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The Forgotten Voices: Power Imbalances in Guatemalan Investor-State Dispute Settlements

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On June 13, 2012, Yolanda Oquelii, leader of the La Puya Peaceful Resitance movement in Southern Guatemala, became the subject of an assassination attempt. She was targeted for starting a non-violent protest, together with many other brave women and men from her community, against a gold mining operation near their homes. They led a sit-in at the "El Tambor " mine to protect their land from the extreme social and environmental degradation caused by exploitative practices carried out by US-based company Kappes, Cassiday & Associates (KCA). Their practices have affected air quality, as well as flora, fauna, top soil and the available quantity of water for local residents. Ever since, community members have continued their sit-in to keep vigil around the clock in the face of violent police harassment, anti-riot intervention and various legal challenges. Eventually, in 2016, their persistent protest triggered a formal lawsuit, setting off a chain reaction of cases which escalated through the Guatemalan court system.

In 2014, the Guatemalan NGO Centre de Acción Legal, Ambiental y Social de Guatemala (CALAS) filed a case against the Ministry of Energy and Mines (MEM) contending that "Exmingua", the Guatemalan subsidiary of KCA, did not hold a valid operating permit based on its failure to carry out community consultations required under Guatemalan law and ILO Convention 169. KCA contended that this claim was 'meritless' and questioned whether there was any Guatemalan law

requiring the implementation of ILO 169 at the time when the mine was constructed. However, in November 2015, the Guatemalan Supreme Court held in favour of CALAS and issued a final decision in 2016 requiring the suspension of mining activities at El Tambor. But just as the valiant efforts of La Puya seemed successful, KCA launched a counterattack, filing an ISDS case against the state of Guatemala claiming damages of $300 million.

I. What are the ISDS Cases?

ISDS––or investor-state dispute settlement––cases are legal challenges that allow foreign investors to resolve disputes with the government of the country in which their investment was made. They are based on legislation found in International Investment Treaties between states which typically include substantive protections and obligations that protect the economic rights of the investors.

The international treaty relied upon in the case of Guatemala was the DR-CAFTA (Dominican Republic-Central American Free Trade Agreement). KCA argued that Guatemala was in breach of the international investor agreement terms that ensured 'fair and equitable treatment, a minimum standard of treatment, indirect expropriation, and full protection and security.' They claimed that the ongoing protests illegally blocked the entrance to the mine sites, preventing Exmingua from "using and enjoying" its exploration license. In addition, they argued that they were "arbitrarily and unlawfully" harmed by the MEM's suspension of the export certificate. They calculated that they were deprived of the value[h] of the El Tambor project, amounting to $150 million, and the Santa Margarita project (of at least the same, if not greater value). Additionally, they allege that they have suffered a loss of $500,000 when they prohibited the exporting concentrate shipments.

KCA martialled a convincing argument in the eyes of arbitrators: it is their gold mine, but the case fails to incorporate the struggles of those involved: it is also a gold mine responsible for numerous abuses against local communities, posing health and environmental risks to Guatemalan citizens. Local communities have faced violence, repression, and criminalization, whilst background forces continue to deplete the region's natural resources. It's an interesting consideration to make given that these claims aren't rooted in empirical evidence. Considering this, should these facts be considered in the ISDS case? Past cases involving the DR-CAFTA suggest otherwise. Guatemala faced another claim arising out of an investment in a Guatemalan electricity distribution company by the U.S. investor Teco Guatemala Holdings LLC––a case that was decided in favor of the investor. Similar to the KCA case, Teco claimed Guatemala breached the 'fair and equitable treatment /

minimum standard of treatment including denial of justice claims' under the IIA. The ruling emphasized the distinct power asymmetry in ISDS cases: the tribunal reasoned purely on the basis of the treaty, making no effort to acknowledge the stake held by third parties.

II. Problems with ISDS

While particularly problematic, the Guatemalan case is not unique. Hundreds of ISDS cases are still pending, forcing us to question the effectiveness of the system and the millions of communities left waiting for their fate to be determined by a system pitted against them.

Arguably, the most pressing flaw of the ISDS system is that it tends to cause a "chilling effect" on the regulatory system: a situation in which the threat of an investor's potential claims leads to governmental reluctance to adopt policies out of fear of being sued by huge conglomerates. In other words: simply knowing that a company might sue stops smaller host states from protecting the rights of their citizens. With reference to the KCA case, the minimum claim of $300 million, if granted, would place an extortionate burden on Guatemala's coffers. While Guatemala is in a better position than other developing countries to satisfy this debt, many other countries would face bankruptcy when confronted with such a large claim.

Of greater concern is the lack of transparency during ISDS disputes. Compared to the US legal system, ISDS proceedings are relatively opaque and exclusive. Tribunals can decide whether to accept or reject third-party amicus briefs and, unlike other legal recourse[s], third parties have no ability to intervene, leaving local communities without a say in which their interests are significantly impacted.

ISDS cases do not enjoy a consistent thread of jurisprudence. While precedents in this form of international arbitration do exist, there is no doctrine of *stare decisis*, so that a previous ruling on one issue from an analogous case does not ensure that a ruling in a pending case will be the same. Cases decided regarding similar matters, even involving the same country and with the same kind of investor have produced different results. This lack of consistency is exacerbated by the absence of an appellate system to correct substantive errors and ensure predictable outcomes. Arbitrators and decision-makers can be subject to bias or constrained by a lack of independence, resulting in decisions favoring investors, with no checks and balances. The rights of local communities and the state at large are left unacknowledged,

whilst the rights of investors have the potential to be overemphasized. Creating a trend, the power imbalance inherent to ISDS is only set to increase.

Finally, the cost and duration of ISDS cases is particularly problematic. Arbitration is usually a long, drawn-out process that negatively impacts host states far more than investors. A King's College London study revealed that ISDS tribunals took on average 181 days, and 103 days for annulment committees to reach a decision. The written phase for submitting briefs – without annulment – took on average 407 days. The KCA case was brought to the court in 2016, and for 5 years has been consuming money, time, and resources whilst wreaking havoc on powerless local communities. As environmental journalist Louis Magriel observed …"This type of arbitration rejects community self-determination and the role of the government to make decisions that protect the best interests of their population." (Gold Mining and Violence by Louis Magriel).

III. Potential Solutions

ISDS dispute resolutions must produce fair, efficient, coherent and consistent solutions. At present, this is not the situation – we need to consider improvements which recognize and uphold the rights of all parties involved. Various short and long term solutions have been proposed.

The 'quick fix' solution to the shortcomings of ISDS would be dispute prevention. This involved creating institutions that act as a precautionary structure aiming to reduce the legal temperature between investors and states. It would focus on developing specific working mechanisms which mediate between all parties involved. As appealing as the immediacy of this solution sounds, it is not viable long term; more permanent solutions need to be considered to properly uphold the rights of those other than the investors.

Longer-term reform of the ISDS system could be a hopeful, albeit lofty, aspiration to redress the power balance. Adapting ISDS policy through the institution itself, for example through making it easier to submit amicus briefs or allow the state to establish bi-legal challenges that mirror the ISDS suit, could help create a more equal system. However, the efficacy of these outcomes are limited. Any reform of the ISDS system will be long and tiresome, and at present, there is no clear solution.

Another potential solution, as advocated by the Columbia Center for Sustainable Investment, is to terminate or withdraw from IIA's altogether. The Center produced a report posing some potential reforms: "Chief among [ways for states to exit or mitigate the recognized adverse effects of the more than 3,300 treaties], we've

advocated for termination (or withdrawal of consent to ISDS arbitration) of these treaties, as a near-term solution, alongside any longer-term project." However, this impacts the economic interests of both state and investor, so is likely to be opposed by both the governments and corporate actors involved.

Arguably, the most extreme yet effective solution would be to create an entirely new system alternative to ISDS. Countries in Latin America have led in this pursuit, establishing the '*Centro de Solución de controversias en Materia de Inversiones*' which aims to establish a new mechanism to resolve investment disputes. However, progress has been slow and the states involved have faced various disagreements. The EU has also attempted to create a 'multilateral investment court,' but the changes made from the current ISDS system are minor and have failed to consider the key shortcomings of inefficiency, lack of transparency and failure to uphold the rights of all parties. Ultimately, whilst the idea of creating an entirely new system seems optimal, the actual act of establishing one that fits the needs of all stakeholders is complex and the potential for completion is low. Through briefly outlining some major potential solutions, it's obvious there is no clear answer. Yet, there is a clear goal: to make the ISDS structure more equitable and to protect the rights of marginalized, developing nations that have been exploited by huge companies. We need to continue the fight to reform the system and ensure that stakeholders don't get left out of the conversation.