

Agua del Tunari v Bolivia (Netherlands-Bolivia BIT)

AREAS OF POLICY AFFECTED: public health (potable water), utilities (water and sewage), privatization (operation of water system), local government (water and sewage), public order (protests).

CASE SUMMARY: The claimant sued Bolivia under a bilateral investment treaty (BIT). The dispute arose from the failed privatization of water and sewage services in the city of Cochabamba. The privatization was based on a 40-year concession contract and assigned to foreign companies exclusive rights to provide water and sewage services in Cochabamba. Public opposition arose from the outset and then escalated. Public concerns related primarily to higher rates and prohibitions on communal wells.

It emerged during the arbitration that, prior to bringing its claim and as public opposition was developing, the foreign investor “migrated” corporate ownership of the privatized assets from the Cayman Islands to the Netherlands in order to have access to the Netherlands-Bolivia BIT. This was done without the permission of Bolivian authorities that approved the original privatization.

The claim was settled after an international campaign to pressure the U.S. company Bechtel, which was the main foreign firm involved in the privatization.

COMMENT: The tribunal adopted a flexible approach to the concept of corporate nationality under investment treaties. A majority of the tribunal allowed the claim to proceed in spite of the investor’s migration of its investment to the Netherlands in order to access arbitration under the Netherlands-Bolivia BIT. The Bolivian-appointed arbitrator dissented on this issue, concluding that the Bolivian authorities that approved the original investment should have been consulted about the change in corporate ownership.

The case is also notable because of the policy issues that flowed from the Cochabamba water privatization and the investment treaty lawsuit. However, problems with the water system reportedly continued after the settlement of the dispute and the withdrawal of Bechtel. Finally, the case showed how public pressure on a corporate claimant could encourage the resolution of an investment dispute.

Source: www.iiapp.org (February 2011), based on information in publicly-available awards and materials in known investment arbitrations (for texts of awards, see www.italaw.com). This report was produced by a research team coordinated by professor Gus Van Harten (gvanharten@osgoode.yorku.ca) of Osgoode Hall Law School of York University in Toronto, Canada. Please see the disclaimer and statement on terms of use available at www.iiapp.org. © Gus Van Harten 2011. *You may forward or re-publish the information in this report with attribution to www.iiapp.org.*