POLICY BRIEFS

WATERLATGOBACIT

THE THREAT POSED BY THE NEOLIBERAL LEGAL-INSTITUTIONAL ARCHITECTURE TO THE DEMOCRATIC PROCESS:

THE INVESTMENT PROTECTION TREATIES AND THEIR IMPACTS

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INTRODUCTION

There exists an international legal-institutional structure to protect foreign investments that involves some 3200 international investment treaties. This brought about an increasing number of legal claims against national States, which are presented by transnational companies and investors before international arbitral tribunals that invoke the protection of such investment treaties. Some of these tribunals are implemented by the World Bank's International Centre for Settlement of Investment Disputes (ICSID), which is the most frequently used mechanism in the system. This legal-institutional architecture covers all aspects of a country's economy where there is participation of foreign private capital, which is particularly important in cases of privatization of public companies. Therefore, almost all economic sectors become affected by this regime of protection of transnational capital, including essential public services such as water and sanitation.

Currently, almost half of the arbitral cases processed by the ICSID are legal claims from private companies and investors against national States connected with the exploitation of natural resources. These claims seek to stop regulatory public policies that could be implemented by governments –regardless of their ideological positions or country of origin– to protect their rights. It is a legal-institutional architecture that prevents national States from applying effective regulatory measures that could affect the interests of transnational companies and investors, as the foreign investment protection treaties give priority to the interests of these companies and investors over the interests and rights of the countries receiving the investments.

EMPIRICAL EVIDENCE AND ANALYSIS

The paradigmatic example of Argentina. Argentina is the country with the higher number of legal claims in the ICSID (59 claims), and has signed 59 bilateral investment treaties (BIT). 55 of these treaties are still in force, and almost all of them were signed during the 1990s. Argentina is one of the States that signed more BITs in Latin America, the region that until 2015 had been the most affected by internal legal claims connected with investments from multinational corporations. In the particular case of Argentina, it is also the case with the highest number of legal claims in the water and sanitation sector: 19% of the claims submitted. Therefore, from the total of 11 legal claims submitted to the ICSID in relation to investments connected with water and sanitation services, 9 are against Argentina (the other two correspond to "Aguas del Tunari vs. Bolivia" and "Biwater Gauff vs. Tanzania").

Argentina's 2001-2003 crisis and the end of "convertibility" (the peso-dollar parity) triggered this escalation of legal claims from foreign companies and investors, which had participated in the privatizations of the 1990s. In the case of public-service concessions, such as water and sanitation services, the contracts that had been signed included tariffs tied to the dollar. When the country broke with the "convertibility" policy in January 2002 and the peso was devalued to gain competitiveness and tackle the crisis, the companies that had their tariffs tied to the dollar by contract demanded immediate tariff increases. However, these demands happened in a context that made unviable people's capacity to pay, as their income was now in devalued pesos and they could not afford tariff increases based on the peso-dollar parity sanctioned by the contracts.

In all these legal claims submitted to the ICSID, the companies demand compensation from the States over violations to "fair and equitable treatment standard" practices, "discrimination", "expropriation" or similar government measures that may affect the right to the free transfer of revenues to the country where the companies are based, the negation of justice or contractual violations, all aspects contemplated in the clauses of the BITs. In the case of Argentina, the total legal claims submitted by the companies against the national State before the ICSID total 28000 million dollars, of which 2762 million dollars correspond to claims related to privatization contracts in the water and sanitation sector. The evidence suggests that, once the arbitration stage is completed, there is a high probability (62%) that private companies will receive a favourable ruling from ICSID. This level of success in the legal claims achieved 78% in the cases submitted against Argentina in relation to the privatization contracts for water and sanitation services: out of 9 cases presented, 2 were cancelled by common agreement, and the remaining 7 resulted in rulings against Argentina. The ICSID decisions favouring the legal claims of multinational companies against Argentina total 7600 million dollars, of which 737 million correspond to the water and sanitation sector.

CONCLUSIONS AND POLICY RECOMMENDATIONS

The investment protection treaties that form part of the legal-institutional architecture developed during the implementation stage of neoliberal policies since the 1980s, constitute one of the most formidable obstacles facing societies to advance democratization processes. Such treaties inequitably favour the interests of foreign private corporations and investors at the expense of the interests of the citizenry of the countries that receive the investments. Also, these treaties grant privileges to the transnational companies that allow them to be in a better legal position than local companies, which do not have access to the rights offered by the BITs. Therefore, the workings of these legal-institutional mechanisms generate a transfer of resources from the developing countries receptors of these investments to the developed countries where the investment flows originate. It must be highlighted that the favourable rulings passed by institutions like the ICSID sanction a transfer of resources from the public sector of developing countries to the transnational private sector, which negatively affects the attempts by the national States targeted by the legal claims to stop currency flights from their countries. These mechanisms have a direct negative effect on the sovereignty of the countries affected.

How to respond?

There are, in principle, three possible responses that States could adopt in relation to BITs and the investments protection regime:

1) Staying in the system, adopting protective measures. Colombia is the country that has received more legal claims since 2016, and, so far, has adopted this position. Its strategy seems to be centred in concentrating efforts to guarantee the best possible defence against the legal claims, without leaving the system.

2) Leaving the system, denouncinig the BITs and the ICSID Convention. Ecuador is the only country, so far, that has taken this decision. In 2009 Ecuador left the ICSID, denouncing the 1965 Washington Convention and in 2017 took the decision to denounce all its BITs, after the conclusion of an independent legal audit carried out by an international commission of experts that recommended this decisions, among other measures. Other countries are taking similar measures: Bolivia left the ICSID in 2007, but has not denounced all its BITs. Venezuela also left the ICSID in 2012, but has not taken decisions about its investment treaties. South Africa, Australia, India, China, Brazil, Indonesia, Poland, and Italy are reviewing their investment laws and excluding any mechanisms that allow investor-State legal claims such as those sanctioned by the BITs from their investment treaties.

3) Leaving the system, demanding the nullity of the obligations binding the countries. This possibility is viable in some cases. Often, BITs were negotiated in suspicious circumstances, or without proper control from public institutions, and these problems are often contemplated in the fundamental laws of the countries. Such problems are included among the causes for nullification mentioned in art. 48 of the Vienna Convention on the Law of Treaties. However, so far there are no examples of countries that have chosen this

possibility.

- Based on the available evidence, our recommendation is that States must consider breaking with the current investments protection regime established by the BITs and by arbitral tribunals like the ICSID, among others.
- Breaking with the neoliberal legal-institutional architecture will allow States to regain political space and the capacity to exercise control over their natural resources.
- It will also allow States to overcome the logic of "regulatory freeze", which prevents States from passing laws to favour national interests, as they are currently tied to international commitments that curtail the State's regulatory capacity and its powers to apply national jurisdiction to deal with legal disputes with foreign companies
- Also, breaking with the system would allow national States to regain control to stop the transfer of resources generated by the local population to foreign hands via the payment of compensations for legal claims submitted by transnational corporations and investors, in the frequent cases where these claims are illegitimate or unconstitutional.
- Breaking with the neoliberal legal-institutional architecture through the denounciation and nullification of investment treaties will allow national States to regain their regulatory capacity to exercise better controls over foreign capital, the possibility better guarantee the rights of local populatons, and to prioritize the observance of human rights, for instance, specifically, the right to water.

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WATERLAT-GOBACIT is a network dedicated to inter- and transdiciplinary teaching, research and intervention on water politics and management. It focuses on issues such as social conflicts around inequalities and injustices emerging from the implementation of water-related megaprojects, extractivism, commodification of essential services, or the impact of water-related disasters.

Key strategic objectives of the Network:

- Contributing to the process of substantive democratization of water politics and management, with emphasis on the development of human communities.
- Participation in advancing theoretical and methodological debates, promoting and developing studies about the obstacles, challenges, conditions, and requisites facing the democratization process.
- Supporting activities, particularly at local and regional scale, to enhance the capacities of different actors engaged with the process of democratization of water politics and management.
- Consolidating and extending cooperation and exchange interactions between these actors, overcoming cultural, language, institutional, national, and other barriers, to help making visible the systemic, structural and global character of the process of democratization of water politics and management.

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