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Water, National Sovereignty and Social Resistance: Bilateral  
Investment Treaties and the Struggles against Multinational  
Water Companies in Cochabamba and El Alto, Bolivia

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**Abstract**

Over the last 20 years, bilateral investment agreements (BITs) have become an important part of the neoliberal 'free trade' agenda to open markets to foreign investment and protect the corporate 'right' to profit over the human right to water. Drawing on two case studies of urban water privatisation in Bolivia, this article argues that BITs act as conditioning frameworks that restrict the ability of governments to meet the demands of citizens for rights such as access to water. Recently, however, Bolivian social movements have launched successful resistance strategies and won important victories against neoliberal globalisation: two private water contracts with multinational corporations have been cancelled. This article analyzes the lessons learned from these two Bolivian cases for social movements elsewhere, especially the importance of international solidarity in pressuring multinational corporations to drop lawsuits.

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**1. Introduction**

'They could never take away our right to water, because they could never take away our thirst.'

-- Eduardo Galeano, Uruguayan writer and environmental activist

In one of his last speeches to the nation on March 6, 2005, the soon-to-be-toppled President Carlos Mesa warned Bolivian citizens in a televised address that they could not exercise their democratic rights to decide the future of their nation's natural resources. Should the gas and water companies that were privatised be expropriated, Mesa warned, the Bolivian state would have to pay millions of dollars to the multinational corporation that had invested in Bolivia's privatised water, gas, and oil companies. Mesa's threat was not a hollow one. Indeed, over the last 20 years, neoliberal administrations in Latin America and elsewhere have slowly dismantled policies that provided a degree of national, democratic control over economic policy, creating legal mechanisms that entrench the corporate 'right' to property and profit in their place.

As the tide has turned against neoliberalism in Bolivia, these policies are being challenged by a powerful social movement that aims to return natural resources to public hands. The recent cycle of social protests was sparked by the victory of Bolivia's first 'Water War' of April 2000, when the local population of Cochabamba succeeded in throwing out the US-based multinational corporation, Bechtel, which had been granted control over the municipal water system only six months before. Over the next five years, protests proliferated and spread across the country, eventually succeeding in throwing out two Presidents within two years and pressuring the government to cancel the second private water contract in La Paz and its poor, satellite city El Alto. The election of Evo Morales, who campaigned on a promise to nationalize natural resources and reverse the damage to the nation's indigenous people wrought by over two decades of neoliberalism, is also one of the fruits of this struggle.

One of the many challenges facing President Morales and his government, however, is the legacy left by a series of neoliberal administrations which have entrenched the Bolivian state into series of binding agreements that protect foreign investors' rights to property and profit. More specifically, Bolivia is party to 24 bilateral investment treaties (BITs) that have helped to create an international legal system that seeks to create a world in which capital flows freely across borders while labour remains locked in place.

The purpose of this essay is to discuss the political effects of BITs and how they have been challenged by the Bolivian social movement for water justice fighting the corporate agenda of water privatisation. We argue that the international legal system of investor protection that has been created by BITs is fundamentally undemocratic in two basic respects. First, BITs are conditioning frameworks that aim to restrict the abilities of governments to meet the demands of citizens for basic needs and human rights, such as access to a safe water supply. Second, the states and institutions that have created these conditioning frameworks lack mechanisms to make the system accountable to citizens. The first two sections of the article provide a brief overview of BITs and their effect on the quality of democracy. The third and fourth sections describe how multinational corporations have used this emerging legal system to protect their 'right' to make profit from selling water services to the citizens of Cochabamba and La Paz-El Alto in Bolivia. The conclusion reviews some of the lessons that can be learned from the Bolivian social movements that are fighting back against the corporate agenda in an effort to assert popular sovereignty over public policy.

**2. Bilateral Investment Treaties**

## 2.1 Neoliberal Structural Adjustment and the Proliferation of BITs

The proliferation of BITs is a legacy of the Third World debt crisis of the 1980s. As is well-known, the ‘solution’ to the debt crisis was neoliberal structural adjustment programs (SAPs), which were designed, orchestrated and imposed by international financial institutions such as the International Monetary Fund (IMF) and the World Bank on heavily-indebted states. SAPs included measures to privatise state-owned enterprises and open borders to trade and investment. Despite claims to the contrary, SAPs did not aim to foster sustainable nor equitable economic growth but rather to ensure that debtor countries could earn the foreign currency necessary to pay back the money borrowed from private banks and G-7 countries in the previous decades (McMichael, 2000).

As a result of structural adjustment, capital-poor, heavily-indebted countries such as Bolivia have increasingly found themselves caught in global framework of competition for foreign investment. The proliferation of bilateral investment treaties (BITs) has been a central part of the effort of Third World states to attract foreign investors (read multinational enterprises) to invest in to-be-privatised enterprises and utilities (Elkins, Guzman and Simmons, 2006, Van Harten, 2005). BITs are designed to further break down barriers to investment, thereby creating more freedom for corporations to pursue profits. Since the early 1990s, many heavily indebted governments have signed BITs with countries where potential investors are located, particularly the advanced industrialized nations of the global North. The number of BITs has jumped from 389 in 1989 to 2,265 in 2003 and now involve more than 176 nations (UNCTAD, nd) (see Table 1).

**Table 1: Distribution of BITs in 2002**

Region	Number of BITs	Number of countries	Average number of BITs per country
Developed countries	1,170	26	45
Developing countries	1,745	150	12
Africa	533	53	10
Latin America and the Caribbean	413	40	10
Asia and the Pacific	1,003	57	18
Central and Eastern Europe	716	19	38

Source: UNCTAD (nd)

## 2.2 BITs and the Water Sector

BITs have served as the primary legal instruments used by foreign direct investors to protect their interests in the water sector. To date, there have been ten known investment-treaty related disputes in the water sector, eight of which have been registered at the International Court for the Settlement of Investment Disputes (ICSID). Private enterprises have preferred to bring their disputes relating to water privatisation to the ICSID for several reasons. First, the ICSID is intimately connected to the World Bank, which has played an active role in promoting water privatisation on the global scale. Second, parties can carefully restrict the amount of information that the ICSID relates to the public concerning the case since both parties must agree to have arguments and decisions made public, providing investors with a veto on information transmission. And third, the purpose of the ICSID is to promote future investment by protecting current investments.

BITs are a form of international hard law that creates legally enforceable rights and entitlements for foreign investors. As legal scholar Gus Van Harten describes, the ‘system of investor protection, in terms of its scope and effectiveness, goes well beyond other international regimes that permit individualized access to international governing institutions’, such as international human rights law and humanitarian law (2005, pp. 603-4). By contrast, soft law initiatives that aim to protect the human right to water, such as the General Comment 15 of the United Committee on Economic and Social Rights, contain no provisions for binding arbitration or damage awards. As Timothy O’Neill concludes, while it may be possible to advance a human rights claim to protect the right to water, “the core problem is not identifying the rights and norms which need to be upheld and protected under international law, but rather seeking enforcement of those norms” (2006, p. 381). Indeed, the implementation of the human right to water crucially depends on the local state’s ‘right to regulate’ to ensure, for example, that access to the existing system is non-discriminatory or to prevent private companies from establishing an unfair pricing system and excessive charges for water supply and sanitation services (Morgan, 2004,

Rosemann, 2005). Since these soft law initiatives lack effective enforcement mechanisms, in practice, the international system of investor protection created by BITs potentially trumps initiatives—either international initiatives or local regulatory law—that aim to enforce the human right to water.

In the first decision arising from an investment dispute involving the water sector at the International Court for the Settlement of Investment Disputes (ICSID), the goal of investment promotion outweighed the local state's right to regulate. At the end of July 2006, the ICSID court ruled in favour of Azurix, a spin-off from the US-based corporation Enron, against the Argentine government. In the lawsuit, the company claimed that the government was using political calculations to interfere with the setting of water tariffs in its concession in the province of Buenos Aires. The court ruled that Argentina breached several provisions of the BIT and ordered the government to pay USD 165 million in compensation. Significantly, the Argentine government was found liable for not providing "fair and equitable treatment" and "full protection and security" to the investment as required under the Argentine-US BIT. As the tribunal put it: "It follows from the ordinary meaning of the terms fair and equitable and the purpose and object of the BIT that fair and equitable should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment...." (para. 360). In short, the local state's attempt to regulate a private company was deemed to be harmful to the promotion of foreign investment and therefore the Argentine was ordered to pay damages.

### 2.3 BITs as Conditioning Frameworks

Since the intent and purpose of BITs is to restrict the ability of states to make decisions that are deemed unfavourable to private investors, the proliferation of BITs has raised critical questions about their effect on the quality of democracy. If democracy is understood to a political system in which the citizens of the country have equal rights in deliberating over public affairs, democratic ideals are compromised when the scope of available political options narrows.

BITs are what progressive economists Ricardo Grinspun and Robert Kreklewich (1994) call 'conditioning frameworks'. As they explain, such trade and investment treaties attempt to 'lock-in' neoliberal reforms and as such:

They constrict economic and social decision making at the domestic level, and exert pressures upon less powerful countries to accept (by eroding what remaining ability they might have to modify), overriding dictates of globalisation and regionalisation in the world economy. The outcome, if unchallenged, will be a narrower set of societal choices; an unprecedented entrenchment of barriers to progressive social change (1994, p. 51).

Regardless of the final outcome of particular legal disputes that arise under these agreements, the fact that such legal protections exist affects the terms under which governments and multinational enterprises negotiate over important matters that concern public health, such as access to safe water. Indeed, the ever-present threat that cancelling or even modifying a privatisation contract in terms that favour citizens' right to water at the expense of multinational enterprises' investments may result in multi-million dollar lawsuits empowers these enterprises vis-à-vis states and citizens for several reasons. First, BITs elevate the legal status of private investors by allowing them to bring claims for damages against host states. By contrast, the citizens of the affected state that may be directly affected by the contract have no means for a direct action claim when the dispute concerns a private contract between an enterprise and a host state (O'Neill, 2006, Van Harten, 2005). Second, global corporations seeking to form consortiums can choose where to register their company—such as a tax haven or a country that is party to a BIT—depending on the benefits that are offered and the company's particular needs at that time. Unlike ordinary citizens, the 'citizenship' of corporations under international law is rather fluid. Multinational enterprises seeking redress can alter their registration in order to best defend themselves for legal action, as we shall see in the case of *Aguas del Tunari* versus the Bolivian government. Third, BITs outline provisions for compulsory arbitration leading to damage awards. From a human rights perspective, damage awards—often worth tens of millions of dollars—are of great concern because the implementation of the right to water requires considerable funding (Rosemann, 2005). Since over 90 per cent of water and sanitation infrastructure is financed by public money, any damages paid by a government to a multinational water company drains resources that could otherwise be dedicated to meeting these goals.

Within this international system of investor protection, states have increasingly found themselves squeezed between contractual obligations and angry citizens. Governments in developing countries are poorly positioned to prevent or punish violations by international investors, particularly violations of

economic and social rights such as the right to water. Indeed, as Maria McFarland Sánchez-Moreno and Tracy Higgins observe, “governments are often facilitators or collaborators in the violations” (2004, p. 1668). There are several reasons for this, foremost among them the pressure faced by capital-poor states from foreign governments and international financial institutions to attract foreign investment at all costs. The political pressure to privatise has arguably exacerbated the scale of corruption since the returns in these transactions are so large (Hall, 1999). In the case of the Bolivian ‘water wars’, negotiations were clouded in secrecy, likely because the government knew that the water privatisation policy would be incredibly unpopular were it subject to an open public debate.

For this reason, the same social organisations that have been involved in defending water justice, such as indigenous groups, women’s groups, labour groups, and environmental groups, tend to be the same organisations that are fighting against neoliberal ‘free trade’ and investment treaties such as BITs (Bakker, 2007, Morgan, 2004). Driven by the belief that participatory democracy is essential for the advancement of a humane development agenda, Bolivian social organisations have also argued that BITs must be dismantled should the right to water be realized.

In sum, the conflicts between investors, states, and citizens over issues such as water pricing and access to water take place against a background of extremely unequal power resources. The international system of investor protection developed by BITs reinforces the unequal dynamics of neoliberal globalisation between ‘footloose’ capital and territorially-bound citizens, which has played out in struggles over the right to water in Bolivia.

### **3. Neoliberal Reform, Bilateral Investment Treaties, and Water Privatisation in Bolivia**

The struggle for water justice in Bolivia has taken place along two central axes: between citizens and the state and between citizens and multinational water companies. Bolivia is a very weakly-institutionalised liberal democracy in which oppositional social movements tend to express their political opinions by taking to the streets rather than through the ballot box (McNeish, 2006). In both of the national and international arenas, Bolivian citizens have been able to exercise their power through collective action, which has thus far proven to be a successful tactic to defend the right to water.

Since the early 1990s, the Bolivian government has been put under pressure by international financial institutions to privatize all public services, including municipal water utilities. As part of the effort to ‘lock in’ neoliberal reforms and open a window for privatization, neoliberal regimes committed Bolivia to a series of BITs. Two of these treaties played a central role in water privatisation: the treaties signed with the Netherlands (<[http://www.unctad.org/sections/dite/ia/docs/bits/netherlands\\_bolivia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/netherlands_bolivia.pdf)>) and France (<[http://www.unctad.org/sections/dite/ia/docs/bits/bolivia\\_france.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/bolivia_france.pdf)>), which came into force on November 1, 1994 and October 12, 1996, respectively. Both treaties were valid for a period of ten years and designate the ICSID as the international court to which disputes that emerge under the BIT are referred.<sup>i</sup>

The decision of the Bolivian government to pursue BITs with European nations such as the Netherlands and France was part of a strategy to attract foreign investors into the country, including multinational water service companies. Foreign investors were only interested in bidding on water utilities in large urban markets, where the population is relatively wealthy and economies of scale are possible (Laurie and Marvin, 1999). Therefore, the municipal water utilities in some of the most populated urban areas of Bolivia—the utility that serves Cochabamba and the neighbouring cities in La Paz and El Alto—were privatized first.<sup>ii</sup> Both of these privatisations since became the subject of intense social struggles known as the ‘water wars.’

International financial institutions, particularly the World Bank, were without doubt the driving force behind privatization in the water and sanitation sector in Bolivia (Nickson, 1998, Shultz, 2003). When state officials were slow to prioritize water and sanitation utilities in their structural adjustment plans, the World Bank turned to more coercive measures. In 1994, the World Bank extended a USD 4.5 million “Sector Reform” loan intended to improve the efficiency of the public water and sanitation utilities in the main cities of Bolivia in order to make them more attractive to private investors. In addition, the Inter-American Development Bank (IDB) granted a USD 1.3 million loan for the same purpose, but it became a major player in the reform process after privatization. The Bolivian government used these

loans to establish the regulatory framework to oversee the privatisation process, including a new Vice ministry of Basic Services and a central government-appointed Superintendencia de Servicios Básicos (Superintendent of Basic Services—SISAB) (Food and Water Watch, nd).

On July 24, 1997, about three weeks after the first Superintendent was appointed, a 30-year concession for the municipal water utility that served the neighbouring cities of La Paz and El Alto was granted to Aguas del Illimani, a consortium controlled by the French multinational Suez (Superintendencia de Aguas, 1997). Roughly modelled on Bolivia's privatisation program, which sought to dampen public criticism by requiring multinational consortia to involve local capital, roughly three-quarters of the shares of the consortium were owned by international capital (French and Argentine), while the remaining quarter were owned by two Bolivian companies involved in finance and construction. At the time of the privatisation of the municipal water utility, there was very little public debate since negotiations over the sale took place in secret (Crespo Flores and Laurie, 2007, Spronk and Kohl, 2006).

Facing heavy pressure from the World Bank, which threatened to cancel a loan if the municipal water utility in Cochabamba was not privatised, the government opened another bidding process shortly after the Illimani contract was signed. Despite the best attempts by the government, it attracted no bids. Two years later, however, the San Francisco-based construction giant Bechtel expressed interest in the Cochabamba concession. On September 3, 1999, a concession contract was signed that transferred control over Cochabamba's municipal utility to Aguas del Tunari, a consortium controlled by International Water Limited, a firm in which Bechtel held majority share (Superintendencia de Aguas, 1999). Similar to Aguas del Illimani, 20 percent of the company's shares were owned by Bolivian capitalists, while 80 percent were owned by the affiliates of multinational corporations based in the advanced industrialized countries. Aguas del Tunari began operations on November 1, 1999.

It is noteworthy that neither the Illimani nor Tunari concession contracts were approved by Congress, which has raised questions about their legitimacy in the public eye. In all, the executive branch of government passed four Supreme Decrees to legalize the granting of the two concessions, a law created and passed by the executive branch of government. The Bolivian Constitution (<http://pdba.georgetown.edu/Constitutions/Bolivia/consboliv2005.html>) (Art. 59, Para. 5), however, clearly dictates that the legislative branch of the state must 'authorize and approve the contracts of enterprises that promise general rents to the State, such as contracts that concern the exploitation of national riches.' During his election campaign in December 2005, then-presidential candidate Evo Morales claimed that the oil and gas contracts approved by Supreme Decree were 'illegal and unconstitutional' (de Córdoba, 2005) because they were not approved by Congress. The same argument could be made about the concession contracts granted to Aguas del Tunari and Aguas del Illimani. Since one of the primary goals of the water justice movement is to assert popular sovereignty over important matters of public policy, the focus of much of the public debate in Bolivia has been on the need to force the government to apply the laws that already exist.

## **4. Cochabamba: Aguas del Tunari versus the Republic of Bolivia**

### **4.1 Cochabamba 'Water War': November 1999 to April 2000**

The social conflict that arose around water privatisation in Cochabamba related to two contentious issues: water pricing and access to water. Immediately after the concession contract was signed, the government water regulator allowed the private company to raise tariffs an average of 35 per cent, which raised the cost of water to around a quarter of the average monthly salary. Some users, however, reported increases to their water bills of up to 200 per cent (Vargas and Kruse, 2000, p. 11). Many of the participants in the protests that erupted between December 1999 and April 2000, however, were not even customers of the public utility and therefore not directly affected by the price increases. Urban residents without water connections and the small farmers from the surrounding region were primarily concerned about the monopoly provisions of the Aguas del Tunari contract and the new water privatization law (2029), which was passed two months after the contract was awarded.

The monopoly provision meant that the concessionaire became the owner of every drop of water within the concession area for the duration of the contract, which caused a problem for urban residents that had dug their own wells and the small farmers who depended on water for personal use and crop irrigation. Due to the dilapidated state of the previous municipal utility, 43 per cent of urban residents were not

served by the municipal water company. Many of these unconnected residents built independent water systems that draw on 'free' water resources. The Tunari contract and the new law threatened to expropriate these communities without compensation. Under the new law, concessionaires could also apply to exploit water resources outside of their service area, which threatened the water supplies used by small communities and farmers in the surrounding region. Small farmers had been engaged in battles with the Bolivian state and the municipality for decades over the drilling of deep wells, which threaten the water resources that they use for irrigation (Assies, 2003, Crespo Flores, 1999). When Tunari took over the public water system, small farmers' organisations were prepared for a fight.

In November 1999, local residents started to receive their drastically increased water bills. These urban residents joined together with the peasants' associations and urban water committees to form the Coalition in Defence of Water and Life (henceforth called by its shortened name in Spanish, the *Coordinadora*), the network of organisations that emerged to articulate a civil society response to tariff increases and the monopoly provisions of the Tunari contract and the water privatisation law. The *Coordinadora* found it relatively easy to mobilize people, most of whom over the last 15 years had seen their real wages fall and the cost of living skyrocket, which many of them connected to their governments' neoliberal structural adjustment programs (Kohl and Farthing, 2006).

In early April 2000, the *Coordinadora* called a city-wide strike that shut down the city with roadblocks, marches, and demonstrations in order to pressure the government to cancel the contract with Tunari. On the streets, tens of thousands of protestors could be heard chanting 'the water is ours, damn it!' Meanwhile, Tunari executives fled the country believing their lives were in danger. The citizens of Cochabamba declared a victory when the government finally cancelled the contract, reversed the water privatisation legislation, and returned Cochabamba's water utility to municipal control under the watchful eye of the *Coordinadora* (Olivera and Lewis, 2004).

While the *Coordinadora* won the initial battle, it had not yet won the war. Two years later, the company's investors returned with a vengeance, demanding that the Bolivian government pay USD 25 million in damages for its 'lost investments' in Cochabamba. Claiming that the government had violated the terms of the BIT between Bolivia and the Netherlands, Tunari brought its case against the Republic of Bolivia to the ICSID (ARB/02/03) on February 25, 2002. Although Bechtel, one of the major shareholders, is an American company the BIT between Bolivia and the United States was not yet in force at the time that the protests erupted.<sup>iii</sup>

## 4.2 Fluid Corporate Citizenship

During the hearings, the Bolivian government's main argument was that the ICSID did not have jurisdiction to hear the case because Tunari was not truly a Dutch company, but a 'shell' created to take advantage of the BIT. When the contract was signed, the company was registered in the Cayman Islands. In November 1999, it reappeared as International Water Holdings B.V. (IWH), a subsidiary of ING Trust, which has its head office in the Netherlands. In March 2000, Dutch activists in solidarity with the Cochabamba struggle went to pay the IWH executives a visit, only to discover that it was no more than a post office box in the ING office (Kruse, nd). If the Bolivian government were found to be correct, the claim would have been dismissed.

In a decision handed down on October 21, 2005, the ICSID judges ruled 2-1 that they had jurisdiction in the case of *Aguas del Tunari vs. Bolivia*, arguing that the transfer would have required planning long in advance of the transfer itself. While the Bolivian government demanded documentation to prove that IWH controlled the company, the judges ruled that 'control' stemmed from 'ownership' and that "[i]f an investor can not ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated" (para. 247). In his dissenting opinion, Jose Alberro-Semerena argued that the company should have to prove that the Dutch branches of Tunari's corporate family tree exerted "actual" control over the company. As Luke Eric Peterson (2005) explains, "[i]n taking this view, Mr. Alberro-Semerena also rejected the argument that majority shareholding and majority voting rights constituted per se control." Second, Mr. Alberro-Semerena argued that more investigation should have been conducted into the timing of the corporate restructuring, raising the contentious issue of how the nationality of corporations should be defined. The Bolivian government had convinced at least one judge of its arguments.



### 4.3 David brings down Goliath: International Solidarity in the case against Bechtel

Social movement leaders in Cochabamba actively sought to make links with activists across borders because they did not trust their own government to defend their interests. Previous to the election of the MAS in December 2005, oppositional social movements viewed the local government and politicians as hostile and unresponsive. International solidarity was therefore primarily viewed as a way to gain political leverage over the Bolivian state and defend what the social movements perceived to be matters of public interest.

One of the major issues for the social movements was the lack of transparency of the ICSID proceedings. Attorneys working on the case lobbied the court to allow for public participation on the grounds that the issue affected an important area of public concern. In August 2002, more than 300 activists in 41 countries signed a petition addressed to the World Bank demanding transparency in the proceedings and that citizens be allowed to participate in the hearings. In February 2003, the ICSID rejected the petition and refused to allow citizens give testimony, observe the proceedings, or even see the arguments. As with all ICSID proceedings, the case would be heard in secret on the basis that the legal basis for such claims is international commercial law, not a matter of public policy. As Martin Wagner, an attorney with US-based law firm Earthjustice involved in the petition, writes, 'The panel explicitly rejected all of our requests for public participation in this closed-door process. It is inexcusable that a panel considering an issue as fundamental as the right to water should be able to exclude the very people whose rights will be affected by the case' (Earthjustice, 2003).

These legal struggles were backed by other campaigns that aimed to raise public awareness about the problems with the ICSID and influence public opinion. US-based nongovernmental organisations (NGO) such as Public Citizen and the Bolivian-US NGO Democracy Center helped to coordinate an international campaign against Bechtel that involved direct action and letter-writing campaigns. In July 2002, the municipal government of San Francisco—the city where Bechtel's head offices are located and the hometown of Jim Shultz, Director of the Democracy Center—passed a resolution to condemn the lawsuit brought by the company. Three months later, activists surrounded the company's headquarters demanding that the company withdraw the lawsuit (Zoll, 2000). Eventually, Bechtel felt the pressure. On March 2004, the Bolivian government announced that Bechtel had accepted their proposal to drop the lawsuit if the government would buy Bechtel's shares in the company for a symbolic sum.

The second largest shareholder Abengoa (a Spanish multinational), however, refused to drop the lawsuit, which left the government's proposal hanging in the air. The uncertainty created by this situation was used as an opportunity by Minister José Galindo of the Presidential Office to issue a warning to all Bolivians that they would have to face 'the consequences' if they continued to demand that multinational companies be expropriated. Galindo was government minister for Carlos Mesa, who took over from Sánchez de Lozada when he escaped to Miami during protests in El Alto over the privatization of gas in October 2003. In a statement to the press on November 19, 2004, his Minister, Mario Galindo argued that, 'failing to respect the rule of law has consequences not only for a sector of the country, but for all Bolivians' and that 'we are all going to suffer'. When asked directly who should pay that USD 25 million demanded by Bechtel, Minister Galindo responded that the government would make sure that 'those who were responsible' should pay and not the government, implying that the residents of Cochabamba should pay through their water fees (Los Tiempos, 2004). Minister Galindo's comments are revealing of the differences of opinion concerning the rights and responsibilities of private citizens and the government in implementing the right to water. According to Galindo, private citizens rather than the state should bear the full burden of costs associated with water delivery, including the costs associated with attracting foreign investment. From a human rights perspective, however, the state would be violating its protective duties if it failed to stop individual persons, groups, companies or other non-state actors from interfering in the universal access to water (Rosemann, 2005).

Despite the recalcitrant stance of the central Bolivian government, local and international activists continued their aggressive campaign against Tunari, this time targeting Abengoa. A letter signed by over 200 organisations and 400 individuals from 30 countries was sent to the executives of Abengoa requesting that the company withdraw its claim for compensation from the ICSID. Eventually, Abengoa followed Bechtel's lead and gave in to public pressure. On January 19, 2006, Aguas del Tunari's main shareholders Bechtel and Abengoa agreed to drop their case in ICSID for a token payment of 2 bolivianos (about USD 0.30). Sources directly involved in the settlement negotiations claimed that the

continued international citizen pressure was the reason that the companies decided to drop the case. As Jim Shultz of the Democracy Center writes, it was ‘the first time that a major corporation has ever dropped a major international trade case such as this one as a direct result of global public pressure, and it sets an important precedent for the politics of future trade cases like it’ (nd).

## **5. La Paz-El Alto: Bolivians take on Aguas del Illimani (Suez)**

### **5.1 Bolivia’s ‘Second Water War’**

As the dust settled in Cochabamba, trouble started brewing over water contract in La Paz-El Alto. While local newspapers report sporadic protests against Aguas del Illimani since its privatisation in 1997, resistance strategies become more effective seven years into the contract. In November 2004, the militant local residents’ association, the Federation of Neighbourhood Councils of El Alto (FEJUVE), which had been radicalized by their confrontation with the state in the ‘Gas War’ of October 2003, took on the water issue as part of the wider agenda to return natural resources to public hands.

#### **5.1.1 Problems with the Aguas del Illimani Contract**

The FEJUVE brought media attention to two basic problems with the service offered by the private provider, Aguas del Illimani. First, the FEJUVE raised awareness about the problems in the contract posed by the definition of the ‘served area’, a smaller area within the larger concession area in which Illimani was responsible for providing services. This restrictive definition allowed the company and the government regulator to claim that the company had achieved ‘full service coverage’, although 200,000 people (about one-third of the population of El Alto) lacked access to basic water services. Second, the company outsmarted other companies in the region by raising fees for new connections rather than tariffs for existing customers. To get water and sewerage connected to your home in La Paz or El Alto, it cost USD 445, the equivalent of almost 9 monthly salaries at minimum wage. These tariff hikes did not elicit the same response as did the price hike in Cochabamba, since most individuals only found out that the price has gone up upon arriving at Illimani’s office when they solicited services. Price hikes to the cost of new connections penalize the poorest of the poor, since it is generally the poorest households that do not have connections to the public water system in the first place. The FEJUVE reported that another 70,000 were excluded from Aguas del Illimani’s service because they could not afford a connection, but these households were counted as ‘served’ if a pipe passed by their house.

With the help of activists from the Coordinadora, the FEJUVE began to negotiate with the government in July 2004 to try to get the government regulator to change the terms of the contract. After six months of fruitless negotiations, the FEJUVE called an indefinite civil strike for the beginning of January 2005, this time calling for the outright cancellation of the contract. Thousands of residents of El Alto took to the streets to pressure the government to return the water company to public control and kick Suez out of Bolivia. Fearing that protests would destabilize the country, former President Carlos Mesa promised to cancel the contract on January 12, 2005 after three days of protest. Since Mesa made the promise back in January, however, the government dragged its heels looking for a way to cancel the contract without prompting an international lawsuit. Both the government and the company knew that under the terms of the contract and the BIT between Bolivia and France, Illimani had the right to sue for damages in international court if the government terminated the contract in a ‘unilateral’ manner.

### **5.2 Suez Strikes Back in Bolivia**

While the Bolivian government initially delayed the termination of the contract in the hopes of reaching a “mutual accord” with the company, Suez initiated the 6-month legal process required under the BIT (Article 8, Para. 2) in order to put forward a claim for damages. The letter dated June 27, 2005 sent from Jean Louis Chaussade, Chief Executive Officer of Suez Environment to the Minister of Basic Services of Bolivia alleges that, “Bolivia has undertaken a series of modifications of the contract and has terminated the contract in a unilateral manner, which have a negative impact on Suez and its investments in Bolivia” (La Jornada, 2005). As noted above, even if the contract with Aguas del Illimani is terminated after the expiry of the BIT (October 12, 2006), the company will still be protected under the terms of the treaty for another twenty years. The letter was a strategic move to gain leverage in the negotiations with the Bolivian government over the terms of the termination of the contract cancellation, even though the company may not follow through with a lawsuit.

As with the Aguas del Tunari case, there are extreme power imbalances between the Bolivian government and the multinational enterprise, Suez. First, Suez has many more economic resources to devote to expensive and lengthy legal battles. In 2005, Suez's operating revenues were around USD 53 billion. By contrast, in the same year the Gross Domestic Product of Bolivia—a country of more than 9 million people—was USD 8.9 billion. Bolivia's public budget is tightly squeezed by a growing fiscal deficit and a crippling foreign debt. The Bolivian government has already paid over a USD 1 million in legal fees during the lawsuit with Aguas del Tunari. Second, Suez has another powerful player on its side, the World Bank. After the Cochabamba 'Water War' private investors have been more cautious about investing in the water sector. In order to restore investors' confidence, the International Financial Corporation, the private sector lending arm of the World Bank, became a shareholder of Aguas del Illimani in 2001 when it purchased eight per cent of its shares. This move has put the Bolivian government in a very vulnerable position because the BIT between Bolivia and France designates the ICSID as the court that will hear disputes that arise under the treaty. In other words, as indirect shareholder of Aguas del Illimani the World Bank is not merely a neutral observer but 'judge and jury' in the case of a lawsuit.

### **5.3 Asserting the Right to Regulate: Government-Commissioned Audit**

From the very beginning of the conflict, local activists claimed that Suez was party that did not respect the contract and therefore it should pay for damages rather than the Bolivian government (Bolpress, 2004, Bolpress, 2005). At the insistence of the FEJUVE, the government commissioned an independent audit of the companies' investment activities over its eight years of service (1997-2005). Despite the frustration that the delay caused for local residents, the results of the audit were worth waiting for. Indeed, the auditor found that Suez had failed to comply with several key aspects of the contract and misrepresented its investment activities in Bolivia.

In a report released in July 2006, the independent auditor appointed by the government found that Illimani was paying at least USD 1 million per year to Suez for management fees, which could not count as its 'investments' (Pozo & Asociados C.P.A, 2006). The auditor also found that Illimani systematically failed to respect local environmental laws and has been dumping raw sewerage in Rio Seco, which flows directly into Lake Titicaca. Perhaps most devastatingly for the company, contrary to Suez's claims that it had invested USD 63 million expanding water and sanitation infrastructure in La Paz-El Alto, the auditor reported that the net fixed assets of the company amounted to only USD 22 million. Furthermore, the company should have been fined by the government regulator at least USD 6 million for failing to meet the promised expansion targets for potable water in the cities of La Paz and El Alto. Indeed, although the company claimed that it had achieved 'full service coverage' it only installed 22,000 new connections out of the 33,000 required by the contract.

The findings of the report may be significant if the case goes to arbitration, making it more difficult for Suez to argue that the government terminated the contract without reasonable grounds. The concession contract between the Republic of Bolivia and Aguas del Illimani clearly stipulates that either party can cancel the contract if there is just cause or if the two parties reach mutual agreement. The auditor's report may be the most powerful weapon in the state's defence should Suez decide to pursue the lawsuit under the BIT.

## **6. Conclusion: 'They Cannot Take Away our Thirst'**

The Bolivian 'water wars' and the international lawsuits arising from them have raised key political questions about the meaning of democracy and the relationships between the international economy, the state, and local civil society. The two disputes highlight the inequality in the international legal system that has emerged between private investors and the citizens of host states where investment is located. Under the international system of investor protection created by BITs, private investors can sue for damages, while citizens of host states currently have no way to take direct action. As the two Bolivian cases demonstrate, until enforcement mechanisms are established in the areas of international human rights law, the achievement of water justice at the local level will continue to depend primarily on the strengthening of the capacity of the local state for regulation and service delivery.

The international solidarity movement that emerged to help defend Bolivian citizens against Bechtel's actions in Cochabamba helped win an important victory in defence of public water. Importantly, these activists brought much-needed media attention to the World Bank and its actions, particularly the lack of transparency within the ICSID. As a result of the lobbying efforts of international civil society groups in the Aguas del Tunari case, the ICSID entertained proposals aimed to improve the transparency of proceedings in October 2004, but eventually defended the idea that arbitration is a 'private dispute resolution process'. The proposals were defeated because it was believed that opening the hearings would penalize southern states on the grounds that it would increase the costs of litigation. As the Civil Association for Equality and Justice concludes, 'It is up to civil society, especially in the south, to pressure their governments to back the proposed reforms' (2005).

Since the 'water wars', the new government in Bolivia has signalled its commitment to public water by appointing Abel Mamani, former leader of the FEJUVE and a key figure in the movement for water justice, as Water Minister. In January 2007, the National Regional Development Fund, a public development corporation, assumed control of water and sanitation services in La Paz and El Alto for transition period that is expected to take about two years (BNAmericas, 2006). There are plans underway to replace Aguas del Illimani with a public-public partnership formed between the newly constituted public utility in La Paz-El Alto and a sister public utility in Europe. The FEJUVE has proposed to introduce a new decision-making model for the water utility that is based upon the experience with participatory budgeting in Puerto Alegre, Brazil: an elected assembly with have the power to make decisions about water services (Pérez, 2005). It is hoped that these measures will help guarantee transparency and accountability in decision-making that has been lacking in previous models of public and private delivery. International solidarity will play an important role in the continuing fight for justice in El Alto to support the social movements against the threats of international financial institutions. The achievement of water justice in Bolivia will thus require the continued solidarity work of social movements and their allies at both the local and international scale.

At a broader level, the Bolivian case also demonstrates that attention must be paid to the local level to stop the slow 'globalisation through stealth' brought by the proliferation of bilateral investment treaties. While anti-neoliberal globalisation movements have effectively derailed international negotiations such as the Multilateral Agreement on Investment in 1998 and the World Trade Organisation in Cancun in 2003, bilateral investment treaties are similarly restricting the possibility for control over economic policy making and therefore must also be dismantled should democratic ideals of equality and social justice be realized.

## Endnote

<sup>i</sup> The French BIT further stipulates that 'investments affected during the same period of validity will continue to benefit from the protections provided by the agreement for another 20 years' (Art. 12).

<sup>ii</sup> The central government also considered privatising the urban water utility in Bolivia's second largest urban area, Santa Cruz de la Sierra. Since the utility is a cooperative and therefore the legal property of its users, however, it could not be privatized.

<sup>iii</sup> The US-Bolivia BIT came into force on June 6, 2001.

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### **Links**

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Décret no. 96-1045 du 28 novembre 1996 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Bolivie sur l'encouragement et la protection réciproques des investissements signé à Paris le 25 octobre 1989  
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