SERIE

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recursos naturales e infraestructura

Revisiting privatization, foreign investment, international arbitration, and water

Miguel Solanes

Andrei Jouravlev

NACIONES UNIDAS

CEPAL

Santiago, Chile, November 2007

This document was prepared by Miguel Solanes, Regional Adviser on Water Resources Legislation and Regulation of Public Services of the Economic Commission for Latin America and the Caribbean (ECLAC), and Andrei Jouravlev, Economic Affairs Officer of the Natural Resources and Infrastructure Division of ECLAC. The authors would like to thank for their contributions and previous work Howard Mann, Jorge Barraguirre, Matthew Porterfield and Michael Hantke-Domas, as well as the cooperation of Agua Sustentable of Bolivia, the International Institute for Sustainable Development (IISD) and the International Development Research Centre (IDRC) of Canada, and the Forum for Democracy and Trade of the United States. The report also draws on the materials of the project ECLAC/The Netherlands, University of Wageningen "Water Law and Indigenous Rights" (WALIR) (WGU/03/010).

United Nations publication
ISSN printed version 1680-9017
ISSN electronic version 1680-9025

ISBN: 978-92-1-121662-2
LC/L.2827-P
Sales N°: E.07.II.G.151

Printed in United Nations, Santiago, Chile

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Abstract

A subject relevant to the governance of water resources and public services is the effect that international trade and investment agreements may have on national capacities to manage natural resources and to regulate public services. As a consequence of globalization, many public services are provided and water rights held by companies within foreign investment protection systems or special conflict resolution regimes, which means that external jurisdictions can intervene in local matters. These agreements, which override national laws, restrict the power of governments to act in the public interest and in that of local communities. The region has yet to assess the consequences that international investment agreements may have on the economic, social and environmental sustainability and efficiency of natural resources utilization and provision of public services. Such an assessment is necessary when formulating public policies, adopting natural resources legislation and regulatory frameworks for public services, granting water rights and wastewater discharge permits, and entering into contracts related to economic activities in which water is an input or end product. This paper is a first step in this direction. It summarizes the main issues raised by Mann (2006a), Hantke-Domas (2005) and Barraguirre (2005), and at the same time expands on some of them. This study also draws on the research done by Agua Sustentable of Bolivia, the International Institute for Sustainable Development (IISD) and the International Development Research Centre (IDRC) of Canada, the Water Law and Indigenous Rights (WALIR) project (ECLAC/The Netherlands, University of Wageningen), and the Forum for Democracy and Trade of the United States.

Introduction

The principal factors that determine the level of foreign investment in a country are the policies that have been adopted towards direct foreign investment, the overall economic situation, and the business environment (Rosales, 2007). Within the context of policies towards foreign direct investment, the most important considerations are general policies creating political and economic stability, the rules governing access and operations, and regulatory policies, especially those related to the overall functioning of markets. General commercial policies are also significant, particularly as these determine the market size. Obviously, tax policies can have a determining influence and need to be stable, equitable, and transparent. Also, there are advantages in location and of access to natural resources, the availability of a skilled labour force, advanced technology, and the possession of adequate and competitive infrastructure. The business environment is a further factor determining the extent of foreign investment both in terms of the promotion and the facilitating of investments.

Countries that adhere more to international agreements on investments, treaties on double taxation, and that are signatories to global organizations, such as the World Trade Organization (WTO), are viewed more favourably (Rosales, 2007). Investors tend to give importance to the extent of State interference in the markets, particularly if it affects competition and the general environment for operating in a given market. For these reasons, developed and developing countries have realized the crucial importance of, and the need for, international mechanisms to facilitate and protect international trade and investment, since both are important for development. On the other hand, Bolivia has recently denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID convention) (see Box 1).[1] The Government of Brazil, when withdrawing six bilateral investment treaties from Congress on 13 December 2002, expressed the view that foreign investors were given a too broad set of rights, at the expense of national jurisdiction and society, and that the stability of the national legal framework and the strength of the national economy explained the important position of Brazil as a recipient of direct foreign investment.[2] Also, the empirical basis for the claim that bilateral investment treaties stimulate foreign direct investment remains weak and recent studies have come to conflicting conclusions (see Box 2) (Tobin and Rose-Ackerman, 2006).

Many developing countries have signed, sometimes without due consideration of the implications,[3] numerous agreements for the protection of foreign investment over the last two decades. In many cases, investment has been addressed as part of wider international trade agreements, such as the North American Free Trade Agreement (NAFTA), the United States-Central American Free Trade Agreement (CAFTA) and Canada-Chile Free Trade Agreement, which include chapters on investment. However, the major source of international investment law is found in bilateral investment treaties and, increasingly, similar regional investment agreements. By the end of 2005, the total number of bilateral investment treaties had reached 2,495, and double taxation treaties 2,758, along with 232 other international agreements containing investment provisions (UNCTAD, 2006a). Unlike trade law, this diverse universe of agreements has no institutional home such as the WTO, and it lacks a comprehensive, consistent, standing dispute settlement process (Mann, 2006a).

Arbitrators sitting on investor-State panels have often focused on the rights of the foreign investors, as expressed in the text of the agreements, and limited their recourse to other sources of international law that may be relevant in any particular case. This approach has been based, at least in part, on reference to the stated object and purpose of the international investment agreements, which is to protect the foreign investor. It has tended to lead to an expansive interpretation of

[1] The following arguments were presented in support of Bolivia's decision to denounce the ICSID convention: (i) the ICSID was established to favour the interests of foreign investors over States; (ii) ICSID tribunals misapply investment treaty obligations and expand protections such as that of fair and equitable treatment in favour of multinational corporations; (iii) some arbitrators serving on ICSID tribunals, or their law firms, act at the same time as lawyers for other investors in similar disputes, thus raising doubts as to their capacity to interpret investment treaty provisions in an impartial manner; (iv) the confidentiality of arbitration hearings charged with resolving matters of public interest; and (v) the lack of a substantive appeals mechanism for arbitration rulings, capable of ensuring consistent outcomes from one case to the next (Cabrera, 2007a). Bolivia also intends to pursue revisions to its bilateral investment treaties (see page 9) (Vis-Dunbar, Peterson and Cabrera, 2007). These revisions would be sought in three areas: the definition of investment, performance requirements, and dispute resolution. As far as the first issue is concerned, Bolivia reportedly wants to limit the definition of an investment to those that "truly generate a value to the country". For rules on performance requirements, Bolivia wants greater scope to set requirements for the use of domestic inputs and establish rules for technology transfer. Finally, in the area of dispute resolution, Bolivia is aiming to limit investor-State arbitrations to domestic fora, rather than international venues such as the ICSID. Bolivia intends to pursue these changes one at a time, as these existing bilateral