Investor-State Dispute Settlement

Millstone around the right to water?

By Shiney Varghese

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The Institute for Agriculture and Trade Policy works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems.

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The struggles around water have taken many forms over the past decades. They have shifted among organizing, protesting, and campaigning against displacement and submergence from large dams, multi-national led privatization resulting in rate hikes, deterioration in the quality of drinking water and sanitation services, as well as increases in toxic pollution from mining and industry. In addition, many campaigns have focused on keeping water out of global trade deals like the World Trade Organization (WTO) or agreements such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Other ongoing, multi-country efforts strive to reclaim public water. All these strands came together in the proactive, decade-long campaign to ensure that the right to water is recognized as a fundamental human right, along with right to food and right to health.

There have also been some important victories in establishing the right to water in national laws and even in constitutions. Yet, we are now at a juncture in which authoritarian regimes use nationalistic rhetoric to push policies that are detrimental to people’s right to clean, safe water. Nowhere it is as evident as in Trump’s America, where a recent regulation to improve water quality has already been rolled back in the name of supposed over-regulation.

Many people in the United States, and indeed around the world, are struggling to make sense of the actions by this new administration. But one thing is clear: President Trump wants to appear to be delivering on his promises, and one of his major campaign promises was on trade agreements. He vowed to reject the Trans-Pacific Partnership (TPP), and to renegotiate the North American Free Trade Agreement (NAFTA). The U.S. has already abandoned the TPP, and the Trump administration is in the process of revisiting NAFTA. In these changed circumstances, our responsibility is to ask: what would be some elements of a post-TPP U.S. trade and investment policy that will protect not only the workers, farmers, consumers and the environment in the U.S., but also in other countries that the U.S. trades with and invests in?

Those debates should include a central focus on Investor-State Dispute Settlement (ISDS), a provision common to many Bilateral Investment Treaties (BITs) and agreements such as NAFTA that cover both trade and investment. ISDS gives foreign investors the right to demand compensation for environmental, public interest, and other laws that undermine their anticipated profits. Cases are decided by unaccountable panels of trade lawyers, who might have conflicts of interest. This provision, initially put in place to ensure investors’ rights against nationalizations or expropriations (the latter especially in countries with shaky legal systems), has evolved to become a tool for corporations to tie up governments in long and expensive legal cases, with chilling effects on public interest rules around the world.

In fact, it is this ISDS provision that allowed the Canadian company TransCanada to sue the U.S. government over the Keystone XL (KXL) Pipeline, where it specifically claimed breach of “fair and equitable treatment/ minimum standard treatment” of foreign investors. As this example shows, no nation is powerful enough to be safe from the overreach of ISDS, whether it is trying to protect national interest or even if an administration is simply trying to fulfill a campaign promise. Because this provision allows foreign companies to use unaccountable and opaque arbitration processes, it compromises host governments’ ability to take specific actions.

The Keystone pipeline brings tar sands oil from Alberta in Canada to the United States. TransCanada proposed an expansion of the pipeline in 2008, known as the Keystone XL, to bring oil directly down from Canada into Montana and from there to Nebraska, a route that goes through fragile environments such as eastern Sand Hills and over the Ogallala aquifer in the U.S. The Canadian tar sands development itself has been an extremely controversial project from an environmental perspective, and several water related impacts have been observed since the project became operational. Clearly, there are serious implications for water and farmland in the United States as well. (See box “Keystone XL and the Right to Water”).

In 2015, President Obama had determined that building Keystone XL pipeline was not in the national interest, and decided not to give approval. Despite an oil leak in April, 2016 that vindicated this decision, TransCanada retaliated in June, 2016 by suing the U.S. for US$15 billion under NAFTA’s ISDS provisions, which allows foreign companies to challenge domestic laws in front of international arbitration panels, such as the International Centre for Settlement of Investment Disputes (ICSID) housed at the World Bank.

During his campaign, Mr. Trump promised to streamline the approval of Keystone pipeline. Within days of assuming office, President Trump issued a memorandum permitting the construction of the controversial pipeline. This was followed by another presidential memorandum (issued to the Secretary of Commerce on January 24), asking to “develop a plan under which all new pipelines, as well as retrofitted, repaired, or expanded pipelines, inside the borders of the United States, including portions of pipelines, use materials and equipment produced in the United States, to the maximum extent possible and to the extent permitted by law.” While this requirement to use domestic steel likely violates international trade rules, it was an opportunity for Trump to show that he keeps his campaign promises.
Keystone XL and the right to water

The Keystone pipeline brings tar sands oil—as diluted bitumen, or “dilbit”—from Alberta in Canada to the United States. TransCanada proposed an expansion of the pipeline in 2008, known as the Keystone XL, to bring oil directly down from Canada into Montana and from there to Nebraska, through a route that is entirely in the U.S.\(^\text{15}\)

The Canadian tar sands development, itself, has been an extremely controversial project from an environmental perspective, and several water related impacts—both in terms of overuse of water\(^\text{16}\) and abuse of water quality\(^\text{17}\)—have been observed since the project became operational. Such concerns extend to the transport of oil through underground pipelines traversing across the Midwest, over the Ogallala aquifer a major source of water for the region, including for agriculture\(^\text{18}\). The US National Wildlife Federation points out that there are highly likely and serious water related impacts in the United States.\(^\text{19}\) In addition, as a Farm Aid document points out “farms (belonging to many family farmers) lie in the proposed path of the Keystone XL Pipeline [...] and it jeopardizes the health and viability of that land, rather than ensuring its health for future generations.”\(^\text{20}\)

The biggest concern is an oil spill or leak from the pipeline that could contaminate not just land but local ground water.\(^\text{21}\) Particularly at risk, are areas with high water table. If the pipeline passes over shallow aquifers, a future spill could contaminate local water sources. For a while, supporters of KXL pipeline argued that segments of the pipeline that already exist show little to no evidence of groundwater contamination. However, they could not sustain that argument after a 2011 spill that released 21,000 gallons of crude oil from the Ludden Pump Station, near Brampton, in Sargent County in North Dakota. For ranchers like Bob Branderat, that spill made all the difference, making him into a “pipeline junkie” who describes the “uphill fight” against TransCanada.\(^\text{22}\)

In November 2017, TransCanada and Keystone was in the news again, this time for the biggest oil leak in South Dakota, FN\(^\text{23}\) with over 200,000 gallons of oil! This leak followed the next largest spill in South Dakota the previous year, with 16,800 gallons of oil spilled onto a farm belonging to Loren Schultz, once again proving that the expansion of Keystone XL was not in the national interest.\(^\text{24}\) With the presidential approval of the project, pipeline opponents are expressing their fears regarding contamination of shallow aquifers and irrigation waters,\(^\text{25}\) even as Nebraskan farmers are refusing to sell their lands.\(^\text{26}\) Given the recent leak and given that there have been over 9,000 significant pipeline-related incidents (excluding thousands of less “significant” pipeline-related malfunctions\(^\text{27}\)) between 1986 and 2016, their fears are justified.\(^\text{28}\) At stake in the debates\(^\text{29}\) on the safety of the Keystone pipeline is the right to clean water and right to health of communities living in the area.

Perhaps in response to this second memorandum, TransCanada announced in mid-February that it would continue to pursue its claims under the ISDS.\(^\text{30}\) Even as TransCanada continued to hold out the threat of the ISDS claim, it proceeded to file an application with the Public Service Commission of Nebraska, seeking approval for the proposed route for Keystone XL pipeline,\(^\text{31}\) a legal requirement in Nebraska, if the presidential approval for the pipeline was to come through at any point.

And as TransCanada decided to move forward with its ISDS claim, the Trump administration agreed to make an exception in the case of the Keystone XL project.\(^\text{32}\) Despite his statement to the Congress the very next day about his “new directive that new American pipelines be made with American steel,”\(^\text{33}\) it seemed that “buy American rules” [...] “won’t apply to the high-profile Keystone project.”\(^\text{34}\) Meanwhile, on February 27 TransCanada agreed to suspend its ISDS claim for one month.\(^\text{35}\)
On March 23, the State Department issued a Presidential permit to TransCanada Keystone Pipeline, L.P., authorizing it to construct, connect, operate, and maintain pipeline facilities at the U.S.-Canadian border in Phillips County, Montana for the importation of crude oil. The very same day, March 23, TransCanada filed a request with ICSID to discontinue the proceedings and dropped the lawsuit.

In short, the ISDS clause in NAFTA allowed this Canadian multinational to craft a win-win scenario. Either it could have pursued the ISDS claim for the US$15 billion from the United States, or it could have used the threat of ISDS claim to get around the new “buy American rules” [especially if it did not want to go through a lengthy WTO dispute settlement body citing this rule as violation of international trade rules].

The TransCanada case is not an exception. Experiences over the last three decades show that this ISDS provision is increasingly being misused by transnational corporations not only to avoid culpability but also to seek to extort public money by suing host governments. Below, I look at how ISDS mechanism has emerged as an increasingly integral part of investment agreements, and examine how this provision protects corporations even when they violate something as basic as right to water.

**A BRIEF REVIEW OF THE BASICS OF ISDS**

A large majority of these investor-state cases invoke Fair and Equitable Treatment (FET) and Minimum Standards of Treatment (MST) obligations of the investment agreements between countries. So far (as recorded by the UN Conference on Trade and Development (UNCTAD) as of January 1, 2017), in over 80 percent of the 487 investor-state arbitration proceedings, companies have alleged that governments have breached FET (linked to MST under customary international law) standard.

According to UNCTAD, “two fundamental principles of public international law” have led to the development of the principles of Fair and Equitable Treatment (FET) and Minimum Standards of Treatment (MST): “[O]n the one hand, the principle of territorial sovereignty asserts [...] each State’s full and exclusive jurisdiction over persons and events in its territory.” On the other hand, “the principle of nationality [...] provides for] the proper treatment of its nationals [when they are] abroad.” Generally, “capital-exporting States [of early twentieth century] insisted on the importance of the latter principle, and treated all measures causing uncompensated injury to the person or property of foreigners as violations of the

**The number of ISDS cases continues to grow**

**Known ISDS cases, annual and cumulative (1987-2014)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Annual number of cases</th>
<th>Cumulative number of known ISDS cases</th>
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<tr>
<td>1987</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1994</td>
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<td>471</td>
</tr>
<tr>
<td>2016</td>
<td>104</td>
<td>575</td>
</tr>
</tbody>
</table>
In the post-World War II era agreements terms such as “just and equitable” treatment (for example, in the Havana Charter for an International Trade Organization, 1948) and “equitable” treatment (for example, in the United States Friendship, Commerce and Navigation (FCN) treaties negotiated between 1946 and 1968) are used to refer to standards of treatment based on fairness and equity. Also, while pre-war FCN agreements had protected just individuals, one of the innovations of the post-war FCNs was that it extended treaty protections to corporate entities. The investment protection provisions of FCNs reflected the fact that investment protection for the first time had become a primary goal of the FCN agreements. Further, these agreements included a dispute resolution provision consenting to the jurisdiction of the International Court of Justice over disputes involving the interpretation or application of the agreement.

By the 1970s, the Bilateral Investment Treaties (BITs)—between capital-exporting and capital-importing countries—began assuming increasing importance in regulating international investment issues, and expressly relied on the criterion of “fair and equitable” treatment. Initially, there wasn’t a system in place in these treaties for the settlement of disputes between investors and host governments. Investor-state dispute settlement (ISDS) is now, however, a regular feature of international investment agreements, both in BITs and non-BITs. Over the years, Fair and Equitable Treatment has emerged as the most relied upon (and successful) basis for investor-claims. The fundamental problem with the FET standard, however, is that it lacks core meaning, leaving the space open for tribunals to expand investment protection to aspects never anticipated by states.

The number of ISDS claims has risen substantially in the last two decades, especially in this century. Between 1987 and early 2016, there were 767 known ISDS claims (figure 2), and 101 governments around the world have been respondents to one or more known ISDS claims. The number of ISDS cases continue to grow. The number of ISDS cases between 1987 and 2017 is now 817 (as of September 30, 2017).

It is also noteworthy that a large majority of the cases are brought by investors based in developed countries against respondent states that are developing countries. For example, in 2014, 60 percent of all cases were brought against developing and transition economies, and the remaining 40 percent against developed countries. In 2016, even as developed country investors brought most of the 67 known ISDS cases, only 29 percent of the 62 new cases that year were against developed countries.

While investor countries claimed to seek a mechanism that offered the possibility of a fair hearing before a tribunal, unencumbered by domestic political considerations in case of commercial disputes, the experience of ISDS tells a different story.

In that story, there is no place for protecting the host country’s policy objectives, especially with respect to its right to regulate in the public interest. As corporations became transnational in nature, outgrowing not only their countries of operation, but even those of their origin, ISDS has emerged as a means for corporations to protect their profits at any cost, and for investors to challenge host country decisions as violations of FET in matters including environmental protection, public health, or other issues of public governance.

In short, because this provision allows foreign companies to use unaccountable and opaque arbitration processes, it compromises host governments’ ability to take specific actions to ensure fundamental human rights such as right to water or protect the environment and public health. Thus, ISDS can potentially affect countries’ ability to meet international commitments or Sustainable Development Goals, such as meeting the SDG#6 on ensuring access to safe water and sanitation, or in meeting Paris commitments around Climate. It allows investors to violate basic principles of sustainable water governance with impunity, rendering host countries unable to fulfi their responsibilities to citizens. Consider the case of the right to water as an example.

**THE EVOLVING RIGHT TO WATER IN INTERNATIONAL LAW**

The ’right to safe and clean drinking water and sanitation’ was explicitly recognized as a human right by the UN General Assembly in July 2010 (General Assembly resolution 64/292, July 2010). However, it took over three more years for all UN Member States to come together and recognize these rights as universal. In December, 2013, the General Assembly reaffirmed “the recognition of the right to safe drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.” In September of the following year, the human rights council unanimously agreed on the comprehensive normative content of the rights to clean drinking water and sanitation, as it affirmed that “the human right to safe drinking water and sanitation entitles
everyone, without discrimination, to have access to **sufficient, safe, acceptable, physically accessible and affordable** water for personal and domestic use and to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity.” These are important milestones in the evolution of right to water in international law.

While most of the trade and investment agreements preceded these developments, the right to water is implicitly included in the human right to an adequate standard of living and the right to health—Articles 11 and 12—of the International Covenant on Economic, Social and Cultural Rights (ICESCR), a multilateral treaty that has been in force since early 1976. To the extent that it is an implicit right derived from a legally binding treaty, right to water has been considered legally binding by UN Commission on Human Rights.

The human rights regime imposes three fundamental obligations on states: the obligation to respect the right, the obligation to protect the right, and the obligation to fulfill the right. Under ICESCR and various human rights treaties, the states have an obligation for a “progressive realization” of human right to water. Towards this, states are required to take necessary steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights.”

While the progressive realization of economic, social, and cultural (ESC) rights may be a gradual and continuous process, the UN Special Rapporteur on right to water has clarified that there are also immediate obligations: “The obligation to respect, protect, and fulfill human rights in a participatory, accountable and non-discriminatory way is a duty that is immediately binding.” According to the *Handbook on Realising the human rights to water and sanitation* by the UN Special rapporteur, “The obligation to protect the human rights to water and sanitation requires that States must prevent third parties from interfering in any way with people’s enjoyment of the human rights to water and sanitation.”

It is the obligation to protect human rights that becomes particularly relevant in the context of investments. In fact, a “large group of cases concerned externalities by massive pollution and over-extraction from unsustainable water use by private actors, mainly industry. International and domestic case-law protected individuals.”

The Handbook also builds on the General Comment No. 15 to elaborate on International obligations of acceding states: “With regard to the obligation to protect, States must prevent third parties, for example, a company based in one State and functioning in another, from violating the human rights to water and sanitation in other countries.” In addition, the Optional Protocol to the ICESCR that entered into force in May 2013, has created a complaint mechanism allowing individuals or groups to file formal complaints on violations of the ESC rights.

So, in the specific context of investments, what does it mean to say that rights to water and sanitation are now explicitly recognized as fundamental human rights by all states?

It means that “International human rights law obliges States to work towards achieving universal access to water and sanitation, guided by human rights principles and their defined standards, while prioritizing those most in need.” According to the Special Rapporteur on Right to Water, “[t]he human rights principles of non-discrimination and equality, access to information and transparency, participation and accountability must be ensured in the context of realizing all human rights, not just the human rights to water and sanitation.” Accountability, she explains in the handbook, “is the process by which people living under a State’s jurisdiction can ensure that States are meeting their obligations with respect to the human rights to water and sanitation.” “Sustainability is” a fundamental human rights principle, that is “essential to the realization of the human rights to water and sanitation.”

As discussed earlier, the legal content of the human rights to water and sanitation entitles everyone to have access to **sufficient, safe, acceptable, physically accessible and affordable** water for personal and domestic use. Thus, meeting the following criteria are essential for fulfilling the right to water: availability, accessibility, acceptability, affordability and quality.

Moreover, water is a public good, and its governance is rooted in principles and values that are central to good public sector governance. These principles, it could be said, concern themselves with two distinct aspects of effective water governance towards realization of the right to water.

1. **First, it concerns itself with acting in the public interest at all times:** This calls for a strong commitment to integrity, ethical values, the rule of law, openness, transparency, inclusivity, and comprehensive stakeholder engagement, in addition to adhering to the human rights principles discussed above.

2. **Second, it concerns itself with ensuring accountability for effective water management:** i.e. managing the use of water that is too polluted, too little or too much, in an ecologically sustainable, cross-sectorally integrated
and socially inclusive way, at an acceptable cost, in a reasonable time frame and in the public interest. It hinges on adhering to the human rights principles of Accountability, and Sustainability—described as essential in the context of human right to water—while also paying attention to others such as non-discrimination, access to information, and participation.

For the state, this requires balancing competing demands for water from different sectors, such as mining and industry, in a way that the rights and interests of the most marginalized and vulnerable groups are prioritized, ensuring right to water for health and right to water for food security and nutrition.64

In the specific context of investments, this would mean that the investors would be required to 1.) abide by appropriate laws of the state; 2.) consider water impact while deciding the location of a plant; 3.) use water efficiently and dispose of water responsibly; and 4.) cooperate with state and other local users in a manner that makes sustainable water management a priority and upholds the human rights principles discussed above.

In sum, unlike ISDS, which in effect binds countries through the imposition of massive fines, the explicit recognition of right to water empowers communities to challenge violations of the right to water in international tribunals. Meanwhile, governments are required to respond to those cases at the UN or other multilateral forums, thus further defining and strengthening international and national norms.

In addition, the explicit, universal recognition of right to water can pave way for improved national legislation, and for preparing regulations and policies that go beyond the minimum legal requirement, and that surpass the standards set by international human rights law. Such national laws, rooted in international human rights, further has the potential to help raise human rights based arguments against investors.

As far as violations of principles and criteria related to right to drinking water and sanitation go, several countries have been sued by foreign corporations when the former took steps to protect citizens’ right to water, often in response to popular demand from residents for safe water at affordable prices.65 Many of these cases have been in Latin America.66

The very first ISDS case in the specific context of drinking water and sanitation services was filed in 1997 against Argentina. In that instance, a contract that the northern province of Tucumán had signed in 1995 with Aguas del Aconquija, a local subsidiary of French multinational Compagnie Générale des Eaux (CGE, later to become Vivendi) resulted in substantial price hikes for water and sewage services. The subsequent popular unrest forced the provincial government to try to limit the price the company charged consumers for water and wastewater services. CGE claimed that the provincial government changed the terms of the contract with its subsidiary, Aguas del Aconquija and filed a case against the Republic of Argentina for failure to protect its investments as provided by the BIT between France and Argentina as well as the ICSID convention (which both France and Argentina were signatories to).67 As per the claim submitted to ICSID, the state of Argentina was involved in ‘indirect expropriation of investors property’, breached the contract to provide ‘full protection and security’, and also violated the fair and equitable standard of treatment.68

These, according to the investors, arose from the regulatory and legal measures introduced by Argentina, its unwillingness to raise tariffs, and its conduct in terms of exerting pressure on investors to reverse or renegotiate the concession. Unfortunately for Argentina, the Tribunal determined that “[u]nder the fair and equitable standard, there is no doubt about a government’s obligation not to disparaage and undercut a concession (a ‘do no harm’ standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation. And that is exactly what happened in Tucumán.” The assumption here is that the government of Argentina was involved in an ‘illegitimate “campaign” against the concession.69

At the end of a ten-year legal battle Tucumán province was forced to pay Vivendi over US$105 million, 31 percent of the amount CGE had initially claimed.70 The case of Tucumán province in Argentina is not unique. In the 1990s several Argentinian regions had concession contracts with multinational corporations based in OECD nations.71

For example, a consortium, Aguas Argentinas, led by the French multinational water company Ondeo (formerly Suez Lyonnaise des Eaux), had the water services concession
contract for the Federal Capital of Buenos Aires and 17 municipalities within Buenos Aires Metropolitan Area. AGBA, led by Spanish multinational Aguas de Bilbao, won the concession in seven municipalities in the province of Buenos Aires. When these water contracts resulted in increased water tariffs and decreased water quality, the state had to step in to regulate, with the result that cases were filed against Argentina in international arbitration panels.\(^74\)

In 2001 Azurix, a subsidiary of the the U.S. multinational Enron, filed a request for arbitration against Argentina with the ICSID. In 1999 Azurix had entered into a concession contract for drinking water and sanitation services in two distinct regions of the province of Buenos Aires (in the southern region, home to the city of Bahia Blanca and the region around the provincial capital La Plata) through its Argentine subsidiary, Azurix Buenos Aires S.A. (ABA). Azurix claimed that Argentina has violated obligations owed to Azurix under the 1991 Bilateral Investment Treaty between the United States of America and the Argentine Republic. According to the claim submitted to ICSID, the state of Argentina had effected ‘indirect expropriation of investors property’, undertook ‘arbitrary, unreasonable and/or discriminatory measures’, breached the contract to provide ‘full protection and security’, and also violated the fair and equitable standard of treatment.\(^75\) Once again, the tribunal found the province and the state of Argentina in violation of FET.\(^74\) Argentina was required to pay over US$165 million to Azurix.\(^77\)

A similar scenario played out in Bolivia, though with a very different outcome. One of the poorest nations in the world, Bolivia was a recipient of the World Bank aid. In 1997, privatization of the public water services (in two urban centers: El Alto-La Paz and Cochabamba) was an explicit condition of the aid Bolivia received for its water development. Cochabamba signed a privatization contract with Aguas del Tunari (a water consortium led by Cayman based International Waters, 100 percent owned by the Bechtel corporation of the U.S. and Spanish multinational Abengoa) in 1999. Shortly after, residents were hit with substantial increases in the water charges, and people took to the streets in protest. The ensuing army crackdown resulted in hundreds of protesters getting wounded and the death of a 17-year-old boy, Victor Hugo Daza.

Because of the massive public outcry, the government was forced to cancel the privatization contract. More than a year later, the consortium sued the Plurinational State of Bolivia for US$50 million. Prior to bringing its claim, the foreign investor switched corporate ownership of the privatized assets from the Cayman Islands to the Netherlands, since Cayman Islands did not have a BIT with Bolivia: an example of forum-shopping by a corporation to game the ISDS mechanism.\(^78\) The claim was then brought under the Netherlands-Bolivia BIT.\(^79\)

According to the Bolivia-based Democracy Center, “For four years afterwards Bechtel and Abengoa found their companies and corporate leaders dogged by protest, damaging press, and public demands from five continents that they drop the case.”\(^76\) Finally, in early 2006, the corporations abandoned the ICSID case for a token payment of two bolivianos (30 cents). This was the first time that a major corporation has ever dropped a major international trade case such as this, and it was the direct result of global public pressure. This has indeed set a precedent for global public pressure in support of challenging corporate violations of fundamental rights.

Most of the ISDS claims discussed above were made by corporations, as states initiated regulatory actions in response to popular protests for safe drinking water and sanitation services at affordable prices. There have been far fewer ISDS cases where the cause is regulatory actions to protect water sources (to ensure public health, or water to safeguard right to food).\(^4\) In one such case, however, the United States took action to phase out a water polluting chemical, resulting in an ISDS case filed by Canadian multinational, Methanex, in 1999.

In 1998, gasoline additive methyl tertiary butyl ether (MTBE), was found to be a “frequent and widespread contaminant in shallow groundwater throughout California.”\(^82\) MTBE was identified as a toxic and potential carcinogen, and was “found in drinking water wells across the nation,” as reported in the United States.\(^83\) The Governor of California, where the issue made headlines, ordered a phase-out in 1999 to prevent any further environmental or public health cost. Methanex was the leading manufacturer of methanol, a component chemical of the MTBE. Under ISDS rules in NAFTA, the Canadian corporations filed a $970 million-dollar claim, citing the decline in its market value and breach of FET/MST through this environmental regulation to phase out MTBE. After a very public media debate in the U.S., “all claims were dismissed at the merit stage.”\(^74\) While the panel’s finding seemed to bolster the case that governments can act to protect public safety, ISDS cases do not rely on precedent, so companies are not at all constrained from making such claims in other cases.

Challenges to the right to water arise not only from cases about water services, but also those in which mining or other activities by foreign companies compromise the state’s ability to provide its citizens with safe water at affordable prices. At times, these activities can compromise a nation’s ability to sustain life itself. Such is the case in El Salvador, where more than 90 percent of the water resources are impaired as a result of mining activities by the multinational, OceanaGold. As in
El Salvador vs. Pacific Rim/OceanaGold\textsuperscript{85}

El Salvador is a small, but densely populated, country with limited water resources. Mining and industrial agriculture have already contaminated much of its water resources. For well over a decade, the country, and its people, have been fighting to protect its waters and their health. But since the summer of 2009, the struggle has been about protecting its sovereignty as well. Pacific Rim, a Canadian mining company (which was purchased by Australian-based OceanaGold for $10 million in 2013) sued El Salvador for millions of dollars in 2009, because the government did not issue a them a gold mining permit. The arbitration was perceived by many as an attempt by a transnational mining company to blackmail the State and to abuse the process, in order to get a mining concession, which it was not entitled to since the mining company never fulfilled all the legal or environmental requirements for a mining license.\textsuperscript{86}

The Pacific Rim project had been facing opposition since 2005 from communities concerned with water quality deterioration, and with the health impacts from toxic cyanide from mining entering the watershed of the Rio Lempa. The huge river provides water to over half of El Salvador’s population. Community protesters were intimidated, and leaders found killed. But when the tiny country of El Salvador decided to uphold a nationally supported mining moratorium and banned Pacific Rim from mining, the company retaliated. In June 2009, Pacific Rim sued El Salvador for delays suffered to the mining project in violation of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR).\textsuperscript{87} The case was brought to the International Centre for Settlement of Investment Disputes (ICSID) housed at the World Bank. Even though an large alliance of national and international organizations and thousands of individuals began asking Oceana Gold to “Drop the lawsuit against El Salvador”,\textsuperscript{88} Pacific Rim/Oceana Gold did not drop the case.

In mid-October 2016, the tribunal finally determined that Pac-Rim’s lawsuit was without merit and that El Salvador will not have to pay the company the $250 million that it sought. Moreover, the company was asked to pay $38 million towards legal expenses incurred by El Salvador.\textsuperscript{89} So far, the company has refused to pay those costs. Even then, this recent decision has implications, not only for the right to drinking water and sanitation, but also for other water dependent fundamental rights such as the right to health and the right to food.\textsuperscript{90} With ISDS still in place, and corporations still interested in mining investments in El Salvador, the country decided to follow a different path. In late March 2017, El Salvador became the first nation in the world to stand up to enormous pressure from global mining corporations and passed the world’s first comprehensive ban on metals mining.

In all these cases, corporations have used the ISDS provision to better protect their investments in projects even as, in some cases, they continued to pollute water in violation of domestic laws. Experiences around the world show that the impacts of these cases can be devastating on the right to water, especially in the case of water intensive sectors such as mining, energy, and agriculture that affect the quality of surface water and ground water sources. This, in turn, impacts the quality of water available in the environment for growing food, for animals, for domestic use and for recreation. For example, the mining sector in Latin America by itself accounts for at least 226 projects that affect about 330 communities, according to the Observatory of Mining Conflicts in Latin America.\textsuperscript{91} It is then no surprise that these projects have resulted in 216 distinct conflicts, six of them cross border conflicts.

In several cases above, the tribunals determined that domestic regulations that were perceived as violating investor rights, were, in fact, a breach of their FET obligations, even though the state argued otherwise. It is rarely the case that investment tribunals examine human rights arguments based on international human rights law against investors. However, for the first time, in a recent case the tribunal awarded the host state’s counter claim related to violation of the human right to water (against the investor’s claim regarding breach of “fair and equitable standard of treatment”).\textsuperscript{92} The ICSID award on Urbaser vs. Argentina is the first to provide a detailed discussion of a host state’s counterclaim based on international human rights law.\textsuperscript{93}

\begin{itemize}
  \item It is not disputed that the human right to water and sanitation is recognized today as part of human rights and that this right has as its corresponding obligation the duty of States to provide all persons living under their jurisdiction with safe and clean drinking water and sewage services.
  \begin{flushright}
  \footnotesize{–ICSID award in Urbaser vs. Argentina, December 2016}
  \end{flushright}
\end{itemize}

The investor’s claim of U.S.$211.20 million was dismissed by the Tribunal. Yet, while recognizing that in certain instances investors cannot violate right to water, the tribunal opined that “[f]or such an obligation [to perform services complying with the residents’ human right to access to water and sewage services] to exist and to become relevant in the framework of the BIT, it should either be part of another treaty (not applicable here) or it should represent a general principle of international law.”\textsuperscript{94}

\textsuperscript{85} INSTITUTE FOR AGRICULTURE AND TRADE POLICY

\textsuperscript{86} INSTITUTE FOR AGRICULTURE AND TRADE POLICY

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\textsuperscript{93} \textsuperscript{94} INSTITUTE FOR AGRICULTURE AND TRADE POLICY
While this new acknowledgement of the right to water is encouraging, the frequent use of FET in ISDS is evidence of how this vague legal standard can be used by corporations to protect their interest at the cost of public interest. In fact, over time, with the frequent use of FET, the ISDS mechanism has evolved as yet another challenge to traditional domestic regulation itself, but this challenge is from outside of the country. As has been suggested by others as well, “from a host state perspective, it is advisable to refer to domestic courts as the forum of choice for disputes arising under the contract, rather than international arbitration. In instances where international arbitration is unavoidable, it should be preceded by an effort to settle the dispute amicably first.”

The evolution of ISDS as a go-to instrument to protect private investments, even when faced with legitimate regulation in the public interest, has made it function as an enabling mechanism that protects corporate violations of fundamental principles of public water governance, such as human rights and sustainability. These instruments are essentially unbalanced, since they protect only corporate interests while being blind to corporate responsibility to protect the natural environment or human health, and actively undermine the rights of sovereign states. If corporations have lost some cases, it is because of sustained public mobilization around right to water or right to health by local activists, with support of international allies. Limiting the potential damage of these cases is not enough.

CONCLUSION

The increased international investments in agriculture, extractive industries, and energy services can all have significant impacts on waterways, forests, agricultural and pastoral lands. Since any investment in these sectors can affect the natural resource base and the public commons (upon which life itself is based), any or all efforts to protect that base, including legitimate regulations in the public interest, can be perceived as affecting the profit potential of a company. This was evident in the case of El Salvador vs. Pacific Rim. As long as ISDS is part of international trade and investment agreements, even if water services were to be excluded in future trade or services agreements, it is clear that the public is not protected in terms of their right to drinking water and sanitation, let alone water for the right to food and the right to health. It greatly weakens governments’ ability to initiate regulatory or legal initiatives to ensure that they act in the public interest at all times, or be accountable for effective water management. In short, with ISDS, rights based, sustainable and effective governance of water itself is under threat.

Given that new regulations in the public interest can be interpreted as a violating ISDS provisions, it is important that future investment agreements eliminate ISDS, enshrine the rights of governments to protect natural resource commons, including appropriate legislation for pollution remediation, and to uphold the criteria and principles for ensuring right to water for its residents. Any reboot on trade policy, whether for NAFTA or any other trade deal, should eliminate this problematic clause and instead require investors to cooperate with the state to help uphold principles of public governance of water—especially those around transparency, human rights, sustainability and accountability.
The development of this multilateral treaty, apparently outside the Arbitratio-2n.pdf.


23. Iowa oil spill.


25. Ibid.

26. Ibid.


As of September 30, 2017, there were 817 known treaty-based investor-state disputes involving states with one or more claims against them as per http://investmentpolicyhub.unctad.org/ISDS/casedetail.aspx?CaseNo=ARB/16/21.


56. Ibid p.33.

60. Ibid 31.

62. Ibid pp. 32.


66. Many of these countries had entered into contracts with water consortiums (often multinationals or their local subsidiaries along with others) to avail loans from the World Bank, which, in the mid-1990s, had required borrowers around the world to privatize their public water systems as a condition for availing loan to finance water projects. Source: IELRC Working Paper, The World Banks influence on water privatization in Argentina: The Experience of the city of Buenos Aires by Andres Olleta www.ielrc.org/content/w0702.pdf.


61. Ibid p.31.


66. For a detailed review of some of these specific cases referred to, below see at https://iris.unive.it/retrieve/handle/10278/29825/22372/marrella%20water.pdf.
In all of Africa, there has only been one high profile case of this
kind Biwater v. Tanzania, where U.K multinational Biwater filed a case
against the Republic of Tanzania in 2005. Tanzania had terminated its
contract with Biwater as the company failed in its contract to provide
drinking water. Tanzania was accused of violating fair and equitable
minimum standard treatment. http://hec.unil.ch/docs/files/21/280/agudas-
delaconquija.pdf

As per the claim submitted to ICSID, the state of Argentina
breached the contract, and also violated the fair and equitable
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