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ESSAY

The Dark Irony of International Water Rights

BRUCE PARDY*

I. INTRODUCTION

In July 2010, the United Nations General Assembly adopted a resolution that declared a human right to clean drinking water and sanitation.¹ The resolution was approved by a vote of 122 to none. 41 countries abstained, including the United States, Canada, the Netherlands, the United Kingdom, Sweden and Japan. Delegates from abstaining countries said that consensus was lacking, that the declaration was premature and in the wrong forum, and that the meaning of such a right in international law was uncertain.²

These objections reflect only part of the dispute over international rights to water. Yes, consensus is lacking, but what is the nature of the disagreement? Yes, this particular resolution may have been premature and in the wrong forum, given the process underway at the Human Rights Council, but some countries object regardless of the forum. Yes, the meaning of

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1. The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010), *available at* <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/64/292&Lang=E>.

2. Press Release, U.N. Gen. Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right by Recorded Vote of 122 in Favour, None Against, 41 Abstentions; Delegates Also Confirm Nominee to Head Office of Internal Oversight Services, Elect Belarus to UNEP Governing Council, U.N. Doc. GA/10967 (Jul. 28, 2010), *available at* <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>.

such a right is uncertain, but it is not just uncertainty that makes it objectionable. Reluctance on the part of many countries is well-founded. Simply put, an international right to water is a poor idea – well motivated but badly conceived.

II. THE DARK IRONY OF INTERNATIONAL WATER RIGHTS

International rights to water have a seductive appeal. The argument goes like this: water is essential to life. Therefore, people need access to water. Therefore, they should have a right to be provided with an adequate supply.³ Enshrining a right to water in international law will enable them to get the water they need.⁴

The logic is flawed. The case for water rights is not established simply from the fact that water is important and access to water is a serious challenge in many countries.⁵ International water rights do not address threats to the availability of clean water – pollution, depletion, monopoly, corruption, conflict of interest and mismanagement – and could even exacerbate them. The dark irony of international water rights is that they could frustrate the very objectives they are intended to achieve.

The ideology underlying the campaign for water rights contains two conflicting premises. The first is that governments cannot be trusted to make clean water available. Therefore, norms of international law must be brought to bear upon them. An international right is the means whereby national

3. Stephen C. McCaffrey, *The Human Right to Water*, in *FRESH WATER AND INTERNATIONAL ECONOMIC LAW* 93, 93 (Edith Brown Weiss et al., eds., 2005) (“Humans need water. We are composed mostly of it and cannot live for more than a few days without it. It seems almost axiomatic, therefore, that there should be a human right to water.”).

4. Peter H. Gleick, *The Human Right to Water*, 1 *WATER POL’Y* 487, 488 (1999) (“By acknowledging a human right to water and expressing the willingness to meet this right for those currently deprived of it, the water community would have a useful tool for addressing one of the most fundamental failures of 20th century development.”).

5. The preamble to the General Assembly resolution notes that approximately 884 million people do not have access to safe drinking water and over 2.6 billion people lack basic sanitation. See G.A. Res. 64/292, *supra* note 1.

governments can be held accountable. The second premise is that only governments can be trusted to deal with water, and certainly the private sector cannot.⁶ The nature of the proposed rights implies that only governments may provide water, and therefore must do so in the form of water monopolies. The possible interpretations and implications of international water rights are troubling.

III. THE MEANINGS AND IMPLICATIONS OF INTERNATIONAL WATER RIGHTS

Proposals for international water rights tend to be ambiguous. For example, consider the wording of the General Assembly Resolution cited above: “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”⁷ General Assembly resolutions do not create binding obligations *per se*, but similar language in a treaty could have at least three competing interpretations. It could mean (a) that some countries can compel other countries to provide water and/or financial resources; (b) that individual citizens can require their own governments to provide water and sanitation; or (c) nothing in binding legal terms.

These interpretations are vastly different but none of them protect against actual threats to clean water, and indeed may make them more acute.

A. An International Right to Water Could Mean That Some Countries Can Compel Other Countries to Provide Water and/or Financial Resources

A right, by definition, is held by some parties against other parties. International treaties are made amongst countries. An international right to water could establish rights and obligations between countries rather than create enforceable rights that

6. See generally Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 *ECOLOGY L. Q.* 957, 973 (2004) (discussing government regulation of private-sector activities that affect water quality and quantity).

7. G.A. Res. 64/292, *supra* note 1.

citizens hold against their own governments, despite wording that implies a personal or “human” right to water.

From the perspective of wealthy or water-rich countries, the risk of establishing international water rights is the risk of losing sovereign control over their own resources. Governments failing to provide access to clean water to their citizens could insist that other countries supply them with water or with funding and technology.⁸ Freshwater resources could come to be regarded as common global resources for the benefit of all humankind⁹ rather than natural resources under the sovereign control of nations, giving credence to calls for international water transfers.¹⁰ A right to water could be interpreted as incorporating the principle of equitable utilization of resources, which has already been applied to freshwater flowing over borders,¹¹ as well as to other natural resources such as biodiversity and the delimitation of the continental shelf.¹² The Biodiversity Convention states that countries are to share the benefits from development of biodiversity resources “in a fair and equitable way.”¹³ The same Article states that countries continue to have sovereign rights over their natural resources, but reference to fair and equitable sharing raises the spectre of the argument that countries which host biotechnology development are obligated to share profits or rewards with other countries.¹⁴

8. See Bluemel, *supra* note 6, at 998.

9. See generally Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1 (1992).

10. See generally A. Daniel Tarlock, *Water Transfers: A Means to Achieve Sustainable Water Use*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 35 (Edith Brown Weiss et al., eds., 2005); Edith Brown Weiss, *Water Transfers and International Trade Law*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 61 (Edith Brown Weiss et al., eds., 2005).

11. David Freestone & Salman M.A. Salman, *Ocean and Freshwater Resources*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 337, 351 (Daniel Bodansky et al. eds., 2007).

12. ELLI LOUKA, INTERNATIONAL ENVIRONMENTAL LAW: FAIRNESS, EFFECTIVENESS, AND WORLD ORDER 53-54 (2006).

13. Convention on Biological Diversity, art. 15, June 5, 1992, 31 I.L.M. 818 (1992).

14. Concerns of this nature have caused the United States to decline to ratify the Convention. See LOUKA, *supra* note 12, at 54.

When freshwater is considered a national resource, the country within which the water is located can exercise exclusive jurisdiction over its fate. Water governance becomes more complicated when rivers or lakes flow across national borders,¹⁵ or where jurisdiction is shared between different levels of government within a confederation of countries (e.g., the European Union) or federations of provinces or states (e.g., Canada or the United States). But shared jurisdiction is simple compared to the governance challenges created by transforming freshwater resources into global common property. No government would be able to dictate the fate of freshwater found within its borders. Arid countries could acquire legitimate claims to a share of the resource. The tragedy of the commons¹⁶ would beckon. As governments rushed in to get their shares,¹⁷ protecting water resources could pose legal challenges similar to those involved in protecting fish stocks in international waters or attempting to fashion collective action against climate change, which so far have proved to be insurmountable. International water rights would have the practical effect of declaring open season on national water resources. Contests between pressing human need and long-term ecological protection would be resolved in favour of the former, imperiling the long-term viability of the resource for the host nation. National sovereign control does not make protection of fresh water inevitable, but does make it possible. The same cannot be said if water is considered an international resource.

B. An International Right to Water Could Mean That

15. See generally Maria Manuela Farrajota, *International Cooperation on Water Resources*, in *THE EVOLUTION OF THE LAW AND POLITICS OF WATER* 337 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2009).

16. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968).

17. Regrettably, wealth transfer may be the real motivation for some governments to pursue an international right to water. One can see the intent in the second paragraph of G.A. Res. 64/292, *supra* note 1, which “[c]alls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.” *Id.* Paying money to governments of developing countries is not the revolution in governance that would provide greater access to clean water.

Citizens Can Require Their Own Governments to Provide Water and Sanitation

An international right to water might be worded in terms that suggest citizens hold rights enforceable against their own governments.¹⁸ The declaration of individual rights in international law, such as the right not to be arbitrarily detained,¹⁹ is no guarantee of enforceability. It is unclear what mechanisms could or should be used to implement such rights.²⁰

Arguments in favor of free or inexpensive water seek to relieve hardship for the poor. Free water for the poor is an attractive proposition because it appears to solve a pressing need in a single proclamation. However, an obligation on the part of governments in arid countries to provide water for free would be not merely counterproductive, but could actually make it impossible to provide water for all. Consumption of anything, including water, varies with price: lower price leads to higher consumption. Where water is scarce, making it free or artificially cheap exacerbates the scarcity because there is no incentive to conserve.²¹

The right to be provided with a government benefit, good or service is a “positive right.” Traditionally, domestic constitutional rights are negative rights, such as the right to free expression, to be presumed innocent, and to be free from unreasonable search and seizure. The essence of negative rights is the right to be left alone, without intrusions from the state. Governments can generally comply with negative rights by

18. See Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. U. J. INT'L HUM. RTS. 331, 345-349, 354-356 (2005); see also Erik B. Bluemel, *supra* note 6, at 963, 972-974.

19. See e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. DOC. A/RES/217(III), at art. 9 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. DOC. A/6316, at art. 9 (Dec. 16, 1966).

20. See generally Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462 (2004).

21. *Clean Water is a Right But it Also Needs to Have a Price*, ECONOMIST, Nov 9, 2006, available at <http://www.economist.com/node/8142904>.

inaction. Positive rights, in contrast, consist of entitlements that governments must actively provide.²² Positive rights reduce or remove the economic incentive to produce goods and services. Legislated ceilings on the price of housing, food or water mean that producers of those goods make less money than the market would otherwise return to them. Supply inevitably decreases. While governments have an unlimited capacity to provide negative rights, since they require merely that citizens be left alone, positive rights require governments to take from some to give to others.²³ While negative rights place limits on the state's ability to interfere,²⁴ positive rights do the opposite.²⁵

22. For example, the South African Constitution provides a right to housing, health care, food, water, and social security. See S. AFR. CONST., 1996, art. 27. In October 2009, South Africa's Constitutional Court decided *Mazibuko v. City of Johannesburg*, 2009 (3) SA 592 (CC) (S. Afr.). The applicants were five residents of Phiri in Soweto. The City of Johannesburg, one of the respondents, had established a policy of providing twenty-five liters of water per person, per day for free. The applicants maintained that the policy offended Section 27 of the Constitution. The trial court agreed, concluding that fifty liters of water was the proper amount. The appellate court reduced this figure to forty-two liters. On final appeal, the Constitutional Court found that Section 27 did not require more free water than the city's policy provided, and observed that courts were ill-equipped to make such decisions. *Id.* at ¶ 62.

23. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 859 (2001).

24. See Court of Appeal, Jan. 27, 2011, *Mosetlhanyane v. Att'y Gen. of Bots.*, CACLB-074-10 (Bots), available at <http://assets.survivalinternational.org/documents/545/bushmen-water-appeal-judgement-jan-2011.pdf>. In *Mosetlhanyane* the Botswana Court of Civil Appeals recognized the right of Bushmen to use an old borehole to extract water for domestic purposes, overturning a government prohibition. The case is likely to be interpreted as an endorsement of the concept of a right to water, but that would not be an accurate reading of the judgment. Instead, the court essentially found that the Bushmen had the right not to be interfered with on the lands that they rightfully occupied. Their right to use the borehole did not consist of a right to be provided with water, or to have the government cover the expense of using the borehole. The court stated:

[T]he appellants as lawful occupiers of the land in question merely seek, at their own expense, permission to use water from a discarded existing borehole for domestic purposes, something they had admittedly been doing before. Indeed, it is not their case that they should be granted a water right to abstract water 'at will, in unlimited quantities, from an unspecified number of boreholes.' . . . All that they need . . . is permission to use the existing or an alternative borehole at their own expense and not Government's expense. . . . Lawful occupiers of land such as the appellants must be

The case for free water rests on the argument that water is essential to life, and therefore it should not carry a cost. But providing water is costly, particularly in urban areas – for regulating and enforcing watershed protection, for treating polluted water, and for infrastructure to deliver clean water and remove water waste. A right to free water does not eliminate the cost of providing the water, but instead demands that it be paid by others, such as through general taxes or fees on some other commodity or service. By so doing, an international right to be supplied with water incorporates a political ideology: water must be provided by government rather than by private means, and the costs of water systems cannot be borne by those who use them. Positive rights to water demand a socialized system of water provision, subsidized by some for the benefit of others. An enforceable right of this nature would remove the democratic right of citizens and countries to determine the ideological premises of the water system they wish to run.

C. An International Right to Water Could be Merely Symbolic, and Mean Nothing in Binding Legal Terms

The history of international environmental law consists largely of grand declarations and feeble delivery.²⁶ Multilateral

able to get underground water for domestic purposes, otherwise their occupation would be rendered meaningless.

Id. at ¶ 16.

25. See generally Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993).

26. For example, the fifteenth session of the Conference of the Parties (COP 15) (held in Copenhagen in December 2009 under the 1992 UN Framework Convention on Climate Change for the purpose of negotiating a follow-up treaty to the Kyoto Protocol) ended in disarray and without agreement on even non-binding, unenforceable greenhouse gas emission targets. The following session, held in Cancun, Mexico, in December 2010, concluded with a non-binding political agreement that called upon developed countries to honour and increase their commitments and developing countries to “take nationally appropriate mitigation actions.” Framework Convention on Climate Change, Nov. 29- Dec. 10, 2010, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention* (Decision 1/CP.16), FCCC/CP/2010/7/Add.1, ¶ 48, available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>. After two decades of work on climate change, the prospect for binding commitments on greenhouse gases is grim.

agreements and resolutions often declare ambitious objectives but lack meaningful enforcement or accountability mechanisms. Rarely do they include sanctions such as trade measures to ensure compliance, or provide for binding adjudication with the ability to enforce judgments. Achievement of goals therefore depends upon voluntary compliance of the parties at cost to themselves, and at the risk of non-compliance of others. Not surprisingly, countries rarely comply in such circumstances. Instead, they act in their own national self-interest. This behaviour is neither remarkable nor sinister. Instead, it is precisely what one would expect from governments with mandates to protect the welfare of their citizens.

A right to water that is unenforceable does not exist. International agreements that proclaim such rights misrepresent the state of the law. Even in international law, no right can be relied upon in the absence of a remedy. Recognition exists for a wide range of human rights, such as the right not to be arbitrarily detained²⁷ or tortured,²⁸ but citizens in some countries do not actually have such rights. If they did, arbitrary detention and torture would not occur without consequence. Declaring rights that do not carry binding obligations may be detrimental to the purposes for which they are proclaimed. Citizens may be duped into believing that they actually have the rights that are declared, and that such declarations are necessary and sufficient means of achieving them. Declaring a right to water confuses legal norms with aspirations, and distracts attention from real work that must be done at national and local levels to reform governance.

Advocates of international water rights have characterized their adoption as an essential first step towards reform. The argument is that they express non-binding norms – statements of what the international community regards as proper or

27. G.A. Res. 217 (III) A, *supra* note 19, at art. 9; G.A. Res. 2200A (XXI), *supra* note 19, at art. 9.

28. G.A. Res. 217 (III) A, *supra* note 19, at art. 5; G.A. Res. 2200A (XXI), *supra* note 19, at art. 7.

desirable,²⁹ even if they are not compulsory. The expression of the right provides a common goal and a standard against which to measure the performance of national governments, even if some fail to achieve these norms in practice.³⁰ Furthermore, where a domestic statute is ambiguous, domestic courts may refer to values and principles enshrined in international law to interpret the meaning of the legislation.³¹

The value credited to symbolic declarations is misplaced. Their role as important first steps is not supported by the history of international environmental law, which is littered with beginnings that did not lead to concrete measures.³² In dualist states, the expression of an international right does not create a right in domestic law,³³ and domestic statutes prevail in cases of conflict with international law.³⁴ Purely symbolic rights are as likely to relieve pressure upon governments as to increase it.

29. John G. Merrills, *Environmental Rights*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 663, 666 (Daniel Bodansky et al. eds., 2007).

30. See Gleick, *supra* note 4, at 489, stating:

What is the value of explicitly acknowledging a human right to water, as the international community has explicitly acknowledged a human right to food and to life? After all, despite the declaration of a formal right to food, nearly a billion people remain undernourished. One reason is to encourage the international community and individual governments to renew their efforts to meet basic water needs of their populations. International discussion of the necessity of meeting this basic need for all humans is extremely important – it raises issues that are global but often ignored on the national or regional level. Secondly, by acknowledging such a right, pressure to translate that right into specific national and international legal obligations and responsibilities is much more likely to occur.

31. See, e.g., *R. v. Hape*, [2007] 2 S.C.R. 292, ¶¶ 53-56 (Can.); 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Town of Hudson*, [2001] 2 S.C.R. 241, ¶¶ 30-32 (Can.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, ¶ 70 (Can.); *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, ¶ 127 (Can.).

32. The notable exception is the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3.

33. See e.g. *R. v. Hape*, [2007] 2 S.C.R. 292 (Can.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (Can.); *Capital Cities Comm'ns Inc. v. Canadian Radio-Television Comm'n* [1978] 2 S.C.R. 141 (Can.); *Francis v. The Queen*, [1956] S.C.R. 618 (Can.).

34. RUTH SULLIVAN, *STATUTORY INTERPRETATION* 130 (1997).

IV. ALTERNATIVES

While it is doubtful that international rights to water would help increase access to, or improve protection of water resources, an alternative roster of rights could be effective if it were to address real threats to water resources, such as pollution, depletion, monopoly, corruption, conflict of interest and mismanagement. Access to clean water calls for a system of laws and responsibilities with the same features as those governing any other important matter: compliance with basic principles of the rule of law and democratic accountability, protection of citizens from the interference of others (including those who would pollute water and other common environmental resources), and protection of citizens' access to goods and services by means of competitive markets and freedom to choose. The rationale for rights is not simply that water is important, but that the main threats to water can be alleviated by establishing certain principles for the way it is governed.

Clean water is a commodity. While some can sink a well or throw a bucket into the local stream, in urban areas water must be collected, treated and delivered. Should water be free because it is essential and therefore priceless, or should it be expensive because it is essential and therefore valuable? The attempt to identify an abstract value for water is based on flawed premises. The proper price for any commodity depends upon supply and demand. The classic example is diamonds, which have little utility but are very expensive due to their scarcity. No justification exists for rights to be supplied with goods that are otherwise subject to competitive markets, such as food or housing, because the competitive market itself protects consumers from rigged prices, false shortages and inefficiency. Any attempt by a seller of such goods to abuse customers would result in lost customers and improved business for the seller's competitors. The only 'citizens' rights' necessary with respect to such goods would be the negative right to be free from government intervention in the market, so as to prevent nationalization or monopolization from destroying the dynamics of competition.³⁵

35. People who are extremely poor have difficulty acquiring necessities such as water, food and shelter from competitive markets because they cannot afford

Maintaining a competitive market for the delivery of water in urban areas is challenging. Building more than one set of pipes underground is rarely feasible. Water delivery systems are commonly run as natural monopolies, and therefore are not subject to market forces.³⁶ When only a single system of treatment and supply operates in an urban area, no competition is available to set a market price. Monopolies restrict water access by dictating terms. Urban residents can obtain only the water that the monopoly supplies, whatever the quality, and must pay whatever price the utility demands. Even natural monopolies do not work well, regardless of whether the monopoly is public or private. They tend to be inefficient and unresponsive to their customers. They may charge high prices because there is no competition to set a market price, or low prices because there is political pressure to do so. Neither outcome is appropriate. Public-private partnerships are vulnerable to having all the disadvantages of public and private monopolies – unrestrained profit-taking, inefficient management, use of public monies for private purposes, and little or no recourse for the citizen customer.

Where monopoly exists, legislating citizen rights may be necessary to counterbalance the monopoly's market power. The freedom to contract is meaningless where a monopoly is the legislated source of an essential good. Monopolized water utilities, even when created by statute and subject to political supervision, cannot be expected to be responsive to customer demands or the discipline of competitive markets if their customers have no legal right to require the utility to meet certain price, service or quality standards. If there is no market to set price, legislated rules should require price to reflect cost of

to pay even competitive prices. But the existence of poverty is not evidence of systemic flaws with the supply of these goods. If stores are full of bread, the fact that a hungry man on the street has no money does not indicate that the price of bread is too high, or that the system of food production requires reform. Instead, it suggests the need for a social safety net to provide the poor with resources to buy bread from the store. If the poorest people do not have money to pay for water, that is a problem attributable to poverty, not to a problem with water governance.

36. See Joseph W. Dellapenna, *Markets for Water: Time to Put the Myth to Rest?*, 131 J. CONTEMP. WATER RES. & EDUC. 33 (2005).

provision and scarcity, getting as close as possible to reproducing the dynamics of supply and demand. Regulation should be arms-length – the operation of water treatment plants and pipelines should be separate from the supervision of the system, which in turn should be separate from the setting of standards that the system is expected to meet. Only in this way is it possible to avoid conflicts of interest within the various arms of government that are empowered to control water.³⁷

The better approach is to not monopolize water.³⁸ It may not be practical to build multiple sets of pipes underneath urban areas, but that does not mean that competition in treatment or delivery is not possible.³⁹ Furthermore, where settlement is rural and people obtain their water via their own private or village wells, there is no rationale for monopoly.

37. See Bruce Pardy, *Myths and Legends*, 9 CANADIAN WATER TREATMENT 7, 8 (Nov.-Dec., 2009), stating:

If those who set the standards also have the job of achieving the standards, then they will set standards that are within their capacity to meet even if that means water of questionable quality. If those who enforce standards also operate facilities, then enforcement will be lax or non-existent. These different functions should ideally be carried out by different levels of government; or, at the very least, by different government agencies willing to censure each other.

38. See ELIZABETH BRUBAKER, LIQUID ASSETS: PRIVATIZING AND REGULATING CANADA'S WATER UTILITIES 147 (2002), stating:

In the best of all possible worlds, consumers would choose their water from a number of suppliers offering different qualities, services, and prices. Industrial consumers could reduce their costs by choosing interruptible supplies or less treated water. Residential consumers could choose untreated water for their gardens and, for their personal use, could satisfy their preferences regarding taste and health concerns. The choice between fluoridated and unfluoridated water, or between chlorinated water and that disinfected by other means, would be made by individual households - or, at least, neighbourhoods - rather than city officials.

39. For example, competition in water and sewer services has been introduced in Scotland under the Water Services etc. (Scotland) Act, 2005, (A.S.P. 3), available at http://www.opsi.gov.uk/legislation/scotland/acts2005/asp_20050003_en_3. The Act authorizes the licensing of firms to enter into contracts for the supply of water and/or sewerage to particular premises. The Water Industry Commission for Scotland claims to have developed a framework for water competition that allows customers to choose a supplier on the basis of service and cost. See *Competition*, WATER INDUS. COMM'N FOR SCOT., http://www.watercommission.co.uk/view_Competition.aspx (last visited Mar. 10, 2011).

When water is captured, it becomes a private good. Before capture, it is a common resource, flowing underground and in surface bodies towards the ocean. Governments have a legitimate role to play, protecting both quality and quantity, so that there is clean water available for the taking. This role is as protector, not provider. All that is called for is to prevent pollution and depletion – not to actively provide water, but to protect the resource from interference from those who would impose environmental externalities upon it.

V. CONCLUSION

Good water governance requires good governance, broadly conceived. International water rights do not achieve this objective, and are likely to threaten the enterprise of protecting water resources.