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THE RIGHT TO WATER IN THE EUROPEAN UNION: A CRITICAL ANALYSIS

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INTRODUCTION

Clean water has always been an indispensable good to life, human health and dignity, and it is a precondition for survival.[1] Yet, its formal recognition as human right to water has been a recent event. This situation was the result of considering water as freely available as the air to breath.[2] The situation is changing due to water scarcity and water stress problems affecting the overall globe. Many reasons causing this situations can be found. For example, population growth, climate change and the global water consumption patterns are the most known causes. In this way the international society felt the necessity of acting on this vital good. In order to tackle the issue, the international community has started working on water problems from two perspectives. On one hand, there is the environmental law perspective that basically concerns the quality of the water sources, its protection and maintenance. On the other hand, there is the human rights law perspective. Compared to the environmental law perspective, this one can be taken as a new approach that has been introduced to the traditional water law to the end of guaranteeing good quality of drinking water to everyone.

The introduction of human rights based approach to water issues was a step that had to be taken. Globally about 884 million people do not have access to improved sources of drinking water, and according to the last report of WHO and UNICEF, water related diseases affect every year more than 1.5 billion people and every ninety seconds a child dies from a water-related disease.[3] Even though the issue of water scarcity is becoming more and more apparent, this situation is not acceptable. Some changes are needed at international, national and regional levels. This changes must be done in two dimensions, a legal one and a practical one. So far, it can be found many international documents and academic works defining the scope of the human right to water, its

1 J Boesen and PE Lauridsen, Water as a Human Right and a Global Public Good, in EA Andersen and B Lindsnaes (eds.), Towards New Global Strategies: Public Goods and Human Rights, Leiden, 2007, 393-394

2 E Riedel, 'The Human Right to Water and General Comment No. 15 of the Committee on Economic, Social and Cultural Rights' in E Rieder and P Rothen (eds), The Human Right to Water (Berlin) Berliner Wissenschafts-Verlag, 2006) 19, 24, fn 19.

3 World Health Organization and UNICEF Joint Monitoring Programme (JMP), Progress on Drinking Water and Sanitation, Update and MDG Assessment, 2015UNICEF World Health Organization and United Nations Children's Fund, Progress on Drinking Water and Sanitation: Special Focus on Sanitation. New York and Geneva, 2008

implications and the possible results and this helped to the recognition of the right to water in many States Constitutions. Yet, there are still many things to be developed, especially in the implementation sphere.

This doctoral thesis will be divided into four chapters. The first one will consist on the international dimension of the right to water. The main methodology used in this part will be the descriptive analysis. It will be reviewed the origins of the right to water, its content, its difficulties in the global sphere and the conflicting interests of the participating agents in the water services. The main objective of this chapter is to understand the current situation of the right to water in the global scenario. Furthermore, it will be analyzed the most important international documents concerning the right to water and its interpretation. This chapter has a more general approach compared to the rest of the chapters, yet, this step is important and necessary in order to have a clear understanding of the concepts and the general content of this right. These elements will constitute the basis for the further analysis that will be carried out in the fowling chapters.

On the other hand, the second chapter and the third chapter will consist on the right to water in the European Union. So far, there is no EU legal provision recognizing or protecting the right to water. However, these two chapters will show the implicit partial presence of the right to water in the Union's legal order.

The second chapter will specifically focus on the EU water law and its policy. It will be analyzed the overall EU water law which are basically composed by a number of water directives. A detailed analysis of them will be useful to find out at what extent the Union rules over water issues. The principal aim of this chapter is to analyze the EU water policy trend, its legislation and the concerning ECJ case-law on water issues with the ultimate goal of finding the human rights features of the EU water law. For such purpose, it will be also analyzed the introduction of the human rights based approach into the EU water law and its prospects.

In order to properly fulfill the human right to water, it is highly important to introduce a human rights based approach to it because of two general reasons. First of all, as it has been already mentioned, the right to water is a precondition for survival, it is a vital element that cannot be

substituted by any other good. Second, because human rights actually empowers people by shifting the legal status of what previously was taken as needs into right-full claims.[4] Furthermore, by recognizing the right to water, it is a way of prioritizing this right.

The importance to study the legal situation of the human right to water in the EU, lays principally on the hypothesis that the EU has become a key agent in the protection of Human Rights. Recently, its approach to the issue has been more active and influential in the global community. Therefore, its direct recognition, would not only meliorate the EU protection of the right to water within its territory, but also it should end up influencing in the further development of the right to water at global level, which still remains in its early stages. Consequently, understanding the legal situation of the right to water in the EU legislation will help to identify possible scenarios where such recognition would be possible.

Once the human rights dimension of the right to water in the EU legal order is analyzed, it will be studied the water services in the Internal Market from a legal perspective. This is the main objective of the third chapter. In this chapter it will be scrutinized the economical dimension of water, the role of the national authority in the management of water sources and water supply and how the Union regulates water services. On this last point, the chapter will focus on the differentiation on whether water services are considered to be a common service or a service of general economic interest. This differentiation is of great import in order to understand and identify the applicable law and to what extent the EU has competition to regulate on them.

The analysis carried out in the second and third chapter will help to determine the legal situation of the right to water in the European Union. Even though the Union has not recognized the right to water, it has its own water law and some elements of the right to water are present therein. Yet, its presence can be only inferred from the existing provisions and this makes its factual situation very volatile. Therefore, these two chapters have been developed with the intention to clearly point out the implicit elements of the right to water in the EU legal order. This should help to the task of providing a clearer vision of the right to water in the EU.

[4] Alston, P., The Rights Framework and Development Assistance, Symposium Paper, A Human Rights Approach to Development, 1998; Filmer-Wilson, E., The Human Rights-Based Approach to Development: The Right to Water, " Neth. Q. Hum. Rts. 23 (2005): 213; The Global Initiative for Economic, Social and Cultural Rights, A GI-ESCR Practitioner's Guide, August 2015, p. 10-13. Available at: http://www.righttowater.info/wp-content/uploads/GI-ESCR-Practitioners-Guilde-on-Right-to-Water.pdf (last accessed 16/01/2016) p. 11

The fourth chapter will consist on a comparative analysis of the right to water at the international level and at the EU level. The comparative analysis will be based on the results achieved in the first three chapters. Right to water has been widely developed at the international scenario, yet studies conducted at Union level is scarce. Thus, comparative studies concerning the right to water at International level and the EU is far more difficult to find and this is the most relevant pertinence of this doctoral thesis.

These two dimensions (international and EU), are very different. They have different structures, different system of implementation, different procedures, different objectives, etc. Yet, with this comparative analysis it is intended to understand the common elements that these two dimensions share, their differences, their strengths and weaknesses. The ultimate goal of this chapter is to find out how each system can help to the other according to their own experiences concerning the right to water, giving a special focus to the point of how the European Union could help to the further development of the right to water.

Finally, one point that must be clarified before getting into the analysis, is that in this thesis, it will be find many times recalling the phrase “right to water in the EU”. Theoretically speaking, there is no right to water *per se* in the Union, yet, for the purposes of this chapter, when speaking the “right to water in the EU” it should be understood as the elements of the right to water that can be found so far in the EU legal order.

CHAPTER I

Development and Protection of the Human Right to Water from an International Law Perspective

1. Introduction

Clean water has always been an indispensable good to life, human health and dignity. However, contrary to its indispensability, access to water is characterized by great disparities between the Global North and the Global South.[5] About 884 million people do not have access to improved sources of drinking water, while 2.5 billion lack access to improved sanitation facilities.[6] Besides, according to the UN Human Rights Commissioner the reality is much worse, as millions of poor people living in informal settlements are simply missing from national statistics.[7]

Over the past century the demand for water has grown at twice the rate of population growth[8] due to various reasons, such as urbanization, pollution of water sources and the impact of climate change, but especially because of the global water consumption patterns which are related to the economic growth and industrial development.[9] This seemed to be an unavoidable step for the economic growth and industrial development of many regions. This phenomenon is directly related to the globalization and the rise of the economic, social and political power of

5 Winkler, Inga T. The Human Right to Water: Significance, Legal Status and Implications for Water Allocation, Oxford: Hart Pub, 2012, p.34

6 UNICEF World Health Organization and United Nations Children's Fund, Progress on Drinking Water and Sanitation: Special Focus on Sanitation. New York and Geneva, 2008

7 UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 35, The Right to Water, August 2010, No.35, available at: http://www.refworld.org/docid/4ca45fed2.html (last accessed: 2 October 2013) (Fact Sheet No. 35)

8 Peterson, Luke Erik, and Kevin R. Gray. International human rights in bilateral investment treaties and in investment treaty arbitration. International Institute for Sustainable Development (IISD), 2003, p.24

9 Fact Sheet No. 35, n3 supra at p.36

corporations. At first glance, it may seem that this phenomenon does not have much relation to the right to water, yet, taking into account the presence of the private entity has become more and more common in the water service sector, their empowerment may end up affecting either directly or indirectly to the citizens rights concerning the access to water.

The first part of this chapter will be dedicated for the understanding of the right to water itself, starting form the evolution of the human right to water towards its recognition in the international legal order, to the end of identifying the key elements of this right. The second part of this chapter will focus on the protection of the right to water and the application of it within the international arbitration jurisdiction. The reason why it will focus in the international arbitration cases is that other international courts jurisdictions do not offer enough information concerning this point, as basically, there were not much cases concerning the right to water or the access to water. Furthermore, in order to understand who protects the right to water, it will be analyzed two main players: the State and private entity.

2. Human Right to Water: Towards its recognition in the international legal order

Human right to water in the international context is a relatively new topic compared to the other human rights. First of all, UN failed to recognize it, neither in the Universal Declaration of Human Rights (UDHR) adopted in 1948 nor in the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. This might have been due to the fact that when the Covenant was drafted, water was considered to be too essential and it was seen as freely available as the air to breath.[10] However, the absence of the right to water in these instruments makes more difficult to deal with it from the human right perspective.

2.1 Historical Background

It was the international humanitarian law the first legal document to protect the access to safe drinking water, yet, it only applies in a very specific situation. The Geneva Conventions III -*Treatment of Prisoners of War* - and IV -*Treatment of Civilian Persons in Times of War*- of 1949, there is a special recognition of the access to water. First, the Geneva Conventions III, in its Articles 20, 26 and 46 established the access to drinking water to prisoners of war. However,

[10] E Riedel, 'The Human Right to Water and General Comment No. 15 of the Committee on Economic, Social and Cultural Rights' in E Rieder and P Rothen (eds), The Human Right to Water (Berlin) Berliner Wissenschafts-Verlag, 2006) 19, 24, fn 19.

from the context of the Convention, it can be understood that such legal provision (the access to drinking water) were not included to protect the prisoner's right to water, but to protect its life and health. Although this document does not have the objective to protect the right to water of a prisoner or civilian person in times of war, this is a valuable document that must be taken into account that water is an essential element for human survival, and its access must be ensured in any circumstances.

Furthermore, the Geneva Convention goes further with its Article 29 establishing the access to water for personal hygiene for prisoners of war; and the Articles 85 and 89 of the Geneva Convention IV establishes the same for civilians in times of wars. It is important to highlight article 127 of this Conventions which literally states: *"The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention"*. This Article does not explain what the human right to water has become so far, but from this article it can be inferred some of the most relevant characteristics of the right to water per se, such as: water is considered to be essential for the good health and it must be sufficient in quality and quantity. Most importantly, this legal provision put the right to drinking water on the same stage with the right to food, to good health, to clothing and medical attention, which are all recognized together in the article 25 (1) of the Universal Declaration of Human Rights. Furthermore, in its Additional Protocol II - *the Protection of Victims of Non-international Armed Conflict* of 1977, states in its Article 5 the right to food and drinking water to people whose liberty has been restricted; and in Article 14 state the prohibition to attack, destroy, remove or render useless on drinking water installations and supplies and irrigation works.

It was in 1972 where the issues on safe water per se, were first alleged in international environmental conferences. The UN Conference on Human Environment in Stockholm[11] expressed high concerns on water pollution caused by man-made activities. This document declared 26 principles to inspire and guide preservation and enhancement of the human environment, recognizing water as a natural resource of the earth that must be safeguarded for the benefit of present and future generations.[12]

[11] UN, Declaration of the UN Conference on the Human Environment, Stockholm, 1972
[12] UN, Declaration of the UN Conference on the Human Environment, Stockholm, 1972, principle 2

The first formal discussion on addressing water problems was held in the UN Water Conference in Mar de Plata, Argentina,1977. The conference issued an Action Plan which included several recommendations on water resources, uses and management and more importantly, it stated that *all people whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.* The most important feature in this point should be the inclusion of the phrase "*all people whatever their stage of development and social and economic conditions"* which is referring to the basic human rights principle of *Non-discrimination.* Such a principle will be reconfirmed in many other international instruments concerning access to water, as one of the main element of this right.

The development of the right to water takes another step thirteen years after with the adoption of New Delhi Statement at the Global Consultation on Safe Water and Sanitation. This instrument supports four main principles on the matter, such as the protection of the environment through integrated management of water sources, institutional reforms promoting women participation at all levels and community management, and the statement calls for improvement on financial practices aimed through better management of existing assets and the use of appropriate technologies.[13] Also, the New Delhi Statement confirmed the general principle of Mar de Plata Action Plan, establishing the principle of "some for all rather than more for some", linking it to the fundamental human rights principle of universality.

In 1992, further recognition of the right to water was possible with at the *International Conference on Water and the Environment* in Dublin. During this round, it was adopted the Dublin Statement on Water and Sustainable Development, which indicated principally the importance to recognize the basic right of all human beings to have access to clean water and sanitation at an affordable price.[14] This instrument was very unique as it recognized in one of its guiding principles for water policy, that water has an *economic value* in all its competing uses and that it should be recognized as an *economic good*. The Dublin principles of managing water as an economic good was controversial,[15] but as the Statement explains in its Action Agenda, the

[13] New Delhi Statement, Global Consultation on Safe Water and Sanitation, 1992

[14] International Conference on Water and the Environment, Dublin, Ir., Jan. 26-31, 1992, The Dublin Statement on Water and Sustainable Development (June 1992) [hereinafter Dublin Statement]

[15] Murthy, Sharmila. The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-

sustainability of urban growth is threatened by curtailment of the copious supplies of cheap water and increasing marginal costs of meeting fresh demands;[16] therefore, future guaranteed supplies must be based on appropriate water charges.

After the Dublin Statement, there were many conferences and conventions about the right to water (or related to the matter), such as the W*orld Summit for Social Development* in Copenhagen, which stated in its declaration that an essential element of poverty reduction was the necessary to meet the basic needs of all people, including the need to provide, on a sustainable basis, access to safe drinking water in sufficient quantities, and proper sanitation for all.[17] Furthermore, the *First World Water Forum held in Marrakesh*, highlighted in its Declaration that "action to recognize the basic human needs to have access to clean water and sanitation, to establish an effective mechanism for management of shared waters, to support and preserve ecosystems, to encourage efficient use of water, to address gender equity issues in water use and to encourage partnership between the members of civil society and Governments";[18] in 2000, the *Second World Water Forum*, adopted the World Water Vision, which outlines the three primary objectives of integrated water resource management; then, the Millennium Development Goals (which brought together many of the goals and targets adopted at previous conferences and identified key development priorities for the 21st Century), was adopted and it has established as one of its targets to reduce by half the proportion of people without access to safe drinking water by 2015;[19] the *International Conference on Fresh Water* held in Bonn, through its Recommendations for Action, called for States to take actions specially in the field of governance securing equitable access to water for all people, actions in the field of mobilizing financial resources, and actions in the field of capacity building;[20] finally the World Summit on Sustainable Development, Rio+10 adopted The Plan of Implementation which indicated that the provision of clean drinking water and adequate sanitation is necessary to protect human health and the environment. In this respect, it has been agreed to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.

Privatization. Berkeley Jourunal of International Law; vol.31, pag. 89-149. 2013

16 Ibid.

17 World Summit for Social Development, Copenhagen, 1995, more specific information available at http://www.un.org/esa/socdev/wssd/text-version/

18 First World Water Forum held in Marrakesh, 1997, available at http://www.worldwatercouncil.org/fileadmin/wwc/Library/Official_Declarations/Marrakech_Declaration.pdf

19 Second World Water Forum, Ministerial Declaration of The Hague on Water Security in the 21st Century, 2000

20 International Conference on Fresh Water, South Africa, 2012

All these international conferences and forums have been an important field where States and experts on the matter expressed their concerns on water issues from various perspectives. It can be said that such opportunities were actually the first step taken by the global community for the formal recognition of the human right to water. As it can be noticed from the above description of the development of the right to water since 1968, its importance, concept and the applicable principles have been developed little by little, and each conferences and forums added an important element to the right to water.

When studying the human right to water, it cannot be avoided to mention the developments made by the United Nations. Especially the year 2002 marked a milestone for the development of the human right to water, mainly for its legal recognition. As it has been already mentioned, the UN failed to recognized the right to water in the International Covenant on Economic Social and Cultural Rights, as the issue was overlooked being taken for granted by the drafters of the Covenant. However, in this year, the Committee on Economic, Social and Cultural Rights (CESCR) clarified in its General Comment No 15[21] that *the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival*. According to the General Comment the State Parties to the Covenant are required to make use of, "*all appropriate means, including particularly the adoption of legislative measures*" in order to implement the obligations and achieve progressively the full realization of the right to water. This document also stated that priority should be given to the water resources required preventing starvation and disease, as well as the water required to meet the core obligations of each of the Covenant Rights.

Even though the General Comment No 15 is not a binding instrument, it is highly significant in many aspects on the recognition of the human right to water, and also it clarifies the scope and content of the right to water by explaining what is meant by sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. It explained that the human right to water covers only *water for personal and domestic uses*,[22] i.e. water for drinking,

[21] UN Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Substantive Issues Arising in the Implementation of the International Covenant on Economic Social And Cultural Rights, General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the Interntional Covenant on Economic, Social and Cultural Rights, E/C.12/2002/11, Geneva, 11-29 November 2002

[22] Fact Sheet No. 35, n3 supra at p.12; also according to it, access to water for agriculture, notably for smallholders comes under the right to adequate food, provided for in article 11 of the Covenant

washing clothes, food preparation and household hygiene. In fact, the General Comment No 15 was the first recognition of an independent human right to water.[23] Moreover, beyond the substantive content of the International Covenant on Economic, Social and Cultural Rights provisions, the Committee reaffirmed the relationship among the right to water, the right to life, the right to liberty and the right to human dignity contained in the Universal Declaration of Human Rights. According to Prof. Salman *this analytic model offers significant reinforcement to the concept of a human right to water, because, without water, many of the rights contained in the core international human rights instruments would be meaningless.*[24] The General Comment is a very valuable instrument for the human right to water and since its adoption this document has been recalled many times as a guiding document for the interpretation of the human right to water.

Later in 2008, also at UN level, the Human Rights Council adopted Resolution 7/22, appointing an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation setting the problem of the safe drinking water into the Council´s agenda.[25] Thereby doing so, the UN human rights system has obtained an exclusive mechanism dedicated to issues related to the right to water and sanitation, and since then, the Independent Expert has been working as an central agent for the right to water at global level.

In July 2010 The General Assembly, with 122 votes and 41 abstentions,[26] formally recognized the right to water and sanitation by supporting the Resolution initiated by Bolivia on 28 July 2010. The Resolution No. 64/292[27] acknowledges that clean drinking water and sanitation are integral to the realization of all human rights. Even though the Resolution is not binding, it has been another big step towards the development of the right to water and sanitation as it asserted the responsibility of the States and International Organizations to provide financial resources, to

[23] Thielborger, P. The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo Conflict?. P.M. Dupuy, F. Francioni and E.U. Petermann (eds) Human Rights in International Investment Law and Arbitration. Oxford: Oxford University Press. 2009, pp. 487-510 (Thielborger, P. The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo Conflict?)

[24] Salman M.A. Salman, The Human Right to Water—Challenges of Implementation Proceedings of the Annual Meeting (American Society of International Law), Vol. 106 (March 2012), pp. 44-46

[25] Later, the Human Rights Council in its Resolution 16/L.4 The Human Right to Safe Drinking Water and Sanitation. (A/RES/HRC/16/L.4 .March 2011) decides to extend the mandate of the current mandate holder as a special rapporteur on the human right to safe drinking water and sanitation for a period of three years.

[26] Data available at: http://www.un.org/News/Press/docs/2010/ga10967.doc.htm

[27] UN General Assembly, The Resolution Adopted by the General Assembly on 28 July 2010, Resolution 64/292 The Human Right to Water and Sanitation, 3 August 2010

help building capacity and to transfer technology to help other countries to provide safe, clean, accessible and affordable drinking water and sanitation for all, but it kept silent on the role of non-state actors and privatization. Soon after, the United Nations Human Rights Council adopted by consensus Resolution No. 15/9, affirming that the right to water and sanitation are part of existing international law and confirmed that these rights are legally binding upon States.[28] The Resolution included some clauses to address the debate around privatization, indicating that states may opt to involve non-state actors,[29] yet it indicates that States maintain the primary responsibility for ensuring the realization of human rights,[30] and finally, it affirmed in clause 9 that this right *is not incompatible* with private sector participation. This last provision will be one of the key points that will be further developed later in this chapter (point 3.2). Many States (including United States and the UK) abstained to vote for the adoption of Resolution 64/292 indicating that it should have been waited for the conclusion of the ongoing process carried out in Geneva, which actually was the adoption of the Resolution 15/9 by the UN Human Rights Council. This argument was understandable as the UN Resolution 64/292 is not a complete document regarding the protection of the human right to water. Therefore, it is rather natural that States have hesitated to sigh a document with no clear responsibilities (even though the document lacks of binding force). From this point of view, it is interesting that Resolution 64/292 obtained 122 votes in favour.

Finally, it must be mentioned that the access to safe drinking water has been recognized in core human rights treaties, such as in the Convention on the Elimination of all forms of Discrimination Against Women,[31] the International Labour Organization´s Convention No. 161, that concerns Occupational Health Services adopted in 1985,[32] The Convention on the Rights of the Child[33] and finally, The Convention on the Rights of Persons with Disabilities.[34] All of them establish specific obligations in relation to access to safe drinking water within each scope. Most of these documents were adopted before the formal recognition of the right to water, thus, its

[28] UN Human Rights Council, Resolution 15/9 Human rights and access to safe drinking water and sanitation, 30 September, A/HRC/RES/15/9, 2010

[29] Ibid, clause 7

[30] Ibid, clause 6

[31] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979,United Nations, Treaty Series, vol. 1249, art. 14 (2)

[32] ILO, Convention No. 161 concerning Occupational Health Services, Geneva, 25 June 1985, article 5

[33] UN General Assembly, Convention on the Rights of the Child, 20 November 1989,United Nations, Treaty Series, vol. 1577, art. 24 and 27 (3)

[34] UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Article 28

definition and protection may be incomplete or insufficient. For such reason and others, this research will focus mainly on the right to water established in the General Comment No. 15. In this way, it will be possible to have a clear analysis with a stable basis for its interpretation.

In this part of the thesis, it has been briefly described the evolution of the right to water at global level. Through this description it was possible to see developments and improvements. Specially, the former recognition of the right to water was a big step. Yet, it is regretful that, so far, there is no binding instrument that directly protects the human right to water. The current scenario shows that it will be difficult to attain to such objective. Since 2010 (the former recognition of the right to water at the General Assembly), the right to water has not improved much at legal dimension. From a practical point of view, it can be said that there is no such urgency to have a legally binding instrument protecting the right to water, but the most important point is to actually protecting it. This seems that this is the path that the development of the right to water is taking at this moment. Recently, it can be seen lot of effort working directly with the national public authorities and in development programmes concerning the access to water. This may not be the best scenario for the protection of the right to water, yet, at this point this seems to be the trend.

2.2 Key elements of the Human Right to Water

Once the development of the right to water has been described and it was possible to see how its scope has extended from being just an environmental issue to a matter of human rights. To continue the analysis, it is necessary to have a clear understanding of its definition and its scope. To this end, the General Comment No. 15 will be an instrument of great use.

As it has been already mentioned, the most common instrument to interpret the human right to water is the General Comment No. 15. Concerning the scope of the human right to water, it establishes as follows:

> *The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for*

consumption, cooking, personal and domestic hygienic requirements.[35]

From this definition, it can be inferred the elements of the human right to water. However, if this definition is the human right to water in its strict sense. Therefore, the elements indicated in this paragraph should be taken as the minimum common denominators to be considered for the protection of the human right to water. As follows it will be analyzed each of the elements.

a) Sufficient water

This refers to the quantity of water. The General Comment does not establish a minimum quantity of water that must be ensured for every citizen. Regarding this, the WHO establishes 20-25 liters as minimum water quantity.[36] However, it also indicates that this limited amount of water raises health concerns as it does not meet the required amount for basic hygiene and consumption needed.[37] Therefore, the WHO indicates that a person needs on a daily basis, between 50 and 100 liters of water in order to avoid health concerns caused by water issues.[38] These parameters should be taken into account, yet the reality shows that the everyday consumption of water in developed countries considerably exceeds such amounts.[39]

b) Safe and acceptable water

This point concerns the quality of water. Both, the quality and the quantity of water are the main topics of the water issues, either from an environmental perspective from a human rights perspective. As it happened with the quantity of water, the General Comment No. 15 did not specify the parameters to be taken into account in order to establish whether the supplied water is safe and acceptable. On this point, there is a useful instrument, which is recognized in the UN system. It is the WHO "Guidelines for Drinking-water".[40] This documents describes the impact of pollutants and elements that can be found in water sources and it establishes recommended

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35 UN Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Substantive Issues Arising in the Implementation of the International Covenant on Economic Social And Cultural Rights, General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the Interntional Covenant on Economic, Social and Cultural Rights, E/C.12/2002/11, Geneva, 11-29 November 2002, para. 2

36 World Health Organization (WHO), Minimum Water Quantity Needed for Domestic Use in Emergencies, 2005 avialable at: http://www.who.int/water_sanitation_health/publications/2011/WHO_TN_09_How_much_water_is_needed.pdf?ua=1 (last accessed 02/05/2014) [hereinafter Minimum Water Quantity Needed for Domestic Use in Emergencies]

37 G. Howard and J. Bartram, "Domestic water quantity, service level and health", WHO, 2003, p. 22

38 WHO, Minimum Water Quantity Needed for Domestic Use in Emergencies, see supra 6

39 European Water Association (EWA), Yearbook 2003, available at: http://www.ewa-online.eu/tl_files/_media/content/documents_pdf/Publications/Yearbooks/EWA-Yearbook_2003.pdf (last accessed 01/05/2014)

40 Ibid, p. 2

parameters, so that it should not damage human health. The WHO explained that the parameters established in this documents should not be understood as minimum standards, yet, it should be applied as guidelines to be taken into account in accordance to the socio-cultural, environmental and economic circumstances of each State.[41]

Although the effectiveness of this document may be diminished, it is understandable that this kind of approach has been taken. The water status varies considerably from one State to the other. Some States may already enjoy the quality of water as established in the WHO Guidelines, others may not be in the same situation. If the quality of water of its territory is far more deteriorated and does not reach to the WHO parameters, in order to reach to that standard, the State will need to invest on water infrastructures and management programmes in order to achieve better water quality. However, in some cases, especially for those ones that need most improvements, it is not feasible to finance such projects. The worse the water quality is, the financing amount would be higher.

c) Accessibility

This element refers to the physical accessibility of water and it is directly related to water supply services. Water should be accessible to everyone without discrimination in the immediate vicinity.[42] The General Comment No.15 adds that the access to water or water services should be culturally appropriate and sensitive to gender, life-cycle and private requirements.[43] It does not matter whether the water supply services are operated by a private or a public entity, ensuring the proper access to water to citizens is a State responsibility.

It is an interesting point that it was added the phrase "*... sensitive to gender, life-cycle and private requirements"*. In fact the needs for water may vary considerably depending on the individual and his situation. So far, many studies have been carried out on how the right to water applies to specific groups, especially for: women, children, persons with disabilities, refugees and internally displaced persons and indigenous peoples. Each of them have specific needs according to their circumstances. For instance, the lives of women and children are affected when there is

41 Ibid

42 UN Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Substantive Issues Arising in the Implementation of the International Covenant on Economic Social And Cultural Rights, General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the Interntional Covenant on Economic, Social and Cultural Rights, E/C.12/2002/11, Geneva, 11-29 November 2002, para. 12

43 Ibid.

not access to water in their villages, as the most of the water collecting role are played by them.[44] In the case of persons with disabilities, many of them suffers from marginalization and discrimination in the access to water caused by inaccessible design of buildings and infrastructure.[45] Refugees and displayed persons also may suffer from discrimination from a proper water supply, especially on those cases where it is overcrowded and the provision of basic services are inadequate.[46]

These are great examples to explain that each group suffer in different ways when there is no adequate supply of water. Yet, they all share one common aspect, they all need appropriate access to water in order to have a life with dignity.

d) Affordability

This last point refers to the economic accessibility of water. No individual should be deprived from the access to safe drinking water in any circumstances, even though if they are not able to pay.[47] This does not mean that people do not need to pay for water services and for the consumption of water. In fact, the water-pricing is one of the key elements for the protection of water itself, as it can be used as an inventive to the consumers to not waste it. Concerning the water pricing issue, the United Nations Development Programme (UNDP) suggested as a benchmark three per cent of household income as a proper price. If the water bill is under such percentage, it should be taken as affordable. However, this will also depend on the regions, as in some places where water scarcity and/or water stress is of high level, the price may rise due to the scarcity and in some cases, for the additional costs for transport.

3. Protection of the Human Right to Water

Many countries (especially developing countries) have opted for accepting foreign investments in the water supply services in order to fulfill their obligation to supply water to the community. However, host States are sometimes likely to show propensity for setting attractive offers with the propose to catch investors, which in future may end up affecting customer's rights to have access to clean and sufficient water with affordable prices. Obviously, when the supplied service

[44] UN, Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 35, The Right to Water, August 2010, No.35, p 19
[45] Ibid., 21
[46] Ibid, 23
[47] UN, Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 35, The Right to Water, August 2010, No.35, p 10

cannot reach the required minimum standards according to their needs, problems may arise and the conflict of interest prevails. On one hand States have the obligation to provide good water services to the population and on the other hand the private investor aims first, to recoup its investment (that usually reach a considerable amount of money) and second, to maximize its profits. Furthermore it must be pointed out that water service, as part of public utilities, falls within the *natural monopoly,* which makes important the role of the State to control the private company's behavior. Especially on the aspects of the water pricing and the quality and quantity of the supplied water.

Under international law, it is clear that Host States retain the primary responsibility for ensuring water supply, but in the case of the investors, their responsibilities have not been specified so far. Currently there are two opposite opinions. On one hand it has been said that Corporations have the direct obligation under human rights law,[48] and on the other hand some authors support that investors, being private entities, are not bound by neither human rights law, nor international law. The first one, contrary to the traditional point of view, has increased and more convincing arguments have been brought.[49]

In order to better understand State's and Private Investor's obligations and responsibilities under international law, each party's roles and responsibilities will be examined as follows.

3.1 The Rule: State Responsibility

Corporation activities can affect significantly to the fulfillment of human rights. In the specific case of the human right to water, such situation occurs basically in three principle scenarios: first, where business is involved in the provision of water services, second, where business is a user of water particularly where water is a limited resource and the business is competing with other users, and third, where business activities that are unrelated to water *per se* have an impact on water sources (for example, where industry causes pollution of water systems).[50] This chapter will specifically focus on the first case, as the aim of this chapter is not to find out the private

[48] See for example, H. Hazelzet, Margot E. Salomon, Arne Tostensen and Wouter Vandenhole, : Casting the Net Wider: Human Rights, Development and New Duty-Bearers. Antwerp: Intersentia, 2007, pp. 395-415

[49] See for example, Salomon, Arne Tostensen Salomon, and Wouter Vanterhole (ed.), Human Rights, Development and New Duty-Bearers, Antwerp: Intersentia, 2007; Nicola Jagers, Corporate Human Rights Obligations: In Search of Accountability, Antwerp: Intersentia, 2002

[50] Gaughran A., Business and Human Rights and the Right to Water. Proceedings of the Annual Meeting (American Society of International Law) , Vol. 106, (March 2012) , pp. 52-55

involvement in water allocation or in water pollution, but its objective is to understand how the access to water is protected for the correct fulfillment of the right to water.

The involvement of private corporations in the provision of water and sanitation services has increased over the past decades, and it has been noted that there was a remarkable 7,300 percent increase on private sector investment levels in water services between 1990 and 1997,[51] and from 2006 to 2007 the amounts of privatization contracts between States and investors has also increased. In total it turned out that about 10 percent of global water consumers receive water supply from private companies.[52]

Taking into consideration that the right to water has recently started to be dealt with a human rights perspective, while before it was not neither relevant in the international society, the private investors on water supply have been more likely to fail to meet the minimum standards of water in quality and in quantity. Nevertheless, the increasing strength of the enterprises and the development of the human right to water in the international context, have risen concerns on human rights responsibilities of the private sector. It must be clear that the States have the primary responsibility in the realization of the human rights. However, considering the present position that the private investor maintains in the water sector, it also should be accountable for its acts and for the quality of the services they provide to the society.

It is an unfortunate reality that host states are not always minded to place their international human rights commitments at the forefront of their interaction with foreign investors. The situation is that countries are competing for Foreign Direct Investments (FDI). Thus, they may end up permitting human rights breaches committed by the investors.[53] If the host State continuously allows the violation of human rights, they are not only neglecting their international obligations to protect the human rights included in international treaties, but also it could affect negatively to the liability of the host state in human rights forums.[54]

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[51] McIntyre, Owen, Emergence of the Human Right to water in an Era of Globalization and its Impliarions for International Investment La, in J. Addicot, J. Hossain Bhuiyan and T.M.R. Chowdhury (eds.), Oxford University Press, 2012, pp, 147-176

[52] Ibid.

[53] OECD, Multinational Enterprises in situations of Violent conflict and Widespread Human Rights Abuses, OECD working paper on international investment, May 2002, Number 2002/1

[54] Peterson, Luke Erik, and Kevin R. Gray. International human rights in bilateral investment treaties and in investment treaty arbitration. International Institute for Sustainable Development (IISD), 2003, p.21

It is generally known that States are responsible for protecting human rights and in principle it is the one that has to guide the foreign investor to not miscarry its duties towards the population. State's obligations concerning the right to water are of a due diligence nature in the sense that the State has to do its utmost to ensure the fulfillment of the right in question.[55] In order to protect human rights, scholars introduced a tripartite typology of state duties, which was first introduced by Henry Shue in 1980,[56] which defines that states have the obligation to respect, protect and fulfill. This model also applies to the human right to water, and within this context, *the obligation to respect* expects States to refrain from interfering directly or indirectly with the enjoyment of the right to water; *The obligation to protect* entails States' to prevent them from compromising equal, affordable, and physical access to sufficient safe and acceptable water when water services are operated by third parties; and finally, *the obligation to fulfill* requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to water. The argument that States can be responsible for abuses committed by private actors' misconduct on the public utilities, has been formally reaffirmed in many international instruments including human rights treaties, general comments by UN expert bodies, and decisions of regional human rights courts in Europe and the Americas.[57] Relating to this, General Comment No 15 notes that in order to fulfill such obligations "*States Parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low cost water and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that theses services, whether privately of publicly provided, are affordable for all, including socially disadvantaged groups.*[58]

At times, host states might try to regulate the economy bewildering foreign investors with the propose to promote or to protect certain human rights interests, yet, such action can bring up claims by the foreign investor against the host state. The latter can refer to its human rights obligations, but once the State manages public affairs taking into account the fulfillment of human rights, this could cause further complaints by the investor,[59] and when bilateral

[55] Thielborger, P. The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo Conflict?, n24 supra

[56] H. Shue, Basic Rights, Subsistence, Affluence and U.S. Foreign Policy. New Jersy: Princeton, 1980

[57] International Council on Human Rights, *Beyond Voluntarism*, 2008, p.54; CEDAW, adopted n 1979 by the UN General Assembly, art. 2

[58] General Comment No15, supra note 22, at p. 27

[59] Jacob, Marc. International investment agreements and human rights. INEF, 2010, p.16

investment treaties are in place, foreign investor has a better chance to challenge the State's measure,[60] as those instruments contain provisions that are favorable to the private sector.

States are not only responsible for the fulfillment of the human right to water, but also they are accountable for it. It is State's obligation to explain what it is doing and how it is moving towards the realization of the right to water for all, as expeditiously and effectively as possible, because the right to water concerns public interests. Within the context of public utilities, in this case of water supply, States should act as a trustee rather than as the holder of the right to water.[61] States must be aware that when they negotiate water concessions with investors (or potential investors), they are actually dealing with a citizens' right.

In order to achieve solutions on violations/breaches on the human right to water, accountability on national water and sanitation strategy has to be effective, accessible and with a transparent monitoring mechanism.[62] Monitoring can take place in three levels: national, regional and international. Civil society organizations and non-governmental actors joint with democratic processes, advocacy and monitoring based on indicators, benchmarks, impact assessments and budgetary analysis can and should be used.[63] In fact, social movements have been instrumental in placing the human right to water back on the political agenda.[64] The engagement between companies, individuals and communities can impact to be a central element in this strategy.[65] Implementation of the right to water is not automatic or self-enforcing,[66] thus, States and aid agencies implement this right by lobbying with legislators, using advocacy and through the creation of public awareness.[67] In any case, the judicial mechanisms should be given more attention and importance rather than the others, even though the international law does not specify mechanisms for domestic accountability, which makes it more difficult to control and to carry it out.[68]

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60 Peterson, Luke Erik, and Kevin R. Gray. International human rights in bilateral investment treaties and in investment treaty arbitration. International Institute for Sustainable Development (IISD), 2003, p.5

61 Thielborger, P. The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo Conflict?

62 Fact Sheet No. 35, n3 supra at p.37-39

63 Fact Sheet No. 35, n3 supra at p.38-43

64 Gupta, Joyeeta, Rhodante Ahlers, and Lawal Ahmed. "The human right to water: moving towards consensus in a fragmented world." Review of European Community & International Environmental Law 19.3 (2010) at p. 303

65 J.Ruggie, Just Business: Multinational Corporations and Human Rights, Norton Global Ethics Series, 2013, at 80

66 Gupta, Joyeeta, Rhodante Ahlers, and Lawal Ahmed. "The human right to water: moving towards consensus in a fragmented world." Review of European Community & International Environmental Law 19.3 (2010) at p. 303

67 Ibid, at 303

68 Fact Sheet No. 35, n3 supra at p 38

Therefore, State's obligations per se towards the human right to water is clear, but when conflict rises from water service operated by a foreign investor, the Host State might confront its obligations on one hand, to protect human rights and on the other hand to respect the Bilateral Investment Treaty. Besides, investors have another key weapon to challenge States' arguments, which is the principle of *fair and equitable treatment*.

On this last point, there is an extensive arbitration case law that gives a vast interpretation of this principle. For example, in the *Azurix Case*,[69] the Province of Buenos Aires, promoted the privatization of the water services and during the privatization process the concession was offered in auction. The US-based water services company Azurix (an Enron spin-off) won the bid and its service took place since in July 1999 with an exclusive 30 year concession contract. Under the agreement, the province agreed to complete certain repairs of past problems (caused by lack of investments and maintenance) before the Azurix would take over water service. However, the province never completed such work, which contributed to the *algae crisis.* Customers complained about the water quality and also about the reduced water pressure and the price hikes; the local authorities response was to suggest the customers to not to pay the water bills. The concessionaire alleged that the province did not undertake the agreed repairs and it attempted to interfere with the tariffs affecting its right to the fair and equitable treatment.

Regarding this point, the tribunal concluded at para. 372 that:

> *The standards of conduct agreed by the parties to a BIT presuppose a favourable disposition towards foreign investment, in fact, a pro-active behaviour of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious.*

This finding is attention-grabbing as the tribunal clearly indicates that the State must act not only

[69] Azurix Corp v. Argentina, ICSID Case No ARB/01/12, Award, 14 July 2006

refraining from bad faith, but also it must ensure the investment environment, therefore, it can be inferred that host States has both, positive and negative obligations towards the investment protection. Actually, as above mentioned, this point can affect human rights protection and public interests, because following this analysis there might be conflict between State's human rights obligations and State's investment protection obligations deriving from this conception. Furthermore it must be noted that within the Azurix Award there is almost no explicit human rights references (consequently there is no references on right to water) as the investor's right prevailed over all.

Also, in the *Suez Case*,[70] where the Host State alleged Defense of Necessity (due to the severe crisis in Argentina between 2001-2003) in order to confront the investor's claim of BIT violations, the tribunal denied Argentina's plea of the defense of necessity indicating:

> *Argentina and the amicus curiae submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations.*[71]

As it can be seen, claims on water supply rise due to various reasons e.g., the supplied water's quality and/or quantity does not satisfied the minimum standard, in order to have the access to water customer's must pay high prices, the access to water is not equally distributed, etc. It can be perceived that the problems arising from water supply are analogous whether public sector or private sector provide the service. In any case, the public sector is always involved. Thus,

[70] Suez Sociedad General de Agusas de Barcelona S.A. Vivendi Universal S.A. V Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010

[71] Suez Sociedad General de Agusas de Barcelona S.A. Vivendi Universal S.A. V Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, at para. 262

governments' will in protecting the human right to water is going to be the most important element for the correct fulfillment of this right. Of course, other elements are important too, yet the most important role will always be held by each State. If a State is not interested in protecting the right to water and it does not play an active part, the correct realization of the human right to water will not be possible.

3.2 The role of the Private Party and the Corporate Social Responsibilities

Corporate Social Responsibility (CSR) refers basically to the secondary obligations,[72] which does not replace the primary obligations entrusted to the States at any case, and currently it still remains a confusing idea whether a non State party has obligations or not towards human rights protection, and if it does, it is still ambiguous in what extent would it be, as the main actor in the protection will always be the host State.

The private sector is a powerful engine of economic growth and the main source of job creation, which concerning to public utilities services can provide an effective mechanism for allocating scarce resources. However, it is also true that the private sector (as it can be observed in the examined cases and many others) can affect negatively to the enjoyment of human rights. The corporate globalization and the subsequent emergence of multinational enterprises have contributed to social development, however, when it comes to the impact of these business on human rights, neither governments nor companies were prepared for this wave of globalization,[73] as actually companies can affect virtually the entire spectrum of internationally recognized human rights.[74]

The involvement of the private sector in water provision together with the long-term concession agreements can compromise water operators' incentive to invest in infrastructure so as to improve or extend the services provided and States actions in order to meet the social objectives of the human right to water.[75] Besides, as the past experience has shown, in States with weak governance and poor law enforcement, corporate human right abuses is actually more evident

[72] Hart, Herbert Lionel Adolphus. The concept of law. Oxford University Press, 2012

[73] Ruggie, J.G., Just Business: Multinational Corporations and Human Rights, Norton Global Ethics Series, 2013, p 34

[74] Ibid.

[75] McIntyre, Owen, Emergence of the Human Right to water in an Era of Globalization and its Impliarions for Intenational Investment La, in J. Addicot, J. Hossain Bhuiyan and T.M.R. Chowdhury (eds.), Oxford University Press, 2012, pp, 147-176

and common.

The liberalization of international trade and the reinforcement of foreign investment have created a situation in which the private investor has the option of taking advantage of lower human rights standards and the weak systems of governance, especially when they operate in developing countries.[76] In the specific case of the human right to water, alike to other public services, according to international law, there is no restriction whether water services must be operated by the States or by the private sector. This has brought up other questions of great importance, such as whether water should be a commodity for profit.[77] Indeed, it would not be reasonable to have such a restriction, because one of the common reasons why States opt for Foreign Direct Investments is because they are not able to supply such service by themselves, usually caused by the large amount of money that must be invested or because they do not have the required experience nor technology to offer an efficient service. Thus, accepting the private investment in the water sector is actually necessary in some cases, especially in developing countries, where the privatization holds a very important role in further developments that must been made in the society.

This view can also be perceived in the inclusion of water and sanitation targets among the Millennium Development Goals (MDGs), where the importance to mobilize private investments in the water sector in order to achieve any realistic chance to meet such targets has been highlighted, as it also will be required an enormous investment. There is one exception on this point, the Bonn International Conference in 2001 adopted the Bonn Recommendations which stated that the private sector participation should not be imposed on developing countries as a conditionality for funding. This perspective is understandable as many water supply issues are caused when there is the private sector participation, yet, taking into account the current situations and the States needs, this point of view is actually less feasible. Additionally, international lending institutions have also pushed for water liberalization[78] arguing that the private sector brings resources and efficiency to the water market,[79] indicating that in the case of water supply, foreign investment can contribute positively to the enjoyment of this human right

[76] Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 45 Netherlands International Law Review 171.

[77] Salman M.A. Salman, The Human Right to Water—Challenges of Implementation Proceedings of the Annual Meeting (American Society of International Law), Vol. 106 (March 2012), pp. 44-46

[78] E.B. Blumel, The Implications of Formulating a Human Right to Water, Ecology Law Quarterly, 2005, p. 973

[79] J. Winpenny, Managing Water as an Economic Resource, Routledge, 1994

but if the quality of the service does not reach a certain level, it is also true that it can affect negatively the enjoyment of it and other fundamental rights,[80]

Many authors support that human rights and business are two separate disciplines with no relations between each other, thus, the protection of human rights is an exclusive concern of host States.[81] Indeed, businesses play a distinct role in society, as they have different objectives, i.e. sales expansion, resource acquisition, diversification, etc. Therefore, it is common for foreign investors trying to camouflage their responsibility challenging that being private entities they are not bound by international law.

However the trend is moving towards extending human rights responsibilities to private sector involved in public utilities,[82] although States have addressed the human rights responsibilities of business enterprises most directly in soft law instruments avoiding to develop such direction on hard law.[83] States may turn to soft law for several reasons: to chart possible future directions in the international legal order when they are not yet able or willing to take firmer measures and where they conclude that legally binding mechanisms are not the best tool to address a particular issue; or more simply, just to avoid having more binding measures gain political momentum.[84] To this regards, the UN Sub-Committee on the Promotion and Protection of Human Rights approved a draft Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights, which identifies general (article H) and more specific obligations (Articles D, F and G) of corporations on human rights. This draft would have been of great importance if its normative value were clear and consistent. This was the first international effort to develop legally binding international human rights standards for companies. However, the draft has been subject of great criticism not only from businesses but also from States and scholars.[85] One of the more serious problems of the draft was that it attributed duties to corporations, which are actually the same duties that the States have,[86] which in the end, only

[80] Fact Sheet No. 35, n3 supra at p.31
[81] See for example, M. Friedman, 'The Social Responsibility of Business is to Increase its Profits' (1970) 13/9 New York Times Magazine 122
[82] See for example, Thielborger, P. The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo Conflict?
[83] J.Ruggie, Just Business: Multinational Corporations and Human Rights, Norton Global Ethics Series, 2013, at 45
[84] *Ibid*, at 46
[85] *Ibid*, at 49
[86] *Ibid*, at 49

brings more confusion and no effective answer.

Another important instrument coming from this trend is the UN Guiding Principles on Business and Human Rights,[87] which constitutes a normative platform and high-level policy prescriptions that provide an authoritative global standard for addressing adverse impacts on human rights linked to business activity. Basically, the Guiding Principles reaffirm that businesses have responsibility to respect human rights and that States have a further duty ensuring that businesses do so. This instrument indicates that corporations, in order to respect human rights, should take appropriate methods, including human rights approach with due diligence.[88] The reason to include a due diligence approach to the issue is mainly based on the recognition that contemporary business activity relies on integrated business relationships that span national and organizational boundaries, and under international human rights law, the responsibility of a business to respect human rights includes acting with due diligence in order to avoid affecting negatively in such essential rights.[89]

As stated before, the impact of the private sector on the water sources is considerable, so that in order to operate in a sustainable manner, and contribute to the vision of the UN Global Compact and the realization of the Millennium Development Goals, private investors have committed to make water-resources management a priority, and to cooperate with governments, UN agencies, NGOs and other stakeholders to address this challenge.[90] It was so that in July 2007, the UN Secretary-General, in partnership with international business leaders, launched the CEO water mandate under the auspice of the UN Global Compact, a unique high profile public-private initiative created to assist companies in the development, implementation and disclosure of water sustainability policies and practices.

Also, within the EU context, its contribution on the corporate responsibilities has been considerable. In 2002 the European Union established a duty that consists in encouraging Corporate Social Responsibility[91] and in setting up a framework to ensure that environmental and

87 UN, Guiding Principles on Business and Human Rights, New York and Geneva, 2011

88 International Corporate Accountability Roundtable (ICAR), Human Right tùDue Diligence: The Role of the State, 2012, available at: http://accountabilityroundtable.org/analysis/hrdd/

89 International Corporate Accountability roundtalbe, HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES, 2012 available at http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/

90 Fact Sheet No. 35, n3 supra at p.30

91 European Union, European Commission. Communication from the Commission concerning corporate Social

social considerations were integrated into companies´ activities. In March 2006 the Commission of the European Union issued a Communication, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility.*[92] Through this initiative the Commission reaffirmed its reference for non-binding initiatives and promotes the creation of a business's alliance for Corporate Social Responsibility.[93] Finally, in October 2011, the European Commission published the new policy on corporate social responsibility, defining Corporate Social Responsibility as the *responsibility of enterprises for their impacts on society.*

Furthermore, as well as the State accountability, the corporate accountability refers to the way in which private actors should disclosure data about human rights policies, procedures, risks and steps taken to address or mitigate impacts. They must be open in their decision-making processes in order for them to be examined by other interested parties. In this light, corporate accountability response to the current situation in which businesses can no longer count on the anonymity of the market place to hide from scrutiny[94] making reference to the existence of voluntary codes of conduct and procedural standards in terms of transparency, reporting and openness to the public, as indirect means of ensuring the socially responsible conduct of Multinational Enterprises (MNEs). This, for instance, is the approach of the Global Reporting Initiative and of the European Commission.[95] As it can be seen from the above explanation, the topic of corporate accountability has been developed at different dimensions which pushes businesses to accept their human rights responsibilities. Having analyzed the current trend on corporate social responsibility, it can be concluded that the classic view that denies that corporations have any kind of human rights responsibilities is not valid any more. The situation is not clear enough and many details must be clarified, yet, at this point, their human rights implications at some extent can no longer be denied.

Responsibility: a Business Contribution to Sustainable Development COM (2002) 347 FINAL, 2 July 2002

92 European Union, European Commission. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility COM (2006) 136 final, 22 March 2006

93 Gatto, Alexandra. Multinational enterprises and human rights: obligations under EU law and international law. Edward Elgar Publishing, 2011, p.8

94 Choucri, Nazli. "Corporate strategies toward sustainability. Sustainable Development and International Law, 1994, p. 189-201

95 Gatto, Alexandra. Multinational enterprises and human rights: obligations under EU law and international law. Edward Elgar Publishing, 2011, p.17

3.2.1 Legal Basis of the Corporate Social Responsibility

The current trend is due to the corporations' powerful condition and their implication on the matter, that they (businesses) are also liable when their acts negatively influence the fulfillment of a human right. Such a rationale derives from three levels of legal sources, which are: national legal order, international legal order and unilateral voluntary commitments made by corporations.[96]

The first legal source can be found in constitutions and/or under ordinary legislation. When States incorporate the human right to water into their domestic positive law and policies, this right becomes enforceable at the national level. Since the publication of the General Comment 15, the number of States recognizing the human right to water has doubled.[97] It is very advantageous, when States explicitly recognizes the right to water in their constitutions, as generally, all natural and legal persons must act in compliance with respective national constitutional law, and constitutional rights can be translated into human rights obligations of corporations.[98] In this light, the constitutional right for water is recognized in different countries, particularly in those that suffer from a severe shortage of water.[99] Major examples are: South Africa's constitution adopted in 1996, praised as the model social rights constitution, in Section 27.1(b) confirms that everyone has the right to access to sufficient food and water; in the case of India, The Supreme Court has ruled that both water and sanitation are part of the constitutional right to life, therefore the Court has stated that the right to access to clean drinking water is fundamental to life and there is a duty on the state to provide under the Constitution (Article 21) clean drinking water to its citizens.[100]

The human rights obligations of corporations can derive also from the International legal order. As it has been examined above, many international treaties and declarations either explicitly or implicitly recognize the right to water. However, basically there is no references to corporate

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96 J. Letnar Cernic, Human Rights Law and Business. Europa Law Publishing, 2010

97 UN, The right to water and sanitation in national law, available at http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/

98 B. Toebes, J. Letnar Cernic. Corporate Human Rights Obligations under Economic, Social and Cultural Rights, Globalization, International law and Human Rights, J. Addcott, J. Hossain Bhuyan, T.M. R. Chowdhury (eds). Oxford University Press. 2012, pp.1-27

99 Kornfeld I. E.Water: A Public Good or a Commodity? Proceedings of the Annual Meeting (American Society of International Law), Vol. 106 (March 2012), pp. 49-52

100 See, A.P. Pollution Control Board II v Prof. M.V. Naidu and Others, (Civil Appeal Nos. 368-373 of 1999) on 22 December 2000

responsibilities concerning this right but this is reasonable considering the traditional view. As an exception there is the General Comment No 14, which indicates that the right to health in Article 12 of ICESCR is directly applicable to the private business sector, which indicates: 'while only States are parties to the Covenant and thus ultimately accountable of compliance with it all members of society – individuals including health professionals, families, local communities, intergovernmental and non-governmental organizations, *as well as the private business sector-have responsibilities regarding the realization of the right to health* (emphasis added)."[101] This should also apply to the right to water which is directed related to the right to health. Yet, to avoid ambiguity and strategic gaming on the ground, it is critical that the two sets of obligations to be clearly differentiated.[102]

The third source comes from the unilateral voluntary commitments made by corporations themselves. The OECD defines it as 'commitments voluntarily made by companies, associations or other entities, which establishes standards and principles for the conduct of business activities in the market place.'[103] Recently, there have been cases where the private investors adopted voluntarily human-rights inspired instruments[104] such as: codes of conducts, social statements in annual accounts and label schemes.[105] This also applies to the water supply services. Yet, it is important to clarify that even though these instruments are adopted voluntarily by the non-State party, once they are adopted it acquires a binding effect[106] that can be used by judges to interpret vague normative.[107] Nevertheless, it is still noticeable a certain investor resistance towards the adoption of legally binding norms either in the national or international level[108].

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[101] Committee on Economic, Social and Cultural Rights. The Right to the Highest Attainable Standard of Health. UN General Comment No. 14, Doc. E/C12/200/4, 11 August 2000

[102] J.Ruggie, Just Business: Multinational Corporations and Human Rights, Norton Global Ethics Series, 2013, at 78-79

[103] OECD, Directorate for Financial, Fiscal and Enterprise Affairs. 'Codes of Corporate Conduct: Expanded Review of Their Contents', May 2011, working papers on International Investment, November 2001

[104] Gatto, Alexandra. Multinational enterprises and human rights: obligations under EU law and international law. Edward Elgar Publishing, 2011, p.19

[105] Cassel, Douglass. Corporate initiatives: A second human rights revolution. Fordham Int'l LJ 19 (1996): 1963; the academic community and civil society have expressed their criticism over voluntary initiatives in International Council on Human Rights Policy, Beyond Voluntarism-Human Rights and the Developing International Legal Obligations of Companies, February 2002, available at: www.ichrp.org (accessed 3 March 2006)

[106] Gatto, Alexandra. Multinational enterprises and human rights: obligations under EU law and international law. Edward Elgar Publishing, 2011, p.19

[107] P. Muchlinski. Human Rights Social Responsibility and the Regulation of International Business: the Development of International Standards by Intergovernmental Organisations, 3, Non-State Actors and International Law 123, 2003, at 129

[108] D. Weissbrodt and M. Kruger, Norms on the Responsibilities of Traditional Corporations and Other Business Enterprises with Regard to Human Rights, 97, American Journal of International Law, 2003, p. 901

Corporations have started to adopt this kind of measure because of the fact that the situation has been changing as the private investors are facing societal expectations that their actions and operations should respect human rights and do no harm to the enjoyment of these rights by individuals.[109] Thus, investors are under pressure of these expectations and irrespectively to the national legal requirements of their host States, they decide voluntarily to adopt the so called codes of conduct. Also it can be perceived that corporations have actually accepted their involvement and high risks to affect the fulfillment of some human rights.

This trend became more evident when various companies have signed up to the United Nations Global Compact,[110] which is a strategic policy initiative for businesses committed to align their operations and strategies with ten universally accepted principles related to human rights, labour standards, environment and anti-corruption. Actually, more than 10,000 corporate participants and stakeholders from over 130 countries are part of this initiative and numbers are actually increasing,[111] however, they exist largely as disconnected fragments incorporating different commitments, with few focused specifically on human rights,[112] which may end camouflaging the main objective of a Corporate Social Responsibility becoming just an instrument to beautify their image without altering their behaviour on the matter.

4. The Right to Water as a matter of Public Interests

The vertiginous augmentation of international investment has been one of the most important factor related to the globalization of the economy, in which opportunities for foreign investment often exceed the prospects of host State investment.[113] Modern investment law and arbitration has acquired attention owing to the perception of large-scale foreign investment, which in order to fulfill its purposes may put aside some important factors, such as human rights and environmental protection.[114] It was between the 1980s and 1990s when countries began to open up to Foreign Direct Investments (FDI). Since customary international law standards on the

[109] Fact Sheet No. 35, n3 supra at p.31
[110] Ibid., p.32
[111] United Nations Global Compact. Over view of the UN Global compact. available at: http://unglobalcompact.org/aboutthegc/
[112] J.Ruggie, Just Business: Multinational Corporations and Human Rights, Norton Global Ethics Series, 2013, at 34
[113] Jacob, Marc. International investment agreements and human rights. INEF, 2010, p.6; Gatto, Alexandra. Multinational enterprises and human rights: obligations under EU law and international law. Edward Elgar Publishing, 2011, p. 4
[114] Ibid.,p.7

protection of foreign investment were frequently complicated with incessant disagreement, international investment agreements emerged as the principal source of norms in the international investment context.[115] Such was the case of the Bilateral Investment Treaties (BITs).[116] In fact, since the conclusion of the first BIT between Germany and Pakistan in 1959, the number of these treaties has increased over two and a half thousand agreements worldwide.[117] There were two main reasons that have induced to develop BITs: the constant ineffectiveness of diplomatic measures on multilateral agreements and the unfavorable treatment to foreign investors in the standards of customary international law.[118]

Regarding this, the BITs have two principal objectives: first to protect foreign direct investment flows by elaborating a series of rights and guarantees, and second, to encourage further economic cooperation, including the promotion of enhanced flows of Foreign Direct Investments into developing States.[119] Moreover, the ambiguity, open-endedness and need for substantial interpretation of the treaty are primal characteristic of these treaties.[120] Therefore, the provisions indicated in the BITs are frequently exasperatingly imprecise, which in case of disputes some difficulties may arise in the tribunal when applying it, as this lack of precision can trigger broad interpretations,[121] facilitating the progress of private investors to challenge various public policies, including of course, the protection of public services.

In International Economic Agreements, (before the BITs appeared), when legal action was taken between the Host State and the Foreign Investor, in order to pursue a solution, it was commonly used the S*tate-to-State arbitration*.[122] This was common especially with the 1994 World Trade

[115] Muchlinski, Peter, Cristoph Schreuer (eds), The Oxford Handbook of International Investment Law. Oxford:Oxford University Press. 2008, p. 16

[116] Sauvant, Karl P., and Lisa E. Sachs, eds. The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows. Oxford University Press, 2009

[117] UNCTAD, World Investment Report 2009 – Part 2. Transnational Corporations, Agricultural Production and Development. New York and Geneva, 2009

[118] Sornarajah, M. The international Law on Foreign Investment. Cambridge University Press, 2010

[119] Peterson, Luke Erik, and Kevin R. Gray. International human rights in bilateral investment treaties and in investment treaty arbitration. International Institute for Sustainable Development (IISD), 2003, p.8; World Bank ´s Report on Global Economic Prospects and the Developing Countries 2003, http://www.worldbank.org/prospects/gep2003/index.htm

[120] Thomas Walde and Stephen Dow, Treaties and Regulatory Risk in Infrastructure investment: The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment, Journal of World Trade 34(2), 2000, p.45

[121] Peterson, Luke Erik, and Kevin R. Gray. International human rights in bilateral investment treaties and in investment treaty arbitration. International Institute for Sustainable Development (IISD), 2003, p. 34

[122] UN UNCTAD, Bilateral Investment Treaties 1959-1999, New York and Geneva, 2000, UNCTAD/ITE/IIA/2, p.99

Organization Agreements and the earlier GATT that contain only State-to-State dispute resolution procedures.[123] Nevertheless, on this matter, the BIT system brought up another solution offering the *investor-State arbitration* and also providing the possibility of binding state-to-state arbitration.[124] This innovation is another important characteristic of BITs that distinguishes from the conventional international investment agreements. Furthermore, the fair and equitable treatment (FET), the investors' dearest principle, basically aims to protect Foreign Investor from the State´s unfair or inequitable acts in exercising its legislative power, better known as the minimum standard of treatment, is the most evident trait of the BITs.[125]

Many FET clauses are either directly or indirectly related to international law principles[126] and offers, as stated before, highly flexible provisions in order to accommodate conflicting interests for each context.[127] This fact triggers even more variety of interpretations by governmental actors, arbitrators and scholars. For such ambiguity, it is evident that there is a general difficulty on investment agreements addressing human rights concerns. In the Bilateral Investment Treaties' provisions, as far as it has been able to identify, it is not common to find even indirect human rights obligations imposed neither on the host state nor on the investor.[128] However, the trend is moving towards the direction to include human rights inspired provisions or references in investment agreements models.[129]

For instance, the draft Norwegian 2007 BIT Model contains preambular language reaffirming that the treaty parties are committed to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights.[130] Another example it the US 2004 BIT Model, which explicitly states that the tribunal shall have the

[123] Bernard M. Hoekman and Michael M. Kostecki, The Political Economy of the World Trading System, 2nd edition, Oxford:Oxford University Press, 2001, p.74-99

[124] Horacio A. Griegera Naon, The Settlement of investment Disputes Between States and Private parties: An Overview from the Perspective of the ICC. 1 Journal of World Investment No. 1, July 2000

[125] S Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice. 70 The British Yearbook of International Law 99, 1999, p.113

[126] Jacob, Marc. International investment agreements and human rights. INEF, 2010, p.17

[127] Schwarzenberger Georg, Foreign Investments and International Law , London: Stevens, 1969, p.114

[128] OECD, International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues. 2008. available at: http://www.oecd.org/daf/inv/investment-policy/40471550.pdf

[129] Jacob, Marc. International investment agreements and human rights. INEF, 2010, p.11

[130] Draft Version 191207. It appears this draft model BIT was recently abandoned following public consultation yielding critical feedback. See D Vis-Dunbar, Norway Shelves its Draft Model Bilateral Investment Treaty (8 June 2009), Investment Treaty News, available at: http://www.itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/

authority to accept and consider *amicus curiae* submissions.[131] Yet, it is still reasonable and common for BIT´s to not contain clauses that condition investor´s rights and activities.[132] As a result, the absence of clauses containing human rights protection is conventional. This is not a result that is only directly related to the main objectives of the BITs but also because the contracting parties are not keen to include such provisions.

The importance to review the international investment law relies on the fact that it was in this jurisdiction where the public interest of the water services has been developed. It is difficult to find the application of the human right to water in international jurisprudence, yet, the investment arbitration, specially the International Center for Settlement of Investment Disputes (ICSID) offers interesting cases that should be studied in order to understand how such arbitration tribunals actually implement the global trend, which is to approach such issues from a human right perspective.

As follows, it will be analyzed the most important points that the investment arbitration case-law offers concerning the access to safe drinking water and the protection of the human right to water.

4.1 The right to Water and International Investment Law and Investment Arbitration

Disagreements concerning the quality of the water services are not unusual. In many water arbitrations, there have been allegations against the water services supplied by the foreign investors for the level of tariffs, water quality, quantity, etc. When these kind of issues are found, they do not only affect the human right to water, but also other basic human right, such as the right to health, non-discrimination, even to the right to education (the last case is common specially in the region of Africa where parents prefer their daughters to not go to school if sanitation facilities are poor), having impacts on security, dignity and freedom.

Basically, there is no rule in international human rights law that establishes whether water services should be delivered by public or private providers or by a combination of the two.[133]

[131] US 2004 BIT Model, article 28-3. available at http://www.state.gov/documents/organization/117601.pdf (last accessed: 16th January 2014)

[132] Peterson, Luke Erik, and Kevin R. Gray. International human rights in bilateral investment treaties and in investment treaty arbitration. International Institute for Sustainable Development (IISD), 2003, p.6

[133] Fact Sheet No. 35, n3 supra at p.35

However, according to the vast international instruments that have been examined above, States are required to ensure that any form of service provision guarantees equal access to affordable, sufficient, safe and acceptable water. On the matter, General Comment No. 15 indicates that when water services are operated or controlled by third parties, States has the implicit duty to put into operation an effective regulatory framework that includes independent monitoring, public participation and penalties for non-compliance.

If egregious violation on human right to water occurs, arbitrators should take into account the human rights implications in order to evaluate.[134] Yet, this has not happened with the human right to water. In any case, the General Comment No. 15 on the Right to Water urges judges, adjudicators and members of the legal profession to pay greater attention to violations of the right to water in the exercise of their functions. However, when the host State has no desire to regulate investors´ activities concerning human rights, the situation becomes less clear what role the human rights may play in arbitration. State's commitment to undertake human right rules and the investor´s approach towards it will have a great importance at the time to consider the breach.[135] Nevertheless, when there is a breach of certain peremptory human rights norms, such as slavery, investment tribunals should not be able to ignore these compelling norms. Even though there have been many arbitrations on investments disputes, at this point there are only few cases where tribunals have explicitly pointed out host State´s international responsibility concerning human rights, but there is no known case where the tribunal weighed the human rights concerns over the investors' rights or their economic freedom. Such precedence is needed also to boost States' commitment on the matter, as in the case where the tribunals weight more the States obligations concerning human rights rather than those ones established in the BIT, States might understand that they are liable human rights breaches committed by the private entities.

For example in the case of the International Center for Settlement of Investment Disputes (ICSID) when there is a legal dispute between one of the contracting Member States and a national of another contracting Member State, it is common to process in accordance with the ICSID Convention, and in many cases the ICSID jurisprudence has shown that it will be difficult

[134] Vienna Convention on the Law of Treaties, 1968, articles 53 and 64

[135] Peterson, Luke Erik, and Kevin R. Gray. International human rights in bilateral investment treaties and in investment treaty arbitration. International Institute for Sustainable Development (IISD), 2003, p.32

for States to bypass ICSID arbitration.[136] The tribunal will interpret the respective treaty, making use of the applicable law accorded therein (e.g. public international law, national law, etc.).[137] In case of disagreement on the applicable law or whenever it is not clear what law to apply, the article 42(1) section 2) of the ICSID Convention provides that the Tribunal will apply the law of the host State and such rules of international law may be applicable. Related to this point, the *Southern Pacific Award*[138] notes that even though the parties do not specifies International Law as the applicable law in the agreement, the application of the international minimum standards must be ensured. However the question, if the human right to water belongs to such minimum standards, remains.[139] As stated above, when egregious violations are in place arbitrators should not hesitate to consider the human rights aspect in the case, however, this is still not clear enough as the term "egregious", according to the UN, is a category of gross and serious violations of international human rights law, yet it does not specify which ones. Basically, it is generally agreed that crimes such as genocide, war crimes, etc., fall within such an ambit, but there has been no case concerning water supply that brought up such a grave violations. Moreover, even though in the situation where the arbitrator decides to apply human rights law he should be very careful in order to not exceed its powers as this is a cause of annulment.[140]

4.2 Case-Law on water issues relevant to the human right to water: The ICSID Jurisdiction

Private sector's failures on water supply, and States' insufficient monitoring and control of the investors operation concerning water services together with its inaction against the investor's violations on this right, have caused social frustration and have brought serious political movements against privatization of water service. In fact, during the last decades, the right to water has suffered breaches in many instances and cases have been brought before international tribunals. Such was the Case of *Gabcikovo-Nagymaro*[141] which constituted a milestone for the international water jurisprudence as the Court pointed out that the parties should have taken into account and contend the newly developed norms of environmental law as those are relevant in the case, indicating that the 1977 Treaty - between Hungary and Slovakia - does not contain

[136] See for example (within the arbitration case law concerning water supply), Compania de Aguas del Aconquija, SA (AdA) & Compagnie Générale des Eaux v Argentine Republic, ICSID Case No. ARB/97/3, Award, at 49 and 52

[137] Schreuer, Christoph H. The ICSID Convention: a commentary. Cambridge University Press, 2009, p.560

[138] Southern Pacific Properties v Egypt, ICSID Case No ARB/84/3, Award, 20 May 1992, ICSID Reports 189

[139] Thielborger, P. The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo Conflict?

[140] See for example, ICSID Convention, article 52 (1)(a)

[141] Case concerning the Gabcíkovo - Nagymaros Project (Hungary/Slovakia), Judgement of 25 September 1997, International Court of Justice

specific obligations of performance but require the parties, in carrying out their obligations to *ensure that the quality of water* in the Danube is not impaired and that nature is protected. (emphasis added) However, this is the only case that can be found in the International Court of Justice concerning water issues. As the ICJ does not offer much on water jurisprudence, it is necessary to give a special attention to the International Center for Settlement of Investment Disputes (ICSID) since it is actually the major international arbitration institute mentioned in BITs.[142] The development of the recognition of the human right to water within the ICSID arbitration awards solving water services privatization issues have not provided much contribution, however, its recent development has been attention-grabbing. Although this fact does not imply the direct recognition of the human right to water per se.

Despite the arbitration case law concerning water supply is rather extensive, references on human rights in investment arbitration have been scarce. This phenomenon can be a result of various reasons. For example, the State party may intend to avoid alleging its human rights obligation in order to avoid population critics towards the State itself for not accomplishing its main role that must act with due diligence; or it is also possible that the arbitral tribunals may not be willing to invoke human rights obligations, if such a provision is not explicitly stipulated in the BIT.

Nevertheless, recently arbitration tribunals have started to develop a new trend which is: *considering that water provision actually is a matter of public interest.* In fact, in the *Suez Case*[143] - the investment dispute that arose out of one of the world's largest water distribution and waste water treatment privatizations - was the pioneer in explicitly considering public interest concerns of water provision in human right terms. In fact the tribunal itself pointed out that no previous tribunal functioning under ICSID Rules has granted a non-party to a dispute the status of *amicus curiae* and accepted *amicus curiae* submissions.[144] The petitioner presented and highlighted in one submission the relevance of the relationship of the human rights law to water and to the issues in the case. In the end, the tribunal denied the petitioners to access to the hearings but it ensured a new path for third parties to present *amicus curiae* submission to the

[142] Ibid., p.9

[143] Suez Sociedad General de Agusas de Barcelona S.A. Vivendi Universal S.A. V Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010

[144] Suez Sociedad General de Agusas de Barcelona S.A. Vivendi Universal S.A. V Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, at para 9

tribunal asking for their participation (although limited) in the case, as the right to water concerns public interests.[145] Following this, in *Bitwater Case*[146] and more recently in *Saur Case*,[147] the tribunals followed such a perspective. On this matter, it must be mention that the acceptance of the *amicus curiae* submission in the proceedings is of great importance because this can assist the Tribunal in order to achieve its fundamental task of arriving to a correct decision in the case[148] and also it would have the additional desirable consequence of increasing the transparency of investor-state arbitration.[149] This was actually a big step in the arbitration case law concerning water supply, yet it is also true that their participation does not weigh as it should.

Initially, Investment arbitration tribunals refused to allow third party participation because of the inherent difference between arbitration proceedings and those before domestic or international courts.[150] For instance, in the *Bechtel Case*[151] - the most prominent investment dispute in the past years - the tribunal denied citizens and NGOs' *amicus curiae* submission due to the fact that the tribunal left the decision as regards amicus curiae participation in the hands of the parties, who did not consent it and consequently the tribunal lacked competence to allow the requested third party intervention[152].

However, in the *Bitwater Case* - arbitration that concerned privatization of its water supply and sewage services in the capital of Tanzania, Dar es Salaam, and the subsequent termination by the Tanzanian government of a supply services contract with the foreign investor - Five NGOs, filed a joint petition for *Amicus Curiae* Status[153] representing human rights and sustainable development concerns, and the involvement of the petitioners in this case was permitted by the Arbitral Tribunal, notwithstanding non-state party's opposition.[154] The tribunal indicated that this

[145] Ibid, at para 33
[146] Bitwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008 (Bitwater Award)
[147] Saur International v. Argentine Republic, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012
[148] Ibid, at para 11
[149] Ibid, at para. 22
[150] See, e.g., Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit over Access to Water, CIEL.ORG, http://www.ciel.org/IfiLBechtelLawsuit_12Feb03.html
[151] Aguas del Tunari S.A v Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005
[152] Barnali Choudhury, Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?, at 814
[153] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007 (Bitwater Amicus Curiae Decision)
[154] Bitwater Award, at para 356

arbitration raised a number of issues of concern to the wider community in Tanzania[155] and in order to accept the *amicus curiae* submission the tribunal referred to *Methanex v. United States of America,* which explained as follows:

> *"there is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondents and Canada: the … arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm".*[156]

Furthermore, according to the arbitration tribunal, arbitration rules expressly contemplate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)).[157] Also, it must be clarified that within this case, and also the others, although the third party petition was accepted, their participation was still limited due to the fact that the parties actually did not agree to consent their participation.

Therefore, after reviewing these cases, it can be inferred that even though the human right to water does not have a prominent role in the final decision, at least its presence is perceivable through the acceptance of the *amicus curiae* submission which is consented based on the tribunals findings, pointing out that the water provision, is actually a matter of public interest. This result has been achieved after many *amicus curiae* submission were rejected. On one hand,

[155] Bitwater Amicus Curiae Decision, at para 7
[156] Methanex v. United States of America (UNCITRAL Arbitration), Decision on Petition from Third Persons to Intervene as Amici Curiae, of 15th January 2001, para. 49.
[157] Bitwater Award, at para. 361

the tribunal accepting the feature of public interest regarding water issues can be taken as a big step, especially for an investment arbitration tribunal. On the other hand, it is regrettable that the tribunals take into account only a little part of the human right to water, as it entails many other important features (such as universality, affordability, accessibility, etc.) that should be noticed in order to evaluate a case.

5. Conclusions for the first chapter

Theoretically speaking, the human right to water has developed considerably, becoming a topic of great importance in contemporary international law and also being consensually recognized in many international instruments. Therefore, it can be said that the human right to water's first obstacle, which is to be recognized, has been somehow overcome as its situation changed from *political intentions to a recognized right and obligation*.[158] However, the political will still plays an essential role as without a binding instrument, its further development will depend on the interests of each governments.

From the analysis carried out above, it is clear that the human right to water has extended its scope little by little. In the early seventies, its importance was focused on the environmental aspect. It was only in the late seventies that it was introduced the idea of the human rights aspects of the right to water, yet for this idea to be further developed, it took more than ten years since then. The several international conventions and forums (described in point 2.1) played an important role for the development of the right to water. So that in 2002, with the adoption of the General Comment 15, it was possible to have a definition and a clear scope of the human right to water for the first time, offering a better understanding of the matter and providing common knowledge on it. It can be said that this instrument affected considerably to the formal recognition of the right to water at international level.

The points 3 and 4 of this chapter focused on, first the protection of the right to water, and second on the application of the right to water in the international arbitration tribunals. From the analysis carried out it can be concluded that: First, the primary responsibility on the provision of water relies on the State. They should approach to all water related matters with due diligence. Second, the trend is moving towards the inclusion of a new duty bearer, which is the private

[158] K. Bourquain, Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law. Martinus Nijhoff Publishers, 2008, at 11

corporations participating in the provisions of public utilities, in which of course water services are included, or in any other activities that may affect to people's health and life. This is an interesting development, however it has been a very controversial one. Yet, this idea seems to be more accepted in the last decade with the participation of businesses in the UN Global Compact by committing themselves to align their operations and strategies with universally accepted principles related to human rights, labour standards, environment and anti-corruption. These developments are of great importance as it is clear that without the participation of the private parties, it will not be possible to achieve the environmental objectives established in the Millennium Development Goals.

Finally, concerning the application of the human right to water in the international arbitration courts, the results cannot be classified positively. It has been primarily examined four cases (Saur Case, Suez Case, Azurix Case and the Aguas del Tunari Case from the ICSID arbitration), yet in none of them the human right aspect of the right to water has been taken into account by the tribunal, despite of the fact that in those cases citizens suffered from, either the bad quality of water, the sudden rise of water prices and/or the non-supply of water. It is obvious that these breaches concerning the access to water are directly related to the breaches of the right to water. The only development of the right to water that could be found in the international arbitration judgments was the acceptance of the the amicus curiae submission on the ground of public interest. Yet, the real participation of the amicus curie are extremely limited. This can be due to the fact that in order to accept their participation, the involved parties should accept it too, however, it can be also taken that the public interest features of the case are not relevant for the tribunal or for the parties.

This situation could basically avoided with the governments' interest in protecting the citizen's access to water with due diligence, as they are the primary duty-bearers in the case. With a weak government ignoring or not working on such issues will continue causing a vicious circle where the State or the private party, or both of them end up breaching the citizens right on access to clean water. International aid, either at financial, technical or at management level together with working directly with the concerning public authorities may play a key instrument to the end of changing this situation.

CHAPTER II

EU AND THE RIGHT TO WATER (Part 1) : THE LEGAL AND POLICY BACKGROUND

1. Introduction

The principal aim of this chapter is to analyze the EU water policy trend, its legislation and the concerning ECJ case law on water issues, giving a special attention to EU human rights protection system to the end of understanding the current situation of EU water Law in order to assess the prospective of the recognition and the protection of the right to water at Union level.

Even though the European Union does not mention the right to water itself neither in its legal instruments nor in other non-binding documents, the Union declared in several documents such as in the declaration made in the World Water Forum, 2006,[159] that water is considered to be of primary human need and that water supply and sanitation are basic social services.[160] In the latter, the Union emphasized the role of the public authorities in taking adequate measures to make such service *effective* and *affordable*. More recently, the EU reaffirmed that "all States bear human rights obligations regarding access to safe drinking water, which must be available, physically accessible, affordable and acceptable.[161] Also, within the EU water legislation such sense can be found. Besides, it can be said that the EU implies a broad scope of the right to

[159] World Water Council, 4th World Water Forum, Mexico, 2006, more details available at: http://www.worldwatercouncil.org/forum/mexico-2006/

[160] European Parliament Resolution on the Fourth World Water Forum in Mexico City, 2006, document available at:http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0087+0+DOC+PDF+V0//EN (last accessed 01/06/2014)

[161] Declaration by the High Representative, Catherine Ashton on behalf of the EU to commemmorate the World Water Day, 22nd March 2010, doc 7810/1 document available at http://register.consilium.europa.eu/ (last accessed 01/06/2014)

water.

The strict sense of the right to water basically covers only the access to sufficient good quality water for personal and domestic use in an affordable price. On the other hand, a broader scope will include other than the above mentioned, the safety against flooding, energy supply, sanitation, recreation and protection of ecosystems.[162] In fact, the EU regulates almost all these aspects in its extensive water legislation and establishes specific measures to counteract the pollution with the ultimate goal to obtain "good water status" in all Europe's water, either inland waters or marine waters. Therefore, it is rather strange that the Union has not recognized the right to water so far.

The importance to study the legal situation of the human right to water in the EU, lays principally on the hypothesis that the EU has become a key agent in the protection of human rights. Recently, its approach to the issue has been more active and influential in the global community. Therefore, its direct recognition, would not only meliorate the EU protection of the right to water within its territory, but also it should end up influencing in the further development of the right to water at global level, which still remains in its early stages. Consequently, understanding the legal situation of the right to water in the EU legislation will help to identify possible scenarios where such recognition would be possible.

Furthermore, it must bear in mind that introducing a "human right approach" into the Union's water policy, will not influence much neither into the protection of the water quality or quantity nor in the management of the water availability, due to the Member States' highly developed economy and advanced technological infrastructure status compared to the developing counties, where water issues concerning quality and quantity is much more evident. All Member States are industrialized countries and their citizens consume far more quantity of water than those established as minimum quantity required by the WHO, which is 20-25 liters[163] However, on this limited amount of water raises health concerns as it does not meet the required amount for basic hygiene and consumption needed.[164] Therefore, the WHO indicates that a person needs on a daily

[162] H.F.M.W. van Rijswick & H.J.M. Havekes, European and Dutch Water Law, Europa Publishing, 2012, p 20

[163] World Health Organization (WHO), Minimum Water Quantity Needed for Domestic Use in Emergencies, 2005 avialable at: http://www.who.int/water_sanitation_health/publications/2011/WHO_TN_09_How_much_water_is_needed.pdf?ua=1 (last accessed 02/05/2014) [hereinafter Minimum Water Quantity Needed for Domestic Use in Emergencies]

[164] G. Howard and J. Bartram, "Domestic water quantity, service level and health", WHO, 2003, p. 22

basis, between 50 and 100 liters of water in order to avoid health concerns caused by water issues.[165] The water consumption amount among Member States differs considerably. For example, a Spanish citizen consumes about 265 liters per day, a French citizen consume about 164 liters per day, a German citizen consumes about 129 liters per day, and so on.[166] In any case the amount of water consumed by a citizen in any Member States territory exceeds far more than those amounts established by the WHO.

As stated above, the recognition of the human right to water will not influence neither to the currently established standards of water for human consumption. The quality of the drinking water and water for domestic use, may also varies between each river basin, and some of them may not meet the parameters established by the concerning directives, especially those in the Drinking Water Directive. However its quality can be considered as "good" compared with developing countries where the water quality affects to their life and health quality in a considerable way. Therefore, recognizing the human right to water and introducing such approach in the Union will definitely have different impact compared to the impact that may cause in developing counties with serious water issues, as they will need considerable changes in the structure itself of the available water management and its quality control, and consequently it will involve a lot of time and costs.

Generally speaking, in the EU context, major impacts will be on two aspects. The first one is on the legal enforceability, introducing substantive and procedural equity in case the supplied water does not meet the conditions established by law for the protection of human health. Thus, its recognition will imply the assurance that citizens are able to enforce their rights before the courts. This does not mean that at current stage, Union citizens are not able to enforce their rights before the courts, but this means that by formally introducing the right to water into the Union law, its protection will be somehow harmonized among the Member States as at this moment, this specific aspect only depends on each Member States' national law. The second aspect that may be affected in case of the introduction of the human right to water will be on the water-pricing. The requirement that the human right to water must entail an economically affordable

[165] WHO, Minimum Water Quantity Needed for Domestic Use in Emergencies, see supra 6

[166] European Water Association (EWA), Yearbook 2003, available at: http://www.ewa-online.eu/tl_files/_media/content/documents_pdf/Publications/Yearbooks/EWA-Yearbook_2003.pdf (last accessed 01/05/2014)

water services to all,[167] means that the cost recovery should not prevent anyone from access to water services.[168] As the WFD introduced the cost recovery principle into the new EU water policy this might be a considerable obstacle.

The chapter will begin with the analysis of the EU water policy and its legislation. However, the study will focus on the Water Framework Directive,[169] and the directives concerning drinking water and water for domestic or personal use, including the WFD's "daughter" directives. This analysis will be combined and integrated with the international agreements on water ratified by the EU, the relevant ECJ case law, EU consumer law, and the union's human rights protection system. The chapter has the ultimate objective to identify the major obstacles that the Union has in order to introduce the human right to water into its legislation.

2. EU and the Member States Position towards the Right to Water

Before proceeding to scrutinize the EU water law and other legal provisions concerning the right to water, it is important and necessary to identify first the EU's position itself and its Member States position towards the matter. This step will clarify the actual scenario whether there is a political will to the development of the right to water, and if it is the case, to what extent.

2.1 The UN General Assembly Resolution 64/292 and the EU Member States

The human right to water has been officially recognized in July 2010 by the United Nations General Assembly throughout the adoption of Resolution 64/292. At the request of United States, the Resolution was voted upon instead of being adopted by consensus. The result was 122 votes in favor, 41 abstentions and no votes against.[170] In fact, among such votes, nine-teen EU Member States abstained, which were: Austria, Bulgaria, Croatia,[171] Cyprus, Czech Republic, Denmark, Estonia, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Sweden, and the United Kingdom. The rest of the Member States, i.e. Belgium, Finland, France, Germany, Hungary, Italy, Portugal, Slovenia and Spain voted in favor, which

[167] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 35, The Right to Water, August 2010, available at: http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf (last accessed 20/05/2014)
[168] Ibid.
[169] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy, 2000, O.J. L 327/1 [hereinafter Water Framework Directive]
[170] Data available at: http://www.un.org/News/Press/docs/2010/ga10967.doc.htm (last accessed 20/08/2014)
[171] It must be noted that by the adoption of the Resolution 64/292, Croatia was a EU candidate country.

corresponded only about the 32 per cent.

However, it cannot be simply concluded that the nineteen EU Member States that did not vote in favor of the Resolution at issue were actually against the recognition of the human right to water. In fact, they may have agreed with the main objective of the resolution itself, but they may have some doubts on specific parts of its content. Such was the case of the Netherlands, which, in spite of recognizing the right to clean water and sanitation in its domestic law, it actually did not support the resolution.[172] Such position was made clear when the Netherlands expressed its doubts on some aspects regarding the text, for instance, generally speaking, it criticized that the resolution had unnecessary political implication; and concerning the content of the text itself, it pointed out the fact that the text did not place sufficient responsibility to national governments, which may affect to citizens' possibility to obtain redress. Its not very clear what the Netherlands meant by unnecessary political intervention. In the case of the recognition of the right to water, the political will is one of the most important step that any State could take as a starting point. At this moment, an international binding document protecting the right to water is not a realistic option, therefore, if the legal path is somehow at its dead-end, the political path would be the most practical option.

In the case of the United Kingdom, it based its abstention in two main reasons which are identified as a substantial issue and a procedural one.[173] For the first, its position was that it cannot be found proper legal basis in order to take the step towards its recognition; and for the second issue, it indicated that this text actually forestalled the process that was going on in Geneva.[174] (In fact the last point has been risen by many other States such as the United States, Turkey, etc.) This is in fact a point that is difficult to understand. It seemed that the UN General Assembly was keen to approve this Resolution instead of waiting for the Geneva process on the matter, however, it is difficult to find out a practical benefit coming from this move.

In any case, the high percentage of abstentions of the EU Member States may have been

[172] Data available at: http://www.un.org/News/Press/docs/2010/ga10967.doc.htm (last accessed 20/08/2014)

[173] Foreign and Common Wealth Office, United Kingdom of Northern Ireland and Great Britain, National Explanation of Vote on UN Human Right Resolution 64/292 of 28 July 2010, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35452/explanation-vote-un-july-2010.pdf (last accessed:15/09/2014)

[174] The adoption process of: UN Human Rights Council, Resolution adopted by the Human Rights Council 15/9, Human Rights and Access to Safe Drinking Water and Sanitation, 6 October, 2010

representing a tough hindrance for the recognition of the human right to water in the EU.

Furthermore, even though Germany, Spain and Belgium voted in favor, they expressed their regrets on the fact that the text did not included the suggestions made by the European Union. Unfortunately, neither an explanation indicating why the Resolution did not included the EU suggestions nor the details of the Union's suggestions are available. It would have been interesting to see what the EU has recommended on the matter as this could have helped to determine the EU actual position concerning the human right to water.

2.2 General Assembly Resolution 68/157

The Resolution 68/157 on the human right to safe drinking water and sanitation (recommended by its third Committee) was adopted on 18th December 2013.[175] The most important points that must be highlighted in this document is that: first, it reaffirmed the recognition of the human right to safe drinking water; second, called upon States to ensure the progressive realization of this right; third, it encouraged international and regional cooperation and technical assistance; and finally, it stressed the importance to take the Human Rights Based Approach in order to address issues related to the fulfillment of the human right to drinking water and sanitation.

Unlike the Resolution 64/292,[176] the Resolution 68/157 was adopted by consensus.[177] This may be due to the fact that the notion of the human right to water is becoming more accepted among the States, including of course, the EU Member States. This may contribute to create a better setting for the recognition of the human right to water in the EU. Of course, it must be added that by that time the process going on in Geneva had already concluded adopting the UN Human Rights Council Resolution 15/9 on Human Rights and Access to Safe Drinking Water and Sanitation. As it has been already mentioned, many States were waiting for this document before voting at the General Assembly.

The Resolution 68/157 reaffirmed the importance of the right to water and encouraged the implementation of it. Having adopted by consensus, it can be inferred that all EU Member States

[175] UNGA, Resolution 68/157 on the human right to safe drinking water and sanitation (18 December 2013), UN Doc A/Res/68/157

[176] UN General Assembly, The Resolution Adopted by the General Assembly on 28 July 2010, Resolution 64/292 The Human Right to Water and Sanitation, 3 August 2010

[177] Data available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/68/PV.70

also agree with the outcomes of this Resolution. At this point, two question emerges.

> *1. When the EU Member States agree with the UN water resolutions, do they agree with them at international level, at national level, at EU level or at all levels?*
> *2. When the EU makes declaration on the importance of the right to water, does it mean that this also applies to the internal situation of the EU, or such declarations remain only at international level?*

This questions are difficult to answer, yet the responses to them will be the key for understanding the prospective of the human right to water in the European Union.

First of all, it must be mentioned that the analysis of the implementation of the human right to water at national level will not be discussed in this thesis, as this will imply the assessment of all 28 Member States implementation process of the human right to water and to analyze whether their national law on water are in line with their international declarations and commitments, and this is outside the scope of the theme of this research.

The issue whether the EU Member States agree with the UN water resolutions either at international level or at the Union level is what will be focused. It is easier to answer to this question for the international level. The EU together with its Member States became the world leading donor in development programmes, in which, programmes on access to water are included. Either Member States individually or coordinating with the EU, their economical aid are of great relevance (This specific aspect will be developed in Chapter IV point 3). Therefore, the question remains whether they agree also at Union level.

The European Union is characterized by its strong “supranational” feature, yet the “intergovernmental” features is also present. In order to change the EU water policy, or any other policy, both of these two aspects are the key elements. The institutional interests and the governments' interests should coincide. At this stage of the research, it is hard to answer to this questions. In order to better understand the situation and assess this issue, it will be first analyzed the overall EU water legislation and the key elements of this policy and secondly it will be studied whether there is the human right element in it. The analysis will continue to the second

part of this topic which is developed in Chapter III that will focus on the relevant legal provisions on water services and the internal market regulation. In this way, it will be possible to have the whole picture of the EU water law and the protection of access to water (water services), allowing to understand what the EU has done so far in implementing the human rights to water, as it has declared in various times the importance of it.

3. EU Water Policy and its Legislation

Improving the water quality in Europe has been one of the most ambitious objective in the EU environmental policy.[178] Its origin can be traced back to 1975 with the adoption of the Surface Water Directive,[179] and from that time the EU water law has been amplified by the adoption of various directives dealing with water issues in its various spheres, such as in its management, quality standards, biodiversity protection, pollution control, etc. It was evident that there was a necessity to specifically regulate such issues that directly affect to human health, to the industry, to the agriculture, and of course to the environment. However, the continuous production of several directives on the matter caused the fragmentation of its regulations, causing in some cases, some incongruence among them. Due to this problem, in 1995 the Environment Committee of the European Parliament and the Council of Ministers asked the European Commission to formulate a new framework directive establishing the basic principles of EU water policy.[180] The aims of this request were to provide common principles and the overall framework for action, systematizing and integrating the existing EU water legislation and to increase public awareness about water resources, with the ultimate aim of improving the aquatic environment in the Community.[181] In this way, the Water Framework Directive (WFD) has been adopted in 2000. This directive is considered to be an overarching directive that covers all inland waters repealing a long list of water directives (a detailed analysis can be found in point 3.2.1).[182]

[178] Jorddan, A. European Community Watr Policy Standards: Locked in or Watered Down?, JCMS: Journal of Common Market Studies, 37, 1999, pg. 13-37

[179] Council Directive 75/440/EEC concerning the quality required of surface water intended for the abstraction of drinking water in the Member States, 1975, O.J. L195, repealed by Directive 2000/60/EC establishing a framework for Community action in the field of water policy.

[180] Preamble 5, Water Framework Directive

[181] Preamble 18 and 19 Water Framework Directive; Kaika, M., & Page, B. (2003). The EU Water Framework Directive: part 1. European policy-making and the changing topography of lobbying. European environment, 13(6), 314-327

[182] For example: Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water directive in the Member States; Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community; Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life; Council Directive 79/869/EEC of 9 October 1979 concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction

Currently, the EU water legislation can be characterized as an integrated legal order,[183] and it is basically ruled by two framework directives which are: the Water Framework Directive (2000/60/EC) and the Marine Strategy Framework Directive (2008/56/EC).[184] Generally speaking, the first one deals primarily with the protection of inland surface waters, groundwater, transitional waters and coastal waters. The second one deals with the protection of the marine ecosystems. In the following sections, both of them will be analyzed in order to give an overview of the whole EU water legislation and its policy on the protection of all waters, i.e., freshwater and seawater, including also, brackish water. However, for the purposes of this chapter, the WFD and its "daughter" directives (e.g. drinking water directive) will be the main subjects of this study. Furthermore, to the end of better understanding the implementation process of the directives it must bear in mind that due to the subsidiarity principle and the proportionality principle which basically defines when the Union should intervene and to the quality of that intervention,[185] as the Union regulates only what is absolutely necessary to achieve the proposed objectives.[186] Therefore, the Water Framework Directive gives only a framework for action and the objectives that must be achieved, so that the overall implementation rests on the hand of each Member States.

3.1 Marine Environment Strategy

The Marine Environment has been continuously affected by serious land-based and ocean-based pollution and for such reason it was adopted the Marine Strategy Framework Directive (MSFD) to the end of protecting the integrity of the marine waters and to prevent its further deterioration. This directive establishes common principles to be developed in Member States' strategies on protecting and restoring Europe's marine ecosystems. The directive applies to all coastal waters and waters from the baseline of territorial waters to the area where the Member State exercises

of drinking water in the Member States; Council Directive 79/923/EEC of 30 October 1979 on the quality of required of shellfish waters; Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances

[183] J.H. Jans, R de Lange, S.Prechal and R.J.G.M. Widdershoven, Europeanisation of Public Law, Europa Law Publishing, 2007

[184] Directive 2008/58/EC of the European Parliament and of the Council establishing a framework for Community action in the field of marine environmental policy, 2008, O.J. L 164/19 [hereinafter Water Marine Strategy Directive]

[185] Chalmers D, Davies G. & Monti G., European Union Law, Cambridge University Press, Second Edition, 2010, pg

[186] J.H. Jans, R de Lange, S.Prechal and R.J.G.M. Widdershoven, Europeanisation of Public Law, Europa Law Publishing, 2007; Chalmers D, Davies G. & Monti G., European Union Law, Cambridge University Press, Second Edition, 2010, pg 363-373

its jurisdictional rights.[187]

The EU approach towards the marine water is based on the ecosystem approach.[188] According to the convention of biological diversity,[189] which the EU is party, this approach is a "*strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.*" Through such approach the directive aims to protect, preserve and to reduce the pollution of marine water.

In order to facilitate the achievement of these objectives the directive divided the concerning marine zone in four regions, which are: the Baltic Sea, the North-East Atlantic Ocean, the Mediterranean Sea and the Black Sea; and each of them are composed by other subdivisions. To the end of complying with the directive and to ensure the implementation of the appropriate programme, Member States who share a marine region or subdivision are required to cooperate among them, and if needed, Member States are required to make use of the existing regional institutional cooperation structures, such as the Paris Convention,[190] the Helsinki Convention[191] and the Barcelona Convention.[192] The principles established in these international (regional) instruments, such as the precautionary principles, the polluter pays principle, the principle of sustainable management and the best environmental practice are applicable to the matter.

Furthermore, the protection of marine waters are complemented with other legislative documents such as directive 2002/84/EC,[193] directive 2005/35/EC,[194] regulation (EC) No. 782/2003,[195] which basically concern pollution coming from ship sources.

As it has been already mentioned, marine water will not be discussed in this thesis, this short

[187] Marine Stragegy Framework Directive, article 3. The directive also applies to the seabed and subsoil on the same extentions explained.
[188] Ibid., Article 1(3), and preamble 44
[189] UN, Convention on Biological Diversity, 1992, Rio de Janeiro
[190] OSPAR Commission, Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention), Paris, 1992
[191] Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 1992
[192] UNEP, Convention for the Protection of the Mediterranean Sea Against Pollution, Barcelona, 1976
[193] Directive 2002/84/EC of the European Parliament and of the Council amending the Directives on maritime safety and the prevention of pollution from ships, O.J. L 324/53
[194] Directive 2005/35/EC of the European Parliamnt and of the Council on Ship-source Pollution and onthe introduction of penalities for infringements, O.J. L 225/11
[195] Regulation (EC) No. 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships, O.J. L 115/1

explanation has been introduced in order to give an overall idea of the whole EU water law.

3.2 Protection of Water and Its Management

The EU policy on protection of water resources changed with the introduction of the Water Framework Directive, which brought the river basin approach[196] for the water management and the combined approach[197] for the pollution control. The last consists on the fusion of two pollution control systems, naming environmental quality standards and emission limit values.[198] Moreover, although not in a explicit way, the WFD introduced the so called *governance approach.*[199] The combined approach is characterized by the establishment of standards and measures at various levels (multi-level governance) meaning that the EU does not establish such parameters or benchmark unilaterally but it involves the participation from the supranational, regional, national and local levels in order to address overarching policies.

Unlike the Marine Strategy Framework Directive that deals only with marine waters, the Water Framework Directive deals with a more complex subject matter. In fact, the WFD deals with all inland waters which comprise surface waters (rivers, lakes), transitional waters, groundwater (some rivers and aquifers), and coastal waters. Inland waters are of extreme importance for human health and ecosystems. Its protection must be guaranteed at any instance, so that the quality and the quantity of the water supplied to the community will be guaranteed.

Another important element that the Water Framework Directive introduced to the EU water law, was the economic value of water and it expressed the complexity of this vital good. On this point, the directive included in its preamble the following statement:

> *"Water is not a commercial product like any other but, rather a heritage which must be protected, defended and treated as such."*[200]

This wording is established in the preamble section but it has no binding feature. Yet, this phrase

[196] WFD, article 3
[197] WFD, article 10
[198] WFD, article 2(36) and article 10
[199] E.Hey, "Multi-dimensional Public Governance Arrangements for theProtection of the Transboundary Aquatic Environment in the European Union: the changing interplay between European and Public International Law", International Organization Law Review 2009/I, 191-223.
[200] WFD, preamble 1

can be taken as a key instrument for the interpretation of the especial position of water as a good within the EU legal order. This would be useful especially when discussing the relationship between the right to water and the water supply services (this point will be featured in Chapter III). The whole signification of the statement is still not clear enough, but it can be perceived the following two points: first, that with the introduction of such statement, the importance of treating water as a special economic good should be reflected in the water-pricing policy; second, the WFD added an extra element to the classic discussion of water, it added the social-cultural dimension of it (which also taken as a wider notion of water). Of course this is just a possible connotation, however it clearly denotes the complexity of the matter.

3.2.1 The Water Framework Directive: A General Overview

The WFD has been one of the most important legal instrument in environmental protection within the EU, and it had a very complex and troubling adoption process. During the negotiating phase, there were more disagreements than agreements between the Council of Ministers and the Parliament.[201] The contradictions were primarily on the new controversial provisions that the draft was introducing into the EU water policy, naming, the introduction of the environmental pricing policy, the implementation period of the directive, the objective to cease the releases of hazardous substances and also, the legally binding character of the directive was intensively argued.[202] Besides, the strong confronting interests among governments, further contradictions were intensified by other sectors such as the industry and the environmental NGOs.[203] Nevertheless, the legislative process for the adoption of the WFD successfully concluded through a conciliation process in June 2000. With the introduction of the WFD several legislative documents on water were repealed with effect from seven years after the date of entry into force of the directive and on other directives after thirteen years.[204] The adoption of the WFD was a step that must have taken in any case and its adoption contributed to stop the further fragmentation of EU water law.

The WFD shows clearly the layouts of the EU water Policy. Its main propose is to establish a framework for the protection of inland waters that are composed by surface waters, ground

[201] Kaika, Maria, and Ben Page. "The EU Water Framework Directive: part 1. European policy-making and the changing topography of lobbying." European environment 13.6 (2003): 314-327.
[202] Kaika, Maria, and Ben Page. "The EU Water Framework Directive: part 1. European policy-making and the changing topography of lobbying." European environment 13.6 (2003): 314-327.
[203] Ibid.
[204] Water Framework Directive, Article 22; see also, above 26

waters, transitional waters and coastal waters throughout an integrated river basin approach.

The following part of the chapter will be first analyzed the objectives of the WFD, and also it will be scrutinized the most important elements that the WFD introduced to the EU water policy.

3.2.2 Objectives of the Water Framework Directive and of the EU Water Policy

Within the WFD it can be found several objectives protecting both, the aquatic ecosystems and the human health. The most important objectives to be achieved are as follows:

a) Prevent further deterioration of waters

Generally, the whole EU legislation on water has this objective. This common aim is associated with other objectives, such as to cease or to reduce the discharges, emission or looses of priority substances and of priority hazardous substances. Being more specific, the WFD establishes different treatment among them. Priority substances are those listed in Annex X of the directive,[205] and such substances emissions are *to be reduced.* On the other hand, the priority hazardous substances are considered toxic, persistent and liable substances to accumulation or substances that can give rise to an equivalent level of concern, and those emissions, discharges or looses must *be ceased*.

The inclusion of a list of hazardous substances was agreed in the initial phase of the negotiation of the WFD. However, the objective of ceasing or phasing-out those substances was one of the most controversial point and it was hardly criticized for not being realistic. In the end, such provision was introduced into the directive but according to the established wording, Member States only have to "aim" to progressively reduce the discharges of priority substances and the cessation of priority hazardous substances,[206] thus, on this aspect, its binding feature was watered down.

Furthermore, in the Annex VIII of the directive can be found a third kind of substances liable to cause pollution that must be taken into consideration.

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[205] The Annex X of the WFD was replaced by the Annex II of Directive 2008/105/EC of European Parliament and Council on Environmental quality standards in the field of water Policy, which lists 33 priority substances and 8 other pollutants.

[206] WFD, article 1(c)

b) To Enhance and to Restore

Besides preventing further deterioration of water status and to achieve good water status, the WFD also aims to enhance and restore all bodies of both, surface water and groundwater. In order to indicate whether a body of surface water or groundwater is in a "good status", it is taken into account different parameters depending on the type of water (whether it is surface water, groundwater or brackish water) or on the propose of the water (e.g. water for agricultural propose, for human consumption propose, etc.). According to the WFD, a "good surface water status" *means the status achieved by a surface water body when both, its ecological status and its chemical status are at least good*.[207] On the other hand, the directive defines a "good groundwater status" as *a status achieved by a ground water body when both its quantitative status and its chemical status are at least good*.[208] These definitions are complemented with the Annex V of the WFD, which establishes more specific criteria and parameters to measure the "good water status" of each type of waters. The inclusion of the Annex V was one of the most crucial aspect to enable the achievement of the established objectives, as without no specific and clear measuring system it would have been impossible to define the status of a river basin district and whether a Member State has achieved the objective. The WFD rules on water for human consumption as well, however in this case Member States are required to meet more specific parameters established in the Drinking Water Directive (Directive 98/83/EC), instead of those parameters established in the Water Framework Directive.

c) To Comply with the Cost-Recovery Principle

Another important objective of the WFD is to promote sustainable water use. To comply with it, the cost recovery principle and the polluter pays principle have been introduced in the directive.[209] According to this principle, Member States are required to take into account the recovery of costs for water services, including environmental costs and resource costs. In order to comply with it, Member States are required to work on the economic analysis of the supply and demand of water in each river basin district and to chose the most cost-effective combination of measures for the achievement of the established objectives. A more detailed analysis on application of this principle in water services will be developed in point. 3.2.3 f).

[207] WFD, article 2(18)
[208] WFD, article 2(20)
[209] WFD, Article 9

d) Mitigation of the effects of floods and droughts

Another important objective of the WFD is to contribute to mitigating the effects of floods and droughts, however, the directive does not mention any specific strategy or programme to apply in such cases. The flood and droughts risk management in the EU is currently based on the Directive 2007/60/EC[210] on the assessment and management of flood risk and by the EU water scarcity and drought policy.[211] These two cases of the unbalanced quantity of water, (either excess or scarcity of water) in spite of being contrary, both of them cause serious environmental, social and economic consequences.

In the European context, droughts are more common in Southern Europe (specially in the Mediterranean region), but recently this problem has become apparent also in Northern European basins, including those in UK and Germany.[212] According to the Intergovernmental Panel on Climate Change (IPCC), central and southern Europe will suffer major water stress and by the 2070s, the number of people affected will rise from 28 million to 44 million.[213] In order to confront such dramatic predictions the Commission identified seven policy instruments in its 2007 Communication on addressing water scarcity and droughts in the European Union,[214] which are:

- to put the right price tag on water,
- to allocate water and water related funding in a more efficient way,
- to improve drought risk management, to consider additional water supply infrastructures,
- to foster water efficient technologies and practices,
- to promote the "water saving culture" in Europe, and
- to improve knowledge and data collection

However, such instruments have not been adequately implemented by the Member States so far.[215] Besides, the EU water scarcity and droughts policy is still in an early stage and it remains

[210] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy, O.J. L 327/1

[211] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Comittee of the Regions, Report onthe Reviewof the European Water Scarcity and Droughts Policy, 2012, COM(2012) 672 final

[212] Ibid.

[213] IPCC, Water Resources, data available at: http://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch12s12-4-1.html (accessed on 27/05/2014)

[214] Communication from the Commission to the European Parliament and the Council, Addressing the challenge of water scarcity and droughts in the European Union, SEC(2007) 993, SEC(2007) 996, COM/2007/0414 final

[215] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Comittee of the Regions, Report on the Review of the European Water Scarcity and

some policy gaps that must be further elaborated.[216]

Compared to the drought management, the flood risk management is far more developed. The floods directive (Directive 2007/60/EC) is based on the general provisions established in the WFD and in order to achieve the primary aim of the Water Framework Directive, which is to reduce the adverse consequences on human health, environment, cultural heritage and economic activity associated with floods. It develops criteria for the elaboration of flood management plans and a series of obligations to be complied by the Member States. Such obligation encompasses the duty to carry out a preliminary assessment by 2011 to the end of identifying the river basins and associated coastal areas at risk of flooding and to take appropriate steps to coordinate the application of the flood directive with the WFD, specially with its environmental objectives.

3.2.3 Key Elements of the EU Policy on Inland Water Protection

a) Protection of the aquatic ecosystems and the human health

First of all, it must be mentioned that the EU water policy has a strong environmental and ecosystem based approach, and it is literally established in the concerning legal texts.[217] On the other hand, the quality and quantity of water intended for human consumption is ensured by the WFD and on other water related directives such as drinking water directive. However, the current EU water law is definitely more developed on the environmental side and the human health protection seems to be incomplete. This might be due to the fact that throughout ensuring the good status of water in general, it will affect positively also to waters designated to human consumption, and consequently it protects human health. Yet, taking in to account the origin and the initial objective of the Community water legislation in 1975 that focused on public health and quality of water used for drinking[218] it is somehow unreasonable not to approach to the matter also from a strong human health protection perspective, thus. A more detailed argumentation on this issue will be developed in point 4.

The WFD has a very extensive objectives and it makes undeniable its strong connection with other policy areas, such as environmental policy, biodiversity protection, spatial planning, nature

Droughts Policy, COM(2012) 672 final

[216] Ibid.

[217] For example, MSFD, article 1(3)

[218] Page, B., Kaika, M., "The EU Water Framework Directive: Part 2. Policy innovation and the shifting choreography of governance." European Environment 13.6 (2003): 328-343.

management, product policy, transport, recreation agriculture and fisheries.[219] Another way to point it out is that any "water resources" cannot be disconnected from the system, which is the environment, and when dealing with water issues it is not possible to break up such intrinsic relations. Therefore, in order to appropriately deal with water issues it is not possible to have one simple approach, instead it should take into account other factors, such as its purposes, that can be for agriculture, household, recreational, environmental and industrial (e.g. water cooling).

b) Water for Human Consumption – Drinking Water Directive

One of the first Community's legislative acts on water was the Surface Water Abstraction Directive, which was in force from 1975 to 2007, and then it has been included into the Water Framework Directive. However, the Surface Water Abstraction Directive and the case-law related to it are still highly relevant for the correct interpretation of the WFD,[220] and especially to the appreciation of the regulations on water intended for human consumption.

Currently, almost all drinking waters fall within the scope of directive 98/83/EC.[221] This legal document concerns the quality of water intended for human consumption and its primary aim is to protect human health by establishing specific parameters of micro-organisms, parasites and other chemical substances, including those related to radioactivity.[222] The directive covers all waters intended for drinking, cooking, and to domestic proposes. It also includes water used in food production, processing and preservation. The directive does not apply neither to natural mineral water appropriately recognized, nor to water used as medical products, as such waters fall within the scope of directive 2009/54/EC[223] and directive 2001/83/EC,[224] respectively. Furthermore, it establishes one more exemption, which is the water intended for human consumption, but only when it fulfills three requirements: first, it should be for individual supply; second, it should provide less than 10m³ a day as an average or to provide water to fewer than fifty persons; third, the supply must not be part of commercial or public activity.

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[219] A.M. Keessen, A. Freriks and H.F.M.W. Van Rijswick, The Clash of the Titans, the relation between the European Water and Medicines Legislation, CMLRev 2010/5, p.1429-1454

[220] H.F.M.W. van Rijswick & H.J.M. Havekes, European and Dutch Water Law, Europa Publishing, 2012, pg. 37

[221] Council Directive 98/83/EC on the quality of water intended for human consumption, O.J. L 330/32

[222] Ibid, *Annex I*

[223] Directive 2009/54/EC of the European Parliament and of the Council on the exploitation and marketing of natural mineral waters, O.J. L164/45

[224] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (Consolidated version : 16/11/2012). O.J. L311/67

In order to achieve the objective to protect human health from adverse effects of any contamination of water, the directive requires Member States to take necessary measures to ensure the cleanness of water intended for human consumption and to regularly monitor the quality of water by methods specified in the directive. An additional case-by-case quality monitoring can be required when no parametric value has been set and it could risk human health. When there is failure on meeting the established parametric values, Member States are to take immediate measures to identify the cause ant to restore the water quality.

c) River Basin Management Plans

The river basin management plan is the basic element of the new water policy in the Union, and it must be produced for each river basin district taking into account the characteristics of the body of waters and the principles applicable to the matter, such as the precautionary principle, preventive principle and the principle of recovery of costs. Each management plan can be complemented by more detailed and specific programmes and management plans for each sub-basin, sector or the type of water, to conduct a better and more precise administration. The '*river basin district'* is defined in Article 2(15) WFD as: ... *the area of land and sea, made up of one or more neighboring river basins together with their associated groundwater and coastal waters, which is identified as the main unit for management of rivers*.

The WFD established that all Member States have to identify the individual river basins lying within their national territory and to assign them into individual river basin districts. In case that there is a river basin that covers more than one Member State's territory, it should be assigned to an international river basin district. In such a case, the concerning Member States are required to coordinate in order to administrate the unit and to implement particular measures. If the river basin district extends beyond the territory of the Union, the Member State(s) should seek to establish coordination with the third country, and in case of impossibility to reach an agreement, the concerning Member State have to ensure the appropriate application of the management plan in the section of the river basing district that lays in its territory. Moreover, in order to facilitate the appropriate administrative managements, Member States have to identify the competent authority for each river basin district and to communicate it to the Commission.

Furthermore, the directive on environmental quality standards, which supplements the WFD,

establishes that Member States must include an inventory of emissions, discharges and losses of all substances listed in its text. Besides, this directive provides Member States the possibility of designating mixing zones adjacent to discharges, however, such areas must be clearly identified in the river basin management plans.

The river basin district is a very basic element of the EU water policy. However, 14 years after the adoption of the WFD that introduced it and established that all Member States were required to implement this system by 2003, there are still many Member States that have not introduced the river basin management plans or they did not do it appropriately. Some of them still remain in the consultation phase. Up to now (April, 2014), Spain, Greece and Denmark are the countries with major problems in implementing this model. In fact, Spain has twenty-five river basin districts, but it only has adopted fifteen river basin management plans;[225] Greece has fourteen river basin districts but still remains four river basin management plans to be adopted.[226] On the other hand, Denmark has approved all the twenty-three river basin management plans by the Environment Minister in December 2011, however they have been withdrawn and currently new plans are subject to consultation.[227]

Furthermore, according to the Article 6 of the WFD and Annex IV of the same document, Member States are required to ensure the establishment of a register of all areas in each river basin district that have been designated protection by specific community legislation of concerning water bodies. Such water bodies will include, areas designated as abstraction of water intended for human consumption, recreational waters, nutrient-sensitive areas, areas for the protection of economically significant aquatic species, including also the conservation of habitats and species directly depending on water (e.g. sites designated under Directive 92/43/EEC on Conservation of Natural Habitats and of Wild Fauna and Flora and Directive 2009/147/EC on the conservation of wild birds).

[225] European Commission, River Basin Management Plans in Spain, available at: http://ec.europa.eu/environment/ water/participation/map_mc/countries/spain_en.htm (last accessed: 01/06/2014)

[226] European Commission, River Basin Management Plans in Greece, available at: http://ec.europa.eu/environment/ water/participation/map_mc/countries/greece_en.htm (last accessed: 01/06/2014)

[227] European Commission, River Basin Management Plans in Denmark, available at: http://ec.europa.eu/environment/ water/participation/map_mc/countries/denmark_en.htm (last accessed: 01/06/2014)

d) International River Basin District and the Transboudary Cooperation

Some water units must be integrated into an international river basin district due to its geographical characteristics. In such a case, as stated above, Member States are required to cooperate among them, and if necessary, also with other third countries. Some river basins have been already managed under this system, such are the cases of the river basin of Maas, Schelde and Rhine.[228] Specially, the International Commission for the Protection of the Rhine (ICPR) is one of the most known international initiative, in which nine states (Switzerland, France, Germany Luxembourg, the Netherlands, Austria, Liechtenstein, Belgium and Italy) cooperate to the end of harmonizing the interests of use and protection in the Rhine area. In fact, the ICPR has been a model for the other international river basins cooperation. Furthermore, the Bathing Water Directive, establishes that in case of transboundary waters, Members States are required to exchange information and take joint action.

Therefore, cooperation can be set as a general rule in EU water policy, including of course the marine environment protection policy. In fact, the international river basin district covers the majority of all river basin districts.[229]

Another relevant guideline on the cooperation aspect is the Helsinki Water Convention.[230] This document establishes several obligations such as to ensure the proper management of transboundary waters and to use them in an equitable manner. Also it establishes guiding principles for the management of such waters, which are: precautionary principle, polluter pays principle, and the sustainable management principle. Actually all these principles are incorporated in the WFD. However, as the means of cooperation are not specifically identified, Member States can opt for informal cooperation as well, and such agreements can be common specially for the management of small transboundary waters.[231]

e) Programmes of measures and monitoring

Member States are to establish programmes, measures, controls and monitoring of water status in

[228] Page, B., Kaika, M., "The EU Water Framework Directive: Part 2. Policy innovation and the shifting choreography of governance." European Environment 13.6 (2003): 328-343.

[229] According to the map of national and international river basin district, available at: http://ec.europa.eu/environment/water/water-framework/facts_figures/pdf/River%20Basin%20Districts-2012.pdf

[230] UNECE, Convention on the Protection and Use of Transboudary Watercourses and International Lakes, 1992, Helsinki.

[231] H.F.M.W. van Rijswick & H.J.M. Havekes, European and Dutch Water Law, Europa Publishing, 2012, p.233

order to establish a coherent and comprehensive overview of the water status within each river basin district. The programmes must include parameters on specific aspects such as, volume, level or rate of flow, ecological and chemical status and also it must be taken into account the environmental objectives and the characteristics of each river basin district. It is of high importance that such programmes, measures and monitoring establish emission controls, either direct or indirect, and such controls must be based on best available techniques, best environmental practices set out in the Industrial Emission Directive,[232] Urban Waste Water Directive,[233] Nitrates Directive,[234] Environmental Quality Standards Directive[235] and any other relevant community legislation. Each river basin district should enjoy a programme and each Member State is required to submit up-dated reports on the implementation of such programmes to the Commission. With all those long lists of pollutants and the extensive legislation specifically concerning the emission of pollutants, it seems as the WFD basically rules on the water quality. However, this directive also regulates on the water quantity, indicating that in each river basin district water abstraction and recharge must be performed taking in to account the criteria of balance.[236]

Furthermore, the WFD classifies the measures into two categories: basic measures and supplementary measures. The basic measures are the minimum requirement to be complied and consist on e.g. measures to promote an efficient and sustainable water use, to safeguard water quality, to control over the abstraction and authorization of artificial recharge or augmentation of ground water bodies, measures to prevent or control the input of pollutants, etc. On the other hand, supplementary measures are those measures designed and implemented in addition to basic measures, with the aim of achieving the environmental objectives, and they are applicable only if the basic measures does not suffice for the achievement of the established objectives. The Annex VI establishes a non-exhaustive list of supplementary measures.

[232] Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions, O.J. L 334/17
[233] Council Directive 91/271/EEC concerning urban waste water treatment. O.J. L135/40
[234] Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, O.J. L 375/1
[235] Directive 2008/105/EC of the European Parliament and of the Council on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council , O.J. L348/84
[236] WFD, article 4(1)(a)(ii)

Another category of measures can be found in the Bathing Water Directive.[237] It establishes that Member states are required to take *exceptional measures* in case of unexpected deterioration occurs with the concerning waters, such is the case of the proliferation of *algae,* which is one of the most common problem that most bathing water can have.

Any programmes of measure must be put under appropriate monitoring. Such monitoring will depend the requirements of the specific directives on waters. For example, the Urban Waste Water Directive indicates that Member Sates are the one responsible for monitoring either discharges from treatment plants or of the receiving waters and its treatment and monitoring will depend on the sensitivity of the receiving waters. In the case of the bathing water directive, it requires that monitoring should take place by means of sampling at the most visited bathing and/or there is a great chance of pollution. Moreover, the directive establishes another requirement in its Article 11(1)(e), that states that all abstraction of either surface water of groundwater should be performed only when specific authorizations are concerned.

In any case, Member States are the only one responsible for the monitoring of their national river basin district and the part of the international river basin district laying in its territory, and the results must be communicated to the Commission regularly or when it is necessary. Such communications should include the information on the costs of the measures, the responsible authorities and who is bearing the cost of the applied programmes of measures.[238]

f) Recovery of Costs for Water Services

As stated above, the WFD introduced a new principle applicable to water management, which is the principle of recovery of costs of water services (including environmental and resource costs) which is directly related to the introduction of the water-pricing policy. The inclusion of such principle caused a major controversy during the process of adoption of the WFD. In fact, the Council was drastically against to the new pricing policy, and it rejected it for two times during the adaptation procedure, first, in the ministerial agreement of 1998 and for the second time in

[237] Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC as amended by Regulation No. 596/2009/EC

[238] European Commission, Report from the Commission to the European Parliament and the Council, on the Implementation of the Water Framework Directive (2000/60/EC), River Basin Management Plans, COM(2012) 670 final, Brussels, 14 November 2012, p 12

March 1999.[239]

The principal reason to introduce the principle of recovery of costs in the EU water policy, as stated in Article 1(b) WFD, is to promote sustainable water use and also, as in Article 9(1) WFD, to provide adequate incentives for users to use water resources efficiently. This reasoning has been used in the international society, as the management of water availability is becoming more complex (due to the extreme floods and droughts, the climate change and the population growth) and if such management fails, its remedy would imply high costs to the country, a result that needs to be avoided.

The directive requires the compliance to this provision by the Member States, however, it makes an exception in its Article 9(4) indicating that Member States will not be in breach if they decide, in accordance with established practices, to not to apply the principle of recovery, only if such practice does not compromise the purposes and the objectives of the directive. Such was the case of Ireland, as this country had abolished all water charges for domestic use in 1997, and the services were financed by tax revenues that the national government transferred to local authorities, who were the responsible ones to provide water service to the public. However, this situation has changed and currently the Irish government is working on a new water charge policy and the first water charges plan should be approved by the end of 2014.[240]

Furthermore, this point (the application of the exception) is also important to understand to what extent the principle of recovery of costs and the polluter pays principle will apply to water services. This is an important issue, especially for the governments as in some cases they may opt to not apply this legal provisions for various reasons, for example, to attract investments or new projects. Case C-525/12[241] clarified this issue. In this case, the Commission brought an action for failure to fulfill obligations against Germany indicating that by excluding certain services from the concept of water services as established in Article 9 WFD for the application of the cost recovery principle and the polluter pays principle, Germany has failed to fulfill its obligations under directive 2000/60/EC.

[239] Kaika, Maria, and Ben Page. "The EU Water Framework Directive: part 1. European policy-making and the changing topography of lobbying." European environment 13.6 (2003): 314-327.

[240] Department of the Environment, Community and Local Government, Irish Water Reform, available at: http://www.environ.ie/en/Environment/Water/WaterSectorReform/#direction (last accessed 01/06/2014)

[241] ECJ, Case C-525/12, Judgement of the Court of 11 September 2014, European Commission v Federal Republic of Germany, OJ C 409/05

It is clear that according to the Article 9 of the Water Framework Directive Member States are required to introduced the principle of recovery of costs and the polluter pays principle into the economic analysis for water uses, to the end of providing adequate incentives (pricing obligation) for all users to use water resources efficiently. The case concerned whether all the activities associated with abstraction, impoundment, storage, treatment and distribution of surface water or groundwater (as established in Article 2(38)(a)) are required to comply with such pricing obligations.[242] The Court answered that not all activities relating to water use are under the pricing obligation.[243] The reason behind the Courts finding was based on one main argument. It indicated in its paragraphs 54 and 55 that the measures for the recovery of the costs for water services are just one of the instruments available to the Member States for the quantitative management of water in order to achieve rational use of water, which is one of the objectives of the Water Framework Directive. The Commission had argued that all the activities related to water uses, as those ones above indicated, have great chances to impact on the state of water bodies and therefore, they may become liable to undermine the achievement of the directive's objectives. This reasoning provided by the Commission is actually valid and it is in line with the objectives of the directive. In fact, the Court agrees with the Commission in this point, however it indicated that:

> *Although, as rightly pointed out by the Commission, the various activities listed in Article 2(38) of Directive 2000/60, such as abstraction or impoundment, may have an impact of the state of bodies of water and are therefore liable to undermine the achievement of the objectives pursued by the directive, it cannot be inferred therefrom that, in any event, the absence of pricing for such activities will necessarily jeopardize the attainment of those objectives.*[244]

This finding is in line with Article 9(4) of the WFD, which establishes an exception that Member States can opt not to apply the principle of recovery of costs for water services if this does not compromise the purposes and the achievement of the objectives of the directive. However, if a Member State want to rely on this provision, they are required to report the reasons for not

[242] Ibid., para 46
[243] Ibid., para 48
[244] Ibid., para 56

applying the recovery of costs.

The Court did not mentioned about this last point. As it has been already mentioned, the Court of Justice found out that Germany did not failed to fulfill its obligations under Articles 2(38) and 9 of Water Framework Directive for not including certain water related activities subject to the principle of recovery of cost. However, following the provision established in Article 9(4) WFD and the available information on the facts, it seems that Germany has actually failed its obligations for not reporting the reason why they are relying on the exception.

From a legal point of view, the outcome of the judgment is understandable, however, from an environmental protection perspective this might be classified negatively. With this judgment, the Court ensured a path for Member States not to apply the cost recovery principle in water related activities. This is a key instrument that the Water Framework Directive introduced into the EU water policy in order to achieve its objectives. It is hoped that Member States will not abuse of this exception for their interests, otherwise, the measures provided by the directive may become less effective.

g) Public Participation, Information and Consultation

Finally, the public participation is another aspect of great importance in the union's water policy. In fact, with the introduction of the WFD this new feature has been amplified, specially on the policy-making.[245] On this point, The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, better known as “Aarhus Convention,” is the most relevant general procedural legal basis applicable to the matter. The Aarhus Convention is a multilateral agreement that has the primary objective to guarantee the access to information, public participation in decision-making and access to justice in environmental matters.

In the EU context, the WFD boosts the active involvement of all interested parties in the implementation of the directive, in particular in the production, review and updating of the river basin management plans. More specifically, the Article 14 WFD establishes two Member States' obligations on public participation. First, Member States are to encourage the active involvement

[245] WFD, Article 14

of all interested parties; and second, they are required to publish the data on the timetable and work programme, an interim overview of the significant water management issues, and the draft copies of the river basin management plans. Besides, in order to allow the active involvement of the public, the States must leave the documents to be commented by the citizens for at least six months. On this point, the European Court of Justice made it clear that all these provisions must be implemented at national level.[246] Furthermore, Member States are to report on a regular basis (every three years) the status of the river basin districts laying in their territory and their respective river basing management plans to the Commission,[247] and also they are required to publish documents on the timetable, work program, management plans, etc., making them available to the public. In case of request such access should be given also to background documents and information.

On this point, it has to bear in mind that not only the States are the ones in charge to provide information to the public, but the EU is also in charge to publish reports (every three years) on European waters status to the citizen, and such report should include the resume of the reports submitted by the Member States, a review of the implementation progress, a summary of the submitted recommendations, a summary of proposals on the strategies against pollution on water and also it should include the comments made by the European Parliament and the Council. Thus, with the information provided directly by the State and with the Commission's report, citizen should be able to compare both results.

However, it must be clear that these provisions supplement the existing general obligations on public participation and access to documents.[248] The most relevant legal basis on access to documents in the EU are: the Regulation 1049/2001 regarding the public access of the European Parliament, Council and Commission documents, Directive, 2003/4/EC on public access to environmental information, Directive, 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. All the above mentioned legal documents have been adopted in accordance with the Aarhus Convention.

The inclusion of public information, consultation and participation features in the water policy,

[246] ECJ, Commission v. Luxembourg, Case C-32/05 [2006]
[247] WFD, article 15
[248] H.F.M.W. van Rijswick & H.J.M. Havekes, European and Dutch Water Law, Europa Publishing, 2012, pg. 30

enable the possible participation of specific stakeholders and the general public in the decision-making in water management. Therefore, theoretically speaking, it can be distinguished two types of interactive policy making, which are the *corporative type* and the *pluralist type*.[249] The first one involves the participation of stakeholders with interests and knowledge on water issues, the second involves a broad citizen participation in the decision-making.[250] The latter can be considered as the ideal involvement in a society with strong democratic principles. Yet, the EU law on access to documents does not make such differentiation as either legal or natural persons have the same right of access to the documents.

The most relevant reasons for the public participation in the decision making primarily relies on obtaining specific knowledge of people/organizations involved in different manners related to water and on the exchange of such information, and finally an interactive policy-making with third parties participation may raise public understanding on the motives of the taken policy measures and consequently may contribute in increasing public support and as they will be provided by important information concerning the water status and the measures taken.[251]

3.2.4 Implementation of the Water Framework Directive

The Water Framework Directive established a defined and a clear implementation calendar to achieve its objectives. The most important deadlines are as follows:

December 2003:	Transposition of the WFD into national law (Article 24)
December 2004:	Analysis of the characteristics of river basin districts, review of the impact of human activity and economic analysis of water uses (Article 5(1))
December 2006:	Establishment of the monitoring programmes (Article 8(2))
December 2009:	Adoption of the river basin management plans (Article 13(6))
December 2012:	Operation of the programmes of measures (Article 11(7))
December 2015:	Achievement of good water status (Article 4(1)(a)(ii))

[249] J.A. Van Ast, S.P. Boot, Participation in European Water Policy, Physics and Chemistry of the Earth, 28, 2003, 555-562.
[250] Ibid.
[251] Ibid.

There are many other intermediate deadlines and update deadlines, yet most of them have not been properly respected, obviously affecting to its implementation. Under Article 18(1) of the WFD, the Commission is required to publish implementation reports reviewing, for instance, the progress of the implementation process, the status of water quality and quantity, etc. In fact, the Commission has published four implementation reports on the WFD up to now. Such are written by the Commission with the reports and information provided by Member States.

First Implementation Report: First Stage of Implementation of the WFD

The first implementation report was published in March 2007.[252] It consisted on the review and the assessment of the first stage of implementation of the directive. It addressed basically three aspects: 1) transposition of the WFD into national law, 2) the establishment of the administrative structures, and 3) the environmental and economic analysis of the river basin districts. This report concluded with mixed results.[253] First of all, the Commission noted significant improvements made by the Member States in the reporting process of implementation of the WFD, with the exception of Italy and Greece that demonstrated serious delays in submitting the report. Each Member State, has reported on the transposition, on the designation of the competent public authority and on the environmental and economic analysis of the river basin districts.

Concerning the transposition of the WFD into national law, article 4, 9 and 14 of the WFD were the ones that the Member States had more difficulty to introduce to its national law.[254] Article 4 consists on the environmental objectives which basically requires Member States to implement necessary measures to prevent deterioration of the status of all bodies of surface waters, groundwater and of other protected areas and to progressively reduce the pollution from priority substances and ceasing emissions of hazardous substances; Article 9 consists on the introduction of the principle of costs recovery for water services that is also related to the polluter pays principles; and Article 14 consist on the public information and consultation. The non-

[252] European Commission, Communication from the Commission to the European Parliament and the Council, Towards Sustainable Water Management in the European Union, First State in the Implementation of the Water Framework Directive 2000/60/EC, COM(2007)128 final, Brussels, 22 March 2007

[253] European Commission, Commission Staff Working Document accompanying document to the Communication from the Commission to the European Parliament and the Council, Towards Sustainable Water Management in the European Union, First State in the Implementation of the Water Framework Directive 2000/60/EC, SEC(2007) 362, Brussels, 22 March 2007, p 47

[254] Ibid., p 11

implementation of these Articles should be considered as a serious issue that must be tackled as soon as possible, as these legal provisions are essential elements for the EU water policy.

From a practical point of view, Article 4 WFD could be taken as the most difficult one to comply with as this issue concerns facts that are external from the Member States. The environmental status/condition of each Member State is different, the sources of environmental pollution are different and these facts are directly linked with the water status of each Member State. Besides, these differences can be found even at regional level. Finding out solutions to achieve the environmental goals established in the Water Framework directive may not be difficult, the problem is financing the programs. This last point consists on an internal issue that depends on each government. As it has already been mentioned, the amount of investment needed to meliorate water quality and quantity can be considered enormous. Considering that the quality of drinking water in the EU is not bad (at global level) many governments may not be interested in this topic, and this fact end up influencing to the quality of programs of measures, which are going to be the key point for the achievement of the environmental objectives.

Unlike the case of Article 4 that has strong internal and external factors influencing its implementation, the implementation of Articles 9 and 14 primarily depend on the political will. In fact, the Commission has asked some States (although not specifying which ones) to change their attitude towards the implementation process and to try to catch up with the lost time.[255] Especially, the application of Article 9 is of great importance as this is linked first with financing the water programs and second, this Article could be linked to the "affordability principle" of drinking water, which actually forms the core part of the right to water (the importance of Article 9 and 14 will be further developed in point 2.2.1 c) and 2.2.2 g) respectively).

The second aspect that the 2007 Report focused on was the establishment of the administrative structures, which mainly concerns the identification of the river basin districts and the designation of the public authority. Article 15 of the WFD required the Member States to send copies of the river basin management plans and all updates to the Commission, yet several Member States had failed to submit this report and consequently, the Commission had to launch infringement cases against: Belgium, Denmark, France, Greece, Spain, Italy, Malta, Poland, and

[255] Ibid., p 48

Sweden.[256] These cases were solved by the end of 2004, except from Spain.[257] In fact, this was not the only time that Spain failed to provide the report to the Commission as in 2011 the Commission launches another infringement proceedings against Spain.[258]

Finally, concerning the last aspect analyzed by the Commission in the 2007 Report, which was on the environmental and economic analysis of the river basin districts, it is directly related to the implementation of Article 5 of the WFD (which is on the characteristics of the river basin district and the review of the environmental impact of human activity and economic analysis of water use). This Article requires the Member States to carry out, among other evaluations, an economic analysis of the water use taking into account the technical specifications set out in Annexes II (groundwaters) and III (economical analysis) of the WFD. The Commission identified that the implementation of Article 5 should be considered as a transition point of Member States water management towards applying the WFD.[259] In fact, the economic analysis that must be carried out by Member States are going to be the basis for the calculation of recovery of costs of water services, which is one of the main components of the new EU water policy.

As well as the case of the Member States failure to report the river basin districts and the competent public authority, the Commission had to launch infringement cases against some Member States, yet the number of cases were less than the ones of the second aspect, as in this case, it amounted to five cases.[260]

Generally speaking, the Commission pointed out serious gap in the implementation of the analyzed aspects of the WFD, yet, on the other hand it seems optimistic as it commented that there is still time to remedy the gaps by 2010 (the first report was published in 2007) and it also seemed to be satisfied with the results indicating that Member States are taking significant steps forward towards a sustainable water management in the European Union.[261]

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[256] Ibid., p 14
[257] Ibid.
[258] ECJ, Case C-403/11, European Commission v Kingdom of Spain, 4 October 2012
[259] Ibid., 21
[260] Ibid., 22
[261] European Commission, Communication from the Commission to the European Parliament and the Council, Towards Sustainable Water Management in the European Union, First State in the Implementation of the Water Framework Directive 2000/60/EC, COM(2007)128 final, Brussels, 22 March 2007

Second Implementation Report: Monitoring of Programmes

The second report was published in April 2009 and this time the Commission focused on the monitoring programmes.[262] Article 8 (monitoring of surface water status, groundwater and protected areas) is the legal basis of this point. This Article establishes that Member States must ensure the establishment of programmes of the monitoring of water status, which should be operational at the latest six years after the date of entry into force of the Water Framework Directive, meaning by 2006.

The required content of the monitoring programmes depend on whether it concerns surface water, groundwater, or protected areas. The results obtained from such monitoring programmes are of great importance, first, to assess the status of water bodies, whether their status are improving or not; and second, to know what measures need to be included in order to achieve the environmental objectives of the Water Framework Directive.[263]

Compared to other Commission's Reports on the WFD, the 2009 Report does not contain much valuable outcomes/information. The Commission recognized a good monitoring effort form the Member States indicating that more than 107000 monitoring stations on surface water and groundwater were reported under the Water Framework Directive.[264] One important point that must be highlighted is that the Commission found out a weak point, which is the lack of coordination of monitoring programmes for international river basin districts. This is definitely an issue that must be improved as soon as possible because there is an important number of international river basin districts within the EU. If neighboring States that share a river basin district have different results coming from the application of monitoring programmes of that district, the lack of coordination may end affecting the water status of the whole river basin district at issue. This is a result that must be avoided.

Finally, concerning the reports submitted by the Member States, the Commission indicated that an effort in the application of monitoring programmes is noticeable. On the other hand, it also indicated the lack of information on the levels of confidence and precision of the monitoring

[262] European Commission, Report from the Commission to the European Parliament and the Council, in accrodance with article 18.3 of the Water Framework Directive 2000/60/EC on programmes of monitoring of water status, COM(2009) 156 final, Brussels, 1 April 2009

[263] Ibid, p.4

[264] Ibid.

programmes and assessment methods.[265] As the system of monitoring programmes and river basin management plans have been introduced with the Water Framework Directive, there is no past experiences or information on it, which makes difficult to define this last aspect with the assessment of the first report. Thus, it will be the future reports that will identify the level of effectiveness of such programmes.

Finally, the Commission staff working document accompanying the 2009 Report[266] offered valuable information that clarifies the monitoring requirements of the WFD. The document contains technical and procedural data to be followed for the monitoring programmes and their reports. This document will be an important guideline for the reports in the future.

Third Implementation Report: River Basin Management Plans

The third implementation report published in November 2012 specifically consisted on the river basin management plans (RBMP).[267] The river basin management plan is one of the basic elements of the new water policy in the Union (which was introduced in 2000). It must be produced for each river basin district taking into account the characteristics of the body of waters.

By the time the 2012 Report was published, 23 Member States have already adopted and reported all their plans, yet the remaining 4 Member States, i.e. Belgium, Greece, Spain and Portugal, have either not adopted the plans or simply did not reported some of the plans.[268] By 2012, the Commission received 124 RBMPs.[269]

The assessment of the RBMPs are acceptable but with such results the Commission found out that it will not be possible to reach the environmental objectives in 2015.[270] Article 4(4) of the Water Framework Directive establishes an exception for the 2015 deadline. Yet, if a Member

[265] Ibid, 5

[266] European Commission, Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council, in accrodance with article 18.3 of the Water Framework Directive 2000/60/EC on programmes of monitoring of water status, SEC(2009)415, Brussels, 1 April 2009

[267] European Commission, Report from the Commission to the European Parliament and the Council, on the Implementation of the Water Framework Directive (2000/60/EC), River Basin Management Plans, COM(2012) 670 final, Brussels, 14 November 2012

[268] Ibid., 4

[269] Ibid.

[270] Ibid., 6

State will need to make use of this provision, it will have to comply with at least one of the following three aspects. First, when it is not technically feasible to achieve the required water status; second, when the achievement of the objectives will require a very high amount of money (disproportionately expensive) and when the natural conditions do not allow the achievement of the objectives.

The biggest issue seems to concern the chemical status of water bodies. According to the Reports submitted by the Member States, 15% of surface waters in the EU has unknown ecological status and 40% has unknown chemical status.[271] This is definitely a disappointing result. In the previous Commissions report (2009 Report) the Commission itself indicated the ambiguity of the possible results coming from the application of the monitoring programmes, yet the answer seems to be that they are actually not efficient at all. Without a clear knowledge on the whole picture of the EU water status it would be difficult to find out the best techniques and appropriate measures. As the Commission suggests in the 2012 Report, Member States need to improve and expand monitoring programs in order to provide a comprehensive picture of the aquatic status.

Furthermore, the 2012 Report on the river basin management plans also provides very interesting findings with a holistic view. It emphasizes the importance of coordination in decision making not only among States (sharing the same river basin districts) but also across different sectors and policies, even involving third parties, such as stakeholders.[272] Water involves many sectors. The most relevant ones are the agricultural sector, the industrial sector and the energy sector, and most of these sectors are operated either by a private party or by a public-private partnership. Taking into account the important role that they play in the water abstraction, water use and water pollution, the their participation should be considered necessary to set "realistic" objectives.

Furthermore, the Commission recalled other water directives (or water related directives) such as the Floods Directive,[273] the Nitrates Directive[274] and Industrial Emission Directive.[275] It indicated

[271] Ibid., 7
[272] Ibid, 9
[273] Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, *OJ L 288*
[274] Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, O.J. L 375/1
[275] Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions, O.J. L 334/17

that the application of the programmes of such directives need to be reinforced to the end of achieving the environmental objectives of the Water Framework Directive. The directives that the Commission referred in this document are not all of the directives that affect to the implementation of the WFD, there is a long list of directives that are directly related to it.[276] Just thinking that all these directives have to be effectively implemented beforehand, makes clear how difficult is to achieve the WFD's objectives.

As the last relevant point of the 2012 Report, it must be highlighted the issue of "transparency" in the pricing policy and in funding the measures. These two aspects are different but they are linked one to the other. This is because the WFD introduced the cost recovery principle and the polluter pays principle into the EU water policy.[277] According to the Commission, only little progress has been made so far in implementing transparent pricing policy.[278] Taking into account that the recovery of financial costs of water services is a key point for sustainability. Therefore, without an effective and efficient application of the cost recovery principle, the provision of sufficient good quality of water may be at risk as the projects themselves will not be economically sustainable. In fact, the Commission had to make use of the infringement procedure against nine Member States (that have implemented a narrow interpretation),[279] from which one arrived to the European Court of Justice.(Case C-525/12, this case has been analyzed in point 3.2.3.f)).[280] Furthermore, concerning the funding of measures the commission proposes a co-finance projects based on the use of cohesion and structural funds in the water sector, yet, at this moment this remains just as a proposal that must be further developed. In any case, this is a very interesting update. If this proposal could be integrated to the EU water policy, the

[276] For example: Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution ad deterioration, OJ L 372; Directive 2008/105/EC of the European Parliament and of the Council on environmental quality standards in the field of water policy, OJ L 348; Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ L 375; Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment OJ L 135; Directive 2010/75/EU of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality, OJ L 64; Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy, OJ L 164; Directive 2009/128/EC of the European Parliament and of the Council 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides, OJ L 309

[277] Article 9 and Annex III of Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy, 2000, O.J. L 327/1 ,

[278] European Commission, Report from the Commission to the European Parliament and the Council, on the Implementation of the Water Framework Directive (2000/60/EC), River Basin Management Plans, COM(2012) 670 final, Brussels, 14 November 2012, p 10

[279] Ibid., p 11

[280] ECJ, Case C-525/12, Commission v Germany, 11 September 2014

accountability of private entities on water issues will be clearly established consisting on a big step, yet, as it has been already mentioned, at this moment, this is just hypothetical.

Fourth Implementation Report: Programme of Measures

Finally, in March 2015, the Commission has published the fourth implementation report on the WFD.[281] This report focused on the Program of Measures established in the Water Framework Directive. As well as the 2012 Report, this one also has a wider perspective. It analyzed the implementation of the Water Framework Directive and how far the Member States achieved the established environmental objectives. Ultimately, this documents offers several recommendations to the end of making the program of measures more effective.

The 2015 Report gave very interesting recommendations. First of all, the Commission suggested Member States to work for a solid basis for programs of measures in order to have efficient river basin management plans.[282] This means that, so far, the applied programme of measures are not as effective as expected. This finding is disappointing as the programme of measures is a key instrument for the proper implementation river basin management plans, which is the core part of Water Framework Directive and the EU water policy. As already mentioned, according to the Commission, Member States did not worked enough concerning the programme of measures, yet this is the essential part of the river basin management plans, therefore, it can be concluded that the core part of the WFD is not being appropriately implemented.

The WFD established 2015 as the year when the "good status" of water should be achieved, yet, the reality showed that by that time, there is still the lack of solid basis for the programmes of measures, once again, a very essential point. It is understandable if Member States were not able to reach to the objective due to environmental or economical issue, but the establishment of programme of measures implies a technical study/analysis and the adoption of appropriate legislation at national level. It is hard to understand that after almost thirteen year has passed since the directive entered into force, and such an essential aspect has not been fully complied with.

[281] European Commission Communication from the Commission to the European Parliament and the Council: The Water Frameworkd Directive and the Floods Directive, Actions towards the 'good status' of EU water and to reduce floods risks, COM(2015) 120 final, Brussels, 9 March 2015

[282] Ibid, p 10-11

The 2015 Report also highlighted the issue on hydromorphology, which concerns in changing the flow and the physical shape of water bodies. This topic has not been developed much so far. Most of the times when water issues were on the table, it were its quality and its quantity the classic attention-grabbers and the main topic, and lately, the issue of water pricing has been incorporated as one of them. The River Basin Management Plan established in the WFD, should also include the water status assessment methods that are sensitive to hydromorphological changes. However, apparently Member States have not done much in this aspect. In this report, the Commission expressed also the necessity of clarifying measures to redress the hydromorphology issue, as at this stage they seem to be very general without any prioritization.[283]

On this section, it has been scrutinized the most relevant points of all the available Reports on the implementation of the Water Framework Directive. It can be perceived that every time the reports seem to be more accurate and complete tackling the weak points of the implementation stage of the directive. It shows that the Commission is gaining experience on the matter and its assessments are of great value. However, the results, especially those Reports of 2012 and 2015, are disappointing. The Member States that did not achieved the established objective, yet they comply with the exceptions provided in Article 4(4)(c) may rely on that provision and to extend the deadline up to 2027 or beyond.[284] However, as it has already mentioned this exception can be provided only if the achievement of the objectives was not possible on the ground of either the lack of technical feasibility, or the measures would have been disproportionately expensive or the natural conditions did not allowed such achievement. At this point, there is no sufficient data available to know which Member State did not achieved the required results and how many of them will fall within the scope of Article 4(4)(c).

3.3 The European Citizen Initiative on Water and Sanitation

First of all, a European Citizen Initiative is an invitation to the Commission to submit a proposal on the field where the EU has competence to legislate, and it constitute the first ever participatory democracy instrument at EU level. Its legal background relies on article 11(4) TEU

[283] European Commission, Communication from the Commission to the European Parliament and the Council: The Water Frameworkd Directive and the Floods Directive, Actions towards the 'good status' of EU water and to reduce flood risks, COM(2015) 120 final, Brussels, 9 March 2015, p 8

[284] See also, European Commission, Report from the Commission to the European Parliament and the Council, on the Implementation of the Water Framework Directive (2000/60/EC), River Basin Management Plans, COM(2012) 670 final, Brussels, 14 November 2012, p 6

and article 24 TFEU, and also on the Regulation No. 211/2011[285] which establishes the required procedure and conditions for a citizen initiative.

The European Citizen Initiative (ECI) on water and sanitation, *Right2water*,[286] was the first initiative that met all the requirement established in the Regulation No. 211/2011. It was officially submitted in December 2013, inviting the Commission to propose legislation recognizing and implementing the Human Right to Water and Sanitation, as it has been recognized by the United Nations in 2010. The submitted initiative highlighted the importance that the governments should ensure and to provide sufficient clean drinking water and sanitation for all in Europe. It urges that the EU and the Member States should guarantee the right to water and sanitation, that the water supply and the water resource intended for human consumption should not be under the rules of internal market and to be excluded from liberalization, and finally, the initiative goes further requiring the EU to act on the improvement to provide a universal (global) access to water. The initiative concerned cross-cutting issues and implied various policies at Union's and National levels.

The Commission gave its conclusions on the initiative on 19th March 2014. On this document the Commission addressed all the requests of the initiative and highlighted the EU commitment to water and sanitation so far.

The first point in question of the initiative indicated that EU and Member States should be the ones responsible to ensure that all inhabitants enjoy the right to water. To the end of answering this point from a human rights perspective, the Commission recalled the EU legal provisions directly relevant to access to safe drinking water and improved sanitation, which included principally article 1 and 2 of the Charter of Fundamental Rights, which cover the right to dignity and the right to life respectively. However it did not further developed specifically the human rights aspect of the right to water and sanitation in the EU law. Following, the Commission highlighted the EU's high contribution on the improvement of water status (both, quality and quantity) throughout its financial assistance and its environmental protection provisions, specially by those established in the Water Framework Directive, Drinking Water Directive, and

[285] Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the Citizen's initiative, O.J. L65/1

[286] EU Citizen Initiative for Water and Sanitation, "Water and Sanitation are Human Right! Water is a public good, not a Commodity!" available at: http://www.right2water.eu/ (last accessed 01/06/2014)

Urban Waste Water Treatment Directive.

On the following point, which indicated that water supply and management of water resources should not be subject to "internal market rules" and that water services be excluded from liberalization, the Commission's answer was very clear. First of all, the Commission underlined the one responsible on the water service quality control are the "national authorities" and that the internal market rules fully respect their competence on the matter. Therefore, the water supply service's nature, whether private or public, will depend on the authorities decision. Thus, the EU is not competent to rule on the liberalization of the services nor on the concession contracts for water supply. However, in order to ensure a proper water supply the Commission indicated that it will further work on the aspect of transparency providing information to the public, as this will contribute to the public participation and therefore it will empower citizens.

The third and last point in question indicated that EU should increase its efforts to achieve universal access to water and sanitation. In order to answer this question, the Commission recalled all EU's and Member States' activities in the international context regarding the improvements of water services in developing countries and its financial assistance and indicated that it will advocate universal access to safe drinking water and sanitation as a priority are for future Sustainable Development Goals.

The ECI on water and sanitation did not welcomed the Commission response in its wholeness, as according to them, the EU lacks ambition in replying the first European Citizens Initiative remaining only to assert the foremost importance of water and to recall that "water is not a commercial product as any other".[287] In fact, the Commission's response was very clear regarding its position towards the recognition of the human right to water. It can be resumed that the access to clean drinking water and sanitation is important, therefore the Union has adopted high standards on water quality and quantity control. The Commission seems to be open to make further adjustment on the current EU water law and to work directly with the Member States and stakeholders in order to ensure the correct implementation of the concerning regulations and directives. Therefore, it would be safe to say that the Commission's position towards this matter is that as the Union protects the access to clean drinking water, there is no need to recognize the

[287] European Federation of Public Service Unions (EPSU), EPSU Press Communication, 19th March 2014 , available at: www.epsu.org/a/10300 (last accessed 01/06/2014)

right to water.

3.4 European Parliament as a new path to the Human Right to Water in the Union

On September 8th 2015, Strasbourg, an important step has been taken concerning the human right to water. The European Parliament approved in simple majority (by 363 votes to 96, with 231 abstentions) the resolution on the follow-up to the European Citizen Initiative, Right2Water.[288] The document contains points of great importance for the recognition of the right to water in the EU legal order, e.g. its quality, quantity, affordability, accessibility, etc. However, other than such classic issues on water that have been treated so far, it must be noted that the novelty of this document is that it contains and it represents a political achievement in the field of the human right to water, as it is the first time that the EP calls on the Commission to come forward with legislative proposals that would recognize universal access and the human right to water. Moreover, the Parliament goes further advocating that the universal access to safe drinking water and sanitation should be recognized also in the Charter of Fundamental Rights of the European Union.

The report was proposed by MEP Lynn Boylan, who indicated that "...the official response of the Commission was vague, disappointing and did not properly addressed the demands of the Right2Water campaign."

In fact, the European Citizen Initiative (ECI) on water and sanitation, was the first initiative that met all the requirement established in the Regulation No. 211/2011.[289] It was officially submitted in December 2013, inviting the Commission to propose legislation recognizing and implementing the human right to water and sanitation, as it has been recognized by the United Nations in 2010. The initiative was based on three main points. First, it urged that the EU and the Member States should guarantee the right to water and sanitation; second, that the water supply and the water resource intended for human consumption should not be under the rules of internal market and to be excluded from liberalization; and third, the initiative also suggested that the EU should act on the improvement in the provision of a universal access to water. Unfortunately, the

[288] European Parliament Resoulution of 8 September 2015 on the follow-up to the European Citizens' Initiative Right2Water, P8_TA(2015)0294, data available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0294+0+DOC+XML+V0//EN (last access: 23/04/2016)

[289] Regulation No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative, OJ L 65/1

initiative did not achieved the desired result, as the Commission, in its Communication on the European Citizens' Initiative “Water and sanitation are human right!! Water is a public good, not a commodity!”,[290] limited itself to reiterating existing commitments. It was for this reason that the Commission was criticized as lacking ambition in replying the first ECI.

Other than the petitions made by the European Citizen Initiative on water, the resolution included also detailed suggestions on the possible action plan in order to improve the quality of water supply and sanitation services in the EU. For example, it is worth noting that in paragraphs 49 to 51 of the resolution, the EP suggested the Commission to set up a benchmarking system. It is difficult to clearly understand from the text what this system will represent or contain, however, if this 'benchmarking system' will imply setting a standard as a point of reference, it would be a great instrument to evaluate the performances of each cases concerning the quality, quantity of water and its supply. On the other hand, it must borne in mind that, in practice, it will be highly difficult to establish a specific point of reference, as water issues entail various aspects (such as legal, political, cultural, geographical, climatological, etc.) that influence on each Member State' decision-making concerning the matter. However, despite its implied difficulty, it is understandable that the EP suggested this system. As the inclusion of such instrument, may accelerate the process to achieve the proper protection of the right to water for all. Furthermore, the establishment of such benchmark will show the Commission's actual will to actively work on this matter.

Furthermore, taking into account recent events, it cannot be ignored the role that the EP has been playing in the ground of the EU water law. Since June 2008, it has been supporting for the improvement of the EU's water quality rules, requiring regular updates of the list of priority substances in order to progressively meliorate the quality of water. Moreover, the European Parliament Environmental Committee hosted on 17th February 2014 the public hearing of the ECI for water, where the the representatives of the initiative recalled the requests made in the first submission to the Commission. Taking into account that the European Parliament approved the present resolution shows that this public hearing was successful.

[290] European Commission, Communication from the Commission on the European Citizens' Initiative “Water and Sanitation are a human right! Water is a public good, not a commodity!”, COM(2014)177 final, Brussels, 19 March 2014

Finally, even though this document has no binding effect, it was the first time that an EU institution called for a legislative proposal recognizing the human right to water. Besides, as explained above, the Commission has already evade this issue with the ECI for water, and it would be difficult to do it once more. Specially because after the response to the first ECI, the Commission was criticized as if it neglects successful and widely supported ECIs in the framework of a established democratic mechanism, the EU may lose credibility in the eyes of citizens. This definitely constitute a further pressure to the Commission to act more specifically on this topic. Therefore, it will be interesting to see what steps the Commission will take concerning the call from the Parliament, especially because the recognition of the human right to water in the EU legal order will imply cross-cutting issues that are hard to solve.

4. Introducing the Human Rights-Based Approach to the EU Water Law : opening a path for the human right to water

The Human Rights-Based Approach (HRBA) has been introduced into the development sphere since the late 90's. It is basically known by its approach that puts the human rights entitlements and claims of the right-holders and of the corresponding duty-bearers in the center of human development.[291]

In fact, this approach is also being introduced to the EU development policy. Recently, the Commission has presented a *Tool-Box on the Rights-Based Approach*,[292] which basically describes the core concept of the RBA and how it can be applied in the EU context. A very interesting point that must be highlighted is that this document refers to the Right-Based Approach (RBA) instead of the Human Right-Based Approach (HRBA), which is the most commonly used terminology that the international organizations and development programs refers to. In that respect, the Commission clarified that this does not mean the weakening of EU commitment towards the matter, instead, not expressing the word *human* it actually cover a broader category of rights, such as social and economic rights.[293] This point may become a key aspect in introducing RBA to the EU water law, as basically the right to water falls within the scope of Article 11 of the International Covenant on Economic, Social and Cultural Rights. This

[291] Filmer-Wilson, E., *The Human Rights-Based Approach to Development: The Right to Water,* " Neth. Q. Hum. Rts. 23 (2005): 213

[292] European Commission, *Tool-Box: A Right-Based Approach, Encompassing All Human Rights for EU Development Cooperation*. SWD(2014) 152 final (April, 2014)

[293] Ibid.

point was clearly explained in the General Comment No. 15,[294] which underlined that the right to water is part of the right to an adequate standard of living as were the rights to adequate food, housing and clothing.[295]

Most importantly there are two main reasons to apply the RBA into the EU water law. First, the RBA works as a framework of guidance to formulate policies, legislations and regulations throughout assisting on the selection of indicators;[296] and second, this approach seeks to identify the right-holders' entitlements and the duty-bearers' obligations in order to help bridge the gap between them.[297] These two points are actually crucial for the development of the human right to water in the EU because the lacking features of the right to water in the EU water law, e.g. legal enforceability of the right and water quantity (availability), might be included in case such approach is applied. As without the possibility for a legal enforceability a human right may remain unachievable. Of course, it must bear in mind that due to the EU essential principles of subsidiarity and proportionality, some other details lacking in the EU law concerning the right to water may remain to the Member States national law.

There is a very important point that must be highlighted. The Right Based Approach has been included into the EU legal order, however this seems to apply only to the developing sphere, that is to say to the Unions external action for development. Another way of explaining this situation is that the RBA may not be applied into the EU internal legal order. So far, there is no specification indicating that the RBA applies only to the developing sphere, yet the practice is clear with no exception.

Regarding the rest of the most relevant elements of the right to water in Europe, which are quality, accessibility and affordability, the Union law does rule on most of such points. Firstly, concerning the water quality, it must be underlined that the EU water law establishes high water

[294] UN Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Substantive Issues Arising in the Implementation of the International Covenant on Economic Social And Cultural Rights, General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the Interntional Covenant on Economic, Social and Cultural Rights, E/C.12/2002/11, Geneva, 11-29 November 2002

[295] UN Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Substantive Issues Arising in the Implementation of the International Covenant on Economic Social And Cultural Rights, General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the Interntional Covenant on Economic, Social and Cultural Rights, Geneva, 11-29 November 2002

[296] European Commission, *Tool-Box: A Right-Based Approach, Encompassing All Human Rights for EU Development Cooperation*. SWD(2014) 152 final (April, 2014)

[297] Ibid.

quality standards, depending on the purpose of the water (e.g. drinking water, bathing water, shellfish water, etc.).

Secondly, concerning the accessibility, the Union actually does not rule directly. However, regarding this point Article 1 and 2 of the Charter of Fundamental Rights are of great relevance. Article 1, which is on the human dignity, is applicable to the case, as basically it protects the central position of the individual in all the activities of the EU, and it is set as the benchmark for the Unions commitment to human rights protection, either at internal or external level.[298] Besides, some academics indicate that dignity has a subsidiary function, which means that it becomes relevant in the absence of a more specific right.[299] Furthermore, regarding this Article it can be found a very interesting point concerning the human right to water. As "dignity" can be considered as the real basis of fundamental rights, it can be lead also to the discovery of new rights not listed in the EUCFR.[300]

Keeping in mind the last and linking it with one of the objective of the EU policy regarding human rights, which is that the Union *seeks to prevent violations of human right throughout the world, and where violations occur, to ensure that victims have access to justice and redress and that those responsible are held to account*,[301] it can lead to find a realistic path for the introduction of the right to water into the EU legal order. First, because the right to water is already a legally recognized human right in the global sphere, and second, because the EU seeks to ensure a redress in such cases. In the specific case of the right to water, in order to claim a breach of the right, the individual may invoke, as EU legal basis, only the article 1 and 2 of EUCFR. However, such legal basis may result general and, therefore such ambiguity in it may end affecting negatively in order to have redress in the case. The application of the right to life within the EU context has been notorious basically on two fields, which are on criminal justice and health care. Direct or indirect application of the Article 2 of the CFR to access to water cannot be found. However, bearing in mind that water is a fundamental good for life and health, its relation is obvious. Furthermore, together with the Article 11 of the International Covenant on

[298] Dupré, C., Article 1 - Human Dignity, in The Charter of fundamental rights – a Commentary of the Articles of the EU Charter, Peers, S., Hervey, T., Jenner, J. and Ward., A (eds),Hart Publishing, p 4-6

[299] M. Olivet, Aritcle1 Dignity in WBT Mock and G Demuro (eds), *Human Rights in Europe Commentary on the Harter of Fundamental Rights of the European Union*, Durham, NC, North Carolina Academic Press, 2010, pg. 9

[300] Dupré, C., Article 1 - Human Dignity, in The Charter of fundamental rights – a Commentary of the Articles of the EU Charter, Peers, S., Hervey, T., Jenner, J. and Ward., A (eds),Hart Publishing, p 4-6

[301] Council of the European Union, The EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12, Luxembourg, 25 June 2012, p 2

Economic Social And Cultural Rights (ICESCR) (on adequate standards of living), which is the most relevant legal basis for the human right to water and Article 12 ICESCR (right to health) were highlighted by the General Comment 15 as a proper legal basis in the International context. Thus, making a simple analogy article 2 of the EU Charter of Fundamental Rights should be applicable too.

Furthermore, the human health implication on the EU water law can be found also in the drinking water directive and the bathing water directive. Both directives establishes high water quality standards in other to protect environmental quality and human health. Especially, the drinking water directive has the principal objective to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean.

Finally, regarding affordability, the principle of recovery of costs established in the Water Framework Directive is highly relevant. The human right to water must entail an economically affordable water services to all.[302] This means that the cost recovery should not prevent anyone from access to water services.[303] The Union does not establish any maximum quantitative value concerning water services, however the WFD indicates that economic analysis must be conducted taking into account the long-term forecasts of supply and demand for water that may include estimates of the volume, prices and costs of the water services and its relevant investments.[304]

Concerning the water pricing issue, the United Nations Development Programme (UNDP) suggests as a benchmark three per cent of household income as a proper price. The average household income varies among each Member State and average charge for water varies even among cities. As a random example, in France the average net household income is 2128 Euros,[305] and the average urban domestic water and sewer bill is 31 Euros per month.[306] Taking

[302] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 35, The Right to Water*, August 2010, available at: http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf (last accessed 20/05/2014)

[303] Ibid.

[304] Art. 9 WFD, and Annex III Economic Analysis

[305] French Statistical Office, Insee.fr. Data available at: http://www.insee.fr/en/themes/document.asp?ref_id=ip1265 (last accessed 20/05/2014)

[306] Le Centre d'Information sur l'Eau, data available at http://www.cieau.com/le-service-public/prix-services-eau-assainissement/le-prix-des-services-de-l-eau-et-de-l-assainissement (last accessed 20/05/2014)

into account the suggested water charge by the UNDP, the three per cent would be about 58 Euro, therefore, it can be said that the water bill in France is affordable. However this is just a case, and as stated before, the values may vary considerably.

5. Conclusions for the second chapter

The aim of this chapter was to analyze the EU water policy and its legislation focusing on the human rights dimension of it. From the carried out analysis, it can be concluded that the EU water law covers all water bodies and it has specific parameters for each type of water source and depending on its water purposes. The establishment of different parameters seems to be obvious, yet it can be also taken that the EU has actually a very developed water law, not only because of its specificity but also because of its variety. In order to tackle the water pollution efficiently, this feature is of great importance. Therefore, the legal basis for the protection of the quality of water sources in the EU can be considered sufficient. In other words, it can be said that the EU water law focuses on the environmental feature of water, The negative aspect of the EU water law is that it actually focuses exclusively on the environmental feature of water and the human rights aspect of it is being neglected. The Union water law does rule on the quality of water for human consumption and the established parameters are settled according to the human health protection, yet it still remains only on the quality of water.

No direct legal provision protecting the right to water in the EU can be found. This does not mean that there is not any feature of the right to water in the Union law. In fact, it can be found that the EU water law actually covers many aspects of the human right to water, especially the good quality of water, the affordability and the protection of human health. These aspects form the core part of the human right to water (The lacking elements would be the accessibility and the establishment of minimum quantity of water). This can be taken as a starting point for the introduction of the right to water within the EU water law. Besides, the introduction of the Right Based Approach to the EU development policy should strengthen the Union's external action on development, which in many cases the issue of access to safe drinking water is involved.

Finally, it must be mentioned the implementation of the Water Framework Directive. This directive introduced interesting measures, approaches and standards to the EU water law. In the beginning, it was considered that the objectives established therein were possible, the reality has

showed the contrary. Many Member States struggled implementing it and some of them are still in the process of implementation. The Commission has been working on this issue and guiding the Member States for the correct implementation of the directive.

The deadline established in the WFD to achieve good water status has already passed and this objective has not been fulfilled as expected. Further controls and monitoring are being operated in order to reach the objective, yet at this stage, it is hard to know when it will be fulfilled. Fortunately, the environmental situation of water seems to be improving and according to the Commission's Reports on water the Member States are gaining experience on the topic and their reports concerning their internal water status are improving as well. Now that the Member States have better understanding of the Water Framework Directive and its methods, it is expected that the implementation process will be boosted.

CHAPTER III

The Right to Water and the EU (part 2): Internal Market Regulation and the Water Service

1. Introduction

Waters can be studied from various points of view, such as: environmental, human health, societal, cultural, economical, etc. The Second chapter of this thesis specifically focused on the legal features of EU water law that support (or may support) the realization of the right to water from a human rights perspective. On the other hand, this chapter will scrutinize the economical dimension of the right to water that is relevant to the EU internal market. Water is a good, either public or private, that has an important economic value. The EU itself considers it as a unique good. In fact, it is stated the preamble section of the Water Framework Directive that: "*water is not a commercial product like any other, but rather, a heritage which must be protected, defended and treated as such.*"[307] Saying it so, it is clear that the Union perceives water as a "complex special" good, however, it is still not clear how complex and how special this good is within the EU water law and whether such position would mean that it will receive any special treatment.

It is feasible to analyze why this good can be so complicated and difficult to rule. In fact, this is one of the objectives pursued in this chapter in order to achieve the ultimate goal, which is of assessing the most relevant features of the EU internal market regulations that end up affecting the performance and supply of the water services which is one of the basic requirements for the fulfillment of the right to water. To this end, the chapter will be roughly divided into two parts.

[307] Preamble 1, Directive 2000/60/EC of the European Parliament and of the Council establishing a Framework for Community action in the field of water policy, O.J. L 327/1

The first one (point 2 of the chapter) will be dedicated to the analysis of the economically relevant features of water and water services, i.e. its economic value and pricing, public and private interests, cross-border element and the various notions of waters perceived by different States. This process should help in the understanding of why the economic dimension of water is a sensible topic. As it will be developed below, it is worth noting that the competent authorities will play a key role in deciding the essentials in the provision of water services. This can include the most fundamental points such as the determination of which category water services belongs to (market service, service of general interest, services provided by non-undertakings, etc.). It will also cover more specific issues such as the monitoring of the implementation of the river basing plans. Concerning the last point, the Water Framework Directive requires Member States to identify the appropriate competent authority in order to ensure the appropriate administrative arrangements and the appropriate application of the river basing management plans.[308]

Following, in the second part (points 3, 4 and 5 of the chapter), it will be studied the EU internal market regulation and its general principles relevant to the development of the water services within the EU territory. A special focus on the Services of General Interests (SGIs) will be given, due to its importance in order to define whether a water service would fall within the scope of EU competition law and, if so what kind of legal consequences would it entail. This step will contribute in the understanding of the legal and political situation that the water services encounter at the Union level. Doing it so, it is hoped to determine the current legal status of the right to water in the EU, more specifically in the internal market.

In this chapter, it will be scrutinize the topic of Services of General Interest. It is of great importance to take this step as the water services can potentially become part of them, so that the services can be precluded from the application of EU law concerning the internal market, especially from those on the freedom to provide services and from the competition rules.

This chapter will be addressed with the following hypothesis: 'legally speaking, the position of the right to water is very fragile as basically, its presence can be felt only in some declarations and/or documents with no legally binding force. Besides, in order to achieve the protection of the right to water, first, it will be necessary to have an efficient provision of such service to the

[308] Article 3(2), Directive 2000/60/EC of the European Parliament and of the Council establishing a Framework for Community action in the field of water policy, O.J. L 327/1

citizens. However, due to the special features that the water services envisages, it is not very simple to study them exclusively from the EU perspective as they, as any other public services, highly depend on each Member States national law, therefore, at the moment, it would not be realistic to look for formalizing the legal position of the right to water within the EU legal order through harmonization measures, instead, it should also be taken into account other routes, where the EU can act through complementing national policies or/and act through the EU consumer protection rules.'

Even though, this is not the most desired scenario, seeking directly for the EU to officially recognize and protect the human right to water, it is not a feasible option, at least at this stage. In order to achieve such goal it will be necessary to deal with some controversial details such as the liberalization of the water supply sector, defining the public and private responsibilities concerning the provision of water, requirements of modernization of techniques, etc. On top of that, taking into account the current situation where water services are regulated basically at national level, it makes far more difficult the recognition of the right to water at EU level. This is a process that has to be developed step by step, otherwise, it may end up failing to achieve such goal, as it has happened with the European Citizen Initiative on water and Sanitation,[309] where the Commission remained only asserting the foremost importance of water and recalling that water is not a commercial product as any other.

From a legal point of view the ECI on water and sanitation failed to achieve its goals (which urged the EU and the Member States to guarantee the right to water and sanitation, to exclude the water supply services from liberalization and to preclude them from the internal market rules, and finally, it required the EU to actively to take part on the improvement to provide a universal access to water).[310] However, the main outcome that can be found from it is that now it is more clear the Commissions position towards the recognition of the right to water. According to the responses that it has given to the ECI on water and sanitation, it can be understood that the access to clean drinking water and sanitation is important, therefore, the union has adopted high standards on water quality and quantity, however, so far, the Union has no competence to regulate water services as the initiative asked for. This is another reason why it would not be very

[309] EU Citizen Initiative for Water and Sanitation, "Water and Sanitation are Human Right! Water is a public good, not a Commodity!" available at: http://www.right2water.eu/ (last accessed 01/06/2014)

[310] For more details on the ECI on water and sanitation see, chapter II point 2.3.

realistic, at the current stage, to achieve a direct legal recognition of the right to water in the EU. Fortunately, the ECI found a way through the parliament, to re-establish the topic in the Union.[311]

Finally, it is worth noting the special position that the water services enjoy within the EU, as the other network industries such as telecommunication, electricity, gas and postal services have already been liberalized in the Union, and also it is negotiating to liberalize sanitation services.[312] However, the Union seems to be reluctant in explicitly liberalizing water services. The EU has shown a strong opposition to treat public water utilities as common market services. In fact, during the negotiation in Doha Round,[313] the Union did not offer to liberalize its own water supply sector, even though it has already liberalized other services concerning public utilities.[314] This shows that the current position of the water services are not as clear as other network industries. On one hand, this is a positive point as, as above mentioned, it has not been liberalized as the rest of public utilities, yet on the other hand, the unclear situation makes it difficult to plan future steps to be taken for the incorporation of the right to water within the EU water law.

2. The Economic features of Water and Water Services and the Involving Interests

Water is a complex good that its economic value has been recognized over the past century. Due to the change in the global water consumption patterns, its scarcity has become more apparent, and is is a matter of great import to efficiently manage this good.

Currently, the water issue is a matter that interests to all States, specially to those ones suffering water shortage due to its geographic and climate situation (in the case of the EU, the issue of water shortage is more common in the Mediterranean region), and so far, the situation in not becoming better, instead where proper action plans are not being conducted, the issue may

[311] European Parliament, Resolution on the Follow up to the European Citizens' Initiative Right2Water, 8 September 2015

[312] Henri Smets, Economics of Water Services and the Right to Water, in Fresh Water and International Economic Law, E.B. Wise, L.B. Chazournes and N.B.Ostervalder (eds.), Oxford: Oxford University Press, 2005, pp. 173-189

[313] The Doha development round stated in 2001 and continues today. It has been negotiated various subjects such as agricultural market, non-agricultural market access, services, trade facilitation, environmental goods, intellectual property issues, etc.

[314] Henri Smets, Economics of Water Services and the Right to Water, in Fresh Water and International Economic Law, E.B. Wise, L.B. Chazournes and N.B.Ostervalder (eds.), Oxford: Oxford University Press, 2005, pp. 173-189

worsen. For this reason, water law has recently being developed and modified in order to better adjust to the current situation and to avoid further deterioration as much as possible.

However, such adjustments involve high costs to the States, that in some cases, they are not able to properly cover such costs, which affects to the efficient protection of the right to water and its resources. It was so that the cost-recovery principle has been introduced to the EU water policy. According to this legal provision Member States are required to take into consideration plans that enable the recovery of costs for water services.[315] To this end, Member States need to integrate the economic analysis to their projects and to choose the most cost-effective combination of measures in order to achieve the objectives.

Even though the Union does not establish the precise way for water management, it provides some guidelines and limitations that should be respected by Member States. As follows it will be analyze the most relevant economic aspects for water management in the EU and how such aspects interact with the guidelines and limitations established by the Union.

2.1 Water Pricing

Listening to the word “economic” features, the first thing that comes to mind may be the 'price'. Yet, this cannot be neither the only aspect of the economic dimension of water nor the most important. However, it is also true that the pricing will have a great impact on water management and especially on water consumption.

As it will be explained bellow (point 5.1) one of the reasons why it is common for States to decide nationalizing water services or to heavily regulate them is to control the extreme raise of water prices. This issue is very common in public utilities that are characterized of being natural monopolies. Some of them have been already liberalized (such as the electricity sector, telecommunication sector, etc.), and the overall supply are on private hands, however, States have the responsibly to ensure the availability and accessibility of certain public utilities to all citizens.

The EU water policy also highlights the importance and necessity of putting the right price tag

[315] Article 9, Directive 2000/60/EC of the European Parliament and of the Council establishing a Framework for Community action in the field of water policy, O.J. L 327/1

on water.[316] It was the Water Framework Directive that officially introduced the cost-recovery principle in the EU water policy. In its Article 1(b) notes that the principle of recovery of costs is necessary to promote sustainable water use and in its Article 9(1) indicates that the water pricing is necessary to provide adequate incentives for users to use water resources efficiently. Unfortunately, it has been very common that the pricing policy of each State did not provide the adequate incentives for users to use water efficiently. This scenario is far more generalized in the agricultural sector compared to the water supply for human consumption.[317]

It is difficult to establish an adequate price for water. First of all, the value of water itself is hard to find out, yet, it's pricing should include all the costs used in the abstraction impoundments, storage, treatment, distribution, cost of the infrastructures and its maintenance, etc. With a wider notion it even should include the waste-water collection, treatment and discharge. Just thinking that the water that it is being used has to cover all these costs would mean that its price cannot be low. Moreover, from an economic efficiency point of view, another way of establishing a price to water, other than the guiding principles established by the WFD, is to apply the Marginal Cost Pricing doctrine, that some States follow or use to follow.

This doctrine indicates that the proportion of the utility rates should be based upon marginal cost for the propose of attaining economic efficiency by means of accurate price signals.[318] In other words, this means that a price for water can equal the cost of the provision of the water.[319] From the market efficiency point of view, the marginal cost pricing is an ideal system, as this would mean that the user of the good would pay the exactly proportionate price for the consumed good. However, the problem with this system in the water sector is that it does not include any incentives for the consumers to not over use the water. Nowadays, it is very important that the price of water includes such incentives, yet, as the issue of the value of water is a relatively new topic, it can be found many States that do not take into account this variable for the water pricing in the country, and to raise the price of water, at this point, would be a little bit complicated specially for political reasons, that the raise of the price of a basic public utility would imply

[316] Communication from the Commission to the European Parliament and the Council, Addressing the Challenge of Water Scarcity and Droughts in the European Union, SEC(2007) 993, SEC(2007) 996, COM/2007/0414 final

[317] World Wild Found for Nature (WWF), Allocating scarce water: a primer on water allocation, water rights and water markets, WWF Water Security Series 1, 2007, pg 35

[318] Greer, M.,Electricity Marginal Cost Pricing: Application on Eliciting Demand Responses, Butterworth-Heinemann, 2012, pg 4

[319] World Wild Found for Nature (WWF), Allocating scarce water: a primer on water allocation, water rights and water markets, WWF Water Security Series 1, 2007, pg 35

public complain towards the government.

Such was the Ireland case, where all water charges for domestic use was abolished in 1997, and the services were financed by tax revenues that the national government transferred to local authorities, who were the one responsible for providing water service to the public. Yet, this situation has recently changed as the Irish government changed its water charging policy from the end of 2014 to the first semester of 2015.[320] The main reason for this change was that the Irish government had been economically straggling for infrastructure. Obviously, this brought up public discomfort where many protest against the measure were taken place.321 The MEP Lynn Boylan has also expressed this issue indicating that the introduction of flat-rate regressive charges has resulted in some of the largest protests that the country has ever seen.[321]

As it can be seen, a pricing policy implies a complex reality, where many spheres must interact but at the same time the interests of each aspect may not reach to a point of understanding. Instead, they contradict to each other. This makes that, in the end, a pricing policy will highly depend on each State's governmental strategy, instead of depending either on the technical date or on the social and environmental needs.

2.2 Public and Private Interests

Management and organization of waterways is a matter of public responsibility. However, it must be clear that the water supply service can be operated either by a public entity or by a private one. This will basically depend on each Member State's national law.

The issue, whether water services should be managed by public or private entities will not be further developed in this chapter, as this has been widely discussed, and both types of management have shown their strengths and weaknesses. Regarding this point, the EU law, as the International law does maintain somehow a neutral position. The Union law does not rule this aspect, however it's position can be said, at this moment, pro-liberalization. In any case, whether the private participation in water services are accepted or not depends strictly on each Member

[320] Department of the Environment, Community and Local Government, Irish Water Reform, available at: http://www.environ.ie/en/Environment/Water/WaterSectorReform/#direction (last accessed 01/06/2014)

[321] European Parliament, Follow up to the European Citizens' Initiative Right2Water, debates, 7 September 2015, information available at: www.europarl.europa.eu/sidesgetDoc.do?type=CRE&reference=20150907&secondRef=ITEM-030&language=EN&ring=A8-2015-0228

States' national law. However, in most of the cases, private entities have an important part to play in performing water related tasks.[322]

In countries where a strong public management and governance, such as France and the UK, the privatization/liberalization of water services have shown relatively good results (the difficulties that they have encountered were those that they still would have met if the services were provided by purely public entities). However, if the State does not enjoy such situation (strong public management and governance), the monopolistic reality of water services may put consumers in a vulnerable position. This situation becomes more apparent, when it involves public utilities as the water services, as these sectors fall within the concept of the natural monopoly, which is characterized by the lack of competitors in the market.

In the EU context, many Member States have a large number of utilities managed under either public, private or public-private partnership; and it can be said that they have been able to maintain the competition in the water sector, respect the fundamental elements of the right to water (although the situation differs considerably depending on each Member State), and to balance the public and private interests. A great example on this point is the Netherlands case. In the Netherlands, the supply of drinking water is a public task; however, it is operated by ten private drinking water companies which ensure the treatment, production and distribution of drinking water to consumers.[323] Yet, it must be noted that the Dutch case may vary from most of the cases compared to other Member States, as the Netherlands has a very positive position towards the human right to water, and its water policy include most of the key aspects of this right.[324]

It must be clear that the existing EU water legislation, having the WFD as the leading instrument, works on the harmonization of the standards on water quality and quantity and not on the protection of right to water or even on access to water. Therefore, the effective protection of the right to water, including the access to it, will vary from one Member State to another. Unlike the

[322] H.F.M.W van Rijswick and H.J.M Havekes, European and Dutch Water Law, Europa Publishing, 2012

[323] H.F.M.W van Rijswick and H.J.M Havekes, European and Dutch Water Law, Europa Publishing, 2012, pg. 400

[324] H.F.M.W van Rijswick, Improving the Right to Water in the Netherlands, in Smets, H (ed.), Academie de l'eau potable et a l'assainissement, sa mise en oeuvre en Europe, Editions Johanet, Academie de l'eau, France, 2012, p 369-391; H.F.M.W van Rijswick and H.J.M Havekes, European and Dutch Water Law, Europa Publishing, 2012, pg. 400

Netherlands case, there are some people in Europe that still do not fully enjoy their right to water,[325] this should be a great reason for the EU to work on this topic.

In the case, where the States decide to nationalize the water service sector, it would mean that the public authority will be in charge for its wholesome. Therefore, no private interest would be involved. On the other hand, if the States opt to regulate such sector, instead of nationalizing it, as happens in most of the cases in the EU, the private side would have a wider space to act. It is in this case that each State, according to the national law, has to balance both interests in order to achieve the effective fulfillment of the right to water for all citizens.

Basically, the main importance of the private participation in water services lays down in two reasons. First, the high amount of financial investment that they do, and second, the experience and the knowledge that they have in providing this services (the know-how). Private entities generally have a better know-how than the States, due to the fact that all private firms decide to participate in the supply of water because of one reason, which is the profit income. Private entities have one clear objective, and this is the greatest incentives for them in order to apply the best technological methods and measures. The problem may rise, when such measures are not compatible with the basic requirements for the fulfillment of the right to water. There is always the risk that the private firms may undermine such requirements in order to maximize their profits. This is the main reason why heavy national regulation on water services is highly common and also, important.

Therefore, even though in the scenario where a Member State opts to liberalize the water services in its territory, it is highly important that it regulates the sector and constantly monitor its effective supply, as in the end, the overall responsibilities for ensuring water supply are retained by the States. Yet, as mentioned above, States should take into account that although they have to regulate this sector, if they are seeking for private participation, they have to regulate it and at the same time, keep it attractive for the private investor.

Finally, speaking about the private participation on the water supply sector, it would be

[325] Henri Smets, Economics of Water Services and the Right to Water, in Fresh Water and International Economic Law, E.B. Wise, L.B. Chazournes and N.B.Ostervalder (eds.), Oxford: Oxford University Press, 2005, pp. 173-189

interesting to mention the Corporate Public Responsibility (CSR).[326] This is basically a voluntary act made by private companies integrating social and environmental concerns in their business agenda.[327] The issue whether private entities should be responsible for the protection of human rights and environment, has been widely argued. Yet, it seems that the current tendency is to favor this pro-human rights movement. However, there are also some academics that critique this position by specifying that human rights and business are two tangential disciplines that one has no relation towards the other, therefore, the protection of human rights, social needs, environmental protection, etc., should remain as an exclusive concern for the States.[328]

It would not be realistic (nor responsible) to look for a protection of the right to water in voluntary acts/codes of the private entities, however, such instruments can be considered to be useful in the further promotion of the right to water and this will show the private understanding and its commitment to the matter. Taking into account that the private entity will always try to look for maximizing its profit income and this often may entail causing breaches on fundamental rights, if they integrate the human rights aspect in the supply of water in their decision making procedures, it would be a big step towards the fulfillment of the right to water. Actually, this would be the most effective move in practice, still, this scenario would be hard to achieve.

2.3 The Cross-border element of water: Cooperation and Shared Responsibilities

Another important feature that must be integrated to the analysis is the cross-border element and the joint responsibility that the involved parties have. Water does not respect national borders. The regulation of the relationship between the various interests within water management embodies an essential part of water law, and there are many parties of diverse categories, such as private and public entities, and on this last one involves public authorities that can be of various levels, either local, regional, national or international. The recently introduced river basin management plan is composed by several district levels, i.e. national river basin districts, national river basin districts outside EU, and international river basin districts.[329] In most of the cases, one river basin pertains to two or more Member States. This means that for a single

[326] Please see Chapter I, point 3.2

[327] European Commission, Green Paper Promoting a European Framework for Corporate Social Responsibility, COM(2001) 366 final, 18 July 2001

[328] See for example, M. Friedman, 'The Social Responsibility of Business is to Increase its Profits' (1970) 13/9 New York Times Magazine 122.

[329] European Commission, water framework directive, facts, figures and maps, available at: http://ec.europa.eu/environment/water/water-framework/facts_figures/index_en.htm (last accessed 10/01/2015)

international river basin, several public authorities may be involved in order to coordinate the management plan.

As it will be explained in the next sub-section, the public authority will play a key role in deciding the essentials in the provision of water services. This can include the most fundamental points such as the determination of which category water services belongs to (market service, service of general interest, services provided by non-undertakings, etc.), and also it should cover more specific issues such as the monitoring of the implementation of the river basing plans. Concerning the last point, the Water Framework Directive requires Member States to identify the appropriate competent authority in order to ensure the appropriate administrative arrangements and the appropriate application of the river basing management plans.[330]

Generally speaking, when it is talked about cooperation and shared responsibilities, it can be differentiated at two levels. The first one is the State-State relationship, and the second one is the State-Private relationship. The last one may concerns the Corporate Social Responsibility as explained above and some other measures established by the State. The topic of cooperation and responsibilities on water issues generally concerns the first case, which is the State-State relationship. This is because the aspect of protection water quality and quantity (environmental matters) and the aspect of access to water (water availability and its supply) remains primarily and fundamentally as a State responsibility.

The cooperation and the shared responsibilities required by the Water Framework Directive basically covers only the State-State case. It requires coordination of programmes of measures applicable to a river basin district, and in order to do so States can either opt for an informal agreement or, on the other hand, the directive also allows the use of international agreements.[331] Such coordination should also imply agreements between States on the equitable abstraction of water resources.

2.4. Water Management and Allocation: The role of the National Competent Authority

One of the biggest issues about water is its management. Good water management requires a

[330] Article 3(2), Directive 2000/60/EC of the European Parliament and of the Council establishing a Framework for Community action in the field of water policy, O.J. L 327/1

[331] UNECE, Convention on the Protection and Use of Transboudary Watercourses and International Lakes, 1992, Helsinki

good administrative organization and good governance.[332] This applies to any country either developing countries or developed ones, and its effective management becomes more important in water stress regions. In the EU case, Italy, Spain and Portugal are found to be suffering a situation of water stress.[333] When talking about water, it must be borne in mind that it is a scarce good, in some regions such issue is worse due to various situations, such as geographical situation, climate change situation, overpopulation, etc. Therefore, how to manage such scarce element will be a key point in the fulfillment of the right to water.

This management will strictly depend on many facts and variables. There are so many that it is difficult to appropriately take into account all of them, as they do not simply include only those concerning the water quality and quantity, instead it also includes the purpose/destination of the water, and such decisions can also be influenced by the interests of various parties.

For example, water is widely used in most of the human activities, such as agriculture, industry, power generation, sanitation and domestic uses. With a wider notion, it even includes those of cultural and religious practices.[334] Therefore, the public authorities are required to take into account such variables to the end of managing the available water resources, as the decision taken for the water management, will affect in sever aspects to people's everyday life. It is for such reasons that also the *Mar del Plata Action Plan*, suggested that public authorities should introduce the priority to the supply of drinking water.[335]

Thus, the reason why water allocations depends strictly on local circumstances is now clear and for such reasons, it is not possible to find or to establish a "model" to follow. However, it can be found some general features that applies for an effective water allocation, which is in line with environmental and the societal needs. In order to achieve such objectives, governments should work on having an effective: a) policy and legislative formulation; b) management strategy

[332] H.F.M.W van Rijswick and H.J.M Havekes, European and Dutch Water Law, Europa Publishing, 2012

[333] European Environmental Agency, Water Scarcity, November 2008, available at: http://www.eea.europa.eu/themes/water/featured-articles/water-scarcity (last accessed on 20/10/2015); European Enviromental Agency, Annual water stress for present conditions and projections for two scenarios, November 2012, available at: http://www.eea.europa.eu/data-and-maps/figures/annual-water-stress-for-present (last accessed on 20/10/2015)

[334] Winkler, Inga T., The Human Right to water: Significance, Legal Status and Implications for Water Allocation, Oxford: Hart Pub., 2012

[335] United Nations, Report of the United Nations Conference on Water, Mar del Plata, 14-25 March 1977, E/Conf.70/29, Chapter I

development; and, c) institutional capacity building.[336] These three aspects is what determines the effectiveness of a State's water allocation strategy, and if one of them is inadequate of not consistent with the others, its effectiveness can be jeopardized.[337]

Additionally, from an administrative point of view, the principle of subsidiarity and the principle of decentralization guide the whole organization in the supply of water. Water management requires appropriate competent authorities and appropriate administrative arrangements to be in place in order to realize the management of river basins in line with the objectives laid down in the various European water directives, especially those established in the WFD.[338]

Generally speaking, when managing and allocating water resources, when States formulate their policies and programs, they are recommended to give priority to the supply of drinking water for the entire population.[339] It is highly important to note the concept of Integrated Water Resource Management, which is defined as '*a process which promotes the co-ordinated development and management of water, land and related resources, in order to maximize the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems*.'[340]

As it can be noticed from the definition, the Integrated Water Resource Management establishes two guidelines that public authorities should take into consideration when managing water resources. The first one is '*in order to maximize the resultant economic and social welfare*', and the second is '*without compromising the sustainability of vital ecosystems*.' These two variables may conflict with each other as basically the first variable favors the 'present' and the second thinks about the 'future'. Obviously, both of them are equally important, therefore, when it comes to water management and allocation, it must be taken into account, other than those material variables listed above, it also should include the balance of the present and future needs. This last point represents the sustainability principle, which is one of the basic principle of the

[336] World Wild Found for Nature (WWF), Allocating scarce water: a primer on water allocation, water rights and water markets, WWF Water Security Series 1, 2007, pg 11

[337] Ibid.

[338] H.F.M.W van Rijswick and H.J.M Havekes, European and Dutch Water Law, Europa Publishing, 2012

[339] United Nations, Report of the United Nations Conference on Water, Mar del Plata, 14-25 March 1977, E/Conf.70/29, Chapter I

[340] Global Water Partnership, Technical Advisory Committee, Integrated Water Resources Management, TAC Background Paper No. 4 (Stockholm, Global Water Partnership, 2000) 22

environmental law that later has been introduced also to the water law.

In the specific case of the EU water policy, its water management is primarily based on the river basin approach as a starting point.[341] The EU water law does not directly rule over the issue of water management and allocation. However, it can be found that it imposes some requirements on the organization of the water management. Such requirements can be found principally in the Water Framework Directive (WFD).[342]

The requirements that can be found in the WFD are basically established in its Article 3. According to it, Member States are required to:

- ensure the appropriate administrative arrangements
- identify the individual river basins lying within their national territory
- identify the appropriate competent authority
- in case of transboundary waters, to assign an international river basin district
- When the river basin district extends beyond the territory of the Community, Member States are required to endeavor to establish appropriate coordination with the relevant non-Member State in order to achieve the objectives of the WFD.

As it can be seen, the EU water law leaves considerable level of discretionality to the Member States as they are free to choose the arrangements for their administrative organization. The Water Framework Directive strictly establishes some requirements on the overall organization and coordination of water management in the EU to the end of achieving the objectives aimed by the WFD.

What interests to this chapter is the quantity of water managed by the water supply service to provide to the citizens for their domestic uses. The water used for human consumption is just a little percentage compared to the ones used in sectors such as energy, agriculture and industry. Every year, about 247000 million m^3 are extracted from ground and surface water in the EU.[343] About the 44% from it, it is used for energy production sector for cooling processes and about

[341] Ibid.

[342] Directive 2007/60/EC of the European parliament and of the Council on the assessment and management of flood risks, OJ 2000 L 288/27

[343] European Commission, Water Scarcity and Drought in the European Union, August 2010, p. 3

24% is used in the agricultural sector and for food production. Instead, water for human consumption arrives only up to 17% of it.[344]

Water allocation does not directly impact the internal market. However, it must be noted that the quantity of water dedicated to human consumption may directly impact to the water pricing. This relationship becomes more apparent when the water services are considered to be common market services instead of Services of General Economic Interest. Theoretically speaking, the *supply and demand* economic model can explain it better.

This economic model applies for the price determination in a competitive market (where competition rules apply). According to this model, the price of a good will vary until it settles at a point where the quantity demanded will equal the quantity supplied.[345] What it is important on this point is that, according to it, when the demand of water exceeds the available water in the market, the price will increase; and when the available water in the market exceeds the demand, the price should decrease.

Therefore, following this analysis, if the State, when allocating this good, designates more quantity of water for human consumption, the available water in the market will increase, which can make lower the current price of water. Following the same analysis, if the State decides to designate less quantity of water to agriculture, the price of water in that sector would increase, and the operators in the agricultural sector will have an economical incentives to not overuse water in their production, yet, this will entail high discomfort in the agricultural sector, which may make impossible to apply this option. Moreover, it must borne in mind, that this scenario is likely in a competitive market, which is highly difficult to find such situation for a public utility as the water services are, due to the fact that they usually take the position of a 'natural monopoly'. (This last point will be better analyzed in the 5.4.2.4 Natural Monopoly in the Water services section of this chapter).

2.4.1 The Competent Authority and The Public Authority

It might be confusing, however, the 'competent authority' mentioned in the WFD differs from 'public authority' that it is generally referred as an administrative local or national authority of a

[344] *Ibid.*
[345] Besanko, D., Braeutigam, R., Microeconomics, Wiley, 4th edition, 2010

specific sector, or simply refers to the government. Instead, Article 3(2) and the second paragraph of article 3(3) of the water framework directive, identify a 'competent authority' as the one designated by each of the Member States to ensure the application of the rules of the WFD within each river basin district laying within its territory and also to ensure the appropriate administrative arrangements for the portion of the international river basin district lying within its territory.

Furthermore, regarding the definition of the 'public authority' it can be noticed interesting findings in the ECJ case-law. Such is the case C-279/12 Fish Legal and Emily Shirley v Information Commissioner and Others.[346] This case concerns the interpretation of Article 2(2) of the Directive 2003/4/EC on the public access to environmental information, which implements the Aarhus Convention. The directive gives citizens the right to access to environmental information in possession of public authorities, without making it necessary for them to state reasons.[347] This judgment is of great importance, first as it clarifies the conditions governing the access of private individuals to environmental information held by the public authorities, and second, as the Court defined the concept of public authority. The last point is the one that interests to this chapter.

The dispute raised on the question whether a private company, in such circumstances as those in the case, can be regarded as 'public authorities' for the purposes of Directive 2003/4. Yet, before getting to the analysis of the case, it must be clear, that the definition of public authority developed in this case, concerns the ones for the public access to environmental information, and not for the water services. It may be confusing as the case concerned three private companies that manage the water sector relating to the environment.

According to the EU law, public authority is defined as:

> *a) government or other public administration, including public advisory bodies, at national, regional or local level;*
>
> *b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the*

[346] ECJ, C-279/12, Fish Legal, Emily Shirley v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd., Southern Water Services Ltd, 19 December 2013

[347] Article 2(2), Directive 2003/4/EC of the European Parliament and the Council on the public access to environmental information and repealing directive 90/313/EC, 28 January 2003, OJ L 41, 14.2.2003

environment; and, any natural or legal person having public responsibilities or functions, or providing public services relating to the environment under the control of a body or person falling within (a) or (b) (…)[348]

The Court identified that the three water companies should be considered to be public authorities by virtue of article 2(2)(c) of directive 2009/4 if they comply with some criteria. In order to classifying them whether to be public authorities or not, the Court established a three-phase system. First, it should be examined whether such entities are vested, under the national law, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.[349] Second, the environmental services provided must be under the control of a body or person falling within Article 2(2)(a) or (b) of the directive 2003/4 and therefore, it should be classified as public authorities specified in Article 2(2)(c) of the directive.[350] Third, the Court indicated, that such public control must be of decisive feature that influences the action of the private entity when operating the environmental services.[351]

Therefore, once these three criteria are met, the private company in question should be considered to be a public authority, and under the directive 2003/4 means that such entity is obliged to disclose to any individual all the environmental information falling within the categories of information set out in Article 2(1) of the directive.

Although the definition of the public authority of the access to environmental information does not interests directly to the topic of this chapter. It actually does in a indirect manner. It has been already explained (in chapter II) that taking into account the current position of the right to water in the EU legal order, at this stage, it is hardly difficult to find a legal provision protecting the right to water, as most of them basically has a too general application, such as the right to life and the right to dignity established in the Charter of Fundamental Rights of the European Union. In fact, the protection of the right to water throughout these fundamental rights is an option, however, choosing this way, it remains an issue, which is that the application of the Charter itself is limited, in this case, meaning the protection of the right to water, its application in practice is

[348] *Ibid*
[349] Directive 2003/4/EC of the European Parliament and the Council on the public access to environmental information and repealing directive 90/313/EC, 28 January 2003, OJ L 41, 14.2.2003, Paragraph 56
[350] *Ibid,* Paragraphs 68-73
[351] *Ibid,* Paragraphs 69, 71

actually abstract. For such reason, it will be necessary to find another way of protecting this vital right.

Such way can be found in the EU consumer protection law, and it is on this last point that the definition of the public authority on the access to environmental information is relevant. This topic will be further developed in the following point.

Finally, regarding the public authority, it is worth noting that the EU directives of regulations leave a certain level of discretionary to Member States for the management of water supply and waste water management, including the related treatment services.[352] If a decision is taken in contravention of the provisions of a directive and that decision brings loss or damage, this can result in a liability issue. The rule is that when there are breaches of European law caused by an organ of a Member State result causing loss or damages, Member States are required to compensate individuals for their loss or damages suffered.[353] Yet, several conditions must be met before a State can be held liable for infringements of European law. Such conditions were established in the Francovich case. First, the result prescribed by the directive should entail the granting of rights to individuals; second, the contents of those rights must be identified on the basis of the provisions of that directive; and third, the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured party.

3. Protection of the Right to Water through EU Consumer Protection

EU consumer law protection can become an important tool for the fulfillment of the right to water. Apparently, the road that the right to water is taking will be characterized as long and insecure. Therefore, in order to protect this vital right from a more realistic point of view for short term results, the presence of consumer protection cannot be ignored.

As a background information, EU consumer law has been introduced to the Union legal order to improve market integration, in 1975.[354] Since then, consumer law has undergone a considerable

[352] European Commission, Commission Staff Working Paper: The Application of EU State Id rules on Services of General Economic Interest since 2005 and the outcome of the public consultation, SEC(2011) 397, Brussels, 23 March 2011, p 17

[353] ECJ, Joined Cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic (Francovich and Bonifaci), 19 November 1991

[354] Concil Resolution of 14 Apirl 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 1975, C 92/1

transformation either at Union level or at national level due to the market expansion and its development.[355] Yet, its legal position cannot be qualified as consolidated, which may complicate to find out a defined set of common knowledge. Currently, the Union consumer protection law is fluctuating between, on one side, the EU market efficiency and harmonization objectives and on other the fundamental social policy objectives that can work as potential instrument to promote human rights values through ethical purchasing behavior[356]

Moreover, consumer protection was also introduced to the Charter of Fundamental Rights, in the same chapter of the right to access to services of general interest. This step has been taken as affirming a pro-social position of the EU creating a stronger link with the citizens.[357] Unlike the right to dignity or the right to health also established in the the Charter, the consumer protection is more precise. When the objective is to find a solid protection of the right to water within the Union, it might be more effective to do it through a more precise right as the consumer protection is. It cannot be denied the strong connection between the right to water with the right to dignity and the right to health, however, they are fundamental rights of extremely broad prospect, that can even be taken as a general principle. Furthermore, another positive aspect of the consumer protection is the existence of the directive 2011/83/EU on consumer rights.[358] This Directive has the main objective of achieving a high level of consumer protection to contribute to the proper functioning of the internal market.[359] As it can be noticed from its objective, this directive is based on market oriented measures, which may jeopardize the other side of the consumer protection, which is the protection of social interests and social welfare. Yet, the presence of this directive makes more solid the legal foundations that can be relied on when looking for a protection of the right to water, because the problem on relying human dignity and the right to health is highly abstract as, first, they are too general and second, the applicability of the EU Charter is limited.

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355 Benohr, I., EU Consumer Law and Human Rights, Oxford University Press, 2013

356 A. Fagan, Buying Rights: Consuming Ethically and Human Rights, in J. Dine & A. Fagan (eds), Human Rights and Capitalism: A multidisciplinary Perspective on Globalisation (Cheltenham: Edward Elgar Publishing, 2006), p.115; Benohr, I., EU Consumer Law and Human Rights, Oxford University Press, 2013

357 Report of the Expert Group on Fundamental Rights, affirming fundamental Rights in the European Union (Luxembourg: Office for Official Publications of the European Communities, 1999), p. 13

358 Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 25 October 2011

359 Ibid, Article 1

It is for such reasons that EU consumer protection law can be the most appropriate tool to achieve the protection of the right to water, especially to achieve short-term results. Moreover, the current consumer law is actually more inclined towards the market efficiency aspect rather than the one of protecting the social welfare. This point can be taken either negatively or positively for the right to water. It is negative because the right to water entails high human rights features that the social sphere of the consumer law could help. Yet, if the protection of the right to water is sought throughout the current consumer law that is market oriented, it may compensate this key aspect that the right to water lacks from.

4. EU Regulation on Water Services

First of all, it must be clear that there is no EU rule directly regulating how water services should be performed. In fact, the EU maintains a neutral position regarding the national, regional and/or local authorities' choices on the provision of water services.[360] Therefore, it can be understood that the provision of water services is a matter of each Member State. As it has been shown in chapter II, the material component of the water management is well defined and assured at the EU level, however its provision itself, basically depends on each Member States national law.

One of the main legal documents regulating services in general is the Directive 123/2006/EC (Service Directive).[361] However, concerning water services, it may not be applicable in its wholeness.[362] This will depend on how each Member State considers water services. Regarding this, two scenarios can be identified. First, a Member State may opt to declare water services as services of general economic interest (SGEI), and second, a Member State can simply treat this service as a normal market services.

Another relevant legal document concerning water services is the Water Framework Directive (WFD), which has been already analyzed from several perspectives. It does not regulate water services itself, but it establishes two fundamental principles applicable to any water services, which are the principle of recovery of costs for water services and the polluter pays principle.[363]

[360] European Commission, Communication from the Commission on the European Citizens' Initiative "Water and Sanitation are Human Rights! Water is a Public Good, not a Commodity!", COM(2014) 117 final, 19 March 2014

[361] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. L 376.

[362] *Ibid*, Article 17

[363] *Ibid.*, Article 9

On one hand, it is true that these two principles are of great import defining the economic value of water, the responsibilities and the sustainable development, thus public authorities must take into account these principles when planning and managing water services; but on the other hand, Article 9(3) WFD indicates that Member States will not be in breach if they decide not to apply the principle of recovery of costs if that will not compromise the purposes and the achievement of the objectives of the directive. The costs for the process of supply of water services, basically concern the costs on production, distribution, treatment services of drinking water and the environmental preservation of water bodies. Therefore, introducing this principle to the water management scheme, applied either by way of taxation or water pricing, etc., Member States are required to cover such costs in order to make feasible the achievement of the established environmental objectives.

In any case, this last scenario would be unlikely to be seen as when the State manages the water service sector, taking into account the high amount of investment required in the sector, it is difficult to find that a State would choose not to apply a cost-recovery programme in its water management. If the water services are provided by a private entity, it will need to recover the amount of the invested money and to have financial profit from it; otherwise the provision of the service will not attract any private investment in the sector. Thus, it will need to recover the cost either through taxation or through water-pricing, otherwise it may become a burden to the State itself.

Another point that must be clarified is what water services actually cover. The Commission takes a wider notion of this economic sector as it includes a broad range of water related activities.[364] Its definition can be found in Article 2(38) of the Water Framework Directive, in which "water services" are identified as follows:

> *Water Services means all services which provide for households, public institutions or any economic activity:*
>
> *a) Abstraction impoundment, storage, treatment and distribution of surface water or ground water,*
> *b) Waste-water collection and treatment facilities which subsequently discharge into surface water.*

[364] H.F.M.W van Rijswick and H.J.M Havekes, European and Dutch Water Law, Europa Publishing, 2012

There are views that all activities covered by the term water services must be related to the final water use. Therefore, other activities such as the dike reinforcement cannot be considered to be part of it.[365] Nevertheless, the Commission appears to have a broader notion of what constitute water services, as the restriction of surface water for navigation purposes may be included as well.[366] Besides, what actually constitutes water services may cover further activities such as hydro-power production, management for navigation and recreation; yet, the current situation shows that the inclusion of such areas remains only as a possibility.[367]

5. A Dilemma for the Water Services: A Regular Market Service or A Service of General Interest?

It is essential to know clearly whether the Water Services provided in each Member State are considered to be of common market services or of service of general interest. For the purpose of this chapter, the most important reason to know whether the Water Services are considered to be as market service or as SGEI is for the legal consequences that it will bring up, as declaring a specific economic sector as a SGEI, Member States can exclude the application of the competition rules on such area (although in such a case other Union rules and principles still will apply).

Before getting to the analysis of whether water services are Services of General Economic Interest or not, it will be given a brief background and explanation of the various services categories, so that it will ease the process in identifying to what group of services the water services can be considered. Having them clearly understand, it will be scrutinized the main point of this section, which is the possible scenarios where a Member State is able to obtain the derogation from the application of EU competition law in a specific services area, in this case, the water services.

Taking into account the legal consequences that it will involve, three groups of services will be scrutinized, which are: Services of General Interest, the market services and services of exercise of public authority and non-undertaking. For the purposes of the chapter, the services of general interests will be principally focused. Other categories do exist, such as the social services of

[365] J.H. Jans and H.H. B. Vedder, European Environmental Law, After Lisbon, 4th Ed (Groningen, Europa Law publishing)

[366] H.F.M.W van Rijswick and H.J.M Havekes, European and Dutch Water Law, Europa Publishing, 2012

[367] Ibid.

general interest.[368] However, these categories will not be examined as it is clear from its definition that the water services will not be considered part of it (social services of general interest basically cover: social security schemes, assistant services, employment and training services, social housing, long-term care).

5.1 Services of General Interest

The EU has a shared responsibility in regulating and defining the conditions for the operation of SGIs with a European dimension.[369] The EU Treaty itself does not neither define nor mention the term 'Services of General Interests' (SGIs). However, its concept has been developed in several EU legal and non-legal acts, and its importance has been emphasized either at Union level or International level. As one of the most relevant document explaining this legal term, it can be found the Quality Framework for Services of General Interests in Europe, in which the Commission explained the concept of SGI as follows:

> *SGI are services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities and non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty. Some aspects of how these services are organized may be subject to other general Treaty rules, such as the principle of non-discrimination.*[370]

Having read that, first, it is clear that the public authority of each Member State is a key player in classifying a specific sector as being of SGIs, and as explained above (point 2.4), the public

[368] The term SSGI covers services of economic and non-economic activities. This type of services only include social security schemes covering the main risks of life and a range of essential services provided directly to the person that play a preventive and socially cohesive role. For a more detailed explanation see, Implementing the Community Lisbon Programme: Social services of general interest in the European Union, COM(2006) 177 final of 26 April 2006

[369] Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on a Single market for 21st century Europe. Services of general interest, including social services of general interest: a new European commitment, COM(2007) 725, 20.11.2007

[370] European Commission, A quality framework for Services of General Interests in Europe, COM(2011) 900 Final (December 2011)

authority enjoys a certain level of discretionary on this aspect. Secondly, this concept indicates that the term SGIs covers both economic and *non-economic* activities. Regarding this point, the *Communication on the Services of General Interest in Europe (2000)* clarifies that the term SGI can be understood as including two sub-groups of services, i.e. Services of General Economic Interest and Non-Economic Services of General Interests.[371]

These two categories have been developed especially in the last decade becoming the center of legal and political debate in the EU.[372] This was especially the case of the SGEIs, which involve highly relevant economic feature concerning both, states and the public. The main feature that characterizes this kind of services is that even though they may pursue profit outcome, it may involve State-aid and/or it may enjoy some State protection, so that it enjoys a more favorable situation compared to the regular market services. Besides, SGEI involves State regulation of the economy in a particular service sector in order to safeguard the provision of a service of national importance. Given the fact that the Union has sought to eliminate such regulation on one hand, and on the other, Member States being keen to protect several service areas, it is understandable that it brought intense political and academic discourse.

The main distinction between market services and services of general economic interest is that the first is of "no general interest".[373] This term basically involves normal market services and they fall within the scope of the Service Directive.[374] Market services should be understood as the rule and the SGIs as the exception. In the specific case of water services, they may be taken either as part of common market services or SGIs. This situation is caused due to the fact that water services involve economic interests that in some of the cases a profit outcome is the main goal (especially when the service is managed by a private entity or by a public-private partnership), but at the same time they also involve a high public concern. Therefore, its final position will strictly depend on how Member States decide to define what water services are in their national context.

[371] Commission of the European Communities, Communication from the Commission, Services of General Interest in Europe, 20.09.2000, COM(2000) 580 (2001/C17/04) 19 January 2001, Annex II

[372] Neergaard, U., Services of General Economic Interest: the Nature of the Beast, in The Changing Legal Framework for Services of General Interest in Europe, Krajewski and others (eds.), 2009

[373] Neergaard, U., Services of General Economic Interest: the Nature of the Beast, in The Changing Legal Framework for Services of General Interest in Europe, Krajewski and others (eds.), 2009

[374] European Commission, Handbook on Implementation of the Service Directive, 2007

Furthermore, it is of high importance to add one of the most fundamental features that any public services have, which is the natural monopoly feature. As it will be explained below (in point 5.1.2.4), a natural monopoly is a special type of monopoly that involves a considerably high fixed costs of distribution and trying to increase competition it may end up creating potential loss of efficiency in the provision of such service. Therefore, following this idea, it is rather understandable that States prefer to declare water services as SGIs, in order to not applying EU internal market rules and its competition law to the end of maintaining its provision efficiency.

5.1.1 Non-Economic Services of General Interest

The non-economic services are a sub-category of SGIs. This kind of services may be also called as "non-market services" or "welfare state activities".[375] The non-economic services of general interest have not been developed as much as the SGEI, which is the other sub-category of SGIs. This might be due to the fact that they are fundamentally an internal matter that the EU has no competence in ruling such sphere.

This term can be found in the Article 2 of the Protocol 26 (on Services of General Interest) of the Treaty of Lisbon, in which it establishes that the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organize non-economic services of general interest. However, some aspects of the organization of such services can be subject to other rules of the Treaty, such as the principle of non-discrimination.[376] When a service is considered to be a non-economic service, neither internal market rules nor competition rules will apply.

It has been argued that there should be clear way to distinguish when a service should be considered to be of general economic interest and non-economic services of general interest. The Commission explained that the main reason of the lack of specific definition on these categories of services, indicating that the changing feature of the market due to the technological, economic and societal factors, it is neither feasible nor desirable to provide a definitive a priori list of all services of general interest that are to be considered non-economic, as in practice, the operation

[375] Neergaard, U., Services of General Economic Interest: the Nature of the Beast, in The Changing Legal Framework for Services of General Interest in Europe, Krajewski and others (eds.), 2009

[376] Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on a Single market for 21st century Europe. Services of general interest, including social services of general interest: a new European commitment, COM(2007) 725, 20.11.2007, p. 5

of these services differs from one Member State to another.[377]

Although there is no specific definition, it can be said that it is unlikely that water services will fall within this concept, basically due to the economic interests that the water services involve. So far, non-economic services basically include: police, justice and statutory social security schemes.[378] However, as it has mentioned before, there is no specific list identifying what kind of services may fall within this legal concept, thus other service areas may fall within the scope of this group. In order to distinguish whether the service is economic or non-economic, it is insisted that it will be required a case by case analysis of each activity.[379]

Finally, it is worth noting that some academics include the exercise of public authorities and non-undertakings into this category.[380] If the services fall within the category of the exercise of public authority, EU internal market rules will not apply.[381] On the other hand, if the services are considered to be performed by a non-undertaking, EU competition rules will not apply.[382]

5.1.2 Services of General Economic Interest

Similarly to the SGIs and non-economic services of general interest, an exact definition of the SGEIs cannot be found neither in the EU legal documents nor in its case-law. As it can be seen in the *BUPA* case,[383] the Union leaves considerable discretion to the Member States in determining what it regards as an SGEI.[384] Besides, in practice, Member States are free to determine the most appropriate way of financing a service of general economic interest. However, some conditions have to be met.[385] Furthermore, concerning the limit of Member States discretion in defining

[377] *Ibid*; Commission of the European Communities, Green Paper on Services of General Interest, 21.05.2003, COM(2003) 270, section 45

[378] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions, of 20 November 2007, accompanying the Communication on a single market for 21st century Europe – Services of General interest, including social services of general interest: a new European Commitment, COM(2007) 725 final

[379] *Ibid.*

[380] Neergaard, U., Services of General Economic Interest: the Nature of the Beast, in The Changing Legal Framework for Services of General Interest in Europe, Krajewski and others (eds.), 2009

[381] Article 51 TFEU, see also, Case C-532/03 Commission v Ireland (2007) ECR I-11353

[382] J.M. Gonzalez-Orus, Beyond the Scope of article 90 of the EC Treaty: activities excluded from the EC Competition Rules, European Public Law (1999) pp. 387-404

[383] Case T-289/03 British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v Commission 2008, Judgment of the Court of First Instance

[384] Case T-289/03 British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v Commission 2008, Judgment of the Court of First Instance, para. 172

[385] P.J. Slot, Note on the Energy cases and Franzen, 1998 CMLRev. 1183, 1200.

what SGEIs consist on, the Court of First Instance in the *Olsen case*[386] explained that Member States actually enjoy wide discretion on this and such outcome can be questioned by the Commission only in the event of a manifest error.[387]

Thus, the competence to define the concept of the SGEI is left to the Member States. Article 1(3) of the Service Directive establishes in its second paragraph as follows:

> *This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organized and financed, in compliance with the State aid rules, and what specific obligation they should be subject to.*

This has been asserted by many other documents, yet, it has been pointed out that it has to be in conformity with the Union law.[388] However, with the recent evolution in the EU law, tensions between the EU and the Member States in the area of SGEIs has become more and more complex, and due to the fact that the Commission has recently proposed to extend it to the field of social services, it is unlikely that such tensions will be easily solved.[389]

So, it is clear that Member States have the competence in defining what SGEIs are. However, when it comes to regulating it, Article 14 TFEU gives the EU a non-exclusive competence to rule on the matter. Nevertheless, apparently the Union seems to prefer to use new governance and soft law in order to address the issue, as this competence has not been used so far.[390] Besides, after an exhausting political and academic debate on whether there is a valid legal base that allow the Union to rule on SGEIs, the Commission explained that although the Union has competence in regulating these type of services, it will not make use of the faculty conferred by the Article 14 TFEU (which basically establishes that the European Parliament and the Council, shall establish

386 Case T-17/02 Fred Olsen v. Commission of the European Communities (2005) ECR II-2031

387 Case T-17/02 Fred Olsen v. Commission of the European Communities (2005) ECR II-2031, para 216

388 Commission of the European Communities, Communication form the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions. White Paper on services of general interest, 12.05.2004, COM(2003) 374, section 2

389 Schweitzer, H., Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States, in Market Integration and Public Services in the European Union, Cremona, M. (ed.), Oxford University Press, 2011, pp.11 -62

390 Peers, S., [et al], The EU Charter of Fundamental Rights, a Commentary , Oxford, Portland: Hart, 2014

the conditions regarding the SGEIs acting by means of regulations in accordance with the ordinary procedure) and it concentrated its efforts to address the issue through other measures, such as building networks of stakeholders and the use of soft law.[391] This may also be due to the fact that first, as stated before, Member States have basically the whole competence on defining it, and second, generally public services that may fall within the scope of SGEIs are a sensible matter that depends on each States domestic law, their political and economic situations. Therefore, as the Union concluded, establishing guiding principles in order to address the matter is the most realistic way of participating on the formulation of this system.

Furthermore, it is worth noting that the Article 14 of TFEU links the SGEIs and the competition rules, reaffirming at the same time the importance of these services, as an Europeanised concept that will be part for the further development in the territorial and social cohesion sphere in the EU.[392] It will be interesting to see the role that the SGEIs will play in such process. This development will also affect the legal position of the right to water in the EU, as due to the fact that the Services of General Economic Interests mainly protects the public interests on several public services (such as the case of water services), it may become an important booster for the recognition, the protection and the fulfillment of the right to water in the EU. Unfortunately, until now it cannot be found any clear patterns that the SGEIs contribute to the protection of the right to water.

The result is that the definition of SGEIs may vary from one Member State to another. However, this entailed the risk that the definition of SGEIs may vary considerable from one Member State to another, and this situation is actually not the desired one. To the end of avoiding this situation, better said, to smooth over the current situation the Commission has been working to harmonize the definition and the application of the SEGIs, by identifying common essential features. It has concluded indicating that:

> *SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public*

[391] Peers, S., [et al], The EU Charter of Fundamental Rights, a Commentary , Oxford, Portland: Hart, 2014
[392] Ibid.

> *intervention. The public service obligation is imposed on the provider by way of an trust and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfill its mission.*[393]

Having read this, it can be found that the *high quality, safety, affordability, equal treatment* and *universal access* can be understood as the lowest common denominator of the SGEIs, which all Member States should take into account when declaring a service sector to be a SGEI.

Supporting this, the document "Green Paper on Services of General Interest" established several common elements in order to address the matter. Other than the ones already mentioned, it also included some other features, such as the continuity of the services, the user protection and the consumer protection.[394] Besides, further guiding criteria can be found in the ECJ case-law. In the already mentioned *BUPA case*, it is emphasized that the provision of the service in question must assume a general or public interest, therefore, it should be distinguished from any other market services with private interest.[395] Furthermore, the Service Directive gives some guidelines for the processes that have to be taken in order to consider a relevant service sector to be a SGEI. It establishes that the assignment of a SGEI should be made by way of one or more acts, the form of which it is determined by the Member State concerned, and should specify the precise nature of the special task.[396]

Therefore, as it is the case of the already studied non-economic services of general economic interests, it cannot be found a list of what kind of services can/should be considered as SGEI. It has been indicated that it principally includes the big network industries, such as the electricity sector, gas sector, telecommunications sector, postal sector[397] and transport sector; and as other possible areas, it has been mentioned the water services and the public radio or television services.[398] The Service Directive mentions also water services as services that can be provided

[393] European Commission, A quality framework for Services of General Interests in Europe, COM(2011) 900 Final (December 2011)

[394] Commission of the European Communities, Green Paper on Services of General Interest, 21.05.2003, COM(2003) 270, Section 49

[395] Case T-289/03 British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v Commission 2008, Judgment of the Court of First Instance, para. 172

[396] Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, 12 December 2006, OJ L 376, 27.12.2006, p. 36–68 (Service Directive)

[397] So far, the postal service is the most developed network industry concerning the SGEIs.

[398] Neergaard, U., Services of General Economic Interest: the Nature of the Beast, in The Changing Legal

as SGEI in the Member States.[399] This does not mean that other type of services cannot be considered to be of SGEI, which actually makes the definition continue being unclear.

Finally, regarding the definition of the term SGEIs, it must be noted that the even the Court seems to be unwilling to establish a precise definition of this category of services, as it had the opportunity to do so.[400] This has provoked the ambiguous situation in the distinction of the services of general economic interests and the services of general non-economic interest, but this can ascertain the necessity to carry a case by case analysis. The ECJ did not elaborate a definition so far, however it developed a system composed by four criteria that Member States should take into account when they granting public subsidies on the ground of the limited derogation established by Article 107 TFEU for exceptional situations.[401] (This case will be further developed in point 5.1.2.5 Derogation from EU competition rules).

Having said that, it is highly feasible that water services, which basically include water distribution, supply, and the waste water services, do fit to the lowest common denominator that has been described above. Also, legally speaking, such characteristics of SGEIs are in line with those required for the right to water, either at Union level or at International level.[402] Water, as a vital element for the human being, it is of common sense that clean water must be provided to all citizens in a continuous manner with an affordable price.

Concerning the economic aspect of the water services, the Union understands water as *a special commercial product that must be protected, defended and treated as such*.[403] Although, its exact meaning is still unclear, 'water' being a commercial product, it evidently shows that water entails economic value. The economic dimension of water is an important part in the EU water policy that must be developed in order to achieve the environmental objectives established in the Water Framework Directive, which also requires that Member States to take into account the principle of recovery of costs of water services. This means, that the water services has to make an

Framework for Services of General Interest in Europe, Krajewski and others (eds.), 2009

399 Article 17, Service Directive

400 E. Szyszczak, Public Services in Competitive Markets, Yearbook of European Law (2001), p47

401 ECJ, Case C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht, 24 July 2003

402 Please see Chapter II

403 Preamble 1, Directive 2000/60/EC of the European Parliament and of the Council establishing a Framework for Community action in the field of water policy, O.J. L 327/1

adequate contribution to the recovery of costs.[404]

5.1.2.1 Services of General Economic Interest and the Charter of Fundamental Rights

The respect to the access to SGEIs is protected also by the EU Charter of Fundamental Rights (CFR). Article 36 of this legal document, which is located in the chapter on *solidarity,* establishes as follows:

> *The Union recognizes and respects access to services of general economic interest as provided for national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.*

This Article is in line with the Article 14 TFEU, which basically guarantees the SGEIs in order to promote the social and territorial cohesion in the EU. The introduction of the access to SGEIs in the CFR has been considered to be a very radical move to extend the concept of fundamental rights, with the objective to over-arch public utilities such as water, gas, electricity and postal services.[405] Bearing in mind this idea and complementing it with the other statements made by the Union, it can be inferred that the EU is approaching the matter of universal services also from a fundamental rights perspective, instead of doing it only from a commercial one. Therefore, Article 36 of the Charter of Fundamental Rights is a key legal basis that can not be ignored in order to protect the fundamental rights whenever there is a breach on them in the process of supplying a public service considered to be a SGEI.

Supporting it, it has been argued that the refusal of the access to SGEIs may constitute a breach to the right to human dignity, which basically protects the central position of the individual in all activities of the EU.[406] Therefore, the inclusion of the respect of SGEIs in the CFR can be considered to be of great import in the implementation and fulfillment of the right to water in the EU.

Nevertheless, it must be highlighted that the CFR will be applicable only when the Union law is in place. If it is not the case, it would not be possible to rely on this legal basis and the protection

[404] H.F.M.W van Rijswick and H.J.M Havekes, European and Dutch Water Law, Europa Publishing, 2012
[405] Peers, S., [et al], The EU Charter of Fundamental Rights, a Commentary, Oxford, Portland: Hart, 2014
[406] Ibid., see also: Ruling of the Court of Appeal in Brussels of 25 February 1988, [1989] JLMB 1132

of such right will strictly depend on the national law of each Member State. Speaking on the case of the right to water, there are many Member States that actively protects it, such is the case of the Netherlands, Belgium, etc.; however, there are some others where such level of protection is not available to the citizens. This situation is not a desirable one, taking into account the importance of water in people's everyday life.

5.1.2.2 Derogation from the Freedom to Provide Services and the Services of General Economic Interest

The freedom to provide services basically enables an economic operator that provides services in one of the Member States to offer services on a temporary basis in another Member State, without having to be established. This is one of the central points of the EU internal market in order to achieve its effective functioning of the EU internal market.

Article 56 TFEU prohibits restrictions on freedom to provide services within the Union in respect of nationals of a Member State established in another Member State. In principle, the water services, as any other services, fall within the scope of the Article 56 whenever the cross-border element is present (as wholly internal situations are excluded).[407] However, several derogations to the freedom to provide services on specific grounds are provided, i.e. public policy, public security and public health.[408] Directive 2006/123/EC (Service Directive), which establishes the derogations from the freedom to provide services more specifically. The derogation that concerns to the present analysis is the one established in Article 17(1)(d) Directive 2006/123/EC, which indicates as follows:

> *Article 16 shall not apply to:*
> 1) *services of general economic interest that are provided in another Member State, inter alias: …*
> *d) water distribution and supply services and waste water services*

(Article 16 of the Service Directive concerns the protection of the freedom to provide

[407] See for example, Case C-108/98 RI-SAN v Commune de Ischia, 1999, ECR I-5219; Case C-52/79 Procureur du Roi v Debauve, 1980

[408] Article 62 TFEU

services, establishing that Member States must ensure free access to and free exercise of service activity within its territory and prohibiting restrictions on it.)

Therefore, once a service is considered to be of SGEI, the freedom to provide services may be affected due to the fact that the service in question may not be under EU competition rules. This means that if a Member State decides that water supply services (or any other public service) are SGEIs, other companies established in the EU would have more difficulties in enjoying their freedom to establish themselves in other Member States and to provide the services on the territory of another EU Member State other than the one in which they are established (in such a case, when a company desires to provide services in that State, the applicable law would be of course the national one). In this case, a situation of competition distortion originated by the State can be evident. As it will be described below, this is a complicate issues because this situation is completely against the objectives of the internal market, but on the other hand, SGEIs are established on the ground to protect the public interest that without public intervention its supply would not reach to meet the basic public needs.

This conflict on the objectives of each legal instruments creates a dangerous scenario, specially for the service sector declared as SGEIs, because the competition law has a very strong position in the EU legal order, that even the laws governing public procurement at Union level (that should prioritize also the social interest and welfare) have a competition-oriented approach.[409]

5.1.2.3 EU Competition rules and the Services of General Economic Interest

The EU internal market rules, procurement law and State aid law can all impact on SGEIs, especially when it concerns the liberalized network services.[410] And, as already mentioned above, States, by declaring a service sector as SGEIs, may avoid the application of the Union's competition rules. Taking into account that 'competition' entails a vital role in the internal market and it seeks to prevent distortions of competition in the market, such legal consequence that the SGEIs entails, can be understood as negative effects that can jeopardize its objectives.

It is also the case of the EU Competition law, whose principal task is to regulate the behavior of firms in the market by establishing some prohibitions in their activities. It can also monitor how

[409] Sanchez Graells, A., Public Procurement and The EU Competition Rules, Hart Publishing, 2011, pg 110
[410] Peers, S., [et al], The EU Charter of Fundamental Rights, a Commentary , Oxford, Portland: Hart, 2014

Member States regulate on markets and it can prohibit anti-competitive legislations.[411] Therefore, EU competition law applies to both, Member States and private firms. However, it is worth noting that applying the EU competition law to private firms is simpler than to States. There are many reasons for this, yet, the most basic reason is simply because it is far more complicated to regulate sovereign States with duties to guarantee and to ensure the availability and accessibility of certain utilities to their citizens. On the other hand, speaking from the EU position that aims competition and liberalization of the markets, the application of anti-competitive rules by the Member States is not a desirable situation as it may end up hindering its economic ambitions established in the EU Treaties and its internal market policy. On this specific point, these two parties hold opposing positions, maintaining tension among them. On the other hand, some academics noticed that the public an private aspects in internal market law and competition law have been blending more and more, making it difficult to find a clear-cut among them, as it existed before.[412] This phenomenon, together with the EU case-law, has been facilitating the development of market provisions guaranteeing the four fundamental freedoms.[413]

An open market economy with free competition is a general rule of internal market.[414] State regulations, when protecting social needs, can occasionally be perceived as part of anti-competitive measures, as it represents a clear way of protectionism. This is what the Union tried to eliminate.[415] So far, the liberalization has gained a prevalent status in the occidental society, the idea of 'competition' among companies has become a basic knowledge, as the competition entails that consumers/users are able to choose a more suitable option available in the market. The absence of competition in the market may end up allowing monopolies in the commerce. Therefore, it is understood that market competition is a fundamental and an important mechanism that creates a wider choice for consumers and it helps in reducing prices and improve qualities of the products and services.

Even though, monopoly in the market is not desired in most of the cases (from a consumer's

[411] D. Chalmers, G. Davies and G. Monti, The Law of the European Union, second edition, Cambridge University Press, 2010

[412] M, Kenny, The Transformation of Public and Private in EC Competition Law (Berne, Stampfli Verkag, 2002); W Sauter and H Schepel, State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts, Cambridge, Cambridge University Press, 2009, p 19-21

[413] Sanchez Graells, A., Public Procurement and The EU Competition Rules, Hart Publishing, 2011, pg 4

[414] Article 119 TFEU

[415] *Ibid.*

point of view), in some sectors it is difficult to avoid it. Instead, in some cases it is actually necessary in order to achieve the most efficient outcome. Such is the case of 'natural monopolies'.

5.1.2.4. Natural Monopoly in the Water Services

Public utilities such as, electricity services, gas services and water services are frequently mentioned as examples of natural monopolies.[416] A natural monopoly is a specific type of monopoly that involves high fixed costs in order to penetrate in the market. The high capital costs are not the only barriers, instead it also requires other material factors (such as land, facilities, machinery) and the know-how, as a high level of technical knowledge will be crucial. Such high capital costs are often referred as barrier to entry. This implies that a single firm can produce at a lower cost than multiple firms.[417] Therefore, in the specific case of natural monopolies, encouraging other firms to participate in such service sector is counter producing to the efficiency and it can end up creating potential loss in the market.[418] Furthermore, allowing many firms to participate in this sector would also mean to allow wasteful duplication of resources.[419]

On the other side, monopolies entail some negative aspects. There is the potential that exploit the monopoly power, the prices may raise, the quality may not be as good as required due to the fact that there are no competitors and consumers do not have other option so that they can change the provider. These also apply to natural monopolies. For such reasons, it is common that governments decide either to nationalize that service sector or to heavily regulate them. In this way, the States have either total control over it or at least more control on the quality, quantity, price, fair distribution of the service among all citizens, etc.

Therefore, the innate nature of the water services of being a natural monopoly is a great reason for States to put them out of the reach of competition rules, including of course, EU competition law.

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[416] Perloff, J.,Microeconomics, Pearson Education, England, 2012, p. 394

[417] Joskow, P.L., Regulation of Natural Monopolies, Center for Energy and Environmental Policy Research, MIT, working paper, 2005

[418] Waterson, M., Regulation of the Firm and Natural Monopoly, Oxford: Basil Blackwell, 1988; Berg, Stanford V. , Tschirhart, J., Natural Monopoly Regulation: Principles and Practice, Cambridge University, 1998

[419] Ibid.

5.1.2.5 Derogation of EU Competition law: the case of Water Services and the State Aid

As a general background on the derogation from the application of EU competition law many cases can be found. The most relevant ones would be the *Reiff Case,*[420] which suggests that the state's involvement in securing that private actors work for the public interest is the reason for not applying competition law; and the *Wouters* case,[421] which EU Competition law would not apply when it would conflict with the protection of a legitimate interest.

As it has been mentioned before, once a Member State chooses to take water services, or any other relevant public utility services, out from the EU competition rules, it should take one of the two formal routes.[422] One is by declaring that the services are not provided by undertakings, and the other way is to apply the Article 106(2) TFEU.[423] If the Member State chooses the first route, it will have to principally demonstrate, among other requirements, first, that such services are part of the essential function of the state and the powers granted to the operator (public or private entity) are typically those of a public authority; and secondly, it will also have to demonstrate that such activity involves sufficient degree of solidarity, which in case the competition law applies, it may constitute a restriction in guaranteeing the solidarity feature.[424]

The other possible path for avoiding the application of the EU competition law in the water service sector, Member States would make use of the second route, which is to apply the Article 106(2) TFEU. This article enables derogation of compliance with the competition law, and it generally applies to three types of undertakings: a) public undertakings; b) undertakings to which the state has granted exclusive rights; c) undertakings to which the state has granted special rights.

Furthermore, To the end of applying this legal provision to the above mentioned entities, such services should meet three criteria, which are: 1) undertakings must have been entrusted by the state with the operation of an SGEI; 2) the state/undertaking should demonstrate that the application of the EU competition law will hinder its performance; 3) the state/undertaking

[420] ECJ, C-185/91 Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co.KG., 17 November 1993

[421] ECJ, C-309/99 J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse orde van Advocaten, 19 February 2002

[422] *Ibid.*

[423] *Ibid.*

[424] *Ibid.*

should demonstrate that the restriction to competition is not against Union's interest.[425]

However, when the water service is considered to be a SGEI and the public authority entrusts the provision to a third party, it must respect the EU public procurement rules, which guarantee freedom to provide services, ensure transparency and equal treatment.[426] The act of entrustment must define the general interest mission, its scope and the general conditions of the functioning of the SGEI.[427] The entrustment itself constitute an unavoidable element for a service area to be considered to be SGEI, as it prove that the content and the scope of a public service is taken by the public authority and not by the undertaking.[428]

Another issue concerning conflicts with EU competition law and SGIs, is that in some cases, the SGIs may also bring up State aid. The general rule is that any kind of state aid is prohibited in the EU as this may entail that a State is favoring a specific firm throughout this tool, so that the firm gains and advantage over its competitors, which is against the EU internal market policy. Once a Member State declares a service sector as a SEGI, it may apply State aid.

Even though the a Services of General interest is provided by private operators, in some cases it may not be possible to operate under economically acceptable conditions without financial support from public resources. Moreover, as explained above, when States requires that the service sector should be operated by a private entity, it should also demonstrate that the participation in that sector is actually profitable. There are other reasons for States to grant State aid, however, this last one is the most common reason to award such support in the supply of public utilities. For such reasons, many governments opt for the path of state aids.

State aid raises complex issues at the Union level that involves political, social and economic

[425] D. Chalmers, G. Davies and G. Monti, *The Law of the European Union*, second edition, Cambridge University Press, 2010

[426] See for example, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts and public service contracts; Directive 2004/17 coordinating the procurement procedures of entities operating the water, energy, transport and postal services sectors

[427] Case T-289/03 British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v Commission 2008, Judgment of the Court of First Instance, para. 181-182

[428] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee ant the Committee of the Regions, White paper on Services of General Interest, COM(2004) 374 final of 12 May 2004

arguments.[429] The rule is that State aid is prohibited in the EU. Article 107(1) of the TFEU establishes that:

> *Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*

However, in practice, in certain economic activities, Member States intervene through the use of public resources to protect/promote such activities or certain firms from other competitors, which can be taken as a breach of the competition rules that govern the internal market. It is understood that even though this is basically against the interests of the EU's objectives, in some cases, State measure protecting an industry or even supporting a specific private entity for social and economical welfare may be necessary. For example, in the case of public utilities, such as water services, requires high amount of investment and the State will have to attack the private entity's attention to invest on it. Private entities, unlike the public ones, have the clear objective that is to maximize their gains. If they classify the market as non-profitable, their participation will not be perceived. The reason why a State decides to entrust private entities to participate in supply of the service may vary, as already explained in point 2.2 (Public and Private Interests).

As stated above, the rule is that state aid is incompatible with the Union law, however, the second and the third paragraph of Article 107 of the TFUE establishes some exceptional cases where derogations to the rule are accepted. Most of such cases are justified by as long as they do not distort competition in such a way as to be against the public interest.[430] The Services of General Economic Interests are potential examples of such justification. Yet, the main way for the States to assess whether the granting of a State aid to a private entity is in line with the Union's legal provision, the ECJ case-law established in the Altmark case[431] a clear system composed by 4 criteria when Member States will make you of the limited derogation established in the Article 107 TFEU.

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[429] Van der Laan and Jentjes, Competitive Distortions in EU Environmental Legislation: Inefficiency versus Inequity' (2001) 11 EJL and E131

[430] Article 107(3)(c), TFEU

[431] See above 90, Case C-280/00

The Altmark case concerned on a preliminary ruling seeking to determine the conditions under which Member States may allocate grants to Undertaking which provide local public transport services. According to this case, to avoid the classification as State aid, the following conditions must be satisfied:

> *a) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. (…)*[432]
> *b) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favor the recipient undertaking over competing undertakings.*[433]
> *c) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, (...)*[434]
> *d) Forth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking (…) would have incurred in discharging those obligations, (...)*[435]

Therefore, if a State measure that supports a private entity that puts this entity in a more advantage position than its competitors, yet this measure complies with all the four conditions mentioned above, this support may escape from the scope of article Article 107(1) TFEU.

Another issue risen in Altmark is whether subsidies granted by the authorities of a Member State to make up a deficit in respect of local public transport services, fall within the prohibition contained in Article 92(1) of the EC Treaty (the current Article 107(1) TFEU). On this point, the Advocate General Léger clearly explained in its opinion the general conditions that fall within the prohibition established in Article 92(1) of the EC Treaty. The Advocate Genenral explained that, the prohibition established in this article requires that the State measure to be characterized

[432] Ibid, paragraph 89
[433] Ibid, paragraph 90
[434] Ibid, paragraph 92
[435] Ibid, paragraph 93

by four cumulative conditions. *First, the measure should confer a selective advantage on certain undertaking or the production of certain goods; second, the advantage should be granted directly or indirectly through State resources; third, the advantage should distort or threaten to distort competition; and finally the measure should affect trade between Member States.*[436] In addition, the Court emphasized that it is settled case-law that the classification as aid requires that all the condition set out in article 92(1) of the EC Treaty are fulfilled.[437]

Other than the first three conditions that have been widely developed by the Court of Justice, it would be interesting to pick up the fourth condition that indicates that the State measure should affect trade between Member States. This last point could be highly relevant in the water sector, where provision of the services are mostly entrusted by national service providers. For example, in the Case C-102/87 France v Commission,[438] the Court indicated in its paragraph 19, that where a Member State grants a public subsidy to an undertaking, the supply of this service (this specific case concerned public transport services) may for this reason be easier to maintain, which puts other undertaking established in other Member States in less favorable situation for providing the same service in that Member State. More specifically in the Tubemeuse Case,[439] the Court found out that there is no threshold or percentage below which it may be considered that the trade between Member State is not affected by the measure, as this does not exclude the possibility that the trade between Member States might be affected, even though the aid provided by the State may be considered small.[440] From the interpretation given by the Court in these cases, it can be noticed that a State measures that apparently does not affect the freedom to provide services, after a careful assessment with a extensive interpretation it may qualified as affecting trade between Member States.

It is worth noting that even though derogations are established, the granting of a State measure supporting a specific entity remains complex and very limited, as in the case where a Member State desires to provide it, either to maintain the existing aid or to grant a new one, it will have

[436] Opinion of the Advocate General Léger on Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht, 19 March 2002, paragraph 55

[437] Altmark, paragraph 74, Case C-142/87 Belgium v Commission 1990 paragraph 25; Joined cases C-278/92 to C-280/92 Spain v Commission, 1994 paragraph 20; case C-482/99 France v Commission, 2002 paragraph 68

[438] ECJ, Case C-102/87 French Republic v Commission, 13 July 1988

[439] ECJ, C-142/87 Kingdom of Belgium v Commission of the European Communities, 21 March 1990

[440] ECJ, C-142/87 Kingdom of Belgium v Commission of the European Communities, 21 March 1990, paragraph 43; See also, Joined Cases C-278/92 to C280/92 Spain v Commission, 1994 paragraph 42

comply with all the requirements and to notify the Commission to go through with the process as established in Regulation No. 659/1999.[441] In any case, as explained above, in some cases, States need to attract private participation in the supply of the service, and the State aid can be State's key instrument to attract them to the end of ensuring the appropriate supply of services.

Finally, regarding the State aid law concerning water services, it is worth noting that the there is no specific sectoral legislation or guidelines for it. EU State aid law is broad and it has developed sector specific rules, such as on: financial sector,[442] agriculture,[443] coal industry,[444] electricity,[445] fishery,[446] postal services,[447] shipbuilding,[448] steel,[449] motor vehicles industry,[450] transport,[451] audiovisual works,[452] broadband[453] and broadcasting.[454] Therefore, at this stage, the applicable State aid law to the water sector would remain the one of general application, which means, the Articles 107, 108 and 109 of the TFEU and other regulations on the procedures and implementing such rules. Some doubts remain why there is no sectoral regulation on State aid concerning water services, as this economic sector has unique feature of great public interest and that often entail public subsidies, a specific regulation may be useful.

[441] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 083

[442] European Commission, Communication from the Commission on the application, from 1 August 2013, of State Aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.7.2013, p. 1–15, 30 July 2013

[443] Commission Regulation (EC) No 1535/2007 on the application of Articles 87 and 88 of the EC Treaty to the *de minis* aid in the sector of agricultural production, 20 December 2007

[444] European Commission, Communication from the Commission - Guidelines on the State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55, 28 June 2014

[445] European Commission, Communication from the Commission relating to the methodology for analyzing State aid linked to stranded cost

[446] Regulation No 508/2014 of the European Parliament and the Council on the European Maritime and Fisheries Fund and repealing Council regulation (EC) No2328/2003, (EC) No 861/2006 (EC) No 1198/2006 and (EC) 791/2007 and Regulation No 1255/2011 of the European Parliament and of the Council, 15 May 2014

[447] European Commission, Notice from the Commission on the application of the Competition Rules to the postal sector and on the assessment of certain State measures relating to postal services (98/C 39/02), 6 February 1998

[448] European Commission, Framework on State aid to Shipbuilding, (2011/C 364/06), OJ C 364, 14.12.2011, p. 9–13 , 14 December 2011

[449] European Commission, Communication from the Commission – Rescue and restructuring aid and closure aid for the steel sector, OJ C 70, 19.3.2002, p. 21–22 , 19 March 2002

[450] European Commission, Communication of the Commission to Member States – Multisectoral framework on regional aid for large investment projects – Code on aid to the synthetic fibres industry – Community framework for Sate aid to the mother vehicle industry, OJ C 368, 22.12.2001, p. 10–10, 22 December 2001

[451] In the sector of transport, it is possible to find guidelines on Air transport, Maritime transport, rail and road and others

[452] European Commission, Communication from the Commission on the State aid for films and other audiovisual works, 15 November 2013

[453] European Commission, Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, 26 January 2013

[454] European Commission, Communication from the Commission on the application of State aid rules to public service broadcasting, 2009/C 257/01, OJ C 257, 27.10.2009, p. 1–14 , 27 October 2009

5.1.2.6 Public Procurement and Water Services

In order to assess the position of the right to water in the EU internal market, the integration of analysis of the Union's public procurement rules cannot be avoided. Unlike the competition law that has a predominant *offer-side* approach which means that its focus is on the production and the offer of goods and services, the public procurement law has a *demand-side* approach to the market.[455] Despite of having different approaches, both of them are based on the same economic principle that indicates that competitive markets generate, at the same time, the most efficient outcomes and it also contributes to the social welfare.[456]

The current legal framework of the EU public procurement, can be divided into two parts, one is the 'classical directive' and the other one is the 'sector directive'.[457] The classical directive refers to Directive 2004/18/EC on the coordination of procedures for the award of public works contracts and public service contracts,[458] on the other hand, the sector directive refers to Directive 2004/17/EC coordinating the procurement of entities operating in the water, energy, transport and postal service sectors.[459] It is worth noting that these two directives on public procurement, unlike the earlier EU directives governing public procurement, it contains a specific reference to the possibility of including environmental consideration in the contract award process.[460] This chapter will specifically focus on the second, as the Article 12 of Directive 2004/18/EC excludes its application in the field of water. This exclusion applies to concessions awarded to: provide or operate services related to production, transport or distribution and supply of drinking water. It also excludes its application to concessions awarded in connection such activities, such as

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[455] Sanchez Graells, A., Public Procurement and The EU Competition Rules, Hart Publishing, 2011, pg 7-8; PA Trepte, Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation, Oxford, Oxford University Press, 2994, p 57

[456] Sanchez Graells, A., Public Procurement and The EU Competition Rules, Hart Publishing, 2011, p 110

[457] European Commission, Public Procurement Strategy, Legal rules and Implementation, information available at: http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/index_en.htm (last accessed 20/10/2015)

[458] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 31 March 2004, OJ L 134, 30.4.2004, p. 114–240

[459] Directive 2004/17/EC of the European Parliament and of The Council coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sector, 31 March 2004

[460] See for example, Articles, 23(3), 26, 27, 48(2), 50 and 53 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts and public service contracts; Articles, 34(3)(b), 38, 39 of Directive 2004/17/EC coordinating the procurement of entities operating in the water, energy, transport and postal service sectors

hydraulic engineering projects, land drainage and the disposal/treatment of sewage.[461] The exclusion of the water sector from this directive is due to the fact that the concessions awarded in the water sector entail complex arrangements and considerations that require different standard and more specific scheme.[462] It is for such reasons that the sector directives exist.

The directive 2004/17/EC applies to concessions in the water, energy, transport and postal service sectors. Article 4 indicates that the directives applies to: the provision of a service to the public in connection with the production, transport or distribution of drinking water; to the supply of drinking water to such networks, to hydraulic engineering projects, irrigation or land drainage connected to the first two activities, and the ones connected with the disposal or treatment of sewage. However, as an exception, the directive shall not be applicable in the case of contracts for the purchase of water if they were awarded by contracting entities engaged in activities with the production, transport or distribution of drinking water or to the supply of drinking water to such networks.[463] There is not much discrepancy between directive 2004/17/EC and directive 2004/18/EC. As the last one, the sectoral directive on water, energy, transport and postal service sectors, establishes the principle of non-discrimination, equal treatment, principle of mutual recognition, principle of proportionality and the principle of transparency as the basic principles for the granting of concessions.[464] Furthermore, the directive establishes the definition of the key words, the purchase system, methods of calculations, exceptions, threshold regulation and details on the types of contracts. Yet, while the EU public procurement law establishes common rules and procedures for high-value procurement, Member States still have wide discretion in implementing the provision established in the directives governing public procurement and regarding public procurement falling outside the scope of the directives, Member States retain full discretion for their regulation.[465]

Even though it will not be developed in this chapter, it should be noted that the directive 2004/17/EC covers four types of sectors, i.e. water, energy, transport and postal service sectors, but the level of liberalization of each service sectors varies. It would be interesting to assess

[461] Article 12(2), Directive 2004/17/EC, above 148
[462] Preamble 40, Directive 2004/17/EC, above 148
[463] Article 26(a) Directive 2004/17/EC
[464] Preamble 9, 20, 22, 55 and Articles 10 and 27 of Directive 2004/17/EC
[465] European Commission, EU Public Procurement Legislation: Delivering Results, Summary of Evaluation Reports, pg 9, information available at: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf (last accessed 20/10/2015)

whether this aspect could either affect or not to the application of the common rules established therein.

Finally, concerning the directives governing public procurement, it must be noted that from 18 April 2016, reforms will be introduced. This reform has two principal aims. The first one is to simplify the already existing rules to make them more efficient for public purchasers and companies; and the second one is to provide the best value for money for public purchases while respecting the principles of transparency and competition.[466]

When a Member State decides to protect the water sector (or any other economic sector) by nationalizing it or heavily regulating it, this State may bring up a publicly-created distortion in competition and, up to now, neither competition law nor public procurement law have effectively tackled the matter.[467] In fact, if a Member State administration applies effectively the principle of good governance, such kind of issues would not be as evident as it can be found in practice. One type of distortion in competition has been already studied above, which concerns State aid. Apart from this, other two essential problems can be found in the public procurement system itself that may end up distorting competition, which are transparency and efficiency of the public procurement system.[468] Some academics argue that in order to minimize such issues, the adoption of a stronger competition-oriented procurement rules should be taken into account.[469] Yet, considering that competition law is based on the economic efficiency and maximization of welfare,[470] by applying a more pro-competitive approach, there might be higher risks of breaching other fundamental rights, as discrepancies between economic efficiency, economic welfare and fundamental rights are not unusual. Therefore, even though the assertion that a pro-competitive approach should be taken in order to contrast the problem of transparency and efficiency in the public procurement system, from a fundamental rights point of view, it would be a solution that must be avoided.

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[466] European Commission, New rules on public procurement and concession contracts (2014 Reform), Information available at: http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/new/index_en.htm (last accessed 24/10/2015)

[467] Sanchez Graells, A., Public Procurement and The EU Competition Rules, Hart Publishing, 2011, p 9

[468] Ibid, pg 110

[469] Ibid, pg 110-111

[470] Givens, R.A., Antitrust: AN Economic Approach, 44th rel, New York Journal Press, 2007, p 1-15

5. Conclusions for the third chapter

In this chapter, it has been analyzed the economic aspect of water and the rules that govern the establishment and supply of water services within the EU internal market. As stated above, unlike the other network industries such as public utilities, such as telecommunication, electricity, gas and postal services that have already been liberalized in the Union, water services have not been liberalized yet.[471] Even the sanitation services that usually are considered together with water services are being negotiated to be liberalized.[472] However, in the specific case of water services, the Union seems to be reluctant in explicitly liberalizing them. At this point, it would be difficult to understand the exact reason for the EU to take this position. Yet, from a human rights perspective, this position taken by the Union is rather favorable, as the liberalization of the water services may end up jeopardizing the elements that the right to water entails. In any case, at this stage, it would be difficult for the Union to move towards the liberalization of this service sector as the social movements concerning the right to water are becoming more evident and somehow stronger with the last support given from the European Parliament. The fear here is that on side there is a strong public pressure that requires the EU to recognize the right to water, and on the other side it can be found one of the most relevant objectives of the EU, which is the expansion and the protection of an effective internal market, the Commission may not find a space of movement to process this conflict.

It has also been analyzed the natural monopoly aspect in the water services and how important is that each Member State regulate this service sector. Due to the basic characteristics of the water services, it is hardly difficult for them to be under competition, therefore the State must control the quality of the services provided by these private entities that in some cases, in order to maximize their profit income, they may not comply with the requirements. As a tool to protect this services it has also been scrutinized the two formal routes that Member States can take in order to elude competition of a specific economic sector.[473] One is by declaring that the services are not provided by “undertaking” and the other, which consists on a more explicit route, is by applying Article 106(2) TFEU.[474] These two paths are not simple and they are monitored by the

[471] Henri Smets, Economics of Water Services and the Right to Water, in Fresh Water and International Economic Law, E.B. Wise, L.B. Chazournes and N.B.Ostervalder (eds.), Oxford: Oxford University Press, 2005, pp. 173-189

[472] Ibid.

[473] D. Chalmers, G. Davies and G. Monti, The Law of the European Union, second edition, Cambridge University Press, 2010

[474] Ibid.

Commission. Still, having clear processes to follow is a very important aspect that can ease other future steps.

The Union has been working on the water issues and it has been gradually achieving its objectives, and its environmental standards are becoming stricter and more detailed. The development of the EU water law has been more apparent from the environmental point of view. Instead, it's human right aspects, hasn't been properly taken into account within the EU law. Of course, the EU water law does mention the importance of good quality water and its quality for human health and for human development. However, it has not officially introduced the human right to water into its legal system.

Still, it is interesting to see how the situation is moving and taking form. The Europeanised concept of the Services of General Economic Interests is playing a role of great import in this process. Member States opting to consider water services as SGEIs in order to avoid the application of EU completion rules to the end of having have better control on the supply of these services, can become a model that has the possibility of being exported to the international society as a precedence for the public involvement in the supply of water services. An involvement that is highly important for the proper fulfillment of the right to water. Furthermore, there is another tool that may help the protection of the right to water in the Union, without recognizing it. The EU consumer protection law can play a key role for the achievement of this objective. In the end, it might be better to look for a short-cut for the protection of the right to water instead of straggling on the very essential aspect that is its recognition, which then will imply further process for its implementation.

CHAPTER IV

EU WATER LAW AND ITS POLICY, AN ADDED VALUE TO THE HUMAN RIGHT TO WATER?

1. Introduction

The right to water has been primarily developed in the international law as part of the environmental protection. Therefore, its concept, its content and the guidelines for the interpretation of the right to water are mostly found in international documents. Since the formal recognition of the right to water in 2010, States have been invited to introduce these elements into their own national law, yet, the countries that have actually succeeded to do introduce the right to water into their domestic law are very limited.

This is somehow a disappointing result, considering that there are a number of international documents concerning the right to water that have been adopted. For example, the General Assembly Resolution 64/292 was adopted with the result of 122 votes in favor, 41 abstentions and no votes against.[475] This Resolution affirmed that water and sanitation as "essential for the full enjoyment of life and all human rights," and it urges the States and organizations to work on this topic for overcoming the deprivation of the right to water and sanitation. So many countries have voted in favor for this resolution, and many other concerning also the right to water, yet the legal implementation of it at national level cannot be perceived much. Of course, the Resolution No. 64/292 is not a legally binding document, yet, the lack of action coming from the States is a disappointing situation. On the other hand, this situation also shows the complexity of the topic.

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UN, General Assembly adopts Resolution recognizing access to clean water and sanitation as human rights, Press Release, 28 July 2010, Data available at: http://www.un.org/News/Press/docs/2010/ga10967.doc.htm (last accessed 20/08/2014)

Despite such circumstances, some developments have been made at international level. However, if these developments on the right to water will not be implemented at national level, much differences will not be possible to see, and the right to water will reach its dead-end. For such reasons, the international law seems to need some boost for a better development.

It is on this point that the EU experience might be of help. Even though the EU has not recognized the right to water, it has been explained in the second and third chapters that the EU water law actually rules over many fundamental and non-fundamental elements of the right to water, and such provisions have been included into the EU water directives, and consequently, they had to be implemented in all Member States. The water directives were not easy to be implemented, and the infringement proceeding concerning them are actually abundant. Yet, this experience can show the difficult aspects that Member States had found at the implementation stage.

For such reasons, the primary objective of this chapter is to make a comparative analysis of the right to water at the International level and at the EU level. The comparative analysis will be based on the results achieved in the first three chapters. In this way, it will be possible to point out each dimensions similarities, strengths and weaknesses. The ultimate goal of the fourth chapter is to find out how each system can help to the other according to their own experiences concerning the right to water, and specially what can the EU offer to the international society for the further development of the right to water according to its experience.

2. Comparative analysis on the development of the Human Right to Water in the EU Law and in the International law Context

This part will be divided into five sections. In these five sections, it will be carried out comparative analysis between the international water law and EU water law on: its evolution, its approach, its principles and common elements, legal enforcement, access to justice and the investment protection provisions and the corporate social responsibilities. This step will make possible to have an overall understanding of the situation of the right to water in each dimension. The main objective of this section is to show the differences and similarities among the International Water Law and EU water Law. Both of them are unique systems and very different. The human right to water was formally born in the International context, yet it is true that since its formal recognition, it has not developed much in the practical sphere. This is a big problem as without the factual implementation of the right, it is impossible to fulfill the right to water. It is on this point that the EU water law and its

external action may become relevant.

According to the results achieved in chapter II and III of this thesis, it was concluded that there is no formal right to water in the EU legal order, yet the EU water law actually regulates on many essential elements of the right to water, which are: good water quality and quantity, affordability, accessibility, etc. The level of regulation established at the EU level may not perfectly comply with those understood as "the right to water" as explained in the General Comment No. 15,[476] yet the core part of it can be actually found in the EU water law. This is an interesting point as it seems that the EU already has the legal foundations to introduce the right to water into its legal order even though there are still some lacking elements.

As follows, this hypothesis will be supported with the step by step analysis of each dimension relevant to the matter.

2.1 Evolution of the right to water in the EU and in the International Society

In this section it is intended to compare the development of the right to water from its origins at the International level and at the EU level. Before getting into the specification of each one, the evolution of the right to water at each level will be briefly described. The differences found in the evolution of the right to water either at international or EU level are important to understand what priorities each level has taken so far and how they address (or addressed) their water law concerning the right to water.

a) The Evolution of the Right to Water at International Level

Generally speaking, the human right to water is a relatively new right compared to the other human rights, which where basically recognized throughout the adoption of either, the Universal Declaration of Human Rights (UDHR) adopted in 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the International Covenant on Civil and Political Rights, both of them adopted in 1966. The reason why the right to water had not been taken into account in the above mentioned documents, might have been due to the fact that by the time they were adopted, water was considered to be too essential and it was seen as freely available as the air to breath.[477]

[476] UN Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Substantive Issues Arising in the Implementation of the International Covenant on Economic Social And Cultural Rights, General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the Interntional Covenant on Economic, Social and Cultural Rights, E/C.12/2002/11, Geneva, 11-29 November 2002

[477] E Riedel, 'The Human Right to Water and General Comment No. 15 of the Committee on Economic, Social and

Yet, a core part of the right to water, which is the access to safe drinking water has been firstly protected in 1949 by the international humanitarian law through the adoption of the Geneva Conventions III and IV and in its Additional Protocol II.[478] However, from this point, there was no development about it until 1972 in the UN Conference on Human Environment in Stockholm, which was the first time that the issue on safe water *per se* was taken as a matter of great import that had to be discussed. It is from this time that the international society has started to think about this topic. The attention paid by many States and other agents towards the matter had already shown by the time that the water scarcity issue, either caused by climate change or water pollution caused by man-made activities, could not be ignored any more, and therefore, further steps had to be taken in order to act on it. It was so that several international conferences on water have started taking place.[479] So far, the most important documents are the UN General Assembly Resolution No. 64/292, UN Human Rights Council Resolution No.15/9 and the General Comment No.15. Especially, the last one is considered to be a key document for the interpretation of the right to water. These documents, together with many others, help to consolidate the right to water in the international dimension.

Having explained that, the development of the right to water in the international context can be divided into three moments.

1. Right to water in the international humanitarian law (From 1949 with the adoption of the Geneva Conventions)
2. Right to water in the environmental law (From 1972 with the Stockholm Conference)
3. Right to water as part of Human Rights (From 2002 with the adoption of the General Comment No. 15)

The logic behind this distinction is not that the right to water has stepped from one moment to another, instead, it means that throughout the time its scope has increased more and more. Once the

Cultural Rights' in E Rieder and P Rothen (eds), The Human Right to Water (Berlin) Berliner Wissenschafts-Verlag, 2006) 19, 24, fn 19.

[478] Protocol Additional to the Geneva Convention and relating to the Protection of Victims of Non-International Armed Conflicts, Protocol LL, 8 June 1977

[479] For example: The UN Water Conference in Mar de Plata Argentina, 1977; the Global Consultation on Safe Water and Sanitation, New Delhi,1992; International Conference on Water and The environment, Dublin, 1992; World Summit for Social Development, Copenhagen, 1995; the First World Water Forum, Marrakesh, 1997; Second World Water Forum, The Hague, 2000; World Summit on Sustainable Development, Johannesburg, 2012; etc. For more detailed explanation please see chapter I point 2.

international society realized the importance to act on water issues in 1972, water was recognized as a natural resource that must be safeguarded,[480] and since then its protection has increased little by little.

It must be clear that during the first two moments, the right to water was not considered as a right *per se*. Speaking about the international humanitarian law, it only established the "access to drinking water" to prisoners of war and civilian persons in times of war. Yet, this protection was not established to protect the right to water itself, but to safeguard the minimum health standards in times of war, in other words, the objective was to protect the health standards and not to protect the access to water.

Unlike the first moment, the second one impacted more to the development of the right to water. The importance of water in the environment is undeniable. Without this element it would be impossible to think about the functioning of any ecosystems, and most importantly, water cannot be substituted with any other good. It is definitely unique, consequently considering the damaged caused to the water resources, either for natural or man-made causes, it was time for the States to act. It was so that new commitments and objectives have been taken. Two important developments can be noticed in this moment. The first one is that it created the awareness. Some States or regions does not suffer from water scarcity issues, yet. However, some studies showed that this situation will change.[481] The most important point of this moment, is the establishment of some guidelines concerning water quality. With such guidelines States can formulate or reformulate their water policies and national standards of water quality.

Since 1949 the scope of the right to water has increased from just being a part of protection of health standards in the treatment of prisoner of war and civilian persons in times of war, to be a recognized human right. This happened in 2010 with the formal recognition of the human right to water by the United Nations General Assembly, and on this moment the third moment of the right to water officially begins. (Before the recognition of the right to water at UN level, there was the idea of the right to water when the General Comment No. 15 was issued in 2002) The Resolution No. 64/292 acknowledged that clean drinking water and sanitation are integral to the realization of all human rights. Even though the resolution is not binding, it has been another big step towards the development of the right to water and sanitation as it asserts the responsibility of the States and

[480] UN, Declaration of the UN Conference on the Human Environment, Stockholm, 1972, principle 2

[481] UN Water Scarcity Fact Sheets, available at: http://www.unwater.org/publications/publications-detail/en/c/204294 (last accessed: 01/02/2016)

International Organizations to provide financial resources, help build capacity and transfer technology to help other countries to provide safe, clean, accessible and affordable drinking water. From this moment, the UN has adopted various documents concerning the human right to water, yet, so far, non of them introduces relevant novelties as they remain asserting the importance of the right to water and the international and national commitment towards it.

Finally, it must be noticed that in this analysis, it was not included the factor of issues concerning transboundry waters. They have always been a matter of international law, and of course it concerns water issues, yet the focus of this chapter is on the right to water itself as defined in the General Comment No. 15, which basically includes water for human consumption and domestic uses.

b) Evolution of the Right to Water in the EU and Differences with the International Level

In order to get into the topic of the right to water in the EU, it will be first developed briefly the history of EU water law. The origin of EU water law can be traced back to 1975 with the adoption of the Surface Water Directive, which was replaced by the Water Framework Directive in 2000.[482] The very first Community directive on water basically concerned the establishment of the quality standards of surface fresh water intended for use of abstraction of drinking water.[483]

Just speaking about the history of water law, it can be found one difference among the two spheres, which is that at the international level, its origin can be traced back to international humanitarian law and environmental law, yet the EU has purely an environmental background on this point. This first difference that was found can be understood as a not important one as it is somehow obvious that the Community did not need any humanitarian law by the time and until now, it basically cannot be talked about an EU humanitarian law. However, as one of the scope of this chapter is to critically analyze the existing differences of the right to water in at the two levels, this first difference has been taken into account.

Since then the EU water law has been amplified throughout the adoption of various directives dealing with several aspects of water. The most relevant legal acts adopted (and those that are valid so far) by the Union on this matter are: urban waste water directive,[484] nitrates directive,[485] drinking

[482] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy, 2000, O.J. L 327/1 [hereinafter Water Framework Directive]
[483] Surface water directive, Article 1
[484] Council Directive 91/271/EEC concerning urban waste water treatment. O.J. L135/40
[485] Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, O.J. L 375/1

water directive,[486] water framework directive,[487] regulation on detergents,[488] groundwater directive,[489] bathing water directive,[490] shellfish waters directive,[491] environmental quality standards directive,[492] and industrial emissions directive[493] (in chronological order). All these directives, except for the WFD, apply either to a specific type of water or to the prohibition or limitation on the standards of concentration of some substances/pollutants in those waters. A common aspect that all these directives share is that all of them are characterized of been a technical one. They basically establish 1) a common standard applicable to each case; 2) requirement of identification, planning, control and monitoring of water sources; and 3) requirement of information and reporting to the Commission.

On this point, it can be found another difference among international water law and EU water law. The international water law has been notorious for its human rights based approach towards the water issues.[494] On the other hand, as it can be seen above, the EU water law is characterized for its technical nature. (This does not mean that the Union does not take into account human health in order to establish such standards, but in non of the EU legal documents can be found a clear human rights approach towards it, yet it can be inferred such approach in some declarations or statements and also in the preamble section of the relevant directives.[495]) Having said that, a very important question rises. Which one is better? Is it better to tackle this issue throughout a human rights based approach or throughout the establishment of standards in order to guarantee water quality for human consumption?

To conclude this sector, it would be appropriate to indicate that unlike the international level, where it was possible to divide the evolution of the right to water in three moments, so far in the EU, it cannot be done so. If one would like to make a division, it could be identified two moments that

[486] Directive 98/83/EC on the quality of water intended for human consumption,
[487] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy, 2000, O.J. L 327/1 [hereinafter Water Framework Directive]
[488] Regulation 648/2004 of the European Parliament and of the Council on Dtergents, 31 March 2004
[489] Directive 2006/118/EC of the protection of groundwater against pollution and deterioration, 12 December 2006
[490] Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC as amended by Regulation No. 596/2009/EC
[491] Directive 226/113/EC on quality requied of shellfish water, 12 December 2006
[492] Directive 2008/105/EC of the European Parliament and of the Council on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council , O.J. L348/84
[493] Directive 2010/75/EU on industrial emission (on integrated pollution prevention and control), OJ L 334, 17.12.2010
[494] Filmer-WIlson, E., The Human Rights-Based Approach to Development: The Right to Water, Neth. Q. Hum. Rts 23(2005)
[495] Please see Chapter II

would be:

1. Pre Water Framework Directive
2. Post Water Framework Directive

Yet, the essential approach did not change from one to the other. The changes adopted with the WFD basically include the introduction of the River Basing Management Plans (RBMP) and the cost recovery principle to the management. Of course the WFD introduced other novelties, yet, they did not make much changes, instead it were done some improvements to the already existing provisions. From a systemic point of view, it can be said that the adoption of the WFD actually stopped the further fragmentation of the EU water law. In any case, for the purposes of this chapter, this division is not relevant because there was not much change on the approach towards the matter.

2.2 Human Rights oriented International Water Law or Environment oriented EU Water Law? In search of a better protection of the right to water

It is clear that in order to have good quality of water the main thing is to have a efficient control and monitoring over the quality of the water intended for human consumption. Therefore, the first step should be to establish clear standards to the end of protecting human health. Following this statement, one can say that EU water law is more practical because of this last point, as the provisions established in its water law tackles directly the quality of water by establishing clear and high standards. Yet, before jumping into a conclusion saying which one is better, first it must be answered two questions. 1) Why doesn't the International Law include technical standards for the limitation or prohibition of certain substances/pollutants as the EU does?; and 2) What is the importance to include the human rights based approach for the protection of the right to water?

Anyone could know that in order to have good quality of water, it is essential to have minimum standards to be respected, yet, why international water law does not include them? Globally, millions of people are still exposed to unsafe drinking water.[496] However, at the international law level, it can be only found the WHO "Guidelines for Drinking-water" (Recognized in the UN system) instead of standards, and more interestingly, until 1982 the WHO actually had "standards", yet it decided to shift it to guidelines.[497] According to the WHO, the guidelines should be applied in

[496] WHO, Guidelines for Drinking-water Quality: Incorporating First and Second Addeda to Third Edition, Volume 1, Recommendations, Geneva, 2010, p1
[497] *Ibid*, p. 2

accordance of the socio-cultural, environmental and economic circumstances of each State.[498] From such explanation, it can be understood that it cannot be established a general standard applicable to all countries as each of them is in a different situation. This step taken by the WHO might be justified on the ground of being realistic. Yet, it should establish at least a "minimum common standard" applicable to all States. It is true that the WHO guidelines for drinking-water are of great import and many States take them into account in order to establish their own national standards. This is what exactly the WHO indicated, that those guidelines should be applied according to each State's circumstances. However, this means that the WHO itself is giving space for some countries (specially those that need to act urgently on this topic) to not act to improve the quality of their waters. By establishing a "minimum common standard" at least it could morally pressure such States to work on the matter. Definitely, this can be taken as one of the weakest aspects of the international water law.

Having analyzed the first question, it is time to move to the second one, which concerns the importance of the human rights based approach for the fulfillment of the right to water. The Human Rights Based Approach (HRBA) is an approach introduced to the study of the human development. The main characteristic is that it puts the human rights entitlements and claims of the right-holders and of the corresponding duty-bearers in the center of human development.[499] The UN defines it as follows:

> *A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyze inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.*[500]

From this definition, it can be understood that basically the HRBA first, introduces key human rights, its principles and standards to the developing processes in order to achieve the objectives (i.e. fulfillment of human rights); and second, by analyzing the inequalities in the distributions of power, it makes possible to identify the duty bearers and their obligations. Clearly introducing a human right into the scenario makes actually a difference in a development process. Because this

[498] *Ibid*

[499] Filmer-Wilson, E., The Human Rights-Based Approach to Development: The Right to Water, " Neth. Q. Hum. Rts. 23 (2005): 213-241

[500] Office of the UN High Commissioner for Human Rights, Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, Geneva, 2006, p 15

means that what were previously taken as simple 'needs' are now translated into rightful claims.[501] This can be translated to 'empowerment' of people and communities affected by the breach. Secondly, by the analysis of the existing inequalities and identifying the corresponding duty-bearers, it also makes possible to identify the right-holders and their entitlements. This steps contributes to clarify the situation and it can also help to meet their obligations.[502] This last point is highly linked with the term 'accountability', and this is another positive aspect that this approach brings to the development process. Accountability is considered to be a key element to improve effectiveness and transparency in the process, which facilitates the planing and monitoring of the development process.[503]

Having identified the added value of the HRBA, it is clear why this is important to include it into the development of the right to water. The international water law has already taken this step. This topic has been widely developed since the 90's and currently, it is clear that the UN (together with other institutions, NGOs, etc.) and also some States are introducing the HRBA to the on going processes concerning development and poverty. This also applies to the specific case of the right to water. A great example is the Kenya Case.

In the informal settlements of Kibera (the largest slum in Nairobi), Kenya, people have always suffered for access to water for various reasons such as legal obstacles, socio-cultural barriers, geographical conditions, and technical obstacles.[504] Yet, in order to improve the situation the Kenyan Government and NGOs have been working towards the realization of the right to water in Kibera. Since 2000, they started tackling the issue throughout reforms, clarifying institutional roles and responsibilities and strengthening regulation.[505] In 2010 they achieved an important goal, which was by including the right to water into the Constitution.[506] Until now they have continued working on the matter and since the Constitutional reform, it was possible to see improvements in the policy

[501] Filmer-Wilson, E., The Human Rights-Based Approach to Development: The Right to Water, " Neth. Q. Hum. Rts. 23 (2005): 213-241

[502] Office of the UN High Commissioner for Human Rights, Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, Geneva, 2006, p 15-16

[503] Van Weerelt, P., The Application of a Human Right-Based Approach to Development Programming, What is the Added Value?, UNDP, New York, 2000, p. 9

[504] The Global Initiative for Economic, Social and Cultural Rights, A GI-ESCR Practitioner's Guide, August 2015, p. 10-13. Available at: http://www.righttowater.info/wp-content/uploads/GI-ESCR-Practitioners-Guilde-on-Right-to-Water.pdf (last accessed 16/01/2016); Umande Trust, COHRE, Hakijamii (2007). The Right to Water and Sanitation in Kibera, Nairobi, Kenya

[505] The Global Initiative for Economic, Social and Cultural Rights, A GI-ESCR Practitioner's Guide, August 2015, p. 10-13. Available at: http://www.righttowater.info/wp-content/uploads/GI-ESCR-Practitioners-Guilde-on-Right-to-Water.pdf (last accessed 16/01/2016) p. 11

[506] Ibid

framework and also at the institutional level.[507] More specifically, they have been working on the participation and empowerment of users, on the establishment of minimum standards, the Ministry published National Strategies on the water services, etc.[508] There are still a lot of things to be done to achieve a full protection of the right to water in Kenya, yet, as it can be seen from the description, with the inclusion of the human rights-based approach to the development processes, many advances can be seen, especially at legislative framework.

On the other hand, the EU has not included the HRBA *per se* to its water law. Instead, the Commission has recently presented a *Tool-Box on the Rights-Based Approach.*[509] This document describes the core concept of the RBA and how it can be applied in the EU context. A very interesting point that must be highlighted is that this document refers to the Right-Based Approach (RBA) instead of the Human Right-Based Approach (HRBA), which is the mostly used terminology that the international organizations and development programs refers to. In that respect, the Commission clarified that this does not mean the weakening of EU commitment towards the matter, instead, not expressing the word *human* it actually cover a broader category of rights, such as social and economic rights.[510] This point may become a key aspect in introducing RBA to the EU water law, as basically the right to water falls within the scope of article 11 of the International Covenant on Economic, Social and Cultural Rights. This point was clearly explained in the General Comment No. 15, which underlined that the right to water is part of the right to an adequate standard of living as were the rights to adequate food, housing and clothing.[511]

Most importantly there are two main reasons to apply the RBA into the EU water law. First, the RBA works as a framework of guidance to formulate policies, legislation and regulations throughout assisting on the selection of indicators;[512] and second, this approach seeks to identify the right-holders' entitlements and the duty-bearers' obligations in order to help to bridge the gap between them.[513] These two points are actually crucial for the development of the human right to

[507] Ibid.
[508] Ibid., p 12
[509] European Commission, Tool-Box: A Right-Based Approach, Encompassing All Human Rights for EU Development Cooperation. SWD(2014) 152 final , April, 2014
[510] European Commission, Tool-Box: A Right-Based Approach, Encompassing All Human Rights for EU Development Cooperation. SWD(2014) 152 final , April, 2014
[511] UN Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Substantive Issues Arising in the Implementation of the International Covenant on Economic Social And Cultural Rights, General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the Interntional Covenant on Economic, Social and Cultural Rights, E/C.12/2002/11, Geneva, 11-29 November 2002
[512] European Commission, Tool-Box: A Right-Based Approach, Encompassing All Human Rights for EU Development Cooperation. SWD(2014) 152 final, April, 2014
[513] European Commission, Tool-Box: A Right-Based Approach, Encompassing All Human Rights for EU Development Cooperation. SWD(2014) 152 final (April, 2014)

water in the EU because the lacking features of the right to water in the EU water law, e.g. legal enforceability of the right to water might be included in case such approach is applied. As without the possibility for a legal enforceability a human right may remain unachievable. Of course, it must bear in mind that due to the EU essential principles of subsidiarity and proportionality, some other details lacking in the EU law concerning the right to water may remain to the Member States national law.

Regarding the rest of the most relevant elements of the right to water in Europe, which are quality, accessibility and affordability, the Union law does rule on most of such points. Firstly, concerning the water quality, it must be underlined that the EU water law establishes high water quality standards, depending on the purpose of the water (e.g. drinking water, bathing water, shellfish water, etc.).

Secondly, concerning the accessibility, the Union actually does not rule it directly. However, regarding this point article 1 and 2 of the Charter of Fundamental Rights and Freedoms are of great relevance. The Article 1, which is on the human dignity, is applicable to the case as basically it protects the central position of the individual in all the activities of the EU,[514] and it is set as the benchmark for the Unions commitment to human rights protection, either at internal or external level.[515] Besides, some scholars indicate that dignity has a subsidiary function, which means that it becomes relevant in the absence of a more specific right.[516] Furthermore, regarding this Article it can be found a very interesting point concerning the human right to water. As "dignity" can be considered as the real basis of fundamental rights, it can be lead also to the discovery of new rights not listed in the EUCFR.[517] Therefore, this Article could be useful when introducing the right to water in the EU legal order.

Keeping in mind the last point and connecting it with one of the objective of the EU policy regarding human rights, which is that the Union *seeks to prevent violations of human right throughout the world, and where violations occur, to ensure that victims have access to justice and redress and that those responsible are held to account,*[518] it can lead to find a realistic path for the

[514] Peers, S., Hervey, T., Kenner, J. and Ward, A., The Charter of fundamental rights – a Commentary of the Articles of the EU Charter, Hart Publishing, 2010, first chapter

[515] Ibid.

[516] M. Olivet, Aritcle1 Dignity in WBT Mock and G Demuro (eds), Human Rights in Europe Commentary on the Harter of Fundamental Rights of the European Union, Durham, NC, North Carolina Academic Press, 2010, p. 9

[517] Dupré, C., Article 1 - Human Dignity, in The Charter of fundamental rights – a Commentary of the Articles of the EU Charter, Peers, S., Hervey, T., Jenner, J. and Ward., A (eds), Hart Publishing, 2014, p 4-6

[518] Council of the European Union, The EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12, Luxembourg, 25 June 2012

introduction of the right to water into the EU legal order. First, because the right to water is already a legally recognized human right in the global sphere, and second, because the EU seeks to ensure a redress in such cases. However, this still remains as a purely theoretical analysis as so far any kind of action has been taken by the Union on the matter.

Another relevant legal basis in the EU is the Article 2 of the EUCFR, which is on the right to life. The application of the right to life within the EU context has been notorious basically on two fields, which are on criminal justice and health care. Direct or indirect application of the Article 2 of the CFR to access to water cannot be found. However, bearing in mind that water is a fundamental good for life and health, its relation is obvious. Furthermore, together with the article 11 of the ICESCR (on adequate standards of living) and article 12 ICESCR (right to health) which are the most relevant legal basis for the human right to water, are highlighted by the General Comment No.15 as a proper legal basis in the International context. Thus, making a simple analogy article 2 of the EUCFR should be applicable too. Yet, the application of the CFR is actually limited as it applies to the EU institutions and bodies and to national authorities only when they are implementing EU law.

Furthermore, the human health implication on the EU water law can be found in some of the EU water directives, meaning, the drinking water directive and the bathing water directive. Both directives establishes high water quality standards in other to protect environmental quality and human health. Especially, the drinking water directive has the principal objective to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean.

Finally, regarding affordability, the principle of recovery of costs established in the Water Framework Directive is highly relevant. The human right to water must entail an economically affordable water services to all.[519] This means that the cost recovery should not prevent anyone from access to water services.[520] The Union does not establish any maximum quantitative value concerning water services, however the WFD indicates that economic analysis must be conducted taking into account the long-term forecasts of supply and demand for water that may include estimates of the volume, prices and costs of the water services and its relevant investments.[521]

[519] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 35, The Right to Water, August 2010, available at: http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf (last accessed 20/05/2014)
[520] Ibid.
[521] Art. 9 WFD, and Annex III Economic Analysis.

Concerning the water pricing issue, the United Nations Development Programme (UNDP) suggests as a benchmark three per cent of household income as a proper price. The average household income varies among each Member State and average charge for water varies even among cities. As a random example, in France the average net household income is 2128 Euros,[522] and the average urban domestic water and sewer bill is 31 Euros per month.[523] Taking into account the suggested water charge by the UNDP, the three per cent would be about 58 Euro, therefore, it can be said that the water bill in France is affordable. However this is just a case, and as stated before, the values may vary considerably.

These examples show how some elements of the right to water are indirectly protected within the EU water law.

Finally, answering the main question which was whether the human rights based approach or the environmental oriented approach would be more appropriate for the protection of the right to water, it should be concluded that both of them are complementary and by lacking one of them a full protection would be difficult to achieve. From the analysis developed above, it is clear that each of them are lacking its complementary part.

Some positive aspects can be concluded from the analysis made above. For instance, both levels, international and EU, are developing the right to water throughout the protection of the environment and of the human health. By comparing the two levels it can be found that at the international level, the human rights approach to the right to water is stronger that the EU approach towards it. On the other hand, the Union has a stronger environmental protection concerning water issues compared to the international one. In deed, many developments have been made concerning the improvements of water quality and quantity at international level, and this happened even before the EU has started regulating it. However, the difference is that such improvements have been made throughout political declarations and non-binding commitments. Yet, the EU case is different. Since the adoption of the first directive on water in 1975, it has established clear standards that all Member States were required to reach. Actual implementation weights more than simple political declarations or commitment to non-binding provisions.

[522] French Statistical Office, Insee.fr. Data available at: http://www.insee.fr/en/themes/document.asp?ref_id=ip1265 (last accessed 20/05/2014)

[523] Le Centre d'Information sur l'Eau, data available at http://www.cieau.com/le-service-public/prix-services-eau-assainissement/le-prix-des-services-de-l-eau-et-de-l-assainissement (last accessed 20/05/2014)

Another positive aspect is that the two essential parts for the fulfillment of the right to water are being developed, at different levels though. Yet, each one could work as the benchmark for the other. From a practical point of view, it would be easier to incorporate the human rights aspect of the right to water in the EU water law rather than incorporating a general standard into the International Water Law. In fact, just establishing a "minimum common standard" would be simple, but the problem is to make States respect them without a strong interest on the matter.

2.3 Applicable Principles and Common Elements

So far it has been identified several differences between the international water law and EU water law, yet it is interesting that they actually share all principles when it comes to water issues. As follows it will be described the basic principles applicable to the right to water at both levels and the instrument that establishes/contains such principle.

a) Principle of Universality

The principle of universality of human rights is the cornerstone of international human rights law. Individuals are entitled to the protection and enjoyment of their human rights without exception, and are entitled to these rights simply by virtue of being human. This is one of the most basic human rights principle.

Unfortunately, access to water is characterized by huge inequalities.[524] These can be shown at ether international level or at national level, even at regional level can be found such situations. However, due to its essential feature for survival, water must be available to all. This means that water should be accessible and affordable to all, yet the facts show that about 884 million people do not have access to improved sources of drinking water.[525] Some academics explain that the lack of access is not a question of water availability as actually there is sufficient water in the globe to meet all peoples basic personal needs, thus the true problem lays on the water allocation itself. [526] Yet, it seems that the technical questions of water supply, water management or water quality actually reflects societal power relations.[527] This is more common in the cases where access to water is scarce and not guaranteed. However the Universality of the right to water is undeniable. Every

[524] Winkler, I.T., The Human Right to Water: Significance, Legal Status and Implications for Water Allocation, 2012, Hart Publishing, p.3-5

[525] UNICEF World Health Organization and United Nations Children's Fund, Progress on Drinking Water and Sanitation: Special Focus on Sanitation. New York and Geneva, 2008

[526] Winkler, I.T., The Human Right to Water: Significance, Legal Status and Implications for Water Allocation, 2012, Hart Publishing, p. 7, 14

[527] Bielefeldt, H., Access to Water, Justice and Human Rights, in Riedel, E. and Rothen P (eds), The Human Right to Water, Berliner Wissenschafts-Verlag, 2006, pp 49-50

single person in the world has the right to have access to water, otherwise his/her survival will be compromised.

The EU itself establishes the universality and indivisibility of human rights in Article 21 of the TEU. This affirmation should apply to all human rights, but a question rises. Does Article 21 applies also to the human right to water? The UN officially recognized it but the Union did not make any declaration on this, therefore, at this moment, it is hard to say if this Article would apply to it. In fact, this question is difficult to answer as there is no other precedence. In order to answer this question, it seems that it has to be waited until the EU does further movements concerning the right to water.

b) Principles of Equity and Non-Discrimination

Discrimination has been prohibited in a number of international instruments.[528] Generally speaking, the principles of equity and non-discrimination encompass, both the prohibition of discrimination and the obligation for States to work towards equality in water and sanitation service provision. Equity and Non-Discrimination are fundamental human rights principles and they are part of the essential elements of the right to water.[529]

These principles together with the principle of universality, represents the core part of the right to water. In fact, access to good water has to be guaranteed to all without discrimination. These two principles have been introduced to the international water law in 1977 with the Action Plan issued after the Mar de Plata Conference. In this document it can be found the following statement:

> *"all people whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs"*[530]

[528] For Example: Articles 1 and 55 of the United Nations Charter of 1945, Article 2 of the Universal Declaration of Human Rights of 1948, article 2 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966, Article 1 of the Convention on the Discrimination in Respect of Employment and Occupation No. 111 of 1958, Article 1 of the international Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 1 of UNESCO Convention against Discrimination in Education of 1960, Articles 1, 2 and 3 of the UNESCO Declaration on Race and Racial Prejudice of 1978, Article 2 of the Declaration on the Elimination of All forms of Intolerance and of Discrimination based on Religion or Belief of 1981, Article 2 of the Convention on the Rights of the Child in 1989

[529] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 35, The Right to Water,* August 2010, available at: http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf (last accessed 20/05/2014), pg 14

[530] UN, Report of United Nations Water Conference, Mar de Plata, 14-15 March 1977

The term “non-discrimination” is not established in this statement, yet, by declaring “all people” it already includes everyone, and therefore, the non-discrimination is already implied. It was so that this principle became fundamental in the international water law and since then this principle has been reconfirmed in many other international instruments on water issues, especially in those concerning the access to water.

The Fact Sheet No. 35 on the Right to Water explained that non-discrimination is considered to be a fundamental principle for the right to water because discrimination are often present in the access to water throughout discriminatory laws, policies or measures; exclusionary policy development, discriminatory water-management policies, denial of tenure security, limited participation in decision-making or lack of protection against discriminatory practices by private actors.[531] Unfortunately, the facts show that discrimination for access to drinking water often suffer marginalized groups. Therefore, in some cases, States should prioritize groups that are considered to be vulnerable to discrimination, and if the case requires, it may also need to adopt targeted positive measures to redress existing discrimination.[532] This interpretation comes from the reasoning developed in the Fact Sheet No. 18 on the Non-Discrimination, which explained that Equal does not mean the same nor identical treatment in every instance.[533]

The principle of non-discrimination is also well developed at the EU level. In fact, the non-discrimination principle is a very fundamental principle in the Union law, yet its application can be classified as limited. The limited application of the principle of non-discrimination in the EU law can be explained from various perspectives.

One of the reasons of its limitation can be linked to the fact that “non-discrimination” was introduced to the EU law to the end of facilitating the functioning of the internal market.[534] Therefore, this principle has been developed primarily focusing that context. The non-discrimination principle is a very basic and general principle that can be applied to various rights and situations, yet, in the EU context the applicability of it is somehow limited, firstly, to those concerning the functioning of the internal market; and later it extended to employment, welfare

[531] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 35, The Right to Water, August 2010, available at: http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf (last accessed 20/05/2014), p 14

[532] UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Realizing the Human Right to Water and Sanitation: A Handbook By the UN Special Rapporteur Catarina del Albuquerque, 2014, p 13

[533] Human Rights Committee, General Comment No. 28: Non-Discrimination, 1994, para 8

[534] Handbook, p 58

systems, goods and services.[535]

The most important legally binding acts adopted by the EU specifically concerning non-discrimination, are, directive 2004/38/EC on on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States;[536] directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. It must be noted that these directives are the ones directly concerning non-discrimination, there are other directives that prohibits discrimination acts, and such directives amounts to a great number of legally binding documents. Moreover, the non-discrimination directives contain some exception regarding third country nationals. For example, directive 2004/38/EC establishes that only EU citizens have the right of entry and residence in another EU Member States.

What it interest the most to this chapter concerning this point, is the application of the principle of non-discrimination in the services area. Article 20 of Directive 2000/123/EC on services in the internal market (Service Directive) require Member States to ensure that the recipient of the service does not suffer discriminatory measures on the ground of nationality or place of residence. This is a very important provision to guarantee the application of the principle of non-discrimination in to water services as well. Yet, something that has to be clear is that in some cases water services may not fall within the scope of the Service Directive. This case would happened when the water services are declared to be of services of general economic interests by the Member State.[537] If this is the case, the principle of non-discrimination should be applied according to the national law applicable to that water services.

Another EU legal document that interests to this chapter is the Racial Equality Directive.[538] This directive has the objective of laying down a framework in order to combat discrimination on the grounds of racial or ethnic origin and it also applies to access to services.[539]

[535] Ibid, 64
[536] For example, directive 2004/38/EC on on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p 77.
[537] Please see Chapter II
[538] Council Directive 2000/43/EC on implementing the principle of equal treatment between persons irrespective or racial or ethnic origin
[539] Ibid., Article 1 and 2 (1)(h)

The last EU legal document that will be analyzed on this section is the EU Charter of Fundamental Rights. The CFR also prohibits discrimination on several grounds. Its Article 21(1) indicates as follows:

> *Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

As it can be seen, Article 21(1) CFR lists many grounds on which discrimination should be prohibited. The grounds listed in this article are similar to those ones traditionally indicated in international law. This variety of grounds permits the Court to apply the non-discrimination principle into any of the above mentioned grounds. Yet, there is one general limitation, which is on the application of the charter itself. As it has been already mentioned, it applies to the EU institutions and bodies and to national authorities only when they are implementing EU law. Taking into account this reasoning and the fact that so far there is no legally binding provision in the EU that guarantees the right to water, it seems impossible to rely on the CFR when it comes to safeguarding the right to water. Regarding this, the only path available would be an indirect one, which means, by connecting the right to water to the already recognized rights in the Charter: the right to dignity and the right to life.[540]

This is what exactly happened in the international dimension. In 2002, when the right to water had not been recognized yet, the United Nations Economic and Social Council explained that taking into consideration the essential character of water to achieve a good life and health, the right to water itself should be considered to be part of Article 11 and 12 of the ICESCR, which consist on the adequate standards of living and the right to health, respectively.[541] Later, due to the high importance of the right to water and the States' interests on tackling the water stress issues, the right to water was officially recognized in 2010. Having this experience, it cannot be denied that connecting the right to water to an already recognized fundamental right is a way of protecting it and a step of achieving an upgrade status of this vital right.

Thinking a hypothetical case, where the people of a village suffer of excess of water charging and

[540] Article 1 and 2 of the CFR; for more detailed explanation please see chapter II

[541] UN Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Substantive Issues Arising in the Implementation of the International Covenant on Economic Social And Cultural Rights, General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the Interntional Covenant on Economic, Social and Cultural Rights, E/C.12/2002/11, Geneva, 11-29 November 2002

they allege that this excess of charge is caused on one of the grounds listed in the Article 20(1) of the CFR, would the Article 20(1) of the Charter apply? Following a simple analysis, the answer would be that it would not be applied, due to the fact that the Charter applies, in this case, when national authorities are implementing EU law. Unfortunately, so far there is no legal binding provision regulating water pricing in the EU, therefore, there is no EU law to implement. However, it is the case where the problem is that the supplied water does not actually satisfy the standards established in the Drinking Water Directive, this may actually cause the affected people to have some health issues. In this case, Articles 1 and 2 of the Charter could be useful. Yet, this is a mere hypothetical case, as so far there cannot be found any ECJ case-law on this topic.

As well as in the EU case, in the international sphere, there cannot be found cases where the principle of non-discrimination was applied. Most of the water related cases have been treated in in the ICSID arbitration tribunals, where, in most of the cases, the foreign investor in water supply services did not comply with the quality or/and quantity of water that must be supplied to the people as established in the investment contracts.

So far, the principle of non-discrimination has been primarily introduced into the various international documents concerning the right to water and its implantation. They all highlight the importance of non-discrimination to achieve the proper fulfillment of the right to water. Yet, when it comes to the application of this principle in cases where the protection of the right to water is sought, its relevance practically amounts to zero. In the EU case, this could be also due to the fact that the right to water is not part of the Union's legal order and therefore, the access to justice concerning this right is far more limited.

The right to water is still a very young right and it is developing step by step. After its formal recognition, its main obstacle has been the implementation of it, including the matter of access to justice. With the further development of the right to water, it is hoped that non-discrimination will not remain as a guideline either for water management programmes, developing programmes or any other projects concerning the right to water. Non-discrimination should be a strong element that the Courts can take into consideration when it comes to the protection of the right to water.

c) Public Participation and Access to Information

Public participation and access to information are considered to be elements necessary to achieve the fulfillment of the right to water. These two elements are different, yet they will be analyzed

together as one cannot be fulfilled without the other one. The access to information is considered to be a prerequisite for active, free and meaningful participation.[542] At international level, access to information has its legal basis on the Article 19 of the Universal Declaration of Human Rights.

Article 19(2) UDHR indicates that: "*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice."* It embraces the right to access to information held by public bodies, and it also explains that other entities may be subject to this obligation when acting public functions.[543] The most relevant reason for the public participation in the decision making primarily relies on obtaining specific knowledge of people/organizations involved in different manners related to water and on the exchange of such information.[544] An interactive policy-making with third parties participation could contribute to the public understanding on the motives of the taken policy measures and consequently may contribute in increasing public support as they will be provided by important information concerning the water status and the measures taken.[545]

For the European dimension, the most important document concerning this matter is the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, better known as "Aarhus Convention".[546] It is a multilateral agreement that has 47 parties, from which 46 are States and one is the European Union.[547] Its primary objective is to guarantee the access to information, public participation in decision-making and access to justice in environmental matters.[548] This instrument, as it is included in the name of the document, concerns environmental matters, therefore, it should be also applicable to water issues. The document itself refers to water issues, yet in a very scarce manner by indicating water as part of a state of elements of the environment, together with the air, atmosphere, soil, land,

[542] UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Realizing the Human Right to Water and Sanitation: A Handbook By the UN Special Rapporteur Catarina del Albuquerque, 2014, p 35

[543] UN Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 34, Article 19: Freedom of opinion and expression, 12 September 2011, p 4

[544] J.A. Van Ast, S.P. Boot, Participation in European Water Policy, Physics and Chemistry of the Earth, 28, 2003, 555-562.

[545] Ibid

[546] UNECE, Treaty Collections, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters, Aarhus, Denmark, 25 June 1988

[547] UN, Treaty Collections, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Status of Ratification, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en (last accessed: 20/01/2016)

[548] UNECE, Treaty Collections, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters, Aarhus, Denmark, 25 June 1988, Article 1

landscape, etc.[549] Yet, this approach is understandable as the document concerns access to information, public participation and access to justice in environmental matters in general.

In 2003, the EU adopted two directives implementing the Aarhus Convention, which are: Directive 2003/4/EC on public access to environmental information,[550] and Directive 2003/35/EC on the public participation.[551] Later, in 2006, the EU further adopted Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies.[552] According to the ECJ, the EU, by adopting the directive on the access to environmental information, the legislature intended to ensure the consistency of EU law with the Aarhus Convention by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities.[553]

These EU legal documents introduced the Aarhus Convention to the EU legal order, therefore, references to water issues is as scarce as in the Aarhus Convention itself, yet, as stated above, it does not have to be taken as an issue as it basically applies to all environmental matters, and therefore its applicability on issues concerning water cannot be denied. This specific point can be seen in the Fish Legal Case,[554] which clarified the conditions governing access on the part of private individuals to environmental information held by the public authorities.

This case consists on a preliminary ruling concerning the interpretation of Article 2(2) of Directive 2003/4/EC on public access to environmental information. The case concerned on one hand, Mrs Shirley and Fish Legal (a legal arm of the English Angler's federation), a non profit-making organization that combats pollution and other damage to the aquatic environmental and to protect angling and anglers; and on the other hand, the Information Commissioner and three water companies, which were: United Utilities Water plc, Yorkshire Water Services Ltd and Southern

[549] UNECE, Treaty Collections, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters, Aarhus, Denmark, 25 June 1988, Article 2(3)(a)

[550] Directive 2003/4/EC of the European Parliament and of the Council, on public access to environmental information and repealing Council Directive 90/313/EEC, of 28 January 2003

[551] Directive 2003/35/EC of the European Parliament and of the Council on providing for public participation in respect of drawing up of certain plans and programs relating to environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003

[552] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, OJ L 264, 25.9.2006

[553] Case C-204/09, Flachglas Torgau GmbH v Federal Republic of Germany, 14 February 2012, at para 31

[554] Case C-279/12, Fish Legal and Emily Shirley v Information Commissioner and Others, 19 December 2013

Water Services Ltd. The main issue of the case concerned the conditions governing the access of environmental information held by the public authorities, more specifically, whether private companies as those in question could be considered as public authorities, thus obliged to disclose environmental information.

The issue raised when on one hand, Fish Legal asked two water companies (United Utilities Water plc and Yorkshire Water Services Ltd) by letter for information concerning discharges, clean-up operations and emergency overflow; on the other hand, Mrs Shirley, also by the same means asked another water company (Southern Water Services Ltd) for information relating to sewerage capacity for a planning proposal in her town. Yet, non of them has received the requested information from the water companies. Both of them complained to the Information Commissioner, yet the commissioner held that the water companies concerned were not public authorities, and therefore, he could not adjudicate on their respective complaints.

What interest the most of this judgment to the proposes of this chapter is that according to the definition of the authority, the obligation to provide environmental information, which is usually held by the States can be also extended to other entities. In deed, in the Fish Legal Case, the Court clarifies this point. First, it explained that in order to determine whether an entity can be classified as legal person which perform public administrative function under the applicable national law, within the meaning of Article 2(2)(a) of Directive 2003/4/EC, it should be examined whether those entities are vested under the national law, with spacial powers beyond those which result from the normal rules applicable in relations between persons governed by private law.[555] In this specific case, the Court held that undertakings, including water companies, that provide public services relating to the environment and that are under the control of a public body (more specifically, under the control of a body falling within the Article 2(2)(a) or (b), i.e. government at national, regional and other level ; or natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment) should be classified as public authorities by virtue of Article 2(2)(c), i.e., any other natural or legal persons having public responsibilities under the control of a body falling within the scope of Article 2(2)(a) or (b).[556] Furthermore, it clarifies that the mere fact that the entity is a commercial company subject to a specific system of regulation for the sector in question, does not escape from the scope of Article 2(2)(c).[557]

[555] Ibid, para 51 and 56
[556] Ibid, paras 68-69
[557] Ibid, para 70

Finally, the court clarified that if an entity is classified as a public authority, it is under the obligation of disclosing the required environmental information, yet, in the case of commercial companies, if the required environmental information does not relate to the provision of such services, they are not obliged to provide environmental information.[558]

The Fish Legal Case is the perfect example of the application of the extension of the obligation to provide environmental information to the private entities. As stated above, this obligation is originally held by the States, yet, when it comes to the implementation of it and the States do not comply with their obligation it is difficult to challenge their omission and this situation is far more common in developing countries, where the level of governance is limited. However, the extension of the obligation to provide environmental information to the private entities, permit individuals and community to directly require the relevant environmental information to undertakings such as entities providing a specific public services concerning the required information. In the case where such entity does not provide the information, in any case, it is easier to challenge the action/omission of a private entity rather than a public one. Of course, this is the EU case, yet, so far is difficult to find another example of this in other levels. Therefore, it makes the Union a pioneer on actually implementing this element.

Furthermore, the Water Framework Directive also establishes an obligation to the Member States to encourage the active involvement of all interested parties in the implementation of the directive.[559] To this end, Member States are required to publish and make available a timetable and work programme for the production of the plan, an interim overview of the significant water management issues and a draft copies of the river basin management plan.[560]

Finally, concerning public participation, it cannot be avoided the topic of the European Citizen Initiative on Water and Sanitation.[561] The European Citizen Initiative (ECI) is an invitation to the Commission to submit a proposal on the field where the EU has competence to legislate, and the ECI on Water and Sanitation constituted the first ever participatory democracy instrument at EU level. Its legal background relies on article 11(4) TEU and article 24 TFEU, and also on the Regulation No. 211/2011[562] which establishes the required procedure and conditions for a citizen

[558] Ibid, para 78 and 83
[559] Article 14 WFD
[560] Ibid
[561] Please see Chapter II
[562] Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the Citizen's initiative, O.J. L65/1

initiative.

The ECI on water and sanitation was officially submitted in December 2013, inviting the Commission to propose legislation recognizing and implementing the Human Right to Water and Sanitation, as it has been recognized by the United Nations in 2010. The submitted initiative highlighted the importance that the governments should ensure and to provide sufficient clean drinking water and sanitation for all in Europe, requesting the EU and the Member States to guarantee the right to water and sanitation, to exclude water supply from the rules of the internal market and liberalization; and also, it required the EU to act on the improvement to provide a universal (global) access to water. Yet, the Commissions answer cannot be classified as a positive one as it remained only by asserting the importance foremost importance of water.[563]

After the Commissions response, the ECI on water and sanitation seemed to arrive to a dead-end as it was clear that the Commission would not make any proposal on the initiative. However, on September 8th 2015, Strasbourg, an important step has been taken concerning the human right to water and the ECI on water and sanitation in the EU. The European Parliament approved in simple majority (by 363 votes to 96, with 231 abstentions) the resolution on the follow-up to the European Citizen Initiative, Right2Water.[564] The document contained points of great import for the recognition of the right to water in the EU legal order, e.g. its quality, quantity, affordability, accessibility, etc. However, other than such classic issues on water that have been treated so far, it must be noted that the novelty of this document is that it contains and it represents a political achievement in the field of the human right to water, as it was the first time that the EP calls on the Commission to come forward with legislative proposals that would recognize universal access and the human right to water.

So far, it has been developed various elements concerning the access to information and public participation in the EU. The Aarhus Convention, the directive 2003/4/EC, the directive 2003/35/EC, the Water Framework Directive, Regulation No. 1367/2006, the ECJ case-law, the European Citizen Initiative and the Parliament resolution on the follow-up to the European Citizen Initiative, all of them represent the hard work that the Union has done so far to the end of promoting and implementing the right to information and public participation in decision-making in environmental

[563] European Federation of Public Service Unions (EPSU), EPSU Press Communication, 19th March 2014 , available at: www.epsu.org/a/10300 (last accessed 01/06/2014)

[564] European Parliament resolution of 8 September 2015 on the follow-up to the European Citizens' Initiative Right2Wate P8_TA(2015)0294

matter. For all these reasons expressed above, it can be concluded that the access to information and public participation, the two elements of great import for the fulfillment of the right to water, consist on the strength of the Union. It has such an abundant legal and non-legal background concerning this two aspects, that definitely can contribute to the international experience.

d) Recovery of Costs and Affordability

Water pricing is a difficult issue and it will definitely vary between States, or even regions. It's pricing should include all the costs used in the abstraction impoundment, storage, treatment, distribution, cost of the infrastructures and its maintenance, etc. Yet this could affect to the other essential element of the right to water, which is the affordability. Even though the recovery of cost is very important, it should not affect to the affordability. Access to water is a precondition for survival.[565] For this reason it is required that clean water must be accessible to all. Yet, in some cases, it has been seen that people actually had access to water but they cannot afford this service due to an excess of pricing. People living in informal settlements or in a low income urban areas are those one particularly affected by this issue.[566]

The Water Framework Directive has introduced the principle of recovery of costs in water services.[567] It required Member States to take into account this principle in the overall economic analysis of the environmental and resource cost. One of the main reasons to introduce this principle into the EU water law was to provide adequate incentives for users to use water resources efficiently.[568]

Therefore, concerning the recovery of costs, it can be concluded that the EU water law and international water law are on the same path. Yet, it does not happen the same with the affordability element. The EU water policy highlights the importance and necessity of putting the right price tag on water.[569] However, as the EU water law does not extend neither to the field of water pricing nor to the field of access to water, such provision remains as a simple suggestion. Once again, this is due to the fact that the EU does not recognize the right to water.

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[565] J Boesen and PE Lauridsen, Water as a Human Right and a Global Public Good, in EA Andersen and B Lindsnaes (eds.), Towards New Global Strategies: Public Goods and Human Rights, Leiden, 2007, 393-394

[566] Winkler, I.T., The Human Right to Water: Significance, Legal Status and Implications for Water Allocation, 2012, Hart Publishing, p.3

[567] Article 9, WFD

[568] Article 9(1) WFD

[569] Communication from the Commission to the European Parliament and the Council, Addressing the Challenge of Water Scarcity and Droughts in the European Union, SEC(2007) 993, SEC(2007) 996, COM/2007/0414 final

Having said that, it can be understood that without a formal recognition of the right to water in the EU, its further development at Union level might be difficult. By not having the competence on ruling this field, there is not much things to do. So far the Union has made many declarations indicating the importance of the right to water, including its access and its affordability.[570] However, by not having a legal competence to rule it, such position of the EU does not influence much to improve the current situation of the right to water.

e) Polluter Pays Principle

This is a general principle of the environmental law, which basically makes the entity responsible of causing the pollution to pay for the damage caused in the environment. The first international document that referred to the polluter pays principle was OECD Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies in 1972. This instrument included the polluter pays principle into the prevention and control progammes in order to encourage the ration use of the environmental resource.[571] Later, after the polluter pays principle became a general practice in the States, the Rio Declaration on 1992 established as follows:

> *Principle 16*
>
> *National authorities should endeavor to promote the internationalization of environmental costs and the use of economic instruments taking into account that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment.*

This provision has been recalled and asserted by many other international instruments concerning environment law.

The polluter pays principle is also part of the EU water law. In 1978, the European Council adopted a Recommendation regarding the cost allocation and action by public authorities on environmental matters. In this document the Council urged the Member States to apply this principle whether the polluter was a a natural or legal person governed either by a private or public law, to make them

[570] For Example, Declaration by the High Representative, Catherine Ashton on behalf of the EU to commemmorate the World Water Day, 22nd March 2010, doc 7810/1 document available at http://register.consilium.europa.eu/ (last accessed 01/06/2015); European Parliament Resolution on the Fourth World Water Forum in Mexico City, 2006, document available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0087+0+DOC+PDF+V0//EN (last accessed 01/06/2014); World Water Council, 4th World Water Forum, Mexico, 2006, more details available at: http://www. worldwatercouncil.org/forum/mexico-2006/

[571] OECD, Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, 26 May 1972, C(72)128 (1972), 14

responsible for the caused pollution, and therefore, they should pay such costs.[572] Its inclusion to the Union law has been successful, at least at legally. This can be seen with the inclusion of the polluter pays principle in the Treaty of the Functioning of the European Union. Article 191(2) of the TFEU establishes that the Union's environmental policy should be based on the precautionary principle, polluter pays principle and those principles that prevent environmental damage.

Specifically concerning the polluter pays principle and water, it can be found two relevant legal instruments. First, Article 9(1) of the WFD establishes that the polluter pays principle should be taken into account when assessing the recovery of costs of water services. Second, the polluter pays principle is also relevant to the industrial emissions directive for which, one of its objective is to avoid or minimize polluting emissions in the atmosphere, water and soil.[573] The directive indicates in its preamble 2 that Member States should comply with the polluter pays principle and the principle of pollution prevention in order to prevent and reduce the pollution caused by industrial activities.

As it has been already mentioned above, the polluter pays principle is a basic environmental law principle. Fortunately, this principle is well developed either at international or EU level. Generally speaking, it can be said that the polluter pays principle has been well developed thanks to its relevance not only in environmental law, but also in the economic development.[574]

f) Principle of Sustainable Development

This principle has a long history in the environmental law and so far, it has been established as a international legal concept.[575] It is defined as: *"...development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*[576] This principle is present in most of the international documents concerning water and environment.[577]

[572] European Council, Council Recommendation regarding cost allocation and action by public authorities on environmental matters (75/436/EURATOM, ECSC, EEC), 3 March 1975, Annex I, para 2

[573] WFD, Article 1, second paragraph

[574] Sands, P., Peel, J., Fabra A., MacKenzie, R., Principles of Environmental Law, third edition, Cambridge University Press, 2012, pg 228

[575] International Law Association, Resolution 3/2002, Sustainable Development, New Delhi Declaration of Principles of International Law Relating to Sustainable Development, India, April 2002

[576] United Nations World Commission on Environment and Development, Chapter 2 Towards Sustainable Development, Brundtland Report, 1987

[577] For example: The UN Water Conference in Mar de Plata Argentina, 1977; the Global Consultation on Safe Water and Sanitation, New Delhi,1992; International Conference on Water and The environment, Dublin, 1992; World Summit for Social Development, Copenhagen, 1995; the First World Water Forum, Marrakesh, 1997; Second World Water Forum, The Hague, 2000; World Summit on Sustainable Development, Johannesburg, 2012; etc. For more detailed explanation please see chapter I point 2.

Since the 70' States were concerned about the future of the water sources. Their deterioration were obvious and if continued in this way, it would have conducted to a very negative results. The importance of the sustainable development concerning water sources has been the central topic of the international environmental conferences. So far commitments on water issues varies from one State to another, it also depends on its water scarcity situation, its interests and its financial availability to conduct effective water programmes.

The principle of sustainable development has been embedded in international environmental law and EU environmental law. In both cases, this principle has been applied to the water law. In fact, all the established standards and commitments have the ultimate goal to achieve the sustainable development.

2.4 Legal Enforcement and Access to Justice

It has already been analyzed the origins of the right to water, its development, its principles and fundamental elements. These are basically the theoretical part of the right to water. In order to have a complete vision of the right to water, it must be also studied the practical dimension it, meaning, the implementation of the right to water and the supply of water itself.

For a proper fulfillment of the right to water, political and legal recognition and its implementation are the key elements. Yet, there is one last practical element that may not completely depend on each State, it is the quality of the water supply services provided to the people. Some academics argue that the legal recognition of the right to water will not influence to the actual situation, as a political or legal recognition will practically remain in the theoretical dimension, therefore, the most important thing to do is to directly work on the technical dimension. This chapter does not completely support this affirmation. It is clear that in order to improve the quality of water services, the most important thing is to directly work on the technical dimension, yet the access to good drinking water is only a part of the right to water, and by working in this way, it may mean to reduce the actual scope of the right to water.

Following the provision established by the UN Economic and Social Council, the human right to water should entitle everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.[578] This is the core substantive part of the right to water, yet, in

[578] UN Economic and Social Council, General Comment No. 15, The right to water (Article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (E/C.12/2002/11), 2002, pg 2

order to achieve this result and to assure it, it is important and necessary to work on empowering people by formally recognizing the right to water, by boosting their participation in the decision-making and by easing the access to justice in case of a breach on the right to water. Besides, the improvement of the infrastructure and technology for water services requires high amount of costs. This means that the water supplier will have to invest, even though this might mean that it will affect to their incomes and taking into account that a private entity's objective is to maximize its profit income, it is hardly difficult to imagine a scenario where the supplier voluntarily decides to do such investment. It is for this reason that a legally binding provision protecting the right to water is necessary. Before braking the physical barrier (e.g. the limitation of the technologies used in water services or the quality of water services itself), it is highly important to work on the legal dimension and brake this legal limitation first.

The first legal source that can be found is in national constitutions and/or under ordinary legislation. When States incorporate the human right to water into their domestic law and policies, this right becomes enforceable at the national level. Since the publication of the General Comment NO. 15, the number of States recognizing the human right to water has doubled.[579] In this light, the constitutional right for water is recognized in different countries, particularly in those that suffer from a sever shortage of water.[580] Major examples are: South Africa's constitution adopted in 1996, praised as the model social rights constitution, in Section 27.1(b) confirms that everyone has the right to access to sufficient food and water; in the case of India, the Supreme court has ruled that both water and sanitation are part of constitutional right to life, therefore the Court has stated that the right to access to clan drinking water is fundamental to life and there is a duty on the state to provide under Constitution (Article 21) clean drinking water to citizens.[581]

The human rights obligations of corporations can derive also from the international legal order. As it has been examined above, many international treaties and declaration either explicitly or implicitly recognize the right to water. However, basically there is no references to corporate responsibilities concerning this right, but this is reasonable considering the traditional view. As an exception there is the General Comment No. 14, which indicates that the right to health in Article 12 of the International Covenant of Economic, Social and Cultural Rights is directly applicable to the private

[579] UN, The right to water and sanitation in national law, available at http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/

[580] Kornfeld I. E.Water: A Public Good or a Commodity? Proceedings of the Annual Meeting (American Society of International Law), Vol. 106 (March 2012), pp. 49-52

[581] See, A.P. Pollution Control Board II v Prof. M.V. Naidu and Others, (Civil Appeal Nos. 368-373 of 1999) on 22 December 2000

businesses sectors by indicating : “While only States are parties to the Covenant and thus ultimately accountable of compliance with its all members of society – individuals including health professionals, families, local communities, intergovernmental and non-governmental organizations, as well as the private business sector – have responsibilities regarding the realization of the right to health.[582] This should be also applicable to the right to water which is directly related to the right to health”[583]

This trend became more evident when various companies have signed up to the United Nations Global Compact,[584] which is a strategic policy initiative for businesses committed to align their operations and strategies with ten universally accepted principles related to human rights, labour standards, environment and anti-corruption. Actually, more than 10.000 corporate participants and stakeholders from over 130 countries are part of this initiative and numbers are actually increasing,[585] however, they exist largely as disconnected fragments incorporating different commitments, while only few focused specifically on human rights,[586] which may end up camouflaging the main objective of the Corporate Social Responsibilities becoming just an instrument to beatify their image without altering their behavior on the matter.

When it comes to the legal enforcement and access to justice concerning the right to water in the EU, it is difficult to analyze it as so far the is no right to water in the EU. Yet, if any of the elements of the right to water that are protected by the EU, these could be individually protected at national level, and not as the right to water itself. If the national law of a Member State recognizes the right to water and that national law is applicable, of course the right to water can be protected directly recalling that legal provision, yet this would not mean the application of EU law. The elements of the right to water currently ruled at EU level are: water quality, access to environmental information, public participation in environmental matters and non-discrimination. All of these forms an important part of the right to water, yet it is obvious that other core elements are missing. Without the inclusion of the lacking elements, it would be impossible to realize the right to water at EU level.

[582] Committee on Economic, Social and Cultural Rights. The Right to the Highest Attainable Standard of Health. UN General Comment No. 14, Doc. E/C12/200/4, 11 August 2000

[583] Committee on Economic, Social and Cultural Rights. The Right to the Highest Attainable Standard of Health. UN General Comment No. 14, Doc. E/C12/200/4, 11 August 2000

[584] Ibid., p.32

[585] United Nations Global Compact. Over view of the UN Global compact. available at: http://unglobalcompact.org/aboutthegc/

[586] J.Ruggie, Just Business: Multinational Corporations and Human Rights, Norton Global Ethics Series, 2013, at 34

2.5 The Quality of the Water Services and The Impact of the Investment Protection Provisions on the Human Right to Water

2.5.1 The quality of Water Services

As it has been already mentioned, the quality of the water services are one of the key elements for the fulfillment of the right to water. If water services are not conducted in a proper way, it may end up compromising the fulfillment of the right to water. For the purposes of this analysis it has been identified four aspects that will compromise/address the quality of water services.

1. The Provider: Who will be in charge of operating the water services?
2. The Control: What kind of monitoring system is it required in the State?
3.The Standards: What legal standards for the quality and quantity of water are applied?
4.The Procedure: If the water service operator infringes the required standards and obligations, what can it be done?

Each of them is going to be further developed as follows:

1. The Provider: Who will be in charge of operating the water services? Globally, water services are being operated either by a public or by a private entity. So far, there is no international law providing whether water services should be operated by public or private providers or by a combination of the two.[587] It seems that on this matter, the EU is in the same path with the international law. There is no specific background to support this affirmation, yet this can be inferred from the following facts: first, the fact whether water services are delivered either by public or a private entity, may not be a matter that concerns to the Union itself because the EU has no competence in regulating the way of provision of water services, as this will depend on each Member State's domestic law; and second, it cannot be found any EU declaration suggesting whether water services, or any other public utility should be operated either by a public or private entity.

Therefore, the EU cannot rule over the type of operator in the management of water services. However, it does interest to the Union whether the public authority respects the EU public

[587] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 35, The Right to Water,* August 2010, available at: http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf (last accessed 20/05/2014) p.35

procurement law when entrusting the provision to a third party.[588] It must respect the EU public procurement rules, which guarantee freedom to provide services, ensure transparency and equal treatment.[589]

This chapter will not analyze whether public or private entity would be better for the operation of water services. The issue whether water services should be operated by a public or private entity has been widely discussed and both types of management have shown their strengths and weaknesses, and it will depend on various factors, including the level of transparency of each government, its level of governance, its socio-economic situations, etc.[590] Yet, for the purposes of this chapter, it will be important to identify whether water services are operated by a public or private entity because of one main reason. This difference will influence on the type of control system that should be applied in the water services. It is not argued that the results of the quality of water will depend on the type of provider, but on the State's monitoring system towards the service provider.

Finally, and before moving to the next point, it has to be clarified that in this section it has not been included the option whether, when water services are operated by a private entity, it is operated by a national or an international company, because there should not be any different treatment among them.

2. The Control: What kind of monitoring system is it required in the State?

If the water services are operated by private entity, this will mean that the State will have to control and monitor them. The control and monitoring must be always present even though the provider is a public entity, yet its content should be different. A private company, by investing on a market, it will seek to maximize its profit. It is supposed that the private entity should always act on the limits respecting the law and the standards established in the concession contract, unfortunately, in some cases, this did not happened, and the private entity ended up choosing its own interests. The most relevant cases are: the Suez Case,[591] Aguas del Tunari Case,[592] and the Saur Case.[593] (please see

[588] See for example, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts and public service contracts; Directive 2004/17 coordinating the procurement procedures of entities operating the water, energy, transport and postal services sectors

[589] Ibid.

[590] Joseph, S., 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 45 Netherlands International Law Review 171.

[591] ICSID, Suez Sociedad General de Agusas de Barcelona S.A. Vivendi Universal S.A. V Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010

[592] ICSID, Aguas del Tunari S.A v Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005

[593] ICSID, Saur International v. Argentine Republic, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012

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States are required to ensure that any form of service provision guarantees equal access to affordable, sufficient, safe and acceptable water. On the matter, General Comment No. 15 indicated that when water services are operated or controlled by third parties, States has the implicit duty to put into operation an effective regulatory framework that includes independent monitoring, public participation and penalties for non-compliance.

On this specific point, there is not much to be said for the EU dimension, as it has no competence regarding the water services, consequently it does not have competence on its monitoring either. The only monitoring requirements established in the EU water law are on the quality and quantity of each source of water, such as surface water, groundwater and protected areas.[594] This responsibility is held by the Member States and the service provider is not related to it at any level.

3. The Standards: What legal standards for the quality and quantity of water are applied?

As it has been already mentioned above (in point 2.2), there is no standard established at international level, instead there is a guideline which is, the WHO Guidelines for drinking-water.[595] This document At international level, States should take into account the guidelines according to their own socio-cultural, environmental and economic situation.[596] According to the WHO, these guidelines are applied as the basis for regulation and standard setting at national level, either in developing or developed countries world-wide.[597] In fact, this document developed every technical detail that a State should know in order to manage their water sources and water services. Such details include: microbial aspects, chemical aspects, radiological aspects, monitoring, roles and responsibilities of the participating agents, infrastructure requirements, etc. Yet, it would be interesting to know, how much States take into account this document in order to establish their water policy and standards.

Unlike the international case, the EU case is easier to know whether Member States are implementing or not the established standards in the Union's water law. The EU water law is characterized by its high and specific standards that Member States are required to meet. These

[594] See for example: WFD, article 8

[595] WHO, Guidelines for Drinking-water Quality: Incorporating First and Second Addeda to Third Edition, Volume 1, Recommendations, Geneva, 2010, p. 2

[596] Ibid.

[597] WHO, Water Sanitation Health, WHO Guidelines for Drinking Water Quality, available at: http://www.who.int/water_sanitation_health/dwq/guidelines/en/ (last accessed 27/01/2016)

standards are established, depending on the purpose of the water, in the EU water directives.[598] Unfortunately, the EU water directives have not been implemented as expected. So far, it can be found many infringement proceedings concerning Member States not implementing a water directive, wrongly implementing it or not notifying as required by the Commission.[599] In fact this is one of the biggest and important difference that exist between International water law and EU water law. If the Commission considered that a Member State has not properly fulfilled its obligation under the Treaties, it can deliver a opinion and give the concerning Member State to submit its observation on the opinion.[600] If a Member State does not comply with the opinion, the Commission can bring against the Member State for failure by the latter to comply with EU law.[601]

This system does not exist in the international dimension. It is far more difficult to make sovereign States to comply the decisions taken in the global forum and to make a follow-up on the level of implementation. The EU experience on the difficulties on the implementation of the water directives can teach in what aspects States have more difficulties in implementing and complying the legal provisions. Such experience will definitely help in establishing feasible objectives and standards of general application, at least in developed countries.

4. The Procedure: If the water service operator infringes the required standards and obligations, what can it be done?

Ensuring the quality and the quantity of the supply of water that must be provided to people is a State's responsibility. Under international law, the primary responsibility ensuring the access to water remains to the State. Whether the service provider is either a national or international one does not matter. When the service provider does not comply with its obligations and responsibilities, States need to act. This will strictly depend on each States national law. In the case when the service provider is an international company, other laws may be applicable, depending on what the concession contract and the relevant bilateral investment treaty (in case of a foreign investor) stipulate. The kind of procedure, the level of the human rights protection established in the national law and the level of transparency will be the key elements in this step.

[598] Each of the water directives regulate the quality of water depending on its purposes.

[599] See for example: Case C-266/99 Commission v France; case C-396/01 Commission v Ireland; case C-526/09 Commission v Portugal; case C-26/04 Commission v Spain; case C-221/03 Commission v Belgium; case C-258/00 Commission v France; case C-390/00 Commission v Italy; case C-298/95 Commission v Germany; case C-416/02 Commission v Spain; case C-340/96 Commission v UK and Ireland; case C-69/99 Commission v UK and Ireland, case C-290/89 Commission v Belgium; case C-233/07 Commission v Portugal; case C-73/81 Commission v Belgium; case C-390/07 Commission v UK and Ireland, case C-280/02 Commission v France; case C-316/00 Commission v Ireland; and many others.

[600] TFEU, Article 258

[601] Ibid.

2.5.2 Investment Protection and the Corporate Social Responsibility

Having analyzed the principle variables that will affect to the quality of water services, it must be analyzed the participating parties, their responsibilities, obligations and rights. This step is important in order to understand the general discrepancy that can exist between the State and the private company. In this section, it will be analyzed on one hand, the general foreign investment protection that applies to any Foreign Direct Investment (FDI), and on the other hand, it will be analyzed the Corporate Social Responsibility (CSR) that applies to any private entity.

First of all, the main participating parties are always going to be the State (or the Host State in case of a foreign investment) and the private investor. In the case of developing countries, it is far more common to find foreign investors providing the water services. As already explained, one of the reasons is that the participation in water services implies high amount of money that many governments cannot afford that much, therefore they decide to seek for a foreign investor. The other reason is that the foreign investors that are interested for a concession for the supply of water already have the experience, the required technique and it can bring new technology for the improved provision of the water services. This is an important factor as for a better service an update in the used technology is necessary.

Generally speaking, the corporate globalization and the subsequent emergence of multinational enterprises have contributed to social development, however, when it came to the impact of these business on human rights, neither governments nor private companies were prepared for this wave of globalization.[602] The experience has shown that companies can affect the entire spectrum of internationally recognized human rights.[603] This situation also affected to the right to water. As already explained, so far it can be seen many cases where foreign investors did not comply with their obligations and responsibilities and they end up breaching the right to water.

Foreign investments are of great import in the social development, especially for the developing countries when it is about the provision of the public utilities to the citizens. Therefore, many States opted to liberalize these sectors, as they are not able to supply such services by themselves. The liberalization of international trade and the reinforcement of foreign investment have created a situation in which the private investor has the option of taking advantage of lower human rights

[602] Ruggie, J.G., Just Business: Multinational Corporations and Human Rights, Norton Global Ethics Series, 2013, p 34
[603] Ibid.

standards and the weak systems of governance, especially when they operate in developing countries.[604]

Furthermore, FDIs receive high level of protection under international law. One of the strongest instrument that they have to protect their investments it the Fair and Equitable Treatment. The fair and equitable treatment is a fundamental principle in investment law, and its application is actually extensive. For instance, in the specific case of dispute concerning water services, there is the the *Azurix Case.*[605] As a brief background, the province of Buenos Aires, promoted the privatization of the water service and during the privatization process the concession was offered in auction. The US-based water services company Azurix (an Enron spin-off) won the bid and its service took place since July 1999 thenceforth an exclusive 30 year concession contract. Under the agreement, the province agreed to complete certain repairs of past problems (caused by lack of investments and maintenance) before the Azurix would take over water service. However, the province never completed the work, which contributed to the *algae crisis.* Customers complained about the water quality and also about the reduced water pressure and the price hikes; the local authorities response was to suggest the customers to not to pay the water bills. The concessionaire alleged that the province did not undertake the agreed repairs and it attempted to interfere with the tariffs affecting its right to the fair and equitable treatment. Regarding this point, the tribunal concluded as follows:

> *The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious.*[606]

This reasoning is a great example of how important and strong instrument can be the fair and equitable treatment for the protection of the foreign investment. Yet, this also mean that the host States will be pressured by two sides. On one hand, as the above paragraph indicates, States are

[604] Joseph, S., 'Taming the Leviathans: Multinational Enterprises and Human Rights', (1999) 45 Netherlands International Law Review 171.
[605] ICSID, Azurix Corp v. Argentina, ICSID Case No ARB/01/12, Award, 14 July 2006
[606] Ibid, para. 372

required to actively protect the bilateral investment treaties, if not, it will be considered that they has breached the fair and equitable treatment. On the other hand, States have the human rights obligations that must respect. This is a difficult dilemma for the States. They have international commitment of respecting and protecting human rights, yet if States become severe on this aspect and establishes high standards of services with strict control on the pricing, this will not be an attractive market for the investor.

On this matter, the Corporate Social Responsibility might be useful. Under international law, it is clear that Host States retain the primary responsibility for ensuring water supply, but in the case of the investors, their responsibilities have not been specified, and this is what eases the investors to escape from their human rights responsibilities. So far there are two opposite positions concerning this issue. On one hand it has been said that Corporations have the direct obligation under human rights law,[607] and on the other hand some authors support that investors by being private entities, are not bound by neither human rights law, nor international law. Many scholars support that human rights and business are two separate disciplines with no relations between each other, thus, the protection of human rights is an exclusive concern of Host States.[608] Indeed Businesses play a district role in society, as it has different objectives, i.e. sales expansion, resource acquisition, diversification, etc. Therefore, it is common for foreign investors trying to camouflage their responsibility challenging that being private entities they are not bound by international law.

However the trend is moving towards extending human rights responsibilities to private sector involved in public utilities,[609] although States have addressed the human rights responsibilities of business enterprises most directly in soft law instruments avoiding to develop such direction on hard law.[610] States may turn to soft law for several reasons: to char possible future directions in the international legal order when they are not yet able or willing to take firmer measures and where they conclude that legally binding mechanisms are not the best tool to address a particular issue.[611]

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[607] See for example, H. Hazelzet, Margot E. Salomon, Arne Tostensen and Wouter Vandenhole, : Casting the Net Wider: Human Rights, Development and New Duty-Bearers. Antwerp: Intersentia, 2007, pp. 395-415

[608] See for example, M. Friedman, 'The Social Responsibility of Business is to Increase its Profits' (1970) 13/9 New York Times Magazine 122.

[609] Thielborger, P. The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo Conflict?. P.M. Dupuy, F. Francioni and E.U. Petermann (eds) Human Rights in International Investment Law and Arbitration. Oxford: Oxford University Press. 2009, pp. 487-510; Salomon, Arne Tostensen Salomon, and Wouter Vanterhole (ed.), Human Rights, Development and New Duty-Bearers, Antwerp: Intersentia, 2007; Nicola Jagers, Corporate Human Rights Obligations: In Search of Accountability, Antwerp: Intersentia, 2002

[610] J.Ruggie, Just Business: Multinational Corporations and Human Rights, Norton Global Ethics Series, 2013, at 45

[611] Ibid, at 46

State's obligations concerning the right to water are of a due diligence nature in the sense that the state has to do its utmost to ensure the fulfillment of the right in question.[612] In order to protect human rights, scholars introduced a tri-partite typology of State duties, which was first introduced by Henry Shue in 1980,[613] which defines that States have the obligation to respect, protect and fulfill This model also applies to the human right to water, and within this context, the *obligation to respect* expects States to refrain from interfering directly or indirectly with the enjoyment of the right to water; the *obligation to protect* entails States' to prevent them from compromising equal, affordable, and physical access to sufficient safe and acceptable water when water services are operated by third parties; and finally, the *obligation to fulfill* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to water. The argument that States can be responsible for abuses committed by private actors' misconduct on the public utilities, has been formally reaffirmed in many international instruments including human rights treaties, general comments by UN expert bodies and decisions of regional human rights courts in Europe and the Americas.[614]

Concerning the right to water, the General Comment No. 15 explained that in order to fulfill such obligations, *"...States parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate law-cost techniques and technologies; (b) appropriate pricing policies such as free or low cost water and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services,whether privately or publicly provided, are affordable for all, including social disadvantaged groups*."[615] Thus, at least at a theoretical level, the tripartite States obligations are established in international law.

Basically, the Guiding Principles reaffirm that businesses have responsibility to respect human rights and that States have a further duty ensuring that businesses do so. This instrument indicates that Corporations, in order to respect human rights, should take appropriate methods, including human rights approach with due diligence.[616] The reason to include a due diligence approach to the issue is mainly based on the recognition that contemporary business activity relies on integrated

[612] Thielborger, P. The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo Conflict?. P.M. Dupuy, F. Francioni and E.U. Petermann (eds) Human Rights in International Investment Law and Arbitration. Oxford: Oxford University Press. 2009, pp. 487-510

[613] Shue, H., Basic Rights, Subsistence, Affluence and U.S. Foreign Policy. New Jersy: Princeton, 1980

[614] International Council on Human Rights, Beyond Voluntarism, 2008, p.54; CEDAW, adopted n 1979 by the UN General Assembly, art. 2

[615] UN CESCR, General Comment No15, E/C.12/2002/11, Geneva, November 2002

[616] International Corporate Accountability Roundtable (ICAR), Human Right to Due Diligence: The Role of the State, 2012, available at: http://accountabilityroundtable.org/analysis/hrdd/

business relationships that span national and organizational boundaries, and under international human rights law, the responsibility of a business to respect human rights includes acting with due diligence in order to avoid affecting negatively in such essential rights.[617]

Furthermore, as will as the state accountability, the corporate accountability refers to the way in which private actors should disclosure data about human rights policies, procedures, risks and steps taken to address or mitigate impacts. They must be open in their decision-making processes in order for them to be examined by other interested parties. Regarding this point, the EU case-law clarified with the Fish Legal Case that in some cases, private entities operating public services are under the obligation of disclosing the required environmental information to private parties.[618]

In this light, corporate accountability response to the current situation in which businesses can no longer count on the anonymity of the market place to hide from scrutiny,[619] making reference to the existence of voluntary codes of conduct and procedural standards in terms of transparency, reporting and openness to the public, as indirect means of ensuring the socially responsible conduct of multinational enterprises. This, for instance, is the approach of the Global Reporting Initiative and of the European Commission.[620]

Also, in within the EU context, its contribution on the corporate responsibilities has been considerable. In 2002 the European Union established a duty that consists in encouraging Corporate Social Responsibility[621] and in setting up a framework to ensure that environmental and social considerations were integrated into companies´ activities. In March 2006 the Commission of the European Union issued a Communication, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility.*[622] Through this initiative the Commission reaffirms its reference for non-binding initiatives and promotes the creation of a business's alliance for Corporate Social Responsibility.[623] Finally, in October 2011, the European

[617] International Corporate Accountability roundtalbe, HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES, 2012 available at http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/

[618] Case C-279/12, Fish Legal and Emily Shirley v Information Commissioner and Others, 19 December 2003, para 78 and 83

[619] Choucri, Nazli. "Corporate strategies toward sustainability. Sustainable Development and International Law, 1994, p. 189-201.

[620] Gatto, Alexandra. Multinational enterprises and human rights: obligations under EU law and international law. Edward Elgar Publishing, 2011, p.17

[621] European Union, European Commission. Communication from the Commission concerning corporate Social Responsibility: a Business Contribution to Sustainable Development COM (2002) 347 FINAL, 2 July 2002

[622] European Union, European Commission. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility COM (2006) 136 final, 22 March 2006

[623] Gatto, Alexandra. Multinational enterprises and human rights: obligations under EU law and international law.

Commission published the new policy on corporate social responsibility, defining Corporate Social Responsibility as the *responsibility of enterprises for their impacts on society.*

3. EU external action and human rights: Prospective for the right to water

3.1 General Background of the EU external action on development

The EU external action is based on the Article 21 of the TEU. It establishes in its paragraph 1 that the Union's external action should be guided by the principles of democracy, rule of law, universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity. It also includes the respect for the principles of the UN Charter and international law. Furthermore, it establishes the importance to build relations with third counties and other organizations to the end of promoting solutions to common problems.

So far, the Union has published many documents and it made many declarations asserting this position and developing new objectives and guidelines for the EU external action concerning human rights at global scale. It has recalled various times its commitment promoting and defending human rights at internal and external level. This makes evident that agreements among the EU Member States on the importance of promoting human rights have not represented much difficulties, but the problem seemed to be on what cases to apply it and how to apply it.[624]

By having a look to the Article 21 of the TEU and so many EU documents and declarations concerning the EU external action on human rights, it seems that the EU has a position with a clear and strong human rights protection provisions. So far, the theoretical part has been well developed, yet, the practice has not shown exactly as it seems. In fact, the EU actual external action on human rights issues seem to be characterized by its double standards and some incongruities.[625]

NGOs and human rights experts have indicated the the EU promotes human rights and it requires third countries to protect them, yet it ignores some human rights breaches within its territory.[626] For such reasons the Union has been criticized by human rights experts in various occasions.[627] Taking

Edward Elgar Publishing, 2011, p.8

624 Smith, K.E., European Union Foreign Policy in a Changing World, third edition, Polity Press, 2014, pg 111

625 Comité des Sages, Leading by example: a human rights agenda for the European Union for the Year 2000, Philip Alston (ed.), The EU and Human Rights, Oxford University Press, 2000; Bùrca de G., The road no taken: The European Union as a global human rights actor, American Journal of International Law, 105,4 (2011); Williams, A., EU Human Rights Policies: A Study in Irony, Oxford University Press, 2004, Chapter 9; Smith, K.E., European Union Foreign Policy in a Changing World, third edition, Polity Press, 2014, p 105

626 Smith, K.E., European Union Foreign Policy in a Changing World, third edition, Polity Press, 2014, pg 98

627 Williams, A., EU Human Rights Policies: A Study in Irony, Oxford University Press, 2004, Chapter 9

into consideration such allegations together with the continuous declarations made by the EU promoting human rights, it seems that it actually has one human rights standards for international level and another one within the Union.

Currently, the EU makes use of three ways for promoting human rights in third countries, those are: the application of conditionalities, the provision of aid to improve or promote human rights and the use of diplomatic instruments.[628] From these three categories, the one that interests the most to this chapter is the one that provides aid to improve or to promote human rights. This is because it is more likely that EU would assist international or national developing programs concerning the improvement of water services throughout the provision of aid. It would be unlikely to think about a scenario where the EU would make use of conditionalities or diplomatic instruments to contribute to the current situations of water issues.

3.2 The Role of the European Union in the International Fora

Once the Union's self-commitment on the global development and the eradication of poverty has been explained it should be studied how the EU actually acts on the matter. The EU has great ambitions in acting not only at European level, but also at International level, yet when it comes to the last one, its position may not be as clear as in the European sphere. In order to understand how far the EU can influence the international dimension concerning global development, it is crucial to identify its role in the international fora. (This part will specifically focus the EU in the United Nations, because this last one is the main international organization acting on the right to water and water issues in general, and of course, it is the biggest international organization.)

The introduction of the Lisbon Treaty gave the Union a single legal personality.[629] It has also introduced major reforms to the EU foreign policy coordination, especially concerning its relations with the UN.[630] Before the Lisbon Treaty, the European Community already enjoyed the observer status in the UN and with the introduction of the Lisbon Treaty its succession by the EU was made directly, and this change has been made through a simple notification procedure.[631] Having a status of *permanent observer*, the EU has the free access to most of the meetings and relevant

[628] Prof. Smith K. includes also another category to these, which is the deployment of civilian and military missions. Please, see: Smith, K.E., European Union Foreign Policy in a Changing World, third edition, Polity Press, 2014, pg 109

[629] Article 47 TEU

[630] Gegrand-Guillaud, A., Characteristics of an Recommendation for EU Coordination at the UN, European Foreign Affairs Review 14, no. 4(2009) pp 607-622

[631] Verlin Laatikainen, K., Multilateral leadership at the UN after the Lisbon Treaty, European Foreign Affairs Review 15, 2010, pp 475-493

documentation.[632] In May 2011, the UN General Assembly adopted the resolution granting the European Union new participating rights. This resolution clarified the EU observer status applicable to its specific situation. Most importantly, it established, first, that the EU will be ensured a seat among observers without the right to vote, co-sponsor resolutions or decisions nor put forward candidates; and second, that the Union would be able to present oral proposals and amendments, which should be put to a vote only at the request of a Member State.[633]

There is an interesting opinion that some academics share, which is that this secondary role attributed to the EU in the UN, does not actually fit the Union's foreign policy ambition established in the Lisbon Treaty.[634] From the various EU documents, declarations and its actual actions concerning development and human rights, it can be inferred that the EU is looking for a leading position in the matter, yet, the EU position in the UN has not changed so far. However, this does not mean at all that the EU will not be able to be a key agent on the topic. Its presence in the international community is strong and undeniable in many aspects, including also the protection and promotion of human rights and global development.

Furthermore, since 2011, the EU has a more strategic approach concerning development projects. This can be seen with the adoption of the *Agenda for Change*.[635] This is the current basis of the EU development policy. The document has been introduced with the objective to increase the impact and effectiveness of the EU development policy. To this end, it established several key principles and policy priorities in its development policy. Most importantly, it can be found two fundamental points that will be guiding the EU action on development, which are: coordination and coherence (this last point will be further developed in point 3.4).[636] The document established that the EU should take a more active leadership role and to make proposals more efficient, for example by avoiding the fragmentation of aid (in other words, coordinating the aids) with a joint programming of the Union's and Member States' aid with the aim of increasing the impact of the its development policy.[637] Later, the Commission has reaffirmed that the action at EU level is necessary as the action made by the Member States alone would not be sufficient to fulfill the objective established in

[632] UN, Permanent Observers, http://www.un.org/en/members/aboutpermobservers.shtml
[633] GA/11079/Rev. 1
[634] See for example, Verlin Laatikainen, K., Multilateral leadership at the UN after the Lisbon Treaty, European Foreign Affairs Review 15, 2010, pp 475-493
[635] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Increasing the Impact of EU Development Policy: an Agenda for Change, COM(2011) 637final
[636] Ibid, pg 10-11
[637] Ibid.

Article 21 of TEU and Article 208 of TFEU.[638] This affirmation is actually the solution for the current problem of the fragmentation of aid at global level, which actually makes less effective the provided aid to a specific issue; yet on the other hand, it is obvious that it is far more difficult to coordinate the objectives and interests of each Member State in order to economically support development projects. So far, it is difficult to find a general coordinator leading this aspect, what can be found are specific organization coordinating one specific area. The coordinating role that the EU is trying to achieve at Union's level would be an interesting model for the development of central agents for the coordination in the aid programmes at global level.

Furthermore, it can be also perceived also that the EU is taking steps to become a central player in the development sphere, especially concerning, again, the coordinating role. Generally speaking, this can constitute an important added value that the EU can offer to the international society. One could say that this role could be played by other international organizations or institutions, yet the unique features that the Union entails (e.g. its supranational and intergovernmental features) makes it a very interesting agent in developing this central role.

Water itself has never been a specific priority for the Union, as its importance has been always linked to the realization of other rights and/or objectives. Besides this fact, due to the current crisis in the EU, especially concerning economic crisis, migration, terrorism and security, the Union's global development interests may be diverted, and therefore those concerning water issues. The current situation clearly shows that the EU has other great priorities, either at internal or external level, especially those ones concerning migration and terrorism. At this point, it is difficult to assess whether such priority issues may end up jeopardizing the further development of water related projects in the future, but, is a fact that must be kept in mind.

3.3 EU external Action and the Right to Water

As it has been already mentioned above, the main objective of the Union's development policy is the eradication of poverty and sustainable development. The access to water and sanitation forms an important part of it, therefore, many of the developing projects carried out in developing countries also include the improvement of such elemental services.

[638] European Commission, Commission Staff Working Paper, Impact Assessment accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Increasing the impact of EU Development Policy, an Agenda for Change, SEC(2011) 1172final, p 27

The Union has provided development assistance concerning water supply and sanitation throughout the world.[639] So far, it is possible to find many examples where the EU made use of the provision of aid as part of EU developing programmes. In 2013, the EU financed with EUR 250 million the programme on food security, water and sanitation in Mali; and later in the same year it was donated a total of EUR 3.25 billion (by the EU together with the International Community) in order to support Mali's development.[640] Furthermore, in September 2013 EU pledged EUR 650 million to support the provision of basic services such as healthcare, clean water and education in Somalia and became the biggest donor.[641] This economic assistance achieved considerable results as it delivered safe water for half million people, it helped 70 000 people produce livestock and it made possible for about 40 000 children to go to school.[642]

Concerning some other water related projects, in 2011, the European Court of Auditors reviewed 23 EU-funded water projects in six African countries (Angola, Benin, Burkina Faso, Ghana, Nigeria and Tanzania).[643] This audit basically assessed whether the Commission has managed EU development assistance for drinking water and sanitation in sub-Saharan Africa with effectiveness and with sustainable results. Between 2001 and 2010 the Union contributed over 1 billion euro in such projects and this is a considerable amount, yet the result achieved by the auditors showed disappointing outcomes. Basically, the Court of Auditors found out, among other problems, that the Commission did not make appropriate use of the existing procedures to increase the effectiveness of the programmes.[644] The projects have been working well at a technical level,[645] therefore, the main problems rely on at the operational and managemental level. A proper infrastructure is in fact a very important piece for the access to water, therefore, having succeeded with this first step is a positive point. However, for an appropriate long lasting result, the operation part is extremely important.

The Court of Auditor's recommendation in order to improve the situation was that the Commission

[639] European Court of Auditors, Press Release ECA/12/36, Water and Sanitation Projects in sub-Saharan Africa – EU Commission could and should do better, Luxembourg, 28 September 2012

[640] European Commission, International donor conference: €3.25 billion mobilized by international community to rebuild Mali, Press Release, Brussels, 15 May 2013; Donor Conference for Development in Mali, 15 May 2013, Brussels, data available at: http://donor-conference-mali.eu/ (last access: 28/01/2016)

[641] A New Deal for Somalia, A Unique Opportunity to Build a Peaceful Society, Brussels, 16 September 2013 available at: http://eeas.europa.eu/archives/new-deal-for-somalia-conference/content/new-deal-somalia-unique-opportunity-build-peaceful-society.html

[642] European Commission, Report from the Commission to the European Parliament Council, 2014 Annual Report on the European Union's Development and External Assistance Policies and their Implementation in 2013, 13 August 2014 COM (2014) 501 final p. 5

[643] European Court of Auditors, European Union development assistance for drinking water supply and basic sanitation in sub-saharan countries, Report No. 13/2012, para 15

[644] Ibid., para 59, 61

[645] Ibid., para 17-20

should make use of the existing procedures, meaning especially those ones concerning the monitoring, economic and financial analysis.[646] It also provided very basic recommendations such as the Commission should define the objectives of the projects and also that it should justify the chosen technological solution and to specify some other alternative solutions.[647] Having said that, it seems that the Court of Auditors is not convinced with the achieved results by the Commission. This Report is a very interesting document, especially for the factual analysis of the cases and it gives also a general view of what have been done so far at a bigger scale. Yet, the recommendations given seem to be too general and vague. This also could mean that the projects are not working in general, yet it is hard to say that such recommendations are actually useful for the further improvement of the current projects, at least, from a practical point of view.

What it is clear so far is that there are various on going EU-financed water projects, yet, they are not working as they should, but on the other hand, it is also possible to expect the Union's far more commitment on promoting and protecting human rights in its external actions. As it has already mentioned above, the EU has been criticized in the past, not only for its management role in the projects, but also and especially for its reluctant position towards the protection of human rights, yet, it seems that this situation has been changing or at least there is the possibility to change. Its international assistance may not be consistent, however its strong presence in the international community concerning the promotion of human rights is undeniable.

On this specific point, the Union's coordinating role on aid/donation will be a key topic. The Sector of water supply and sanitation the biggest increase in aid fragmentation from 2005.[648] Aid fragmentation is a problematic issue as it may result in duplication of efforts, contradictory initiatives and avoidable transaction costs in the provision of the assistance.[649] An efficient water supply service entails high amount of investment, beginning from the establishment of the infrastructure, the introduction/actualization of efficient technology to the maintenance and control of it. The aid fragmentation may end-up affecting to the efficiency of the projects. By avoiding this better results may be achieved with the same amount of aids. Therefore, as established in the Agenda for Change,[650] the principle of coordination may play an important element to make more

[646] Ibid., para 62
[647] Ibid.
[648] Bürckey, U., Trends in In-country Aid Fragmentation and Donor Proliferation, An Analysis of Changes in Aid Allocation Patterns Between 2005 and 2009, Report on behalf of the OECD Task Team on Division of Labour and Complementary, 2011, p. 5
[649] Ibid., 6
[650] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Increasing the Impact of EU

effective the developing projects. This interests specially to the water sector, as above mentioned, it is one of the most affected sectors by the non-coordination of donors and financial aid.

Having explained that, it can be concluded that the Union's economical assistance concerning the quality of water and the access to it are of great relevance at international level (especially concerning the introduction of technology and infrastructure) and with the introduction of the RBA into the Union's development cooperation policy, it seems that the EU is in the correct path. On the other hand, as it can be perceived from the Court of Auditor's report, better results should be achieved from the amount of aid provided to the projects. In the end, it does not matter how high the amount of aid could be if the results are not satisfactory and long-lasting. At this point, it is clear that some changes had to be done. It has not passed much since this report, therefore it would be difficult to assess the incorporated changes to each projects, yet, it will be interesting to see the steps taken by the Commission to tackle the operational and managemental issues of the water projects.

3.4 Policy Coherence for Development as a key element in EU external action concerning the right to water and water supply

Policy coherence for development was initially introduced to the Union in 1992 and it was reinforced by the Article 208 of TFEU. Since then, it has been considered a fundamental element for the Union's development policy and its importance has been further developed and reaffirmed with the adoption of the Agenda for Change. On one hand it is clear that the EU acknowledges the importance of the policy coherence also among non-development policies that are likely to affect developing countries.[651] Yet, on the other hand, the principle of policy coherence has been an object of contentious in the external relations of the European Union.[652]

The Union has been working on the matter for more than two decades. The most important steps on this matter have been taken by the European Council. Such steps have became more specific and targeted in the last decade. For example in 2005 the European Council has reaffirmed the Union's commitment to the implementation of Policy Coherence for Development dealing with non-development policies areas, more specifically in the areas of: trade, environment, security,

Development Policy: an Agenda for Change, COM(2011) 637final

[651] See for example, Council of the European Union, Millennium Development Goals: EU Contribution to the Review of the MDGs at the UN 2005 High Level Event, Conclusions of the Council and the Representatives of the Governments of the Member States Meeting within the Council, 24 May 2005, para. 18

[652] Carbone, M., Mission Impossible: The European Union and Policy Coherence for Development, in Policy Coherence and EU Development Policy, 2011, p 1

agriculture, fisheries, social dimension of globalization, employment, migration, research and innovation, information society, transport, energy and climate change.[653] More specifically, in 2009, the European Council highlights the importance to have a new framework for the policy coherence for development throughout a more targeted, effective and strategic approach.[654] To this end, it identified five priority areas: 1) trade and finance, 2) climate change, 3) food security, 4) migration, and 5) security and peace building.[655] The identification of specific priority areas help to clarify the Union's position concerning global development.

Analyzing the specific case of the right to water, it can be said that it should fall within the scope of two of the above mentioned priorities areas, which are: climate change and food security. First of all, the relation between climate change and water is essential. Its protection and management are the key elements not only for human survival, but also, and equally importantly, it is fundamental for the maintenance of the whole ecosystem. The relation between food security and water is undeniable as well as in the first case. Without sufficient water quantity of good quality it is impossible to achieve food security.

It is interesting to find out that two of the five Union's priority areas on policy coherence for development, actually applies to the right to water; and more importantly it tackles from the two perspectives that are inherent in the right to water itself, which are the environmental aspect and human rights aspect.

The Union promotes human rights, it expressed several times that an efficient water supply is essential for human development, it is also a leading donor in development projects that also include the establishment and/or improvement of water sources and water supply. After carrying out a description and an evaluation of the Union's external action on development, it can be concluded that it can be concluded that the current external scenario seems to be a positive one for the further development of the right to water. There are still many details that must be improved and developed, yet the Union's intention and its path seems to coincide. The issue remains at internal level. Within the EU a considerable problem remains, which is the double standard of EU actions concerning human rights. With the analysis carried out above, this double-standard issue is evident.

[653] See for example, Council of the European Union, Millennium Development Goals: EU Contribution to the Review of the MDGs at the UN 2005 High Level Event, Conclusions of the Council and the Representatives of the Governments of the Member States Meeting within the Council, 24 May 2005, para 19

[654] Council of the European Union, Council Conclusions on Policy Coherence for Developments (PCD), 2974 External Relations Council meeting, Brussels, 17 November 2009, para. 6 and 7

[655] Ibid., para 11

However, this issue is not only present in the human right to water, but also in other human rights. The only solution to the problem would be to tackle the differences case by case, but in the end this will depend whether the Union and the Member States are actually interested or not in doing it so. This last step strictly depends on political will (or political wills), which is, unfortunately, hard to predict, especially if it involves many States' interests.

4. Conclusion for the fourth chapter

This chapter's objective was to identify similarities, strengths and weaknesses of the right to water between the international sphere and the EU sphere, with the ultimate goal of finding out how each system can help to each other according to their own experiences concerning the right to water, and specially what the EU can actually offer to the international society for the further development of the right to water according to its experience.

Taking into consideration the comparative analysis carried out in this chapter, the most relevant aspects that were found are as follows:

First, concerning the development of the right to water from its origins, it can be concluded that the International law has amplified its scope step by step, from just being a part of protection of health standards in the treatment of prisoner of war and civilian persons in times of war, to be one of the main arguments in the international environmental fora, and to the recognition of the right to water as part of the human rights. On the other hand, the Union has developed its water law at technical level by introducing the establishment of standards and controls in the water sources. The EU amplified its water law by covering more waters for different uses, yet, the scope itself of the EU water law has always remained as technical matter.

Second, whether environmental approach or the human rights approach would better fit for the development of the right to water, it has been concluded that both of them are complementary, therefore, water issues should be tackled with a two-fold approach. Both of them (international and EU) actually approach water issues with these two perspectives, yet they are not introduced at the same level or with the same efficiency. EU water law is characterized by its strong environmental approach that can be seen in all of the water directives; instead, implication on human health are directly addressed only in the drinking-water directive and bathing water directive. On the other hand, the international environmental law seems to have a more equilibrated approach concerning water issues. Yet, the weak point of the international law becomes apparent in the implementation

phase. This is not a matter that concerns only to water law, but to most subjects in international law. Unlike the Union that once it introduces a legal provision, it must be implemented by the Member States, and it has better mechanisms of control whether they are efficiently implementing it. Besides, the EU holds useful information and experience that can contribute to the international water law in order to establish realistic standards and objectives taking into consideration its past experience in the implementation phase.

On the other hand, the human rights approach of water issues is far more developed in the international sphere rather than the EU one. The human based approach has been introduced in many development programmes that also concerns water issues. As it has been explained with the Kenya experience, this approach actually helps to enable the entitlement of the right itself. The status from being considered just simple needs, this approach opens the path to make it possible to be shifted into rightful claims. This approach is what actually is lacking in the EU water law. By introducing the human rights based approach into its water law, it would enable the protection of the rest of the elements of the right to water that the Union does not regulate so far (e.g., access to water, affordability).

Finally, concerning the EU external action concerning water issues, it can be concluded that the EU actually has an important role for promoting and protecting the right to water at the international fora. As it has been mentioned, the EU supports either international or national programmes concerning development and the eradication of poverty and its commitment has shown considerable case by case improvement. What it can be perceived from the analysis, it can be concluded that the EU is an active and important promoter of the right to water at international level. This position of the Union cannot be felt at internal level. This is an example of the double-standards embedded in the EU on human rights issues, which was hardly criticized in several times by human rights experts and NGOs. Unfortunately, it is difficult to say whether such double-standards situation will be improved. In fact, the most problematic obstacle that may end up jeopardizing the development of the right to water *per se* in the EU could be this double-standards.

However, the important role promoting and protecting the right to water by the Union is undeniable. Other than the economical aid provided by the EU in the international fora, it can also contribute valuable data obtained from its experience on the implementation phase of the high water quality standards. The establishment of a 'common minimum standards' applicable to all States could represent a key instrument for the further development of the right to water. Taking into

consideration there is no such instrument in the current international water law, the EU contribution could represent a new update of the right to water.

Finally, it must be mentioned the coordinating role that the EU could play in the international fora. This could mean the most important added value that the Union could offer. The necessity of a central agent in coordinating aid is highly important in the current scenario where the fragmentation of aid is becoming more apparent; and so far, it seems that the EU is the most appropriate agent in taking this role.

CONCLUSION

The issues of water scarcity and water stress are not new. These issues have always been present in many parts of the world. Especially the northern region of Africa and the Middle-East have been the most affected ones.[656] On the other hand, the EU Member States have not suffered much of this issues in the past, except for Spain and Portugal. Now, water scarcity is becoming a problem that involves the whole globe. It was so that the European Union has also started to act on this topic. For this reason the Union included flood and droughts risk management into the EU environmental law, EU water law and its policy as a way of confronting the problem.[657]

Among the EU Member States, those ones from Southern Europe are the ones that suffer more from droughts, but recently this problem has become apparent also in Northern European basins, including those in the UK and Germany.[658] Moreover, it is estimated that central and southern Europe will suffer major water stress by the 2070s and the number of people affected will rise from 28 million to 44 million.[659] The results of these studies have shown the need to tackle this problem before it will be too late. The introduction of the flood and droughts risk management into the EU environmental law and water law was not a surprise as the circumstances required the development of the flood and droughts risk management in the EU water law and because all of them share the same general objective, which is the protection of ecosystems and its maintenance. As it has been seen in the previous chapters, the EU has been working on these issues with a strong environmental approach.

This notorious environmental approach characterizes the EU water law. Much differences cannot be found in the EU approach to water issues that are being regulated at Union level. The general standards for the water quality and quantity for different water uses are established according to environmental parameters. This is actually important and necessary for the protection of

656 UN, Managing Water Under Uncertainty and Risk, World Water Development Report 4, volume 1, 2012

657 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Comittee of the Regions, Report onthe Reviewof the European Water Scarcity and Droughts Policy, 2012, COM(2012) 672 final; Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy, O.J. L 327/1

658 Ibid.

659 IPCC, *Water Resources*, data available at: http://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch12s12-4-1.html (accessed on 27/05/2014)

ecosystems, yet this only represents a part of the issues concerning water. In order to have a complete coverage of it, it is necessary to include the human rights aspect of it. However, the current legal situation concerning water issues and human rights (most importantly, human health) in the EU are not being paid enough attention. This does not mean that the Union water law is completely lacking in the protection of human health, but this means that there are many aspects that could be improved.

As it has been mentioned many times in this thesis, the EU needs a better human rights approach to water issues. The Union has been regulating on the topics that interest the most to the Union itself, which is the protection of the water sources, its maintenance and in some cases the improvement of the environmental status of water, and it remained silent on the human rights aspect of the water issues. This is a mistake which has already been committed at international level by not including the right to water neither to the Universal Declaration of Human Rights (UDHR) adopted in 1948 nor in the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966. In the end, it had to pass decades for the International Community to realize the importance of recognizing it as a fundamental right. The human rights dimension of the right to water is undeniable and its fulfillment must be guaranteed as an essential element of survival.

With the analysis carried out in the four chapters of the thesis, it can be said that from a legal point of view, it should not be as difficult as it seems to introduce the right to water into the EU legal order. As it has been concluded in the second, third and fourth chapter, the Union has an interesting legal foundation for the recognition and the implementation of the right to water.

There were two main objectives to be developed in this thesis. The first one was to understand and clarify the legal situation of the right to water in the EU. The second objective was to find out how the EU can contribute to the further development of the right to water in general. Regarding this last point, it was identified two principal ways that the EU can contribute to the further development of the right to water at the international stage.

For the first main objective, which was to understand and clarify the legal situation of the right to water in the European Union, it has been found the following points:

First of all, it was identified essential elements of the right to water and complementing elements of the right to water. Among the essential one there are the quality of water, the quantity of water, its

accessibility and its affordability. Among these four features, the EU water law extensively regulates on two of them, which are the quality and quantity of water. On this regard, the EU water law basically establishes to types of standards to be met for the quality of water. One is the environmental standards that are established for the protection and maintenance of the general ecosystems. Most of the EU water directives establishes this type of standards. The other one is the human health standards, having as its main legal basis on the drinking water directive. Water for human consumption has other requirements compared to the water for the functioning of the ecosystems. This differentiation of standards seems to be obvious and normal, yet it is a good starting point to show the human rights features, even though minimum, that are implied in the EU water law.

Furthermore, the European Union also protects the health of bathers. Through the introduction of the Bathing Water Directive, Member States are required to monitor and assess the quality of the bathing water according to the parameters established in the directive. This is another water directive that protects human health. These two directives are the example of the human health considerations in the EU water law, even though it is to a minor extent. The incorporation of specific standards of bathing waters to the Union law is a very interesting point. The essential elements of the human right to water does not cover this aspect of water and health protection, but this perfectly falls within the scope of the broad interpretation of the right to water.

Concerning the other two essential elements of the right to water, i.e. affordability and accessibility, the EU water law does not regulate them properly. The affordability element may be related to the cost recovery principle and the polluter pays principle introduced by the Water Framework Directive, yet this principle has the main objective to promote sustainable water use and to provide adequate incentives for users to use water resources efficiently. Therefore, at this moment, it is not possible to relate the applicability of these principles to the requirement that water should be affordable to all. The accessibility element is basically in the same situation. The Union does not regulate on how water supply services should be provided, consequently it does not regulate on the accessibility of water as this point strictly depends on each Member States national law. Yet, this does not mean that it cannot be found any EU legal provision that does not protect this feature. One of the most important principles of the access to water is the principle of non-discrimination, which is also a very fundamental principle of the Union law. The human right to water implies the access of drinking water to all, without any discrimination. This reasoning may seem abstract, yet, this step is of great importance in order to find out the applicable legal basis for the right to water in the

European Union. Furthermore, on this point, it cannot be forgotten the role of the consumer protection law as an alternative to protect the access to water to all. Taking into account the current situation, a recognition of the right to water in the EU is not very realistic in an immediate future, yet, considering the importance of this right, other possible ways to protect this vital right must be looked for. The EU consumer law has not achieved a consolidated status yet, however, it is definitely being developed. As it has already mentioned, the aims of this thesis are to understand and clarify the legal situation of the right to water in the EU and to find out how the EU can contribute to the further development of the right to water in general. However, this thesis also proposes the use of the consumer protection provisions as an alternative to protect the right to water. Yet, it must be clear that it is proposed only to the end of achieving short-term results and this possibility should not be understood as an perfect alternative that can replace the formal recognition of the right to water in order to achieve its protection.

On the other hand, as it has been already mentioned, there are also complementing elements to the right to water. The most common examples are: the access to justice on water issues, public participation, access to environmental information, flood and drought management, sanitation, etc. Unlike the essential elements that are clearly identified, there is no specific list identifying the complementing ones. The most important point that must be highlighted is the public participation in the decision-making. Concerning this, the Union has two strong instruments. For a general participation, there is the European Citizen Initiative (ECI), which is a participatory instrument that consists on an invitation made by citizens to the Commission to submit a proposal on the field where the EU has competence to legislate. The ECI on water and sanitation did not have a good result, yet, this was the first time that the recognition of human right to water in the EU has brought up as a topic. Besides, this issue grabbed the attention of the European Parliament and the resolution on the *follow-up to the European Citizen Initiative Right2Water* has been adopted in September 2015, which represents the first political achievement that the right to water has obtained in the European Union. On this document, the Parliament invited the Commission to come forward with legislative proposals that would recognize universal access and the human right to water. It will be interesting to see how this matter will be developed in the future.

The other relevant instrument that the Union has concerning public participation, is the Aarhus Convention, which the EU has introduced to its legal order in 2003. The primary objective of this legal document is to guarantee the access to information, public participation in decision-making and access to justice in environmental matters. The Aarhus Convention has been initially introduced

throughout two main directives, which are Directive 2003/4/EC on public access to environmental information, and Directive 2003/35/EC on the public participation. So far, it seems that the implementation of these directives in the EU are in a good path. The public participation and the access to information are the key elements required for the proper fulfillment of the right to water. Therefore, this is another positive aspect that can be found in the current EU law for the right to water.

Having said that, it can be concluded that at least from a legal point of view, the EU has a strong legal foundation to introduce the right to water in its legal order and also, it can be inferred that the Union is ready to support and to promote human rights at global scale.

The second general objective of this thesis was to find out how the EU can contribute to the further development of the right to water in general. In order to explain it, it has been found out one internal step that the Union should take and two ways that the Union can take in order to contribute to the further development of the right to water at global level.

First of all, the internal step that the Union should take is to promoting the right to water in the EU. Recently, the EU has started playing an important role promoting and protecting human rights, and according to the affirmations made by the Council of the European Union and the Commission, this role could be boosted with the introduction of the Right Based Approach to the developing cooperation. This should be also applied to the right to water. Of course,if the EU could regulate properly on the right to water both, from environmental perspective and human rights perspective would be the most desired scenario, yet at the current state, this is not a feasible option. For such reason, this thesis proposes the promotion of the right to water or even the promotion of the essential elements of the right to water individually as a path to develop the right to water in the Union. It must be mention that this thesis insists as a first step to promote the right to water inside the European Union because, as it will be explained in the following paragraphs, the EU is already promoting the human right to water either directly or indirectly at the global scale.

As the first way of contributing to the development of the right to water at international level, it has been identified the option to share its own experience on the difficulties of the implementation of high water quality standards. For the global improvement of the water quality it is highly important to establish feasible objectives. The EU has adopted a number of water directives and each of them applies to a specific use of water and consequently its standards varies depending on each

requirements. The reality has shown that many Member States had difficulties meeting such standards (some of them continue having some difficulties) and for such reason the European Commission had to launch several infringement proceeding against many Member States. This may have been a negative experience, as this means that Member States were not able to properly implement the water directives, yet this also means that the EU has obtained data on the most common aspects that States may find difficult to comply with, especially concerning the quality of water. This is a valuable experience that only the European Union can offer to the international water law. This experience translated to technical data should be useful to establish realistic standards that should be achieved by all States, or at least by the developed ones.

The second way that the EU can contribute to the further development of the right to water concerns the EU external action. On this point, the Union is including the Rights-Based Approach (RBA) to its development cooperation policy.[660] The Council made a very interesting affirmation on this. It highlighted the importance of working in partnership with other development agents such as the UN bodies and international financial institutions to the end of promoting the rights-based approach to development. This is an important commitment that the EU appears ready to hold and by doing it so, it will be easier to transport its experience to the international dimension, which should be of great contribute. Furthermore, the Council goes further with the declaration of EU commitment to support the integration of human rights issues in EU policy formulation and its advocacy in the global agenda. This affirmation constitute a great support for the integration of the human right to water in the EU policy. However, the introduction of the RBA to the EU development cooperation policy is a recent event, and so far, it cannot found any example implementing it. Yet, this new EU commitment is attention grabbing and it will be interesting to see how this approach will influence to the Union role in the protection of human rights.

Finally, it should be mentioned the last important move made by the European Union specifically concerning the right to water, which was the European Parliament invitation to the Commission to come forward with legislative proposals that would recognize universal access and the human right to water. Once again, it will be interesting to see the Commission's reaction towards it as this next step could address the prospective of the recognition and implementation of the right to water in the European Union.

As a final evaluation, it can be said that at the current stage it is difficult to say whether the right to

[660] Council of the European Union, Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights, Brussels, 19 May 2014

water may be directly protected by the Union law. The EU law has a very interesting legal basis for the protection of the right to water, yet, without a will to actively promote this right in the internal dimension of the EU either by the Union institutions or by the Member States, this step may be difficult to be developed. Besides, the Union will have to solve first another problem, that is also directly related to the right to water, which is its double-standard on protecting human rights. This is one of the most essential problem that must be tackled. The Union should no longer have two standards on the protection of the human rights, differentiating human rights promotion and protection at internal level on one side, and those at international level, on the other. In the specific case of the protection of the right to water, by solving this incongruence, it is expected to see some harmonization among the Union's position towards this right at internal and external dimension.

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