WATER IN ANDEAN COUNTRIES AND FREE TRADE AGREEMENTS
(English version)

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Content

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Introduction

One of the most frequently asked questions when talking about free trade agreements is whether water and the services associated with this resource are included, i.e. whether the countries signing a Free Trade Agreement (FTT) are obliged to permit the free trade of water and to open basic potable water services.

It is a fact that water is part of trade agreements in different ways, with various intersections. We must underline that negotiations on water uses – within the context of FTTs – are chiefly concentrated in the following fields: the trade of commodities, services and investments, agriculture and intellectual property.

"There is not only one relationship between free trade agreements and water, but multiple relationships that intersect and complement one another according to the consumption and non-consumption uses of water" (Pablo Solón, *Cruces de Caminos*, 2005).

The intersections in this topic are systematized in the following table:

TABLE 1
Intersections between FTTs and Water

	Goods	Services	Investments
Bottled water	X		X
Water exports	X	X	X
Potable water services		X	X
Environmental services		X	X
Water use for hydroelectricity		X	X
Water use for mining		X	X
Water use for the oil sector		X	X
Water use for tourism		X	X
Water use for agriculture			X
River transportation		X	X
Water rights			X

Source: *Cruces de Caminos*, 2005.

The table above shows that in the free trade agreements water is included or considered in various forms: sometimes as a commodity or product, and sometimes as a service or an investment. Investment also refers to the rights associated with water use, such as concessions, licenses, authorizations etc.

In this setting, this study will determine whether water and its different uses are included in FTTs as a commodity and as an investment in services. The objective is to determine, in the light of a FTT, the state's regulatory capacity once a commitment has been assumed in this sector. The analysis will center on the impact of the FTTs negotiated with the US and the impact thereof on the Andean countries' regulatory capacity of water and potable water services. Likewise, and by way of illustration, an analysis is made of the juridical and institutional costs of entering into treaties on this topic. Finally, some proposals are presented with a view to negotiations on water and free trade.

[1] This paper is a summary of a study with the same title, which was carried out as a consultancy within the framework of the Project "Visión Social del Agua" (Social Vision of Water) led by Agua Sustentable. The study was carried out with support from Carlos Crespo and Oscar Campanini in Bolivia, Hildebrando Vélez Galeano in Colombia, Juan Fernando Terán in Ecuador and Guillermo Rebosio in Peru.

I. THE FREE TRADE AGREEMENTS

The agreements established within the framework of the World Trade Organization (WTO)[2] are the basis of all free trade agreements currently in force or being negotiated and which somehow deepen the liberal currents or contents contained in each of the WTO commitments[3], in terms of extending the coverage of treaties to all natural resources and services, introducing vigilance entities to national legislation and regulation, open markets, services and natural resources to foreign investment, reduce the efficacy of judicial national systems, limit the negotiation through the mechanism of "negative lists", push the countries to a progressive liberalization.

For example, what the US was unable to achieve in the WTO Uruguay Round was achieved in the North American Free Trade Agreement (NAFTA)[4]. The NAFTA comprises all topics covered by the WTO and includes the so-called "new Singapore issues"[5].

This liberalization model (of WTO and NAFTA) has been repeated in the Free Trade Treaties (FTTs) of the US with Chile, Singapore, Central America and the recently signed ones with Peru and Colombia. As regards the Andean FTT, it is important to underscore that Peru and Colombia have signed an agreement with the US, though in 2006, those agreements had not yet been ratified by their respective Congresses. Ecuador pulled out from its negotiations in 2006. Bolivia was only an observer in the entire process and Venezuela was not part of the negotiations.

Rather than only emphasizing liberalization, the position of this paper is that the aim of deepening trade commitments should be to extend the benefits and limit the damages, through the establishment of regulations that protect public interests and that do not imperil domestic economies. Nonetheless, we argue that the logic of the free trade agreements often the other way around: minimum benefits and large-scale (environmental, social and economic) damages; new conditions for the negotiations that only satisfy the interest of one of the parties; arbitrary decisions; the same treatment of different sectors and sensitive products (social goods), the exclusion of benefits etc.

II. WATER AS A COMMODITY

In their commodity trade relations in the World Trade Organization (WTO) and within the framework of FTTs, Andean countries use the Common Tariff Nomenclature of the Cartagena Agreement Member Countries which is called Nomeclature Andina (NANDINA), a tariff classification similar to the US Harmonized Tariff Schedule. In both classifications, water is classified under tariff codes 22.01, 22.02, 25.01 and 28.51 (Table 1).

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[2] The World Trade Organization that has been operating since 1 January 1995 is the global platform for free trade agreements. At the moment, the organization groups 147 countries. The WTO is a multilateral body that works on the norms governing trade between the member states and in which the trade agreements are negotiated. The principal purpose of the system is to facilitate the circulation of trade flows with as much freedom as possible and the regulation of trade on the basis of transparent and predictable norms.

[3] The General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

[4] The NAFTA (US, Canada and Mexico) has been in force since 1994, the same year in which the negotiations of the WTO ended. It is a pioneering example of the free trade agreements.

[5] The so-called "new Singapore issues" were: investment facilitation, competition and state procurement.

TABLE 2
NANDINA

NANDINA Code	**Description of Goods**	**CET % COL. ECU. VEN.**	**CET % BOL.**	**MFN Customs Tariff % BOL.**
SECTION V **MINERAL PRODUCTS: SALT, SULPHUR; EARTHS AND STONE; PLASTERING MATERIAL; LIME AND CEMENT**				
22.01	Waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavored; ice and snow			
	- Mineral waters and aerated waters			
2201.10.00.00		20	10	10
	- Other			
2201.90.00.00		20	10	10
22.02	Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other non-alcoholic beverages, not including fruit or vegetable juices of heading no 20.09			
	- Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored			
2202.10.00.00		20	10	10
	- Other			
2202.90.00.00		20	10	10
SECTION V **MINERAL PRODUCTS: SALT, SULPHUR; EARTHS AND STONE; PLASTERING MATERIAL; LIME AND CEMENT**				
25.01	Salt (including table salt and denatured salt) and pure sodium chloride, whether or not in aqueous solution or containing added anti-caking or free-flowing agents; sea water			
	Other			
2501.00.90.00		5	10	5
SECTION VI **PRODUCTS OF THE CHEMICAL OR ALLIED INDUSTRIES** **INORGANIC CHEMICALS, ORGANIC OR INORGANIC COMPOUNDS OF PRECIOUS METALS, OF RARE-EARTH METALS, OF RADIOACTIVE ELEMENTS OR OF ISOTOPES**				
28.51	Other inorganic compounds (including distilled or conductivity water and water of similar purity); liquid air (whether or not rare gases have been removed); compressed air; amalgams, other than amalgams of precious metals			
	Distilled or conductivity water and water of			
2851.00.30.00	similar purity; liquid air and purified air	10	10	10

Source: Import Tariffs Bolivia, 2006

Both the Common Tariff Nomenclature of the Cartagena Agreement Member Countries (NANDINA) and the US Harmonized Tariff Schedule (HTS) consider water as a commodity. Unprocessed natural mineral water, ice, snow and sea water are expressly and clearly mentioned.

Although the argument of those who defend free trade for water is that the legislation does not consider water in its natural state, but as bottled water that is indeed a product, the fact is that the water used for preparing this product can come from natural water sources given in concession. Consequently, for analysis purposes, the product must be linked to the "raw material", i.e. the water source.

On the other hand, there are several headings with the reference "other", which apparently refer only to the commodities that have not been mentioned under the 4 code heading and hence their interpretation would be limited by the description of the commodity and in some cases, the specifications in complementary notes included at the beginning of the chapter, but in the case of water this rule is less precise.

In the lists of commodities per country of the WTO General Agreement on Tariffs and Trade (GATT), Bolivia, Peru, Colombia, Ecuador and the US present the headings analyzed above in different ways.

Bolivia and Peru have included as a package all their customs headings on consumer goods, establishing in the case of Bolivia a consolidated tariff or ceiling of 40% and in the case of Peru a tariff of 30% ad valorem for commodities involving water contained in headings 2201, 2202, 2501 and 2851. Colombia has reached a compromise, listing every heading and not in a package like Bolivia and Peru, and has included only headings 2201 and 2202 with a consolidated tariff of 70%.

Ecuador only includes headings 2201.90.00 and 2202.10.00 with a consolidated tariff of 30% and in the definition of heading 2201.90.00, it is clarified that the description of "other" will cover "natural ordinary water, ice and snow, not containing added sugar or other sweetening matter or flavored".

The US included headings 2201, 2201.10.00, 2201.90.00, 2202, 2202.10.00, 2501.00.00 and 2851.00.00 in the WTO. In summary, only this country included the 4 groups of headings containing water. As regards customs tariffs, as opposed to the Andean countries, the US has established a fixed consolidated tariff of 0.26 cents per liter for heading 2201.10.00 and 0.2 cents per liter for heading 2202.10.00.

Of what we have seen, we can conclude that in the WTO both the Andean countries and the US treat water as just another commodity; there is no precise tariff definition delimiting the scope of the liberalization commitment, and no special treatment is foreseen for water.

In the case of the FTT between Peru and the US, the negotiation was based on eight-digit headings. Peru used its own Customs Tariff[6] and the US Harmonized Tariff Schedule (HTS). In water, only headings 2201.10.00, 2201.90.00, 2202.10.00 and 2202.90.00 (this last one exceptionally by Peru) were considered.

The problem identified in the headings under the generic description "other" was not considered in the same way by both parties. Peru maintained the description "other", while the United States specified the products under heading 2201.90.00, closing its reference only to these commodities. There is no special observation on behalf of Peru, probably because according to the provisions contained in the Customs

[6] The Customs Tariffs of Peru were prepared on the basis of the Common Nomenclature of the Cartagena Agreement Member Countries (NANDINA), including additional subheadings in conformity with the faculty granted by Art. 4 of Decision 249 of the Commission of the Andean Community.

Tariff, the concept "other" covers non-aerated water, ice and others. Nonetheless, with this last word, the interpretation of this heading – except if it refers exclusively to snow - is very wide.

The sea water, the ice, the snow, the unprocessed natural water are subject to negotiation.

Water is a limited natural resource and a public good, which is fundamental for life and health. However, the headings refer to this resource as just another commodity. The description responds to a formal definition of what should be understood as a commodity. But a commitment involving water is not exclusively related to the gradual elimination of customs barriers, but leaves open the door for water trading companies to take decisions on the commercial exchange of this resource.[7]

The different countries do not resolve the interpretation of the heading "other" in the same way. If a state has a domestic norm regulating this topic, it can introduce exceptions to the headings involving water so as to permit the state to institute or maintain - besides duties, taxes or other charges – prohibitions or restrictions on the importation of any product of the territory of any another contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party which may be made effective through quotas, import or export licenses or other measures (article XI-1, General Agreement on Tariffs and Trade or GATT). If the states do not have these domestic safeguards, they will not be able to use this authority recognized by the GATT.

Most Andean countries do not have any regulation in this topic and the environmental exceptions that could maybe be interposed are of a temporary nature.

III. WATER AS AN INVESTMENT IN SERVICES

At present, there are three service classifications: the Sectoral Services Classification List (W/120) – adopted within the framework of the negotiations on the General Agreement on Trade in Services (GATS) during the Uruguay Round; the Provisional Central Classification of Products (CCP) of 1991; and the Central Classification of Products of 1997.

Potable water and sanitation services are included as part of the environmental services. Below, an overview is given of the coverage of these services in each of these classifications.

TABLE 3: CLASSIFICATION OF ENVIRONMENTAL SERVICES

W/120	Provisional CCP 1991	CCP 1997
A. Sewage Services (9401)	9401 Sewage services	941 Sewage services 94110 Sewage treatment 94120 Tank emptying and cleaning
B. Refuse disposal services (9402)	9402 Refuse disposal services	942 Refuse disposal service 94211 Non-hazardous waste collection services 94212 Non-hazardous waste treatment and disposal services 94221 Hazardous waste collection 94222 Hazardous waste treatment and disposal services
C. Sanitation and similar services (9403)	9403 Sanitation and similar services	943 Sanitation and similar services 94310 Sweeping and snow removal services 94390 Other sanitation services
D. Other services (9409)	9404 Cleaning services of exhaust gases 9405 Noise abatement services	949 Other environmental protection services not elsewhere classified

[7] Many water producing companies hold concessions that cover entire watersheds and they even have rights to the water sources. Besides, they distribute the water in the domestic and external markets.

	9406 Nature and landscape protection services 9409 Other services not elsewhere classified	

The liberalization of environmental services follows the parameters of the General Agreement on Trade in Services (GATS) in the WTO and of the chapters on cross-border services and investments in the FTTs.

3.1 Crossborder Services

The people defending the benefits of the chapter on crossborder services and the GATS underline that multilateral or regional negotiations are not a threat to public services – of which the environmental services form part – because literally *all services supplied on a non-commercial basis and in the exercise of governmental authority* are excluded from the sphere of application.

However, it is not entirely clear which ones are the services supplied in governmental authority. The WTO Secretariat admits that there is ambiguity in the terms "on a commercial basis" and "services not supplied in competition with one or more similar service suppliers"[8]. For example, in the case of social services and hospital services, in a background document, the WTO Secretariat itself doubted whether these were included in the exception of paragraph 3 of article I of the GATS; according to this document, "The hospital sector in many countries is made up of government-owned and privately-owned entities which both operate on a commercial basis, charging the patient or his insurance for the treatment provided" (WTO document, 1998, p. 11, quoted in Hartmann, E. & Scherrer, C., 2003, P.14). Hence, it seems little realistic to give arguments for application of the exception.

In an analysis of the legal framework, Markus Krajewski (2002, quoted in Hartmann, E. & Scherrer, C., 2003, p. 15) concludes that the GATS includes a very restricted definition of the public services sector; they are not considered "special" as compared to other services. There appears a notion of likeness of the service. The likeness in provision is what makes the entities similar, regardless of whether they are of a public or private nature. This vision of public services is different from the definition of public services as a general interest function, as common goods, a notion underlying for example the doctrine of French public law. The WTO notion is based on an economic concept of public goods, which refers only to services that cannot be provided efficiently through the market because of their characteristics of "non-rivalry" and "non-exclusion". Therefore, public services are not defined by the nature of the service or the characteristics of the service provider, but by the supply mode.

On the other hand, in the specific case of potable water and sewer system services, it is important to take into account that as a consequence of the already existing overburden in the public system related to budget constraints, governments have started to "commercialize" these services more and more, within a profit-oriented approach.

Likewise, within the framework of the structural adjustment programs accompanying the World Bank and IMF loans, governments were required to reduce public spending, which resulted in many services being privatized. Hence, in recent years funding mechanisms for "hybrid" entities such as public private partnerships or private groups in developing countries have become growingly common.

Because of the introduction of criteria related to profitability and competitiveness in sectors that used to function as not-for-profit public monopolies, these services loose their condition of governmental services. (Krajewski 2002, quoted in Hartmann, E. & Scherrer, C., 2003, p. 15).

[8] "'On a commercial basis' can be defined as a service supplied without seeking profit, and 'in competition' when two or more suppliers are operating in the market. Hence, only the services supplied without profit aims through a state monopoly would be excluded from the scope of the GATS" (Alban, 2005, p. 13).

In the FTTs, the definition of services only excludes certain services related to air transportation and the services provided in the exercise of governmental authority, supplied not on a commercial basis nor in competition, i.e. the services that do not deserve being treated as an object of investments because of the low profit level or the complexity of the service which, as explained, is not the case of potable water services, but rather corresponds to courts, central banks and defense. At the time the definition is set in the FTT, the services clearly written as not included are not covered by the FTT; which means that, for example, services of commercial air transportation, banks of states, etc., are not going to be part of the agreement, therefore the economy is not liberalized for these sectors.

Beyond technical considerations, the evidence of the negotiation on basic utility services and particularly the provision of potable water and sewer systems can be found: first, in the fact that this sector is mentioned in the sectoral list of WTO W/120 as a reference for negotiation; second, in the requests for opening the service sector at the WTO level, the principal ones being those from the US Coalition of Service Industries and the European Service Forum that have exercised considerable pressure through their government representatives for developing countries to "compromise" their energy and water services. "The EU has requested commitments from the GATS on "environmental services in 64 countries" in its preliminary negotiation proposal – offer as per the Doha process" (Martin, B. & Simpson , R., 2005, p. 18). Third, the commitments subscribed in this sector are not only on a multilateral level, but on a regional level.

3.2 Concept of Investment in the FTTs

As commitments in the environmental services sector are considered an investment in services, they are also subject to the provisions contained in the investment chapter in a FTT. In the WTO "the GATS in itself can be conceived as a kind of framework for a multilateral agreement on the promotion and protection of investments in services" (ECLAC, 2000a, p. 30).

In the FTT between Peru and the US, Art. 10.28 establishes that an investment is any asset that is the property of or that is controlled by an investor, either directly or indirectly, and that has the characteristics of an investment, including characteristics such as committed capital or other resources, the expectation of obtaining profits, or the assumption of risk, which can be in the form of "(a) a company; (e) ... concession agreements, income-sharing agreements and other similar agreements; (g) licenses, authorizations, permits and similar rights granted in conformity with domestic legislation etc." The wide scope of this definition interprets contractual rights – as in the case of concession agreements, the modality under which potable water provision is authorized – as a natural element of investments, basically because according to the commercial ideology, public services can be supplied efficiently only through market mechanisms.

This concept does not take into account the nature of the service, the general interest, the collective need, the impact of the service, its social function etc. The only factor of interest are the economic benefits obtained from the production of goods or the provision of services in the market and it is aimed at attaining the economic and political objectives of the parties to the treaty.

The mentioned article of the FTT between Peru and the US is applied to "concessions" (through which water sources have been granted in Andean countries), not only because of the concept of "investment", but because there are other references in this chapter that clearly show the scope as regards these services. Thus, article 10.1 paragraph 2 states that "the obligations of any Party under this section will apply to any state company or any other person when executing any regulatory, administrative authority or any other governmental authority as may have been delegated by that Party".

Provided that the concession is an administrative act, the granting of which is subject to government control, it is said that this chapter must be binding for the authorities that have, in relation to the investors, regulatory, administrative or other attributions.

Another important provision in the Peru-US FTT, which expressly refers to these services, is Art. 10.28 that states that an investment agreement will be "a written agreement between any national authority of one Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies for establishing or acquiring a covered investment different from the written agreement in itself, which grants rights to the covered investment or the investor: (a) with respect to the natural resources controlled by a national authority, and for the exploitation, extraction, refinery, transportation, distribution or sale thereof; (b) with respect to the provision of services to the public in representation of the Party, such as the generation or distribution of energy, the treatment or distribution of water, or telecommunications; or (c) for implementing infrastructure projects such as the construction of roads, bridges, channels, dams or oil or gas pipelines that are not for the exclusive or dominant use and benefit of the government…".

This article makes it fully clear that the obligations of the investment chapter prevail in the states that authorize investors to provide services concerning water treatment or distribution.

As from this moment onwards, the country can (and frequently may) be involved in conflicts because of the level of obligations imposed by the investment chapter in a FTT. A tough job considering that the typology of this part is similar to that of a Bilateral Investment Treaty, and considering that one of its characteristics is an endless list of measures favoring investors such as performance requirements, expropriation and indemnity, national treatment, fair and equitable treatment, most-favored nation treatment etc. Besides, non-compliance automatically gives rise to a demand before the International Centre for Settlement of Investment Disputes (ICSID).

3.3 Lists of non-conforming measures in Crossborder Services and Investments

Negotiations of services sectors are based on lists, positive lists in the WTO and negative lists in a FTT.[9]

In negotiations on positive lists, a country voluntarily lists a certain number of services sectors and after identifying the sector, it mentions the type of access and treatment for each one and for each supply mode it is willing to contractually offer to service providers from other countries.

In the type of access and treatment, the country can describe the restriction why its institutional juridical framework makes it impossible to comply with the principle; for example, it can state "NONE" in case there are no limitations to Market Access or National Treatment, or it can say "WITHOUT

[9] In an ALADI study titled *Situación de las negociaciones y el comercio de servicios regional e internacional* (Situation of the negotiations and regional and international services trade), 2004, p. 36, the positive and negative lists are defined as follows:

Positive Lists

The positive-list approach that is also known as the bottom-up approach consists of a list of the services intended to be liberalized, whereby the rest of the universe is protected. This approach, based on the notion of progressivity, arose in the Uruguay Round as an instrument intended not to affect the sensitivity of many developing countries, and in which the specific commitments are the key elements.

Negative Lists

The negative-list approach that is also known as the top-down or verticalist approach consists of the drafting of lists of services that are not the object of liberalization; in other words, in this approach all services are liberalized, unless they are mentioned on the lists. This explains why these lists are called negative lists. The logic behind a negotiation on a negative list is what is known as the "list or loose it", i.e. all incompatible measures not listed in the reservations must be derogated. The key elements in this approach are the general commitments.

CONSOLIDATION" when the state wants to be free to introduce all measures as it may judge necessary, even if these are inconsistent with the obligations of Market Access and/or National Treatment.

In the negative lists, the comprehensive inclusion of all services sectors is automatic, unless otherwise specified in the list of reservations (called the "Non-Conforming Measures") based on the specific disciplines of the chapters on services and investments that go beyond the categories of access and treatment.

In the FTTs, these lists are called "Non-Conforming Measures". A non-conforming measure is "any law, regulation, procedure, requirement or practice", a "non-conforming" measure is therefore a national decision which violates the requirements of Market Access, Local Presence, National Treatment, Performance Requirements established in the FTT. For example, the General Labor Law of Bolivia (article 3) establishes that companies cannot hire more than 15% of foreign personnel on their payroll. This provision is contrary to the principle of market access.

Non-conforming measures can be horizontal or sectoral, present or future. Horizontal measures apply to all sectors; sectoral ones only apply to one specific sector. The present lists are established when there is a law regulating a services sector and the provisions therein contained are opposed to some obligations of the agreements. The future lists allow the parties to safeguard what could be interpreted as some services and some faculties of the state in respect of those services. In the Peru-US FTT, the present reservations were established in Annex I and the future reservations in Annex II.

Non-conforming measures of the water and sewage supply services must contain reservations regarding the obligations of the crossborder services and investment chapters. As this is a negotiation with negative lists, this must be set out necessarily, as otherwise the interpretation would be that this sector is open and that henceforward the state receiving the investor would no longer be able to impose requirements against the commitments established in the treaty.

If a country does not have a law in the sector of basic services, for example, which permits it to indicate its non-conformity with some of the treaty requirements at the moment of the negotiation, it could prepare a list with reservations, thus reserving the right to institute the conditions for provision of water services in its country.

We must clarify that the parties can manage both lists, provided they have not committed this sector in the WTO.

This form of negotiation conspires against countries with liberal regimes for the trade in services on the basis of unilateral openness, because when consolidating the current situation through the negotiation under the stand-still clause[10], an unbalanced situation crystallizes as compared to the countries that have not liberalized their services sector, thus generating a situation with an unequal exchange of concessions in terms of binding commitments.

Insofar as a country does not have policies and regulations in most services sectors and no clear national objectives have been defined, the negotiation based on positive lists could be more advantageous for the country. In addition, this would guarantee the country's freedom to introduce new restrictive regulations in the sector that are not part of the specific commitments, as this does not necessarily imply a general stand-still obligation.

[10] Clause on a status quo or the prohibition to create new barriers to trade in services.

IV. REMAINING NORMATIVE SOVEREIGNTY

One of the principal preoccupations regarding the application of trade agreements in services is the effect of these agreements on the government's capacity to regulate compliance of the public policies. Although FTT advocates insist that governments could apply the conditions as they judge convenient in their reservations, there is less enthusiasm when asked about what would happen when those countries have insufficient normative capacity to establish their non-conforming measure.

Even when formulating reservations, the capacity of exclusion that can be applied in any of these, leaves only a small possibility of regulatory autonomy for the future. In theory, natural resources regulation, on the provision of potable water services and others, is preserved if a sufficiently wide list was collected of aspects that are safeguarded from application of a FTT so they would fall outside the FTT's scope.

In practice, with or without safeguards, there can be no requirements hampering trade as all limitations could be considered restrictive or discriminatory. Henceforward, any modification in the norms would be possible only if that country introduces criteria that respect the framework committed in the agreement and in the non-conforming measures. It can therefore not be more restrictive than agreed, even though it could be more liberal.

Besides, regulations should not affect either investments or trade. Regulations are measures adopted by the national or local governments, i.e. which the state normally uses for administering resources.

In other words, the state continues giving up its possibility of regulating in accordance with the particular interests of its inhabitants and adjusts the laws on water to private investment criteria or, in the end, regulation is through the market (Flórez, M.I., 2003).

An important matter in this point is related to Art. 11.7 of the Chapter on Cross-Border Services and 6 of the GATS related to "Domestic Regulation" which mention the obligations of each Party to "*…ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services*". Furthermore, Art. 11.7-2 b) and Art. 6.4 b) known as the "proof of necessity" stipulate that requirements should be "*not more burdensome than necessary to ensure the quality of the service*". This merely refers to the quality of the service and not the quality of the access. The ideal situation would be for access to be included in the concept of quality, which would open the door to limit it.

The ministerial declaration of Doha includes a categorical declaration that was ratified in Cancun (par. 7) "*We reaffirm the right of members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services"*. This represents a political commitment that reinforces the same declaration contained in the preamble of the treaty, which could have this effect but even if it had, it did not open the way for clarifying whether the "proof of necessity" is applied only to the sectors already committed in the liberalization or to all sectors.

In the FTT, we see that the sphere of application covers the measures adopted or maintained by one Party that affect the crossborder trade in services. "[This reference is important to determine the scope of the term] "affect", as it is difficult to establish a dividing line between the sphere of application of the disciplines and the covered measures". (Abugattas, 2004a, p.2).

Within the framework of the GATS, there were some discussions, but at the level of the FTT this debate is more interesting because the sphere of application of the services chapter widens the coverage commitment laid down in the WTO. In the GATS, coverage refers illustratively to the four service supply modes; on the other hand, in the chapter on services the scope is interpreted in a different manner,

including definitions related to the provision of a service and the measures adopted by the members that affect the trade of services[11].

"Recent conclusions of the WTO Appellate Body say that the word *affect* in its current sense refers to a measure that has an effect on, and this implies a wide sphere of application beyond the scope of the terms regulate or govern" (Abugattas, 2004a, p. 3).

Therefore, the obligations of the agreement do not only apply to the juridical norms the sector regulates, but to all types of measures that affect the provision of this service in the present and in the future.

In this respect, Abugattas (2004a) says that: It is important to underline that the agreements exclude all provisions of the chapter on the crossborder trade in services, among others the articles related to domestic regulation, from the mechanism for settling controversies between the Investor and the state. This exclusion can be very relevant in terms of protecting the countries' right to regulate services, a right that is explicitly included in the GATS. In this sense, it is important to consider that in the case of the NAFTA, in view of the interpretation of some provisions in controversies between investors and the state, in some cases the states' right of regulating has been questioned (p. 7).

As the FTT includes foreign investments, it widens the mandate of the WTO for issuing and enforcing norms on non-commercial matters. While the old system of the GATT produces multilateral norms that only affect the customs policy of the members or the "border trade policies", the services agreement (GATS) affects the internal organization of economies. The sectoral and national regulations, as well as the development policies, will have to be adjusted and be subordinated to new international norms.

With a FTT, the public policies in services and goods that might restrict the use of a resource would be affected by the scope of the investor's rights.

Within this framework, it is difficult to imagine the negotiations creating a situation of harmonious cohabitation between the internal capacity to regulate national services of regulatory entities and the access of foreign service providers to domestic markets.

The results of the negotiations of Andean countries on the environmental services sector in the FTT with the US have yielded the following lessons learned:

1. The country with optimum norms for regulating its services reflected the requirements of its norms in its reservations.
2. The country with a federal system listed in a measure the regulatory autonomy of its states, i.e. without specifying the state conditions for the provision of the service.
3. The country with scanty norms raised future reservations, even though the setting out thereof was negotiated and subordinated to approval by the other party.
4. The country with or without normative bases established "future measures", reserving the right to adopt or maintain any measure that is not incompatible with that country's obligations in conformity with article XVI of the GATS.
5. The country with domestic liberal provisions did not raise any reservation as its juridical regime is open.
6. The country that opened a sector (environmental services, for example) at the level of the WTO did not mention a bilateral measure in that sector as the openness is automatic.[12]

[11] One of the most notable changes is the final exclusion of migration.

[12] According to Art. XIX of the GATS on economic integration, the countries start bilateral negotiations in order to be more liberal so any retroactive and restrictive actions are permitted.

We must clarify that these results were not the same for the Andean countries and the US. As regards the Andean countries, in most cases future reservations were used to protect their normative faculty in the sectors that as at the moment of the negotiation were seen as activities with a deep impact in the standard of living and that were not previously liberalized. Whereas for the US it was insufficient to establish a measure at the federal level, and so it also changed the negotiation modality from negative to positive lists as its normative faculty is unalterable.

V. COSTS OF THE TREATIES

The free trade treaties are ratified by the states, but the rights agreed upon are granted to private persons and to make sure this actually happens, the treaties contain provisions on the mechanism for settling controversies that may arise between the national investor of a state and the state receiving the investment. The incompliance of any obligation assumed in the treaty gives rise to international liability of the receiving state because of the caused damages. The innovation is that the procedure for stopping such behavior or obtaining an indemnity deviates from the classic system of International Law.

In the classic system, private persons do not enjoy the "ius standi" (direct access to the justice tribunals) and therefore, it is the state of nationality of the person that will file the claim through Diplomatic Protection. But by virtue of the Calvo doctrine this can happen only once the affected private person has exhausted all administrative and judicial resources defined in the national legislation of the state it wants to sue. In this system, this is modified as it is possible for private persons to directly access the international arbitration body in the conditions agreed upon in the treaty. Thus, they enjoy ius standi.

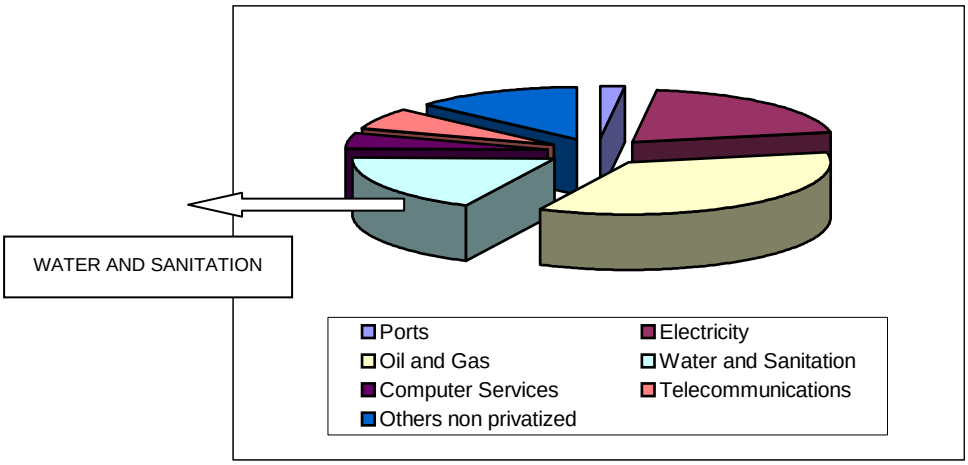
This mechanism is not used for a state to file a suit against private persons or another state and neither for states or private persons to file suits against international funding or other organizations. It is a market with very specific clients and passive subjects that resort to the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank.

Despite the existence of different international courts[13] that deal with disputes between national states and private investors, the subjects involved have a marked preference for the ICSID.

Another relevant matter is that under these rules, most demands correspond to sectors linked to natural resources management, the exploitation of oil, gas and minerals, the generation or supply of electricity, potable water and sewer systems (because of the privatization of public companies) or the food industry. (Ortiz, R., 2006, p.8)

[13] These courts are for example the International Court of Arbitration of the International Chamber of Commerce, the United Nations Commission for International Trade Law etc.

GRAPH 1
DISTRIBUTION OF DEMANDS IN THE ICSID
PER ACTIVITY SECTOR OF THE COMPANIES



Source: Own elaboration based on data of Ricardo Ortíz - FOCO. Bilateral investment treaties and demands in the ICSID, 2006.

Argentina is the country facing most lawsuits in the ICSID, many of which are related to water demands.

Suits have been filed with the ICSID against all Andean countries, except for Colombia. Of these countries, only Bolivia was sued in connection to water within the framework of its Bilateral Investment Treaties. One is the demand related to the Bechtel case (Aguas del Tunari) and another one that was about to be filed was the case of Aguas del Illimani (AISA) through the transnational company Suez Lyonnaise des Eaux.

Below a more detailed overview is given of these cases:

5.1 Case 'Bechtel versus Bolivia'

In 1997, the World Bank offered financial aid to Bolivia to develop sanitation projects with the condition of the country privatizing the water system in the cities of El Alto-La Paz and Cochabamba. In September 1999, in a process with only one bidder, the water service in Cochabamba was granted to Aguas del Tunari, a company controlled by the transnational company Bechtel.

The international consortium Aguas del Tunari (AT) was incorporated in the Cayman Islands with a capital of USD 2,500. AT was incorporated on the moment of signing of the agreements by International Water Ltd (IWL), a subsidiary of the Bechtel Corporation of San Francisco holding 55% of the shares of Aguas del Tunari, Abengoa with 25% and Bolivian entrepreneurs with 20%. But on 4 November 1999, Bechtel sold half of IWL to Edison S.P.A, an Italian energy and services company. In a parallel way, Aguas del Tunari changed its juridical domicile from the Cayman Islands and appeared in the holding International Water Holdings B.V., a post box in the offices of the holdings agency Intra Beheer B.V., in turn subsidiary of ING Trust, headquartered in The Netherlands[14] (Kruse 2002, quoted in Crespo, C. & Campanini O., 2005, Annex 3 p.1), a country with which Bolivia has signed an Agreement on the Promotion and Protection of Investments (BIT)[15].

[14] In fact, the Dutch activists who worked in solidarity with Bolivia only found two empty offices and a post office box.
[15] See Barlow & Clarke, 2002 quoted in Crespo, C. & Campanini O., 2005, Annex 3 p.1.

The Bolivian government had to rescind the agreement with AT in Cochabamba six months after the concession was granted when popular pressure – known in the entire world as the Water War – paralyzed this valley city on three occasions between January and April 2000 when people protested against the privatization and tariff increase from 35 to 200%[16].

In 2002, based on the BIT Bolivia-The Netherlands, Aguas del Tunari - Bechtel sued Bolivia in the ICSID. The ICSID formally registered AT's lawsuit against Bolivia as Case ARB/02/3; and in July 2002 a tribunal was set up with one arbitrator appointed by Aguas del Tunari, another one accredited by Bolivia and a third one appointed by the ICSID itself as the parties were unable to reach an agreement.

The exact content of Aguas del Tunari's claim was never made public, but according to declarations of authorities the company demanded an indemnity of USD 25 - 100 million, even though in the seven months it operated in the country the maximum amount it invested was half a million dollars according to information provided by the government of that time. When AT was incorporated, the shareholders (Bechtel, Abengoa and the Bolivian shareholders) paid USD 10 million to set up the company, but later they said they did not need all that money and so they gave back 90% to the shareholders, leaving only USD 1 million in Bolivia.

On 7 March 2002 (and later in September of that same year), activists in Amsterdam organized a protest march in the offices of Aguas del Tunari. On the other hand, in the first week of July 2002, the Supervisory Board of San Francisco (a kind of municipal council), the city where Bechtel is headquartered, passed a resolution with 7 votes against 2 (2 abstentions), promoted by the NGO Public Citizen and other social organizations from Bolivia and the US, to condemn the lawsuits filed by this company against Bolivia and demanding that the company withdraw the demand filed with the ICSID[17].

In August 2002, more than 300 activists from 41 countries signed an international petition addressed to the World Bank to demand that the lawsuit be transparent and open to the public, permitting the participation of citizens. They asked to participate as parties in the lawsuit; and if this were impossible, they requested to participate in all phases, with permission to issue petitions, attend hearings, and they also demanded that the tribunal visit Cochabamba to verify the facts etc.

In the first week of February 2003, the ICSID refused this request, not allowing the public or press to participate, and not even to attend the lawsuit as observers. The argument was that the characteristics of the trial and the responsibilities of the tribunal were already laid down in the BIT and ICSID norms[18].

Three years were spent on the organization and prior solution of different matters and on 26 October 2005, the ICSID arbitration panel determined that it indeed had competence and jurisdiction to arbitrate in this case and that it is natural for a transnational company to find a country with a BIT with the country where they will make an investment.

In March 2004, as a result of the negotiations in the ICSID, in a reserved hearing on 11 and 12 February of the Bolivian government with Bechtel, it was announced that the North American company would accept withdrawing the demand in ICSID provided the Bolivian state pay USD 1 for every Bechtel share. Thus, the Bolivian state, as the then Vice-minister of Basic Services, José Barragán, pointed out could purchase

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[16] It was impossible to control the multitudes, not even with the state of siege ordered by the government of Hugo Banzer. One person died and 30 were injured in the clashes.

[17] Months before, a network of organizations in Bolivia and the US had started to analyze and act in the "Bechtel versus Bolivia" case. They sent hundreds of emails, developed a webpage and, on key moments, network members visited San Francisco and Washington (Kruse, 2002:1).

[18] Note of David Caron, president of the ICSID tribunal in the case of Aguas del Tunari versus the Republic of Bolivia, to Martin Wagner, director of the international program Earthjustice, an NGO that was part of the pool of lawyers of the social organizations (http://www.earthjustice.org/news/documents/2-03/ICSIDResponse.pdf).

55% of the Bechtel shares, plus the 20% of the shares of the Bolivian companies that seemingly accepted the proposal, meaning that when having 75% of the total shares, it could wind up AT and avoid subsequent legal actions. The water coordination instance 'Coordinadora del Agua' refused the proposed solution as it considered this was a way out for Bechtel to "wash its image" and a "conditioned sale" for the Bolivian population. In October of that year, Abengoa, the Spanish company that owned 25% of the shares of the AT consortium refused the proposed solution and demanded total payment of the indemnity.

Throughout December 2004, as the result of a campaign promoted by Democracy Center[19], more than 300 e-mails were sent to the Spanish company Abengoa, demanding that it withdraw its demand against the Bolivian people. The company responded by arguing that AT had filed the demand, and not Abengoa, thus camouflaging the fact that they are shareholders with a participation of 25%; hence, the decision on filing a suit against Bolivia in the ICSID was a decision of the different members of the consortium, and they did not refer to the fact that they are the only ones opposed to the purchase of the shares.

The negotiations were suspended but the then Minister of the Presidency, José Galindo, took advantage of the uncertainty and for stigmatizing the emerging movement in El Alto against Aguas del Illimani and the demand for nationalizing the hydrocarbons, he affirmed that: "the lack of respect for juridical security has consequences not only for one sector of the country, but for all Bolivians, something we will feel in a couple of weeks or days from now in the mentioned case", as "the country is about to loose (and) we Bolivians will have to pay USD 25 million … (hence) we must prepare a lawsuit to find out who is really responsible for the events"[20].

In March 2005, aimed at showing their opposition to transnational companies, 210 organizations, groups, associations and personalities from 23 countries, as well as 412 citizens – men and women – from 30 countries signed a letter addressed to the executives of Abengoa, in which they did not only mention the adverse conditions of the agreement with AT for the people of Cochabamba, but in which they also criticized the negative attitude of this company towards a "negotiated solution with the Bolivian government". Besides, they demand that "ABENGOA S.A. rectify and immediately withdraw their demand for an indemnity filed in ICSID against the Bolivian government and desist from its wish to impoverish Bolivia even more".

On 19 January 2006, the Bolivian government bought 80% of the shares "free of all charges" from the principal shareholders Bechtel and Abengoa for a symbolic value of 2 bolivianos (less than USD 30 cents) and the companies agreed to make an end to the long dispute in the ICSID.

In this case, there are three topics that draw the attention:

First, the demand is filed by Aguas del Tunari against Bolivia without all partners having discussed and even less so approved this decision, according to a public statement of some Bolivian partners.

Second, the process was not transparent. In August 2003, more than 300 organizations submitted an international citizen petition demanding that the case be public and open to participation and citizen surveillance, but the Center did not accept this request, arguing that the characteristics of the trial and the responsibilities of the tribunal were already laid down in the bilateral investment treaty and in the ICSID norms.

Third, a suit was filed against Bolivia based on the BIT with The Netherlands though none of the investors was Dutch. The shareholders in Aguas del Tunari were North American, Spanish, Italian and Bolivian, but

[19] See the webpage of the Democracy Center, headed by Jim Schultz: www.democracyctr.org
[20] See Peredo, 2004 quoted in Crespo, C. & Campanini O., 2005, Annex 3 p.1 analysis of this statement, see in Peredo, 2004.

not Dutch. Despite this too obvious fact, the ICSID accepted the demand of Aguas del Tunari. Bolivia had no possibility of denying the jurisdiction of the ICSID as this was stated in the BIT and its only alternative was arbitration to previously discuss the matter of jurisdiction and competence.

The Bolivian state signed 24 Bilateral Investment Treaties[21] in the nineties, thus giving up a large part of its regulatory faculties and submitting to a supranational juridical system. Therefore, if the government decided in the future to include criteria in its legislation to give priority to certain uses (domestic use, irrigation) and users (small users, indigenous organizations, peasants, small cooperatives and committees, unions and associations of small-scale producers etc.) and to establish strict control mechanisms for certain users (private sector, large-scale users) and sectors (mining, industry, hydro-electricity sector), it might be sued under the protection of the bilateral investment treaties in force.

5.2 Case 'AISA versus Bolivia'

In La Paz and El Alto, the potable water and sewer system service was the responsibility of SEMAPA. Based on the capitalization law, through a Supreme Decree issued by the government, the decision was made to tender out the potable water service. In this sense, the ministry of capitalization – a ministry with no portfolio – proceeds to tender out this service, but only one company submitted an offer, namely Aguas del Illimani SA.

Aguas del Illimani (AISA), which was granted the concession for providing water and sewer system services in the cities of La Paz and El Alto, is a partnership in which the majority shareholder is the French company Suez (55%), one of the biggest companies in the world in the water and sanitation sector (in 2003, its profits totaled EUR 39,622 million); another partner is Bolivian Investment Corporation-BICSA (22%), the financial group of the Banco Mercantil, which is linked to the family of former president Jorge "Tuto" Quiroga. The other partners are CONNAL (5%), Inversora en Servicios (9%), the company workers (1%), and the World Bank through the International Finance Corporation (8%).

AISA offered to expand the potable water network in El Alto with 71,752 connections. Based on this offer, the ministry of capitalization decided to award the potable water supply agreement to Aguas del Illimani. On 24 July 1997, the concession agreement with this company was signed. On that same date, an agreement is signed between the Autonomous Municipal Potable Water and Sanitation Service (SAMAPA) and AISA for the latter to use SAMAPA's assets under a lease modality.

The concession agreement is signed for a thirty-year period to conclude in 2026. The agreement and the 11 annexes specify certain obligations such as the revision of prices and tariffs and expansion goals.

In the first eight years of the concession, the poorest inhabitants of La Paz and El Alto, the cities covered by AISA, insistently complained about the dollarization of the tariffs, the increased cost of the potable water and sewer system connections, the incompliance of maintenance and renewal of the sanitation system and the absence of investment projects in poor areas.

In October 2004, the Federation of Neighborhood Councils of the city of El Alto (FEJUVE El Alto) starts issuing the first social demands related to incompliance of the universal access to these services and incompliance with the promised potable water connections, leaving various families without access to this service. Finally, the protest movement exploded in January 2005, when a people's mobilization paralyzed the city of El Alto for more than 10 days, demanding immediate expulsion of the company for not satisfying the need for basic utility services of at least 200,000 persons.

[21] Annex No. 7 contains a precise reference to the 24 bilateral treaties signed by Bolivia.

Between 6 January and 22 April 2005, Bolivian authorities issued different provisions to terminate the concession agreement with the company Aguas del Illimani S.A. (AISA), in response to the demand of the citizens of El Alto who were deeply dissatisfied with the service. On a moment of popular commotion, government authorities proposed that AISA redraft the potable water and sewer system expansion goals, revise the high costs of the connection, and hire auditors to evaluate the activities of the private administrator in the first years of the concession and possible rescission of the agreement.

But Suez interpreted this as a "violation of the basic guarantees" Bolivia had given at the moment of awarding the concession, including its "financial viability". On 27 June 2005, the Ministry of Public Works and Services received a letter from Suez, in which they demanded government measures with the argument that the Agreement on the Mutual Promotion and Protection of Investments (APPI) entered into between Bolivia and France in October 1989 was being infringed and they formally announced the beginning of a dispute because their "significant investments" in Bolivia had been damaged.

Within the framework of article 8 of the APPI that states that "all disputes related to investments between one of the contracting parties and a national or corporation of the other contracting party must be settled between the two parties. If the dispute has not been settled in six months, as from the moment on which any of the parties in dispute has manifested the dispute, any of the parties must submit it to arbitration in a court of arbitration", and so the period of 6 months of prior consultations is started.

According to AISA, the following measures specifically violated the BIT:

- Supreme Decree No. 27965 (6/I/05) that orders the SISAB "to proceed to revise legal and financial aspects of the concession agreement…", including the redefinition of expansion goals for the five-year period 2002-2006 and the dedollarization of the tariffs.
- Administrative Resolution SISAB No. 4/2005 (7/I/05) to unilaterally modify the connection costs "without respecting the basic promises of the regulatory and contractual framework of the concession" (p. 2) and, on the other hand, Administrative Resolution SISAB No. 26/2005 (4/III/05), which rejects the Revocation Remedy filed against the said Resolution.
- Supreme Decree No. 27973 (12/I/05), which orders the SISAB to "immediately take all necessary actions for rescinding the concession agreement" (p. 2).
- Administrative Resolution SISAB No. 19/2005 (23/II/05) pointing out that "in compliance of SD 27973 …as from this date, actions are started for Rescinding the Concession Agreement", and Regulatory Administrative Resolution No. 35/2005 (18/IV/05) that rejects the Revocation Remedy against the said Resolution.
- Regulatory Administrative Resolution SISAB No. 22/2005 (23/II/05) that provides for "legal, technical – operational, economic – financial, commercial and other audits within the framework of Regulatory Administrative Resolution SISAB No. 19/2005" and Regulatory Administrative Resolution SISAB No. 36/2005 (18/IV/05) that rejects the Revocation Remedy against the said Resolution.
- Supreme Decree No. 28100 (22/IV/05) that authorizes the SISAB to proceed to procure audits, the necessary legal services and the necessary financial, institutional and technical assistance for rescinding the concession agreement.
- Supreme Decree No. 28101 (22/IV/05) that establishes an interinstitutional commission to design the management, operational and financial model of the new company that will provide the potable water and sanitation services, as well as a commission responsible for monitoring and follow-up of the process for terminating the agreement with the concessionary. Besides, SISAB, the municipal governments of La Paz and El Alto and the Ministry of Finance are ordered to find a way for "assigning the credit currently granted" to the concessionary to the new company.

AISA considers that these measures have a "deep negative impact on Suez and Suez Environment and its investments in Bolivia" within the framework of the APPI, concretely on the following provisions: Art.

5(2) on their right not to be subject to expropriation or nationalization or any other way of dispossession, Art. 3 on their right to receive fair and equitable treatment, Art. 4 on the state's obligation to give them national treatment and most-favored nation treatment and finally Art. 5(1) on their right to protection and full and absolute security in Bolivia.

The state's obligation to provide fair and equitable treatment to foreign investors or to give them an indemnity in case of expropriation is being interpreted discretionary by the transnational companies and courts of arbitration, which do not take into account the objective circumstances that must necessarily lead to a modification of the terms of the concession agreements or regulatory frameworks.

Since the social conflict broke out in El Alto against AISA, the state has not been able to take any measures without the private operator threatening with a lawsuit in foreign courts of arbitration. This way, the BIT with France limited the state's capacity to legislate and impose performance requirements on the Foreign Direct Investment (FDI) and opened the possibility to sue the state in the ICSID. In the first semester of 2006 the new government of Evo Morales developed a complex process of negotiation with the main investor of AISA, the French company Suez. In order to a avoid a complicated and long arbitration process, both parts agreed to agreed to find an amiable solution, nevertheless, AISA had presented by that moment a letter to CIADI informing about the situation. Finally the government agreed to pay an amount that strictly expressed the real an effective investment (determined by an audit) of AISA (about 5,5 million dollars) an bought the water company.

The excessive advantages granted to the investors through the bilateral investment treaties – advantages that are amply consolidated with a FTT - become a boomerang for the state, which suffers from growing limitations to exercise its sovereign function.

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