, both formal and informal, that facilitate participation in, or the capacity to participate in, transnational urban water services governance? The article was structured so as to propose that at the international level, three more or less formal avenues (albeit not necessarily legal in the international sense) potentially facilitate participation: investment protection regimes, the articulation of a human right to water, and the development of voluntary standards governing the provision of water and wastewater services. The case narratives supplemented these avenues with a variety of forms and processes at domestic level. The four most important formal domestic avenues are the legislative framework and amendments made to it, lawsuits based on sector-specific aspects of the legislative framework, quasi-judicial resolution fora such as an Ombudsman, and rulings made by a regulator. The three most important informal avenues, which apply equally at domestic and international levels, are protests and other forms of direct action, political bargaining and the media.

##### ***A Moving between Law and Politics at Multiple Levels***

To understand the interplay between national and international levels as well as between formal and informal dimensions of these processes, recall that global administrative law is construed from a strategic perspective as an evolving process in which the key players in the field of urban water service delivery engage with the different facets of global administrative law as parts of a larger political opportunity structure. Given the links between administrative law mechanisms and the actions of government, and the focus of this article on the construction of *global* administrative law, it is helpful here to contrast the strategic perspective of just two sets of actors: end-users or

<sup>84</sup> *Government of the Republic of South Africa and others v Grootboom and others*, 2001 (1) SA 46 (CC).

<sup>85</sup> For example, in relation to redistributive cross-subsidies in water and electricity: see *Pretoria City Council v Walker*, 1998 (2) SA 363, where a group of white residents in Pretoria refused to pay their electricity and water bills after local government redemarcation amalgamated their suburb with neighbouring townships. New water connections in those townships were heavily cross-subsidized by the rates paid by white residents, who claimed this violated their constitutional right to equality. They lost the case and the court supported cross-subsidization, but only by a very narrow margin of 5–4.



consumers, and foreign water service providers. First, then, I ask: When do end-users and foreign water service providers rely on formal legal avenues as opposed to political processes, unruly and routinized? Secondly, how do end-users and foreign water service providers using these forms and processes move between international and domestic levels? The building blocks of global administrative law-like avenues for participation in policy-making, in the specific context of urban water service delivery in the South by Northern companies, look very different from the two perspectives of end-user or water service provider. For this reason, it is most effective to ask these questions together, of each group in turn, taking end-users first.

### 1 End-users

In both Argentina and South Africa, end-users have used all types of informal avenues to participate in water services policy-making, and in both countries direct action and protest has been a particularly important driver of that capacity to participate. Used in combination with the media, it has opened up opportunities for political bargaining which did not previously exist. What differs between the countries, however, is the capacity to translate that bargaining into participation avenues that 'stick', becoming routinized, established, and formally protected. This capacity is less pronounced in South Africa than in Argentina, leading to the aforementioned 'pop-corn politics'. The reason for the difference lies in the relationship between end-users' formal legal strategies and their political activities.

In Argentina, the two types of strategies have mutually reinforcing effects, while in South Africa they tend to be unconnected. Thus, in Argentina the collective claim filed by the Ombudsman on behalf of end-users protected them from being legally pursued by the water service provider for their direct action strategy of non-payment. This was reinforced by regulator rulings upholding the end-users' position, which together with ongoing protests kept open the political space for legislative bargaining for a social tariff. The impact at that stage was more substantive than procedural – the social tariff was enacted, the contract with Vivendi terminated, but only at a later stage did enduring new avenues of participation emerge. Again, this happened through a combination of formal legal strategies with political bargaining, this time at both domestic and international levels, in relation respectively to the Córdoba right to water case and the ICSID petition for amicus participation.<sup>86</sup> In South Africa, on the other hand, direct action has not for the most part been coordinated with formal legal strategies: indeed there is extensive ambivalence within the more politically

<sup>86</sup> The interdependence of legal and political strategies is a 'big picture' claim here, since the precise actors in the Tucumán, Córdoba, and Buenos Aires ICSID cases do not overlap: different NGOs and companies are involved in each case. But the climate for receptivity by the legal actors of the activists' claims clearly improves between 1998 and 2005, in direct correlation with repeated sequences of political protest and legal action. It is no doubt also important that Argentina's legal system has since 1994 recognized the right for affected individuals and organizations to resort to the judiciary for the protection of *collective and diffuse rights* by the promotion of a special writ, the 'collective *amparo*' (Art. 43 of the National Constitution). Over time, the use of this writ has enabled judges to require the political branches to consider policy responses for large collectivities in ways that amplify the political ramifications of legal decisions far beyond specific individuals, in the process bridging collective protest and the policy-making process.

radical activist groups over the strategic wisdom of using formal legal strategies. Formal legal strategies have potentially won consumers some procedural rights in relation specifically to disconnection, but the pursuit of such strategies is detached in terms of both venue and personnel from the patterns of direct action and political bargaining. From the end-user perspective, the legal strategy has not, therefore, inserted them into tariff-setting processes and more structural aspects of water service delivery.

This difference between South Africa and Argentina is also related to the different ways in which end-users have moved between international and domestic levels. In South Africa, where such movement has occurred, it has not linked informal strategies to formal legal ones. Thus although NGO coalitions lobby politically to keep South Africa from committing water services to multilateral trade agreements (and GATS in particular), they play no role in the legislative amendment strategies catalyzed by the banks to protect foreign investors from legal and financial risk, nor have they formed a national-international coalition of any kind analogous to the one that emerged in Argentina in relation to the ICSID dispute. And while South Africans who protest in support of the notion of a human right to water do share activist networks and mutual learning processes with international NGOs working on GC15, there are only weak links between direct protestors and those who have brought formal lawsuits. This may account for the fact that the effect of the litigation is to protect narrowly focused rights of notice and representation in particular individual instances of disconnection, rather than the extensive participation in collective political processes envisaged by GC15. At any rate, the lack of integration between ‘unruly’ and ‘routine’ participation characterizes the intersection between national and international strategies just as much as at the national level between formal and informal modes of participation.

In Argentina, moves by end-users between domestic and international levels integrate legal and political modes of participation. Initial reliance on purely domestic combinations of direct protest, local media, the Ombudsman and the regulator were constrained by the effect of water service provider participation in investment protection regimes at the international level. In later stages of the ‘big picture’ evolution of water policy-making routines, end-users coordinated with international NGOs both in respect of GC15-type processes and in relation to ICSID avenues, in the first instance securing additional participation domestically and in the second internationally. The direction of influence here is complex, however. It would not be true to say that the ICSID process per se enhanced end-user participation, despite the fact that it is the *site* for an expansion in participation. Rather, it is arguable that the direct protest and the extensive, albeit frustrated, use of domestic legal processes by end-users is what made possible their success in opening up ICSID participation. Similarly, the right to water litigation fleshes out and makes real the kinds of participation envisaged by GC15, rather than the reverse, and again there is evidence that the direct action and quasi-judicial processes of the years leading up to the right to water case provided a fertile political context for its success, creating sufficient popular debate to make the judges feel more comfortable with granting a remedy to protect the right of a kind with extensive political ramifications.

## 2 Foreign Water Service Providers

A similar analysis can now be undertaken in respect of foreign water service providers, who in some respects have a simpler array of alternatives since their greater material and structural power mean they are not dependent on unruly forms of protest. In both Argentina and South Africa, foreign water providers rely primarily on political bargaining but in the knowledge that their capacity to use formal legal dispute resolution in the context of investment protection regimes casts a powerful shadow over the structure of bargaining power. In South Africa this is less obvious than in Argentina, but mainly because in South Africa foreign provider participation in legislative framework amendment was more successful in securing its desired outcome, at least in the example given.

This stance towards legal versus political strategies is closely tied to the question of when foreign providers move between national and domestic levels. Here, a rather striking bifurcation is noticeable: foreign water providers prefer to participate in international processes for dispute resolution but in domestic processes for standard-setting. For example, they influenced, albeit very indirectly, the South African legislative framework for allocating control over bill collection and disconnection, but have been extremely hesitant to use domestic courts to clarify the constitutionality of pre-paid metres. Or, in Argentina where foreign water service providers' political bargaining strategies failed to secure desired amendments to the legislative framework, they turned to international dispute resolution, avoiding formal legal engagement with the local ombudsman, regulator or courts.<sup>87</sup> The question of why this might be the case is most likely a combination of factors, the most important of which is the private nature of international arbitration proceedings. It is clear from industry's steadfast refusal in the ISO process to encourage the public accessibility of concession contracts that a closed domain is of first importance to these players. There is also a possible lack of faith in the domestic judiciary. This is not to suggest that there are fears of anything as crude as outright bias, but merely to note that domestic courts will necessarily take into account a much wider array of considerations than the specificities focused on by a BIT concerned primarily with establishing a stable commercial environment. That they will do so in a public forum, in addition, is surely sufficient to account for this evasion.

Overall, an understanding of the strategic significance of administrative law-like avenues of participation for end-users and foreign service providers in the water sector suggests the following conclusions. For water service providers, the two most effective formal channels are international investment protection regimes and domestic-level legislative frameworks. Both can be accessed by political bargaining without resort to direct action or protest, and this, combined with the ability to switch levels easily, constructs a narrow but secure set of participatory avenues. There are

<sup>87</sup> The avoidance is particularly notable in this case because the concession contract actually specified an obligation to exhaust local remedies before invoking the jurisdiction of the ICSID process. On this particular technical point, the ICSID tribunal allowed Vivendi to resort to the ICSID process without having done this: Award, *supra* note 45, at para 54 (although it also stated that Vivendi could have chosen to pursue local remedies without damaging its choice later to pursue the ICSID process: para 55).

limits to this: effective participation in the domestic-level legislative frameworks, as with participation in domestic regulatory processes, depends on the domestic political context, and a foreign water service provider can find itself shut out.

End-users in one sense have a much wider array of avenues open to them for participation in policy-making, but far less leverage in routinizing stable avenues of participation. This is partly because of their relative inability to switch between domestic and international levels, and partly because of their inferior political bargaining power. However, both limitations can be at least partly overcome by supplementing political bargaining with direct protest, and creating mutually supportive links between that protest and domestic-level formal legal avenues. Where there are many such avenues, there is more opportunity for such synergistic links: thus the *absence* in South Africa of ombudsman and regulator fora, as well as the absence of a collective procedural mechanism analogous to the Argentinian ‘collective amparo’<sup>88</sup> are likely to be important factors in the lack of productive interaction between formal and informal modes of participation.

In theory, a dynamic, yet stable, iterative process of mutual constitution between informal and formal modes of participation could evolve for both end-users and foreign providers. Initially it seems as if differential capacity to switch levels skews the likelihood of neutral dynamic stability. Foreign providers can switch levels more easily than end-users, giving them a comparative advantage. Yet because standards remain nationally articulated even when dispute resolution is international, switching levels does not necessarily ‘trump’ the issue. Participation in crafting the rules of the game is ultimately more valuable than winning a victory on a particular dispute, even when that victory has ripple effects on the rules of the game. If end-users can prise open participation in that enterprise – the collective, structural dimension of policy-making – whether by unruly or routine means, then they rebalance the playing field, however temporarily. And constructive relationships between legal and political strategies are an important means of prising open such a space.

## **B *The Character of Global Administrative Law***

The above sums up the political opportunity structure created by global administrative law, or law-like, features in the context of transnational water service delivery. But the *character* of those features has a more general pertinence. To capture a sense of this character, I begin with some summary observations about the scope and tools of global administrative law in this area, which will lead me to a brief consideration of the substantive political conflict underpinning the struggles over participation. That route will allow me to return to the question of participation from a slightly new angle that throws fresh light on the political salience of emerging global administrative law.

The most important observation about the scope of global administrative law as it emerges from this case study is that its target includes the decision-making processes of private actors as well as public, and particularly hybrid processes such as ISO and

<sup>88</sup> *Supra* note 86.

ICSID that blend state and non-state dimensions in complex ways. One implication of this is that private actors such as foreign providers can find themselves equally a target or a utilizer of a tool that expands participation, reflecting the contingency of the political opportunity structure provided by administrative law. For end-users, the tools of administrative law may take different forms depending on the target – constitutional or human rights law in the case of the state, consumer or investment law in the case of private providers. It may seem here that end-users would not be invoking *global* administrative law against public providers but rather that the issue would be ‘re-domesticated’. But this would miss the impact of the ever-ready potential of international involvement fostered by an open global economy, as well as the lasting traces of past such involvements – there are many dimensions of both the South African and Argentinian cases where strategies honed against private entities were re-used against public ones. So global administrative law is increasingly about challenging or routinizing the power to have the last word on setting the rules of the game, and the source of such power increasingly includes networks of private actors.

Moreover, the source of global administrative law in a more doctrinal sense is a patchwork of substantive legal protections – consumer, constitutional, statutory duties, BITS, human rights – that together constitute a sector-specific bricolage held together by pervasive threads of process. Although process is clearly the main focus here, consider for a moment some important substantive differences in the strategic preferences of end-users and foreign water service providers within this bricolage. Although both groups seek to expand participation and to be able to switch levels, their preferred venues are different. Foreign water service providers shun General Comment 15, and favour BITS regimes and the ISO process. End-users, while they pursue most venues in light of their weaker political bargaining power, are clearly much more constrained in their level of participation in BITS regimes, and are not engaged at all in ISO standard-setting. These preferences are in part driven by the different implications of these venues for substantive dimensions of water service delivery. While detailed discussion of these issues is inappropriate here, it is striking how the contrast between BITS and socio-economic human rights as areas of law reflects the substantive political conflict that underlies ‘globalization’ debates about growing international economic integration and the spread of neo-liberalism. Moreover, the idea of developing standards to balance tensions between economic and social objectives is by now the classic ‘regulatory’ response to this moral-political problem of the appropriate limits of market forces. It is a response that builds on what Christopher Borgen has recently labelled ‘the hegemony of process’, which he identifies as the thread that binds together such disparate fields as investment and human rights law. With their common emphasis on processes that at least in principle are open to contingent configurations of varying interest groups, Borgen concludes that:

a purely geographical [North vs South] distinction is increasingly irrelevant. Rather, different constituencies build alliances across state and class lines to forward their claims both in their domestic fora and internationally. All of these constituencies...access and use the tools of

globalization via the means of transnational legal process . . . This is not the global versus the local, it is the normative struggle of competing conceptions of the good that uses the tools of globalization.<sup>89</sup>

This foregrounding of substantive political issues is helpful: in the instant case of water it makes sense of the different preferences for ISO and BITs on the one hand, or GC15 and open-textured domestic processes on the other hand. But the salience that I have argued pertains to the informal and political dimensions of global administrative law (can't read) means that North – South power dynamics remain far from irrelevant, for process as well as substance. Specifically, these substantive dimensions have an important general procedural implication – they are linked to a distinction between two important *modes* of participation, political and technical. The political – technical distinction is *orthogonal* to questions of how formal an avenue of participation is, and distinct from the question of whether participation occurs at local or international levels.

Technical forms of participation relate to the particularities of urban water service provision and tend to be individualized, focused on resolving particular disputes or confrontations. They are, however, *constituted* by informal political bargaining that sets the larger 'rules of the game' in ways that tend to exclude end-users. Political forms of participation are collective, have the capacity to change the rules of the game, and invoke values that go beyond the specificities of urban water service provision. Such forms when applied to individualized disputes connect end-users to possibilities of changing the larger rules of the game. When the regulatory framework is what I have called 'transactional' (in discussing the South African case), the focus on stable transactions *between government and service provider* means that the provider has access to political forms of participation, while end-users are displaced to the province of a discretionary relationship between service provider and end-user that is 'beyond the bounds' of regulatory control. ICSID processes to date are an excellent example of such a displacement. And in general, providers prefer to structure the policy-making process as a transactional one, while end-users prefer the opposite. This is an endemic tension which will not disappear; it is the 'stuff' of administrative law in regulatory contexts, whether at international or domestic levels.

But the analysis in the first part of Section 4 suggests that a relatively stable and productive relationship between these two modes of policy-making can subsist when formal and informal avenues of participation mutually interact. That interaction is crucial to making participation 'stick' and to assisting end-users in creating avenues for participation at international as well as domestic levels. For both water service providers and end-users, routinized informal practices lend substance and effectiveness to formal legal opportunities for participation, and for end-users, unruly protest is a vital supplementary tool for giving 'bite' to these opportunities.

<sup>89</sup> Borgen, 'Transnational Tribunals and the Transmission of Norms: the Hegemony of Process' *St. John's Legal Studies Research Paper No. 08-0024* (2005) at 55–56, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=793485](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=793485).

Yet in due course, the new opportunities opened up by either protest or informal bargaining must be legally embedded if stabilization of new routines of participation is to occur. And judicial action exists at the intersection of technical and political forms of participation, for there individual success can have radiating effects in ways that impact on the rules of the game. This is especially so if collective procedures like the Argentinean 'collective amparo' apply, especially in quasi-judicial arenas that are relatively cheap and simple to access: such techniques can translate individual participation into collective power. This highlights the important role of law in mediating the necessary and inevitable tensions between formal and informal strategies of participating in policy-making, as well as between technical and political modes.

The very fact of a balance between technical and political, quite apart from the means of achieving it, is also critically important. The four vignettes that opened this article gestured towards events in Chile and Bolivia that, while impossible to explore in any detail here, present suggestive contrasts to the cases discussed. Bolivia is an instance of a 'hyper-political' setting for water service delivery, while Chile is 'hyper-technical'. Both have experimented with foreign private provision of water services. In Bolivia, major social unrest and legislative battles have been the key sites of struggles around participation, with popular elected representation on the boards of water providers much more of a goal for end-users than vindicating rights through the legal system. Experiences with ICSID arbitration have generated protest, but largely in political terms focused on the social injustice of making a large claim against a poor country. These classic instances of political participation, however, have not been routinized, and consequently the policy environment in the water service arena remains adversarial, political, and locked in conflict. Chile, in stark contrast, has a water sector dominated by a technocratically-oriented regulatory agency, a centralized executive commitment to efficiency goals, and a highly bureaucratic subsidy system that neutralizes the political resonance of affordability issues. In output terms, it outperforms any other Latin American country but the scope and tools of participation are both strikingly narrow and markedly domestic. One could perhaps say that in neither case is there any significant emergence of global administrative law, albeit for opposite reasons.

Finally, while a productive balance between technical and political facets of global administrative law is partly a question of the relationship between formal and informal modes of participation, the level of governance is also salient. Recall the importance to that relationship of the division of labour in terms of where the 'last word' can be had – at the international level for dispute resolution, at the national level for standard-setting. If *global* standards were to become a major shaping force, it would significantly dilute the need for foreign providers to switch levels, and would entrench their comparative procedural advantage. This means that while ISO TC224 standards so far have almost no impact on current modes of policy-making at the level of domestic implementation, their future salience is considerable. It is important then to note the highly technical nature of the ISO process, its expanded inclusiveness

notwithstanding.<sup>90</sup> Yet ISO also increasingly arrogates a broader political role to itself, symbolized by its recent entry into the business of developing a global standard on social responsibility.<sup>91</sup> This is a significant emblem of the increasing location of power in networks of largely private actors. The combination of these features of the ISO process suggests that if ISO's standards achieve greater prominence in the future, unruly forms of participation will continue for some time to play a crucial role in the social construction of global administrative law in urban water service delivery.

<sup>90</sup> The 'technical' nature of TC224 especially pertains to the desire to keep to the particularities of urban water service provision. As an example take TC224's response to consumer NGO input – they have been receptive to some consumer-advocated amendments (e.g., regarding network expansion and even (guarded) references to affordability), but have been extremely cautious on more political issues, particularly the notion of presumptive public access to concession contracts. See Simpson, *supra* note 30.

<sup>91</sup> The ISO Social Responsibility Working Group had its inaugural meeting in Mar. 2005 in Brazil where it took the first steps towards a voluntary, non-certifiable standard ISO 26,000 that will be suitable for application by 'all organizations, including business': Hohnen, 'Setting the standard in Salvador', available at [www.ethicalcorp.com/content\\_print.asp?ContentID=3570](http://www.ethicalcorp.com/content_print.asp?ContentID=3570).