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## **Bilateral Investment Treaties and the Right to Water** **The case of the provision of public water supply and sanitation services**

**Submission by AquaFed**  
**to the OHCHR consultation on business and human rights:**  
**Operationalizing the "Protect, Respect, and Remedy" framework on**  
**business and human rights.**  
**to be held in Geneva on 5<sup>th</sup> and 6<sup>th</sup> October 2009**

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## 1. Key Messages

This submission concentrates on the core activity of our members which is the provision of public services of water supply and sanitation. As practitioners of this service delivery they are accustomed to implementing the Right to Water under the control of States. This is a responsibility that goes beyond their Corporate Social Responsibility CSR. It is one of their core activities.

Many of the countries that have the greatest need to give the practical reality of access to water and sanitation to their people are severely constrained from doing so by important factors such as: lack of financial resources, low levels of expertise and technology, poor governance and institutions, etc. The prime remedies to these deficiencies lie in their own hands. Their position can be significantly improved if they can engage financial resources, institutional, technical and management skills from overseas sources to support their efforts.

These potential resources are available, but frequently do not flow to the countries in greatest need, because of the constraints identified above. The perceived and real risks of material, reputational and other losses drive otherwise willing investors and operators away from engagement in such countries. The result is that the potential to realize the Right to Water and Sanitation is not mobilised as it could be.

States - at the combined levels of central and local government - are the organising authorities of public water and sanitation services. Using a private operator through a PPP contract or license does not limit their regulatory powers – in practice it usually strengthens them. However, it adds “contractual” obligations to them.

On rare occasions when issues have appeared between States and private operators, these did not derive from BITs or from human rights but were the result of contractual obligations when circumstances meant that one or both of the parties had difficulties to comply. Changing circumstances are normal in the life of long-term partnerships. Most of the contractual difficulties that they cause are settled amicably by common consent between the parties. BITs are there to ensure that difficulties that cannot be settled amicably will be settled fairly. They do not create these contractual difficulties since there is no link between them.

We believe that the existence of Bilateral Investment Treaties (BITs) enhances the ability of States to attract foreign expertise, technology and investment, thereby helping them to meet their obligations to implement the Right to Water. These BITs do not create any obligation that would prevent the States from organising the progressive implementation of the Right to Water.

We are not aware that any State has ever been prevented by a contract or a license with a private water operator, be it a national, a foreign or a combined ownership company, or by a Bilateral Investment Treaty from respecting, protecting and fulfilling the Right to Water in its national territory.

**The BIT obligations of a State to protect the investment of foreign shareholders of a local water operator, are compatible with and beneficial to the needs of this State to respect, protect and fulfil<sup>1</sup> the Right to Water in its national territory.**

BITs contribute to implementing the Right to Water, by opening the option for populations to benefit from additional knowledge, good practice, technology and investment coming from international sources.

Those who allege that there are difficulties for States to comply simultaneously with their obligations resulting from BITs and with their obligations regarding the Right to Water, largely use cases of public-private partnership contracts (PPP) for water supply where the central government has specific contractual obligations. Our experience is that their arguments are not valid or convincing in assessing the existence of conflicts between States obligations regarding BITs and the Right to Water when delivering water and sanitation services. These arguments are more theoretical than real and often more ideological than practical.

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<sup>1</sup> The words “*respect, protect and fulfil*” come from the definition of the States Parties responsibilities outlined in General Comment 15 on the International Covenant on Economical, Social and Cultural Rights.

## 2. Acronyms

BIAC	Business and Industry Advisory Council to the OECD
BIT	Bilateral Investment Treaty
ECLAC	UN Economic Commission for Latin America the Caribbean
GC15	General Comment 15 to the International Covenant on Economic, Social and Cultural Rights
HRC	UN Human Rights Council
ICC	International Chamber of Commerce
IOE	International Organisation of Employers
OHCHR	Office of the UN High Commissioner on Human Rights
PPP	Public-Private Partnership
RtW	Right to Water, including Right to Drinking Water and Right to Sanitation, as in GC15

## 3. Introducing AquaFed and Private Water Operators

AquaFed, the International Federation of Private Water Operators, represents water services providers of all sizes, operating in around 40 countries, as both locally and internationally owned businesses<sup>2</sup>. Our members business is to be the operators of public services entrusted to them by governments (central government, local government, water authority) to supply drinking water and to manage wastewater to their populations.

In this way they are used as a tool to implement the Right to Water that includes the Right to access to Drinking Water and the Right to Sanitation as described in the General Comment 15 to the International Covenant on Economic, Social and Cultural Rights (GC15). Implementing the Right to Water is their core business.

As practitioners of this Right they have contributed and are continuing to contribute to the work of the OHCHR and the UN Human Rights Council on the recognition, the definition and the implementation of this Right. (See list of references at the end of this submission.)

## 4. Focus of this submission is on water supply /sanitation services and the Right to Water

We are making this submission having read the following text on investment agreements, taken from the draft agenda for the meeting to take place in Geneva on October 5<sup>th</sup> and 6<sup>th</sup> 2009, page 2.

*“The Special Representative has said that States should not undermine/diminish their own capacity to meet their duty to protect against human rights abuses. One area where this may happen is when states enter into investment agreements. What guidance can be provided to States on how to avoid such risks in the context of investment agreements so that such agreements do not constrain the fulfilment of the state to protect, and encourage companies to respect rights?”*

We contest strongly the assertions that lie behind the first two sentences of this statement. Our submission outlines the reasons. Because of this position, we maintain that the second part of the statement is irrelevant and without practical purpose. We therefore do not advance recommendations other than to honour contracts and negotiate the consequences of any changes to, or premature termination of, contracts in good faith.

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<sup>2</sup> [www.aquafed.org](http://www.aquafed.org)

AquaFed is concerned with general issues concerning International Investment Agreements (IIAs) and on Bilateral Investment Treaties (BITs). This is not the scope of this submission.

**We deliberately restrict our comments in this submission to the core activity of our members which is the provision of public services of water supply and sanitation.**

Frequently we see examples where a deliberate confusion is created between the issues of providing, financing and regulating the provision of water and sanitation services with issues involved in the management of natural resources (in this case water) and business activities that are dependent on them. This confusion is unhelpful in clarifying the role of private operators.

We feel that this focus on water supply and sanitation services is particularly relevant to the work of the OHCHR and the Special Representative. Many of the assertions and publicly-available documents that allege potential conflicts between the obligations of States regarding BITs and human rights base their main arguments on cases of public-private partnership contracts (PPP) for water supply. The arguments they draw from these cases are not valid or convincing for water experts.

In the provision of public water services, the essential human right is the Right to Water that includes the Right to Access to Drinking Water and the Right to Sanitation as described in the General Comment 15 to the International Covenant on Economic, Social and Cultural Rights.

For private water operators, implementing this Right to Water is a responsibility that goes beyond corporate social responsibility (CSR). **Realising the right to water is a core activity of these companies.** Their experience in the field is that **they contribute to increasing** - not diminishing - the capacity of States to meet their duty to realise the Right to Water.

The experience of BITs from those operating companies which are owned by foreign investors provides no cases where these BITs have constrained any State in fulfilling its obligations to the Right to Water. On the contrary, BITs contribute to implementing the Right to Water, by opening the option for populations to benefit from additional knowledge, good practice, technology and investment coming from international sources.

## **5. BITs contribute to implementing the Right to Water**

According to GC15, **States have the responsibility to respect, protect and fulfil the Right to Water.** This means that they have to ensure access progressively of all their population to safe drinking water and sanitation. Bilateral Investment Treaties contribute positively to their efforts as explained below.

### **5.1. Providing additional means**

To succeed in expanding the number of people who benefit from access to safe water and sanitation, States need to use water operators. Water operators, public and private, are the tools they use to realise their water/sanitation policies. When considering the different options available in selecting an operator, governments in developing countries may decide not to restrict their choice to local operators but to also consider the potential value that can be brought by foreign operators. This may result in arrangements through which the country takes advantage of the skills and capacities of foreign operators. These operators bring their managerial and technical capacity and in some cases the private operator themselves also bring important financial resources to fund new physical investments. In other cases a private operator attracts foreign financial investors to participate in its activities.

In all these situations foreign organisations need to accept the risk to invest in the country. They would certainly hesitate to take this risk without the protection of Bilateral Investment Treaties. BITs are put in place to facilitate foreign investment in developing countries whereby governments commit to allowing investors to have "fair and equitable" use of their investments. They are very important to investors as the "last resort" in situations where breach of contract or expropriation

might occur in countries where the legal systems, the courts and governance procedures are weak or unreliable. Consequently BITs are essential to the activity of water operators that are owned partially or totally by foreign shareholders and for foreign financial investors.

Furthermore, in the absence of the legal protection provided by an International Investment Agreement, if the State does not honour contracts and disputes cannot be settled satisfactorily this could tarnish the image and reputation of a country and impact its ability to attract investment, technology and expertise coming from international sources.

As a consequence BITs contribute to the efforts of States that want to respect, protect and fulfil the Right to Water. Indeed, water operators, owned partially or totally by foreign shareholders, have **expanded access to water to tens of millions of people** in the past two decades (see table 1 below that relates to a sample of 28 contracts) and have **improved the quality and reliability of service to many more**. Without the protection of BITs these operators would not have done this and it is highly probable that many of these millions of individuals would not have access to water today.

## 5.2. Strengthening domestic legal systems

BITs contribute to the development of a strong domestic legal system that protects the rights (including property rights) of both domestic and foreign commercial actors. BITs impose disciplines on those governments whose legal system does not provide the necessary protections to commercial actors and their property. By requiring fairness and non-discrimination, BITs stimulate host countries to provide to their people and local companies the same stability, fairness and protection that they provide to foreign investors.

## 5.3. Reducing the financial cost

Both public and private financial institutions evaluate country risk and charge higher interest if the country risk is greater. Insurance companies that provide risk insurance also charge a bigger premium if the country risk is higher. **BITs considerably reduce country risk** because they provide enforceable protection to investors. As a result, the financial costs of new investments are reduced

All these factors have the effect of **increasing the resources available to a state that can be used to accelerate its efforts to meet its obligations to the Right to Water (Drinking Water and Sanitation)**.

**Table 1**

**Expansion of access to water in developing countries provided through PPP contracts mobilising foreign shareholders (1990-2006)<sup>3</sup>**

Name of PPP project	Country	Period of reference	New water connections	Population gaining access to piped water
Manila East	Philippines	1997-2006	250,000	2,900,000
Manila West	Philippines	1997-2006	230,000	1,900,000
Jakarta	Indonesia	1998-2006	210,000	2,000,000
Batam Island	Indonesia	1996-2006	80,000	500,000
Johor state	Malaysia	2000-2006	180,000	800,000
Macao	China	1991-2006	75,000	180,000
Casablanca	Morocco	1997-2005	260,000	1,200,000
Rabat	Morocco	2002-05	65,000	250,000
Tangiers and Tetouan	Morocco	2002-05	45,000	150,000
Buenos Aires	Argentina	1993-1999	240,000	2,000,000
Guayaquil	Ecuador	2001-2006	160,000	800,000
Santa Fe	Argentina	1995-2006	60,000	500,000
Cordoba	Argentina	1997-2006	-	200,000
La Paz El Alto	Bolivia	1997-2005	80,000	400,000
Manaus	Brazil	2000-2006	50,000	300,000
Barranquilla, Santa Marta, Soledad	Colombia	1997-2006	100,000	600,000
Montería, Tunja	Colombia	1996 or 00-05	n.a.	200,000
Cartagena	Colombia	1996-2006	70,000	500,000
Gabon	Gabon	1996-2006	50,000	300,000
Mali	Mali	2001-2005	40,000	400,000
Guinea	Guinea	1989-1998	-	600,000
Senegal	Senegal	1996-2006	190,000	1,700,000
Côte d'Ivoire	Côte d'Ivoire	1990-2006	300,000	4,000,000
Maputo	Mozambique	1999-2006	20,000	150,000
Niger	Niger	2001-07	30,000	450,000
TOTAL 28 projects			2.8 million	23 million

<sup>3</sup> Source: "Public-Private Partnerships for Urban Water Utilities", P.Marin, World Bank, PPIAF, Trends & Policy options n°8, February 2009 [http://www.ppiaf.org/documents/trends\\_and\\_policy/PPPsforUrbanWaterUtilities-PhMarin.pdf](http://www.ppiaf.org/documents/trends_and_policy/PPPsforUrbanWaterUtilities-PhMarin.pdf)

## 6. States can implement the Right to Water while respecting Bilateral Investment Treaties

Some allege that States might have difficulties to comply simultaneously with their obligations regarding the implementation of Human Right to Water (RtW) and their obligations resulting from Bilateral Investment Treaties. This seems more theoretical than real.

We believe that the existence of BITs enhances the ability of States to attract foreign expertise, technology and investment, thereby helping them to meet their human rights obligations.

**We believe that the BIT obligations of a State to protect the investment of foreign shareholders of a local water operator, are compatible with and beneficial to the needs of this State to respect, protect and fulfil the Right to Water (RtW) in its national territory.**

This belief in the absence of conflict is based on the following reasons:

- a) *States have practical ways to implement the Right to Water and simultaneously to respect BITs*
- b) *No practical case examples exist*

We are not aware that any State has ever been prevented by a contract or a license with a private water operator, be it a national, a foreign or a combined ownership company, or by a BIT from respecting, protecting and fulfilling the Right to Water in its national territory.

- c) *Unfounded arguments*

None of the documents that allege that awarding a PPP contract or a long term license to an operator with foreign shareholders creates a potential conflict between the State obligations to respect its BIT obligations and the duty of the public signatory of this contract (State, local government, water authority) has ever provided convincing arguments or field case showing that such a risk is real.

These reasons are substantiated in paragraphs 6.1 to 6.3. below.

Before discussing them, it is necessary to highlight the peculiarity of the water sector. This business sector is a “regulated” sector where the States have means and obligations that add to their capacities and obligations to implement the Right to Water and to their capacities and obligations under BITs. States, at the combined levels of central and local governments, are the organising authorities of public water and sanitation services. If they use a private operator through a PPP contract this does not limit their regulatory powers. However, it adds obligations to them. We will refer to these as “contractual obligations”.

**In our business sector, the potential challenge for States is to comply simultaneously with their contractual obligations, with their human-rights obligations and with their International Investment Agreements. In practice, most issues that have appeared between States and private operators did not derive from BITs or from human rights but arose from contractual obligations that one or both of the parties had difficulties to comply with.**

These contractual difficulties are normal in the life of long-term partnerships. They are falsely presented in some documents as if they were derived from BITs. Most of these contractual difficulties are settled amicably by common consent between the parties to the PPP contract. BITs are there to ensure that difficulties that cannot be settled amicably will be settled fairly. They do not create these contractual difficulties. They are supposed to provide a framework to resolve them in an equitable way and thus to help overcome them.

Therefore, the existence of contractual difficulties cannot be argued as “trapping” States between BITs and the Right to Water since:

- If these difficulties create problems with the Right to Water, States have full capacity to protect the Right to Water<sup>4</sup> by correcting the situation through the PPP contract or via other means. If necessary they can even terminate the PPP contract by using the appropriate contractual provisions.
- **If these difficulties cannot be solved locally, the BIT will provide the protection of international arbitration but will not create any obligation to the State than goes beyond complying with its contract obligations.**

## 6.1. States have practical ways to implement the Right to Water and simultaneously to respect BITs

The discussion about an alleged conflict between the implementation of BITs and the implementation of the Right to Water cannot be made without mentioning the specific role and means of the States in organising and delivering public water and sanitation services.

The central and local governments have all rights and capacities to organise the delivery of these services, to fix policy targets, to set the service conditions in all geographical areas and to fix the price charged to water-users. If payments by water-users are not sufficient to compensate for the cost of the service the States can add budget subsidies.

When a private operator is used through a PPP contract or a long-term license the right of governments to make the main decisions is not altered. **The private operator has no powers to oppose a policy that aims at ensuring progressively access to safe water to all.**

### Practical examples:

If a government wants to decrease the price of water charged to poor populations it can select between several options that are equally valid for public or private operators, including:

- Changing the tariff structure while adapting cross-subsidies in such a way that the revenue decrease is compensated by the price increases borne by other water-users
- Decreasing the price charged to poor populations and compensate the revenue decrease of the operator with public subsidies
- Maintaining the tariff structure and organising a mechanism allocating targeted subsidies to poor people without changing the tariff structure. This is what works successfully in Chile.

If a government decides to expand the public delivery of water to more areas than what is included in a PPP contract previously agreed with a private operator it has also several options including:

- Increasing the goals of the PPP contract while providing appropriate means to the contractor
- Awarding the mission to develop the service in additional areas to other operators.

## 6.2. Absence of practical cases of BITs restricting the ability to implement the Right to Water

We do not know of any practical case where a State has ever been prevented by a contract or a license with a private operator, be it a national, a foreign or a combined ownership company, from respecting, protecting and fulfilling, the Right to access to Water in its national territory. This is independent of the existence of a BIT or a foreign shareholder.

As explained above a BIT provides investors the protection of international arbitration. In business sectors such as ours, which involve the provision of public services under government control, a

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<sup>4</sup> The ways PPP contracts contribute to the implementation of the Right to Water and the necessary safeguards are not in the scope of the current submission which deals specifically with Bilateral Investment Treaties.



BIT does not create any obligation to the State that goes beyond complying with its contract obligations.

The State obligations resulting from BITs have been experienced in practice in some exceptional circumstances by members of our industry. In all these very few cases, the main contract obligation, for which an international arbitration was sought, was the financial obligation for the State to indemnify a foreign-owned local private operator after the State decided the premature termination of the PPP contract. This obligation resulted from the provisions of the PPP contract and the indemnities were due to all shareholders of the operator, be they national or foreign.

In such cases of premature termination, the bulk of the amount of the indemnity to the operator is usually the reimbursement of investments that it has already made in the execution of its contractual obligations to carry out investment decisions made by the State. These investments are already giving benefits to the State (without the State having paid for them up to the termination of the contract).

This indemnity might be onerous if a significant investment has been made but has not yet been reimbursed by users and/or taxpayers. For example when a huge investment has been made to expand the water networks and thereby secure the Right to Water to more individuals. This exceptional indemnity is mainly a postponed payment of a cost that was decided previously by the State to benefit the population and that has been borne temporarily by a third party with the related risk. The State and the water-users are already enjoying the benefits, but the investor has not recovered his investment costs. Even if all public budgets are constrained, the postponed payment of an investment that is already giving benefits to the State and to the population cannot be viewed as an additional economical burden to the country.

Such expenditure would not prevent the State from implementing its human rights obligations. If this is considered to be the case, it could be argued that any public expenditure such as organising military defence or a diplomatic network or investing money in a public corporation would challenge the ability of the State to fulfil its human-rights obligations.

Alleging that such an indemnity from the State prevents the fulfilment of human rights obligations is therefore unfounded.

**Box 1. Buenos Aires:  
a PPP contract that provided access to water/sanitation to millions of Argentinesans**

Some have alleged a problem in Buenos Aires, Argentina.

In practice, our belief is that

- the Argentinean State (central +local governments) has the same obligations vis-a-vis the population of Buenos Aires whatever option it selects for managing the service delivery: public operator (present case), local private operator, foreign private operator or local-foreign operator.

- Its obligations resulting from the contract signed with Aguas Argentinas and from the applicable BITs have never prevented it from changing laws, changing tariff structures, deciding subsidies, fixing investment priorities or investing additional funds to accelerate network expansion. Some of these decisions may have resulted in an amendment to the PPP contract but without the contractor having the possibility to stop them.

The difficulty experienced by the private water operator in Buenos Aires was the consequence of a brutal devaluation of the Argentinean peso which made him unable to reimburse the dollar-denominated debt that had been mobilised to extend the water and sanitation networks to millions of individuals.

A public operator that would have borrowed the same amount of dollars would have had exactly the same difficulties to reimburse this debt and would have looked for some financial help from the State as the private operator did in compliance with the PPP contract.

The State did not provide this financial support despite its obligations. However, should it have done so this would not have prevented it from continuing to drive the expansion of the water and sanitation networks and to continue progressing towards the full implementation of the Right to Water.

### 6.3. Unfounded arguments

More and more publicly-available documents use cases of public-private partnership contracts (PPP) for water supply to allege difficulties for States in complying simultaneously with their obligations resulting from BITs and with their obligations regarding the Right to Water. A number of unfounded arguments can be found in recent literature. Many of these are simply a repetition from one document to another. We have not been able to analyse all of them. However, our belief is that most arguments published:

- result from a misconception of the work of private water operators and of the role and capacity of the public authority in a PPP contract (often resulting from an anti-private bias),
- mostly use cases such as Cochabamba (Bolivia) and Buenos Aires (Argentina) where the central government had obligations towards foreign investors that result not only from a Bilateral Treaty but also from a concession contract of which the Central Government is a signatory party.
- are built on a misconception of the role of BITs in investments made through PPP contracts
- underestimate the capacity of a Central government to comply with its contractual obligations or its obligations under a BIT without damaging its capacity to implement the Right to Water.
- even more importantly, they are not specific to foreign investors: the alleged difficulties with regard to the Right to Water would have been the same with local private operators, and in many cases also public operations.

For these reasons the arguments are unfounded and are not convincing in their assertions of the existence of potential conflicts between the obligations of States regarding BITs and the Right to Water in the delivery of public water supply and sanitation services. They seem more theoretical than real and often more ideological than practical.

### **6.3.1. Misconception of the respective roles and capacity of operators and public authorities**

Operators implement the public policies that are decided by public authorities. They have no right or ability to substitute themselves for public authorities in key decisions.

Some draw argument from the existence of price increases in areas served through PPP contracts to hint at violations of the Right to Water and induce blame of the private contractor. However, price hikes:

- i) are always decided by public authorities and not by the private operator,
- ii) are very often the result of an investment policy aiming at expanding the public service to un-served poor people
- iii) would be the same or might even be higher with a public operator in the same conditions,
- iv) may be mitigated by cross-subsidies or external subsidies which is the responsibility of the public authority and not in the scope of the private operator.

Therefore, private water operators cannot be held responsible for price hikes. Using them as scapegoats does not clarify the issues to be faced to implement the Right to Water.

Other arguments are linked to the water resource that is used or to ways through which wastewater is discharged in rivers. In practice, the water resource that is abstracted and the location of wastewater that is discharged in the fulfilment of public water services, whether operated by public or private operators, is decided by the State and not by the operator itself.

### **6.3.2. Misconceived arguments built on specific cases where the State has other obligations**

In many locations, public water services are decentralised to local governments or local authorities. The World Bank estimates that around two thirds of investment decisions in the sector are made locally. This means that many foreign investments in the sector of water services are made through contracts with local governments, local water authorities or local water utilities. In these cases the Central Government is responsible to protect the Right to Water and to comply with a BIT, if any. It may not be responsible for the actual delivery of water and sanitation services.

Quite surprisingly, all cases that are discussed and proposed by authors contesting BITs as cases where the State is supposedly “trapped” between the BIT and the Human Rights are cases where the Central government has direct obligations of another type: it is a direct or indirect signatory of the PPP contract and, as such, has many obligations to make the partnership successful. In these cases the State must simultaneously comply with its contractual obligations, its human-rights obligations and with its obligations under international investment agreements (BITs for example). Experience shows that the difficulties that may appear between the State and the private water operator mostly derive from the PPP contractual obligations and must not be attributed incorrectly to the BIT or to the human rights.

In such contractual situations it may happen that external reasons, including political ones, result in the inability or the unwillingness of the central government to fulfil its obligations under the contract. That was the case for example in Buenos Aires (Argentina) or Cochabamba (Bolivia). These contractual commitments may create difficulties that have nothing to do with BITs or with human rights. Building arguments on cases where the main State obligations vis-a-vis foreign investors derive from a contract and not from a BIT does not help clarifying potential issues that might derive from BITs.

Should there really be an issue for States to comply with their BITs obligations at the same time as their Right to Water obligations, this is almost certainly the reflection of more fundamental problems between the Right to Water obligations and the contractual obligations. If this is true, it would apply equally to domestic and foreign private operators and one would expect this to be much more commonly reported. However, difficulties of this kind, be they with local or foreign operators, do not appear in serious literature. This is not surprising since **operators are not an obstacle to the implementation of the Right to Water**. On the contrary, they are agents of governments that contribute to its implementation.

### **6.3.3. Misconception of the role of BITs in protecting investments made through PPP contracts**

BITs have an essential role to protect foreign investments made through PPP contracts or licenses with a public authority in a country. States have full powers to enter contracts and to modify these contracts as they deem necessary to adapt to changing circumstances, including human rights obligations if they occur. They also have the freedom to terminate contracts or licenses early if they deem this necessary. These powers and freedoms are not limited. However they must be used while respecting the rights of the other contracting party.

A key purpose and objective of a BIT is to provide security to one particular kind of party (an international investor) to a contract, in the case of injury or loss caused as a result of non-respect of contractual obligations to it by the public signatory of the PPP contract.

In practice, BITs are invoked in our business sector when a breach of contract, an early termination of the contract or an expropriation has taken place and it has not been able to be remedied by normal negotiation processes. The alleged difficulties expounded in these arguments are therefore the consequences of breach or termination of contract or expropriation and not of the existence of a BIT. This applies in all the public service sectors where the private activity is under the responsibility and control of governments.

The following case (Box 2) shows that parties can resolve difficult contractual challenges of this kind, without resorting to international arbitration.

## **Box 2 La Paz -El Alto:**

### **State and investors resolve impasse by mutual consent thus avoiding international arbitration**

AGUAS del ILLIMANI (AISA) a Bolivian company was awarded a 30 year concession contract for the water and wastewater services of LA PAZ and EL ALTO by the State of BOLIVIA after an international tender in August 1997,

In October 2003, the elected Bolivian President was forced to resign after a popular upheaval. From 2004 a growing unstable and unpredictable context impacted much of the country. In January 2005, the Government conceded to pressure groups and the President issued a decree to terminate the concession contract

AISA stated that it was ready to undertake revision of contract terms, objectives, and mechanisms, provided that an orderly and fair framework of the rule of law and of contract was maintained. It contested the claimed assumption that the contract was not being complied with fully.

During 2005, no specific measure was decided; the Bolivian regulator said he did not see legal ground for the cancellation of the contract.

In 2006, after the election of a new President, the parties engaged in meaningful discussions. An audit was conducted to evaluate the value of the assets financed by AISA and the company's compliance with the terms of the contract. Throughout this period AISA continued to provide the service,

Negotiators from both parties succeeded in building a solution that was accepted in December 2006 by the parties and thus avoided recourse to International arbitration.

A sound going concern was transferred to the Bolivian state and an indemnity was provided as compensation for the economic loss to the shareholders of AISA based upon the value of their un-amortised investment in the water infrastructure.

### **6.3.4. Underestimation of the capacity of governments to comply simultaneously with all their obligations**

Some authors argue that BITs curtail the regulatory powers of governments.

For example, U.Kriebaum writes that imposing another tariff scheme on the investor could violate the investment protection standards<sup>5</sup>. This is absolutely contrary to our experience. Thousands of PPP contracts for water/sanitation services have experienced policy changes imposed by the public authority and this without violating State obligations. Changes in tariff schemes are very common. For example, the number or the span of tariff blocks is often changed by governments. Investment priorities and many other elements may also be changed over time.

PPP contracts include provisions that allow the parties to mitigate policy changes in an equitable way. As such they provide practical and workable solutions to the theoretical difficulty of a State being bound by contractual or international obligations. The State has full capacity to change its policy, to deploy new targets, to decide to target other un-served people and at the same time to amend the related content of a PPP contract to take account of these changes and to maintain the economic viability of the contract. There is no example where a private operator legally has been able to block this type of decision. What is real is that in many cases PPP contracts make the cost of policy changes more visible than they would be where a public operator is used. The fact that these changes are made through a contract **increases transparency and accountability**.

It is absolutely normal that the cost of policy changes is considered carefully by governments before making decisions to change their policies. Difficulties in funding ambitious policies that, for

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<sup>5</sup> Kriebaum, 2007, see footnote 7, page 188: "*The State could either impose another tariff scheme on the investor and thus risk violating the investment protection standards or else violate its human rights obligations*".

example, aim at expanding water networks to new areas may create hesitations but these hesitations must not be attributed to the private operator. They result from the reality of actual costs to be borne irrespective of the nature of the operator.

Our experience is that in developing countries governments face many difficulties in implementing the Right to Water. The presence of a private operator does not limit their ability to regulate the sector or to set up appropriate policies. On the contrary, this presence is used by them as an implementation tool. If they want to discontinue its use they have the full ability to terminate the PPP contract prematurely as was experienced in Bolivia, Argentina, Tanzania and other countries.

Therefore, the risk of curtailing the regulatory powers of governments to implement policies targeted at delivering the Right to Water does not exist in practice.

Protecting foreign investors against public robbery does not prevent the government from using its regulatory powers fully. Again, we are not aware of any field case where an international agreement curtailed the regular and legal use of the full power of the government to oversee the fulfilment of the Right to Water.

### **6.3.5. Theoretical difficulties that have been envisaged are not specific to foreign investors.**

6.3.5.1. As explained above, difficulties for States in respecting, protecting and fulfilling the Right to Water that relate to price increases, to tariff schemes, to investment priorities, to pro-poor subsidies, etc are not increased by the use of private operators through PPP contracts to implement their water policies. Even if there was a difficulty with some individual inhabitants, this difficulty would not be linked to the nationality of the owners of the water company (or even to it being private). Therefore, the obligations of a Bilateral Investment Treaty do not interfere with the implementation of the Right to Water vis-a-vis individual rights-owners.

6.3.5.2. In the case of PPP contracts the only argument that we have found in the literature (and that is specific to private operators that are owned partially or totally by foreign shareholders) is that the protection of BITs may result in the requirement for the State to pay a contractual indemnity. This exceptional indemnity is mainly a postponed payment of a cost that was decided previously by the State to benefit the population and that has been borne temporarily by a third party with the related risk. This is discussed in paragraph 6.2 above.

### **6.3.6. Danger of unfounded arguments**

Some parties seek to demonstrate that public private partnership arrangements, and in particular PPP contracts, are incompatible with meeting the Right to Water. They use many unfounded and unconvincing arguments. These include the existence of BITs and the consequences these may have in the case of failure by a State to honour its contractual obligations to international investors that may result in international arbitration. Their assertions of the existence of potential conflicts between the obligations of States regarding BITs and the Right to Water in the delivery of public water supply and sanitation services are ill-founded and more theoretical than real.

We believe that the focus on water supply and sanitation services is particularly relevant to the work of the OHCHR and the Special Representative. There are a number of publicly-available documents that allege potential conflicts between obligations of States regarding BITs and human rights. These mainly base their arguments on cases of public-private partnership contracts (PPP) for water supply and the arguments they draw from these cases are not convincing for water experts.

If these arguments are allowed to continue uncontested and uncorrected, thereby perpetuating confusion and misunderstanding, the potential for States to utilise the tool of private sector participation as a means of delivering the Right to Water and Sanitation will be limited. This **will be to the detriment of those countries most needing support**, investment and technology. If this happens, the intentions (which may or may not be good) of those who argue in this way will lead to results that are contrary to the ultimate objectives of rights-based development, including meeting the Millennium Development Goals.

### 6.3.7. Examples of documents using non-convincing arguments

A number of unfounded arguments can be found in recent literature. Many of these are simply a repetition from one document to another. Examples include an Austrian article published in 2007<sup>6</sup> which is a main source of arguments on that topic and a document published in 2008 by the UN-Economic Center for Latin America and the Caribbean (ECLAC-CEPAL) that builds on it<sup>8</sup>.

The content of these two documents that relates to the Right to Water is discussed below.

#### 6.3.7.1. "Privatizing human rights: the interface between international investment protection and human rights"<sup>7</sup>

This article is the main source of arguments for the ECLAC report where it is referred to 6 times. The cases it uses in the water sector and its main arguments are discussed in several paragraphs of this submission.

#### 6.3.7.2. "Revisiting privatisation, foreign investment, international arbitration, and water"<sup>7</sup>

This document produced by UN staff brings together most of the arguments used elsewhere.

Page 58: *"A number of human rights issues associated with foreign investment have arisen over time and are likely to emerge in the future. Water supply services may not be in accordance with human rights standards, or human rights may be violated, for example, by foreign investors polluting the environment or the water supplies, or employing child labour, or utilizing water on indigenous lands, without respecting their rights (Kriebaum, 2007). There may also be other areas of conflict between human rights and foreign investment protection."*

Page 60: *"Moreover, foreign investors may challenge human rights-inspired regulations that interfere with their investments by resorting to bilateral investment treaties. And here is where bilateral investment treaties, foreign investor rights (property protection, fair and equitable treatment, etc) and human rights eventually collide."*

AquaFed comments: The reality of a "collision" between international trade law and human-rights based national law is asserted but not substantiated nor justified by the authors. The only potential problems about water and sanitation services that are mentioned in this ECLAC report are listed in page 58 (see excerpt above). **Quite extraordinarily they have no "foreign" component.** Risk of pollution, child labour, use of indigenous land can apply to all types of businesses: both national and foreign. As far as private water operators are concerned, should this risk be real, it would be the same for national and international operators and also public operators. In practice, the water resource that is abstracted and the location of wastewater that is discharged in the fulfilment of public water services, whether operated by public or private operators, is decided by the State and not by the operator itself. This so-called argument therefore has nothing specific to do with foreign operators. Furthermore no example of such risk of challenge of the Right to Water or collision between Bilateral Investment Treaties and the Right to Water is substantiated in the ECLAC report.

The content of this submission by AquaFed concludes that this risk is more theoretical than real. In our experience professional water operators do not challenge the Human Right to Water. On the contrary they are always very concerned to meet, if not better, the Human Right to Water.

Page11: *"Current international trade and investment law can affect water resources and water-related public services. Concern with the way in which water has been brought into trade and investment agreements – and the way in which such agreements curtail the regulatory powers of governments – has been expressed by a number of authors."*

AquaFed comment: No example of such theoretical risk in the field of water and sanitation services is provided in the ECLAC document. The content of this submission by AquaFed concludes that this risk is more theoretical than real.

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<sup>6</sup> Kriebaum, Ursula 2007, "Privatizing human rights: the interface between international investment protection and human rights", the law of international relations – liber amicorum hanspeter neuhold, August Reinisch and Ursula Kriebaum (Editors), Eleven International Publishing.

<sup>7</sup> M. Solanes & A. Jouravlev - Revisiting privatisation, foreign investment, international arbitration, and water. – United Nations ECLAC - November 2007

## 7. Conclusion

In the drinking water and sanitation sector States - at the combined levels of central and local government – have a special responsibility. They are the organising authorities of public water and sanitation services. The role of public and private water operators vis-a-vis the human rights goes beyond Corporate Social Responsibility. They are tools used by States to implement the Right to Water.

In this sector the potential challenge for States is to comply simultaneously with their contractual obligations, with their human-rights obligations and with their International Investment Agreements. In practice, most issues that have appeared between States and private water operators did not derive from BITs or from human rights but arose from contractual obligations that one or both of the parties had difficulties to comply with due to changing circumstances.

Most of these contractual difficulties were settled amicably by common consent between the parties. BITs are there to ensure that difficulties that cannot be settled amicably will be settled fairly. They do not create these contractual difficulties.

The existence of Bilateral Investment Treaties (BITs) enhances the ability of States to attract foreign expertise, technology and investment, thereby helping them to meet their obligations to implement the Right to Water. These BITs do not create any obligation that would prevent the States from organising the progressive implementation of the Right to Water.

Therefore the BIT obligations of a State to protect the investment of foreign shareholders of a local water operator are certainly compatible with and beneficial to the needs of this State to respect, protect and fulfil the Right to Water in its national territory.

## 8. References

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