ICSID, THIRD WORLD PEOPLES AND THE RE-CONSTRUCTION OF THE INVESTMENT DISPUTE SETTLEMENT SYSTEM

by

IBIRONKE TINUOLA ODUMOSU

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LL.M., The University of Calgary, 2005

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ABSTRACT

This thesis addresses the following central question: How, if at all, does the engagement of Third World peoples with investment activities and law, and the International Centre for Settlement of Investment Disputes (ICSID) tribunals’ responses to such engagement, reconstruct the international investment system? The thesis seeks to understand how changes occur in the investment dispute settlement system by focusing on the mutually reinforcing interactions between Third World peoples, investment law and activities, and ICSID tribunals. Without discounting states and foreign investors’ place, it demonstrates that Third World peoples’ resistance has the potential to contribute to the re-construction of the investment dispute settlement system when ICSID tribunals account for these interactions.

This thesis’ research methodology is principally analytical. It involves inter alia a detailed study of three ICSID tribunals’ decisions that address Third World peoples’ place in the international investment system. The theoretical perspective is rigorously interdisciplinary. It draws from Third World Approaches to International Law (TWAIL), Lon L. Fuller’s interactional theory of law, and constructivist international relations theory in formulating a perspective that I refer to as “TWAIL Constructivism”. TWAIL Constructivism’s four-fold tenets that inform this research work emphasize actors’ identity, power relations in the international system, ideational resources that are available to actors, and methods of engagement.

While the interactions between Third World peoples and the ICSID system have the potential to contribute to a robust assessment of investment disputes in a manner that actively engages the perspectives of these peoples, at the present time, such contributions are modest. Nevertheless, these modest contributions shape the norms that emerge in the international investment system including norms of participation, norms of interaction and norms of regulation. In order to further the contributions of Third World peoples’ interactions to the development of “intersubjective beliefs” or legal norm-building in this area of the law, there is a need first, to hone a peoples’ initiative, which encourages peoples’ participation in the dispute settlement system. Second, tribunals’ initiative that recognizes the agency of Third World peoples and takes their perspectives seriously in reaching robust decisions is necessary.
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To my parents
CHAPTER 1: INTRODUCTION AND CONCEPTUAL FRAMEWORK

I. Introduction and Background

This thesis addresses the following central question: How, if at all, does the engagement of Third World peoples with investment activities and law on the one hand, and the International Centre for Settlement of Investment Disputes (ICSID) tribunals’ responses to such engagement on the other hand, re-construct the international investment system? This introductory chapter sets out an outline by which this study will explore this question.

The international law on foreign investment has undergone significant transformation since the decolonization era of the 1960s. Commentators often assert that that the international law on foreign investment is one of the most fiercely contested areas of international law. \(^1\) International investment law does not only often lack clearly defined rules on investment promotion and protection, this area of the law has always generated opposing positions and implicates diverse actors and interests in the process. \(^2\) Investment dispute settlement (which in this thesis, principally involves investment arbitration) \(^3\) in particular has metamorphosed from a relatively obscure mechanism that generated significant debate in some quarters in the 1970s

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\(^3\) In this thesis, the term “investment dispute settlement” can mostly be used interchangeably with the term “investment arbitration” and is often so used because most of the cases discussed are investment arbitration cases. However, reference is usually made to investment dispute settlement since the institution that forms the subject of analysis in this thesis – the International Centre for Settlement of Investment Disputes (ICSID) – is a body that also offers conciliation as a dispute settlement process. It should be noted though, that the conciliation proceedings are few and far between and all but a few of the discussions in this thesis pertain to investment arbitration. Nevertheless, in the spirit of capturing ICSID’s mandate, as well as to include pre-arbitration and post-arbitration processes, and dispute settlement in fora like the International Court of Justice, the term investment dispute settlement is mostly adopted. On its part, “investor-state dispute settlement” means those dispute settlement proceedings initiated by investors against states; “state-investor dispute settlement” refers to dispute settlement proceedings that states (could) initiate against investors; while “state-state investment dispute settlement” involves the settlement of investment disputes between states. The term “investment treaty arbitration” is seldom adopted on a general level because even though investment treaty cases are now the most prominent cases, this thesis also discusses cases that do not derive their jurisdictional basis from investment treaties.
to a much debated global issue in the last decade of the 20th century. At the present time, international investment arbitration is once again at the fore of the metamorphosis of the international investment system. And, no other group of countries has been more involved as defendants in investor-state dispute settlement processes than those categorized as, or those that self identify as, the Third World.

It is undeniable that the term “Third World” is a problematic categorization. This is especially so since states that are traditionally viewed as being part of this category might no longer, according to some commentators, fit what they understand as its connotation. Determinants of the Third World category have included classification based on levels of economic development, a colonial history, and sometimes, an ideological commitment to non-alignment during the Cold War era. However, if the Third World is only viewed in terms of gross domestic product (GDP), levels of industrialization, volumes of trade or in terms of a first, second and third world, then that category might not include states like India and can arguably have ceased to be relevant. This thesis departs from such construction. Rather, it analyzes the Third World as a contingent (self-identifying) category that insists on history and continuity, while acknowledging the diversities inherent within the category. Borrowing from Professor Mickelson and others, the Third World is viewed in the present study as a “historically constituted” set of not-always-harmonious voices created and continuously identified as “Europe’s other”, that desires a reformist, and in some cases, revolutionary rethinking of international relations, including international law. The Third World includes states considered as “developing” in dominant discourse even though those states’ levels of industrialization vary. In fact, some of these states have now become relatively huge capital exporters, but with large percentages of their populations with experiences still comparable to any other part of the Third World. As a result, more importantly, the category “Third World” encompasses Third World peoples qua peoples. True, the Third World is not an autonomous

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4 Some commentators contest the existence of a “Third World” arguing that it is no longer relevant. See Mark Berger, “After the Third World?: History, Destiny and the Fate of Third Worldism” (2004) 25 Third World Quart. 9 at 31.

category, but from New Delhi to Bujumbura and from Cochabamba to Dar es Salaam, sizable subaltern populations exist with diverse, yet substantively similar concerns. While highly contextual, the Third World remains a category that poses a counter-hegemonic stance and seeks a counter-hegemonic reading of international law and international relations.

Although not the only category of actors that have contested the international rules on foreign investment, the Third World has been prominent in keeping this area of the law in a constantly-evolving state. In response to the unclear and often contested nature of investment rules, from the latter half of the 20th century, states commenced an aggressive program that involved the conclusion of international investment agreements (IIAs/investment agreements). These IIAs include bilateral investment treaties (BITs), regional trade agreements like the *North American Free Trade Agreement* (NAFTA) and sectoral treaties like the *Energy Charter Treaty* (ECT). These treaties dictate the rules that drive transnational investment promotion and protection and largely compensate for the absence of a global agreement on foreign investment. The agreements have gained immense prominence. UNCTAD’s World Investment Report 2009 reveals that by the end of 2008, 2,676 BITs and 273 other international agreements with investment provisions had been concluded. These agreements now form the basis for most investment disputes that are settled by international tribunals. Dispute settlement mechanisms provide the major means of enforcing the provisions of IIAs.

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6 In compiling the number of available International Investment Agreements (IIAs), UNCTAD usually includes double taxation agreements (DDTs). However, in this thesis, the term IIA does not include DDTs.

7 For a general statement on BITs, see generally, Dolzer & Stevens, *supra* note 1.


10 Recent attempts at concluding a global investment agreement include the Organization for Economic Cooperation and Development’s (OECD) Multilateral Investment Agreement (MAI) and the World Trade Organization’s (WTO) attempt to conclude such an agreement. Both attempts did not result in the proposed global investment agreements.

However, although IIAs purport to clarify the applicable rules in the international foreign investment system, at least between or among the parties to the particular treaty in question, they have not gone unchallenged by members of the international community. Apart from proceeding largely on the basis that economic liberalization is a good thing and expressing an overarching purpose of protecting foreign investment, these IIAs also generate significant attention because they often omit several other interests from their purview. These sometimes include the public interests of the local populations in the geopolitical zones that are affected by foreign investment activities. Although the effects of foreign direct investment (FDI) activities might not be dissimilar to other industrialization activities, FDI possesses characteristics that are different from other economic activities, thereby generating considerable attention. The distinctive features that set it apart from other economic activities include binding international obligations assumed under IIAs that domestic investment might not share; the need to repatriate profits from foreign investment, that could lead to balance of payment problems for the host state; and the sometimes limited ability to regulate the operation of foreign investments that derive from the interpretation of the provisions of IIAs.

Generally, IIAs, and dispute settlement processes in cases where disputes ensue, are particularly relevant to the Third World because of the perception that this group of countries needs to attract foreign investment for economic development. At the turn of the 21st century, FDI flows were the largest source of external finance to the Third World. IIAs are also particularly relevant to the Third World because as capital importers, Third World states

12 In this thesis, the terms “international order” and “international system” are used interchangeably. The use of the term “international system” does not reflect an attachment to the term’s definition in any school of international relations theory. It simply denotes the existence and relationship between international actors in the international domain.


15 The discussion in this thesis is related to foreign direct investment (FDI). Thus, the terms, FDI and foreign investment are usually used interchangeably.

assume most of the obligations under BITs, which are the most prevalent forms of IIAs.\footnote{Sornarajah, \textit{International Law on Foreign Investment}, supra note 1 at 343 notes that “investment treaty formulations were originally intended to be a sword to be used against developing countries. Their use against developed countries was not foreseen.”} However, it is important to note that the capital importers and exporters category has become blurred. Third World states now conclude IIAs among themselves and in these instances, traditional capital importers become capital exporters as well. Also, even in agreements between industrialized states and Third World states, states like Brazil, China, India, and South Africa among others, act as capital exporters in some instances. As well, agreements like NAFTA that include two traditional capital exporting states of Canada and the United States, inevitably cast both as capital importers in practice. Nevertheless, under South-North IIAs, Third World states continue in most cases to assume the position of the host capital importing state.

By virtue of the large number of IIAs that they conclude and because they are very often host states, investment dispute settlement is, unsurprisingly, mainly a concern of Third World states. However, it is not only a concern of Third World states because within the last decade, developed states have also been defendants in investor-state arbitration cases. Nevertheless, in the recent past, Third World states have assumed the position of defendants in most dispute settlement claims. As a result, in assessing the recent transformations in the investment dispute settlement system and the potential emancipatory capabilities of international law in making positive contributions through the dispute settlement process, this thesis focuses on Third World peoples. Such focus is necessary because when the veil is lifted, they are the group that is mostly affected by both positive and sometimes negative investment practices, laws and dispute settlement decisions. Also, although investment arbitration has become an area of interest to the industrialized North, especially since the initiation of proceedings under chapter 11 of NAFTA commenced, and despite the fact that some recent investment treaties now turn their attention to environmental and labour standards, Third World peoples still assume a distinctive position in this dynamic. The views, needs and interests of these peoples often appear different to those in which the international investment system is mostly interested. As such, their approaches and methods, and their contributions to the investment dispute settlement system merit discussion.
This thesis will take public interest concerns seriously. But this study does not suggest that investment protection, which is the present dominant issue in this realm, is unimportant. Such an approach is counterproductive. It is not entirely in the interest of Third World states to refuse to extend legal predictability and security towards foreign investors. FDI flows are not devoid of benefits to the Third World, for they often foster job creation, provide expertise and services sometimes not readily locally available and contribute to oft-contested technology transfer, among other factors. If well managed, the impacts of foreign investment on local populations can be mostly positive. However, investment law can be lopsided in favour of the interests of economically powerful actors in the international order. IIAs, and arbitral decisions, often exclude justiceable considerations of issues like economic development, and other public interest factors that are relevant to the Third World. Further, a major charge against IIAs is that they erode national sovereignty and result in regulatory chill by making it difficult for states to regulate in the public interest. This is a situation that has ceased to be solely a Third World concern as developed states have also begun to contend with similar effects of IIAs especially in the context of the NAFTA. However, it remains mainly a Third World issue because, more often than not, Third World states defend the overwhelming majority of investment arbitration cases.

The view that the Third World assumes a particularly relevant and sometimes even precarious position in investment dispute settlement has informed the investment dispute settlement system for decades. In fact, it was against the backdrop of the perceived need to protect foreign investment in Third World countries, and the position that investment protection would facilitate investment flows to these countries, that the World Bank established in 1966, the institution at the heart of this thesis – the International Centre for Settlement of Investment Disputes (ICSID). I focus on ICSID and its tribunals’ decisions in this study because, of all

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18 See Ahmed Sadek El-Kosheri, “ICSID Arbitration and Developing Countries” (1993) 8 ICSID Rev.-FILJ 104. The author argues that ICSID was established in order to encourage foreign investment in developing countries.

19 The Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965, (1965) 5 I.L.M. 532, entered into force on October 14, 1966 [ICSID Convention]. See the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) 5 I.L.M. 524 [ICSID Report]. The ICSID Report is the report of the Executive Directors attached to the ICSID Convention that explains the need for and the provisions of the Convention. In addition to dispute settlement under the ICSID Convention, ICSID provides Additional Facility Rules for the settlement of disputes that do not fall within the purview of the ICSID Convention. The Additional Facility Rules are applicable where either party to a dispute is a state that has not ratified the ICSID Convention or is a national of such a state or where the legal dispute does not arise directly out of an investment. See Article 2 of ICSID
the investment dispute settlement mechanisms, it is a treaty-created international institution dedicated to the settlement of foreign investment disputes, and its founding documents maintain that it seeks to balance developed countries and Third World interests.\(^\text{20}\) The drafters of the *Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention)* recognized the need to balance the interests of the Third World with those of other actors in the international investment system. What such balancing entails and whether it is being realized is a legitimate inquiry.

In purporting to provide a balanced approach to investment dispute settlement between the Third World and capital exporting states, which at the time ICSID was established, were mostly developed states, ICSID was established to play a dual role. The idea was to establish an institution that could facilitate the settlement of foreign investment disputes through arbitration and conciliation and in the process, facilitate the flow of investment to countries that need it.\(^\text{21}\) In the course of its history, ICSID has responded to investment protection by taking its dispute settlement role very seriously. The Centre provides institutional mechanisms for tribunals that settle legal disputes that arise out of investments between contracting parties and nationals of other contracting parties.\(^\text{22}\) However, there is no empirical research to support arguments about its contribution to the facilitation of investment flows.\(^\text{23}\) Although such

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\(^\text{21}\) *ICSID Report*, *supra* note 19, art. 9. An early version of this paragraph of the chapter was originally published in Odumosu, *supra* note 2 at 347-348.

\(^\text{22}\) *ICSID Convention*, *supra* note 19, art. 25.

\(^\text{23}\) See Jose E. Alvarez, “The Emerging Foreign Direct Investment Regime” (2005) ASIL Proc. 94-95. In discussing the foreign direct investment (FDI) regime generally, of which ICSID is an important part, Professor Alvarez states as follows: “There are also different assessments about whether the FDI regime has worked. If the aim of some of these treaties is to advance political-strategic alliances, there is little doubt investment treaties have achieved that. Furthermore, if the goal is to improve the lot of the foreign investor, the FDI regime has been successful in that realm. But if the goal of investment treaties is to increase the actual flow of FDI to LDCs, the UN Conference on Trade and Development and World Bank Studies to date have failed to establish any clear cause-and-effect relationship. . . .”
empirical research is unavailable, the data on disputes submitted to ICSID suggests that an overwhelming percentage of ICSID arbitrations are initiated by foreign investors from developed states against Third World states. Since the establishment of ICSID, only a few arbitral proceedings have been initiated against developed states, several of them arising from disputes governed by NAFTA. 24 Most of the cases that are presently pending before ICSID were initiated by foreign investors against non-(high income) Organization for Economic Cooperation and Development (OECD) states. 25 This data suggests that ICSID arbitration is more relevant to Third World states and raises questions as to why they are more prone to investment disputes. 26 Indeed investor-state arbitration has been referred to as a “Third World” type of investment regime. 27 Possibly, responses lie in the nature of IIAs that are concluded, the parties to the IIAs, and the sharing of benefits and burdens under those agreements.

The timing of ICSID’s establishment is also instructive in assessing its place in the international investment order. It was created at a time when decolonization was at its zenith in the Third World. The institution is charged with facilitating the settlement of investment

24 Some of the arbitral proceedings initiated against developed states under ICSID’s auspices include one against Iceland, another against New Zealand, one against Spain, and three against the United States under NAFTA. There is currently a new case pending against Canada – Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada (ICSID Case No. ARB(AF)/07/4). See Swiss Aluminum Limited and Icelandic Aluminum Company Limited v. Iceland (ICSID Case No. ARB/83/1); Mobil Oil Corporation and others v. New Zealand (Case No. ARB/87/2) (the case was settled but the findings on Liability, Interpretation and Allied Issues of May 4, 1989 are reported at (1997) 4 ICSID Rep. 140); Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7), (2001) 16 ICSID Rev.—FILJ 248, (2002) 5 ICSID Rep. 419; The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (ICSID Case No. ARB(AF)/98/3), (2003) 42 ILM 811, (2005) 7 ICSID Rep. 442; Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), (2003) 42 ILM 85, (2004) 6 ICSID Rep. 192; ADF Group Inc. v. United States of America (ICSID Case No. ARB(AF)/00/1), (2003) 18 ICSID Rev.—FILJ 195, (2004) 6 ICSID Rep. 470. All the United States’ ICSID cases arose based on NAFTA Chapter 11 and were arbitrated under the Additional Facility Rules and not under the ICSID Convention because neither Mexico nor Canada, the other NAFTA parties, are parties to the ICSID Convention. Although Canada recently signed the Convention on December 15, 2006 it has not deposited instruments of ratification.


26 See generally Jan Paulsson, “Third World Participation in International Investment Arbitration” (1987) 2 ICSID Rev.—FILJ 19 for the argument that arbitration is a neutral process where parties participate on an equal footing and Third World states are no longer prejudiced by the system.

27 Thomas W. Walde, “Investment Arbitration under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation” (1996) 12 Arb. Int’l 429 at 446. Professor Walde argues that it was not feasible to apply investor-state arbitration only to the Commonwealth of Independent States under the Energy Charter Treaty without extending such discipline to Western states.
disputes between states and foreign investors. Its establishment was a particularly ingenious measure given that foreign investors, being non-state actors, did not have international legal personality at the time. Even in present day international law, the position of these actors as subjects of international law is arguable. ICSID’s novelty was enhanced by its exclusion of recourse to diplomatic protection, the separation of its dispute settlement mechanism from municipal legal systems and the establishment of a unique and limited jurisdiction. Aside from the ingenuity of the drafters of the ICSID Convention, several other factors shaped the emergence and character of ICSID, as it was not established on a blank page devoid of history. In its over four decades of existence, it has situated itself within the historical trappings of the international system and of the politics of interacting within the system. In the process, ICSID has also created its own history and contributed to shaping the contemporary development of the international law on foreign investment. The dispute settlement mechanism of the institution, the resistance to its processes from some Third World and other international actors, and the dynamic that the interactions between these actors and ICSID create and foster, form the basis for my research on the impact of these interactions on investment dispute settlement in a globalized 21st century world.

II. The Research Problem and Questions: The Paradigmatic Conflicts in Investment Dispute Settlement

The international investment dispute settlement system of the 21st century is significantly different from that which existed at the time that ICSID was established, even if the ideas that drive the system and its objectives have not undergone significant transformation. While the institutionalization of the participation of foreign investors was an ingenious move in the 1960s, the present system has witnessed a proliferation of other relevant actors. These actors like other actors in the international economic system, share different and sometimes conflicting views on the ordering of the international law on foreign investment and investment dispute settlement. However, since the widespread economic liberalization of the 1980s to the 1990s, the positions of some of these actors have been slightly modified. For


29 ICSID Convention, supra note 19, arts. 25-27.
example, some Third World states, especially Latin American states that were squarely against the internationalization of investment disputes have become parties to the *ICSID Convention*.\(^\text{30}\)

These states now include international dispute settlement clauses in their investment agreements, hence the assertion that the views of many actors in this area of the law have morphed. Yet, it appears that some states like Bolivia, Ecuador, and maybe Venezuela are engaging in a retreat towards their posture on investment dispute settlement during the first three quarters of the 20\(^{\text{th}}\) century.\(^\text{31}\)

Since colonial times, the international law on foreign investment and investment dispute settlement have generated ideological conflicts involving capital importers (mostly Third World countries) and capital exporters (mostly developed countries). After the end of formal colonial domination, the development of the international law on foreign investment continued to reflect the struggles for power within the international order, not only among states but also between Third World states and some transnational corporations (TNCs) that are rich enough to exert significant influence on some smaller states. The influence of powerful TNCs has been visible since the pre-colonial and early colonial periods, prompting some commentators to identify economic globalization with these earlier times.\(^\text{32}\) In fact, some of these TNCs acquired sovereign status that colonial territories were denied due to the latter’s lack of independence. It is not surprising that the early post-colonial Third World state viewed TNCs and the international foreign investment system with suspicion. Thus, while industrialized states and TNCs shared similar perspectives on foreign investment, post-colonial Third World states, fueled by historical experiences, dependency theory, and their newly found sovereign status pursued the vision of the New International Economic Order (NIEO), which most Western countries did not share.\(^\text{33}\)


\(^{31}\) See the discussion of Bolivia and Ecuador’s withdrawal from ICSID in chapter three, part IV of this thesis.


Also relevant are the post-World War II human rights and environmental movements – the transnational non-governmental organizations (NGOs). While NGOs have engaged in many (ideational) struggles before the 1990s, their active participation in the international law on foreign investment was heightened in the last decade of the 20th century. This group of actors has added an additional perspective to the law of foreign investment. Like the other groups mentioned above – industrialized states, Third World states, and TNCs – there is no single identifiable NGO position on the international law on foreign investment. Some of these groups are diametrically opposed to the ordering of the international investment system and are referred to as “anti-globalization”, while others engage the system, not by attacking its very fabric, but by seeking to change its priorities, or at least infuse it with ideals that they hold precious, like environmental protection. Yet, some NGO groups are business associations that seek to further entrench the current international investment system. The NGOs that form part of the discussion in this thesis are those that work toward a more public interest-sensitive investment regime proposing either moderate or radical transformations.

All the groups of actors discussed so far subscribe to paradigms that Professor Sornarajah depicts as three conflicting paradigms that drive the international foreign investment order: the free market, Third World, and NGO-driven paradigms. Previously, there were mainly two conflicting views – that of Third World states on the one hand, and TNCs and industrialized states on the other hand. However, presently, NGOs have carved a niche for themselves in espousing labour, environmental and human rights claims in this area of the law. At the risk of generalizing, in the international law on foreign investment, as capital exporters, developed states mainly favour what may be termed the free market paradigm. This paradigm relies on


35 The literature on NGOs and international law is huge. See e.g. Steve Charnovitz, “Nongovernmental Organizations and International Law” (2006) 100 AJIL 348. Professor Alvarez states that: “Although the impact of NGOs on legal development ebbs and flows, no one questions today the fact that international law – both its content and its impact – has been forever changed by the empowerment of NGOs.” Jose E. Alvarez, International Organizations as Law-Makers (Oxford; Toronto: Oxford University Press, 2005) 611.

36 For example, the International Institute for Sustainable Development (IISD) is an organization that is not fundamentally opposed to the international investment system but seeks to change its priorities and focus. For IISD’s work, see its website at <http://www.iisd.org>.

37 I am indebted to Professor Sornarajah for his articulation of the components of the paradigms in M. Sornarajah, The Settlement of Foreign Investment Disputes (The Hague: Kluwer Law International, 2000) 77-84. He titles them: “the free maket paradigm”, “the paradigm favoured by developing states” and “the third paradigm”.

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the principles of the free movement of foreign investment (a principle emphasized in the preamble to the *ICSID Convention*), sanctity of the foreign investment contract (or in the case of a treaty, the *pacta sunt servanda* principle), the international minimum standard of protection, prompt, adequate and effective compensation in the event of expropriation, international settlement of foreign investment disputes, and the creation of international treaty regimes for investment protection. Of course, many of the principles included in this paradigm may now be ascribed to Third World states by virtue of their conclusion of investment treaties that embody these principles.

The *Third World states’ paradigm* was supported by principles like the absence of freedom of entry for FDI, the possibility of restructuring contracts based on arguments of sovereignty, national standard of treatment, localization of the foreign investment contract, and maintaining a difference between state contracts and ordinary contracts. Third World states have largely modified their views on these principles. Mostly, because of their development concerns and the need to attract foreign investment, Third World states usually contract outside the framework of these principles, for example, delocalizing foreign investment contracts by submitting to international dispute settlement and supporting the freedom of entry for FDI. In spite of this changing position, especially in bilateral circumstances, Third World states usually espouse alternative views in multilateral fora, which do not always correspond with those of foreign investors and the majority of developed capital exporting states.

The third view, the *NGO-driven paradigm*, adopts a perspective that incorporates other areas of international law into the international law on foreign investment. For this paradigm, international law is borderless and is mostly regarded as a comprehensive whole. The paradigm focuses on environmental protection and on human and labour rights that might be impacted upon by foreign investment activities, and sometimes, economic development. Claims by NGOs are not always in tandem with the positions espoused by either developed or Third World states. These NGOs acting as *amicus curiae* in investment arbitration cases articulate the view that they do not support any party’s position but seek to help the arbitrators
to reach robust decisions.\textsuperscript{38} While these NGO groups have generated considerable attention in investment arbitration, some commentators credit the modest changes in the system to the influence of powerful states like the United States that have been defendants under NAFTA and not necessarily to the NGO movement.\textsuperscript{39}

Although the foregoing classification represents the dominant views that these groups largely subscribe to, some caveats are necessary. First, as stated earlier, Third World states often contract around the principles that they subscribed to for several reasons, including the need to attract foreign investment, which is usually achieved on terms based on the free market paradigm. As I discuss later, this change in policy in order to attract foreign investment does not necessarily imply that all Third World states have changed their ideas on the international law on foreign investment. Second, developed states also adopt different arguments depending on whether they are in the position of capital exporters or capital importers. As capital exporters, they generally subscribe to the free market paradigm but as capital importers in dispute settlement cases, they make arguments similar to those adopted by Third World states, or at least seek to temper the effects of the free market paradigm. On NGOs, their position is not entirely clear, and as a result, a relevant question is whether there is an NGO paradigm in international investment law separate from the political economy of developed and Third World states. Irrespective of the conclusions on this point, there is clearly a paradigm that takes environmental and human rights issues into account and sometimes, this is strategically deployed by both developed and Third World states. Largely, the three groups can be identified based on the categorization above, with a cautionary consideration of the intersections and departures that sometimes occur.

Even though there have been changes in international law and the different view points described above exist, IIAs and investment arbitration still reflect a preoccupation with investment protection.\textsuperscript{40} More importantly, none of the paradigms described above by

\textsuperscript{38} For a discussion of the work of NGOs in investment dispute settlement, see for example, Ibironke T. Odumosu, “Revisiting NGO Participation in WTO and Investment Dispute Settlement: From Procedural Arguments to Substantive Public Interest Considerations” (2006) 44 Can. Y.B. Int’l L. 353.


\textsuperscript{40} For example, commentators note that the fundamental basis of the OECD MAI was to provide investment protection. See Riyaz Dattu, “A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral
themselves, encapsulate the perspectives that Third World peoples have begun to enunciate in investment dispute settlement. Rather, one would need to pick some principles from the paradigms in order to articulate perspectives that Third World peoples hold. Recent investment disputes have witnessed an articulation of views that represent the concerns and interests of Third World peoples as a category of persons that are significantly impacted upon by foreign investment whether positively or negatively.41

The Third World peoples’ category begs to be considered independently of the other paradigms, including the Third World state. Third World states are entrusted with ensuring the well-being of their populations and in investment dispute settlement, many of these states take this responsibility seriously. However, sometimes for the sake of strategy adopted in defending a claim, these states are prevented from presenting arguments that may expose a clear peoples’ cause before investment arbitration tribunals. This is because while those arguments might be meaningful in human rights settings for example, they might not be entirely apposite within an economic framework. As such, peoples’ perspectives in the international investment system are not always synonymous with those of states and neither can those perspectives be boxed into categories. Sometimes, interests that people espouse are expressed in terms of affordable clean water,42 at other times, they are health and environmental concerns regarding toxic waste.43 In some instances, they are fears of economic collapse and concerns for very basic human needs like food and housing.44 Even the classification of these peoples’ identities evades universal definition. For decades, international law has recognized a peoples’ category and articulated this view in the recent United Nations General Assembly Declaration on the

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41 See the cases discussed in chapter six of this thesis.


44 Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19) [Suez v. Argentina]. See <http://www.worldbank.org/icsid> for the decisions that have been rendered in this case.
Rights of Indigenous Peoples\textsuperscript{45} and in older pronouncements like the Declaration on the Right to Development,\textsuperscript{46} the Declaration on Permanent Sovereignty over Natural Resources,\textsuperscript{47} and the Charter of Economic Rights and Duties of States.\textsuperscript{48}

The use of the term “Third World peoples” may engender the critique of essentializing these peoples, as critical perspectives have moved towards anti-essentialist perspectives of categories. However, the adoption of the term is used as a kind of strategic essentialism in a maner that Professor Spivak articulated.\textsuperscript{49} While strategic essentialism disavows uncritical essentialist perspectives, it uses these categories in order to understand the socio-political realm. Hence, the Third World peoples’ category is not a fixed one. Rather, the term is strategically adopted in order to present these peoples in spite of the differences that exist among them. Within the context of this thesis, the elusive Third World peoples’ category refers to the communities that are the recipients of the positive as well as negative impacts of foreign investment. What may hold true for these groups in their interaction with foreign investment, may not necessarily apply in other instances. As such, what appears as a coherent narrative with regards to a particular project may not be the case for other issues. In each case, peoples’ languages vary and their interests are often locally rooted. Just as each investment dispute is settled on its particular facts, the merits of peoples’ views are located in particular narratives. These views involve as much a politics of identity as it does a legal conceptualization of interests.

Thus, the Third World peoples’ terminology is adopted in order to conceptualize for the purposes of studying. As Esteva and Prakash note, “[i]n many cases, peoples … have not a specific name or label with which they identify themselves or are identified by others. Their informal condition as the unnamed and the unidentified is an important aspect of their politics, often offering them the camouflage essential to their survival; as is their “failure” to adopt any

“institutional structure.”\textsuperscript{50} While potentially strategically important, their non-institutional structure often contributes to near-invisibility in the international investment system. Yet, often, at particular times and in particular investment scenarios, these peoples coalesce around a common agenda and organize loosely, if not institutionalize, on the basis of a common purpose. It is in the sense of this kind of organization that these peoples groups may be regarded as (grassroots) movements.

Being the group that investment law impacts most directly, this thesis is concerned with the silences that attend the participation of Third World peoples in this area of the law. While Third World peoples’ subject-hood in international investment law is undetermined at this moment, it is important to recall that there was a time when foreign investors could not submit claims directly for dispute settlement and had to resort to diplomatic protection by their home states. My categorization of Third World peoples as actors does not suggest formal participatory status that actors like states and foreign investors possess. Rather, it is for a call to subject the silences that investment arbitration engages in to scrutiny and to give voice to these peoples in the international law on foreign investment. Third World peoples’ participation can be divided into two modes of interaction. First, they interact with their domestic investment systems in ways that are transported to the international dispute settlement arena through parties’ pleadings and second, by initiating applications to participate as non-disputing parties in dispute settlement proceedings. Case examples discussed later in this thesis provide instances of relative successes of these modes of interaction. One example involved the activism of Argentine peoples during Argentina’s socio-economic crisis that allowed discussions of public interest and human rights dimensions of the peoples’ requests in the subsequent ICSID dispute. Another addresses the people of Cochabamba, Bolivia’s contention over the provision of a fundamental resource – water. This is perhaps, the most poignant instance of grassroots activism that provided instant results for the people and was later the subject of an ICSID dispute. These examples allow for both descriptive and prescriptive analyses of the contributions of Third World peoples’ interaction with the investment system to the re-construction of the investment dispute settlement system.

As this introductory discussion has demonstrated, there have been several changes in investment dispute settlement processes and substance. In terms of process, there is the recent participation of NGOs as *amicus curiae*, whereas with regards to substance, most investment treaties now have recourse to the prompt, adequate and effective compensation standard, which used to be fiercely contested. Also, in terms of changes in arbitral decisions, some investment arbitration tribunals have started to enunciate health-sensitive perspectives in their decisions. However, a pertinent question remains and that is the question that animates this thesis: How much have the changes in the investment dispute settlement system impacted on Third World peoples and how do these peoples’ activities contribute to the changes in the dispute settlement system, if they do at all? This question requires a historical analysis of the development of investment dispute settlement, the resistance of Third World peoples to some investment activities and some investment laws, an engagement with the multiplicity of actors that interact in this area of the law, the constitutive nature of these actors’ interactions, the role of ICSID tribunals in writing these interactions into law, and the possibilities of reconstructing the investment dispute settlement system through the institutionalization of these interactions before ICSID tribunals.

The broader enquiry is necessary because one cannot examine Third World peoples in the ICSID system in isolation. In each case, these peoples acquire their identity from the context of other actors and from interactions within, around and even outside the system. The Third World peoples category in investment dispute settlement acquires its analytical relevance when viewed from a broader framework of the other relevant actors in this realm; hence, the frequent reference to “multiple actors” in this thesis. Implicit in this multiplicity is the need to approach investment dispute settlement as an area beyond the domain of states and foreign investors and the tribunals that settle the disputes. These actors – states, foreign investors and the dispute settlement tribunals – are the primary actors within the system and are referred to as “traditional actors” in this work. Foreign investors are regarded as traditional actors because they currently participate directly in investment dispute settlement in contrast to actors like

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Third World peoples, and not because they have always had defined international legal personality similar to that which states enjoy. The ICSID system envisages dispute settlement between states and foreign investors and their interests are thus, paramount within the system. As such, it remains necessary not to lose sight of these traditional actors’ primary place in the system while undertaking an analysis of ICSID’s engagement with Third World peoples. In addition, NGOs have also acquired a rather impressive status as potential *amicus curiae* where they so qualify and their participation could impact on Third World peoples because some may argue that the NGO perspective incorporates peoples’ perspectives, or that NGOs and Third World peoples could have some potentially positive partnerships within this system.

Drawing from the historical capacities of arbitral awards to shape the international law on foreign investment, and situating these awards within the broader scope of the international order, the thesis locates ICSID within the discourse of international investment law and focuses on its contributions to shaping this area of the law. Because ICSID engages mostly with the Third World, this thesis will consider how ICSID tribunals respond to Third World peoples, their interests, as well as their activism, and the contributions of the interaction between these peoples and ICSID to the international law on foreign investment. It recognizes that while states, foreign investors, and NGOs might strategically modify their positions, these peoples intently focus on their particular areas of concern. This thesis, thus, adopts a people-centered approach to investment dispute settlement that transcends positivist conceptions of international law.

The following questions form the focus of this thesis. In these questions and throughout the thesis, the term “constitute” is used in the sense that Professor Alexander Wendt does when he says that the properties of an agent “are made possible by, and would not exist in the absence of, the structure by which they are ‘constituted.”

(1) How does a consideration of the perspectives of Third World peoples, and of their engagement (sometimes through domestic activism, or non-disputing party participation before ICSID) constitute the investment dispute settlement system, and how does ICSID respond to and contribute to the re-construction of this system? In responding to this first research question, this thesis adopts a contextual approach that

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reads the interaction of Third World peoples in light of the position of other relevant actors in this system, that is, Third World states, industrialized states, foreign investors, and NGOs. Because of the relatively novel nature of an analysis of Third World peoples’ participation in this realm, some of the precise questions that will be considered in relation to this group of actors include the following:

(a) In what ways do peoples’ groups participate in the international law on foreign investment, and especially in investment arbitration?

(b) Are these groups’ methods of participation acceptable to the current regime of investment arbitration, or are they at least, beginning to approach some modicum of acceptance in this area of the law?

(c) Does the participation by these peoples’ groups change investment dispute settlement either procedurally or substantively, or both, even if in modest ways? Or does the evidence support the hypothesis that recent changes in investment dispute settlement are only/mostly attributable to such states like the United States and Canada?

(d) Do peoples’ participation and activism lead to changes not only in investment dispute settlement but also in the substantive principles of the international law on foreign investment?

(2) Flowing from question ‘1’ above, a further question arises: whether given their significance to the Third World, ICSID tribunals, as conceived of in the ICSID Convention, can meaningfully address the diverse commercial and non-commercial interests in the international investment system. If they can, are they sufficiently suited to balancing conflicting interests and developing a robust international law on foreign investment in the process? This inquiry questions ICSID’s place in the international investment order and its role in constituting relations among relevant actors, and how such relations constitute the institution itself.

Although not the major question investigated in this thesis, the thesis also tests the theoretical perspective that it develops against its empirical investigation. As a contribution to theoretical and methodological perspectives for engaging in international law research, this thesis adopts, as well as investigates, the potential contributions of constructivist international relations (IR)
theory, and Third World Approaches to International Law (TWAIL), in assessing the reconstruction of the investment dispute settlement order. While constructivism provides a theoretical background for the interactional legal perspective that this thesis develops, the thesis also recognizes and explores constructivism’s limitations in addressing issues of the nature that this thesis analyzes. In this regard, the TWAIL perspective serves as a theoretical approach that supplies the elements for filling the gaping hole that constructivism leaves. Meanwhile, in its own right, TWAIL provides the methodological background for this thesis’ research. Thus, one of the questions that this thesis explores is constructivism’s (in)ability to address the sort of Third World-centered issues that the thesis raises.

Essentially, this study situates investment law and dispute settlement in the socio-political context of the interactions that shape this area of the law. It proceeds based on the preliminary thesis that Third World peoples’ engagement with the law, as part of a broader interactional process that involves diverse actors, might lead to meaningful changes in the international investment order. And not only can these interactions contribute to change, especially if dispute settlement tribunals engage them effectively, they could be constitutive of the very nature of the dispute settlement system that emerges. In its analyses, this thesis navigates several terrains, including a substantial discussion of the place and role of the major actors – states and foreign investors – in this framework. It then turns its attention to issues and strategies that are of particular interest to Third World peoples.

In setting the conceptual framework for this study, chapter two explores the theoretical and methodological perspectives that the thesis draws on. It engages in a substantial discussion of an interactional theory of law, drawing insights from constructivist IR theory and TWAIL perspectives. In this regard, it develops a perspective that I call “TWAIL constructivism” in order to provide a theoretical basis for the balance of the study. TWAIL constructivism is a blending of different schools of thought that I develop in chapter two in order to analyze the subject matter of this thesis. This TWAIL constructivist perspective frames and shapes the discussion of the actors that constitute the investment dispute settlement order. Most of the analysis is prescriptive and it seeks to identify how actors may better interact within the system. The prescriptions of TWAIL constructivism run through the thesis with each chapter focusing more on a particular tenet of the perspective than the others, and with power relations
(in its ideational and material manifestations) – as one of the tenets – running through the entire thesis. On its part, chapter three presents a historical introduction to investment dispute settlement and to ICSID. The introduction is necessarily historical, drawing from one of the tenets of the TWAIL constructivist perspective that is enunciated in chapter two. Chapter three questions and examines ICSID’s ability to incorporate multiple interests that exceed the interests of the traditional disputing parties within its realm.

Chapter four examines the impact of international investment agreements on investment dispute settlement generally, as well as on the Third World in particular. Drawing from one of the methodological prescriptions of the TWAIL constructivist perspective, this chapter focuses on the ideational capacities of investment agreements. It provides a background to the rules that form the core of investment agreements, which are further discussed in the concluding chapter in order to understand how the participation of Third World peoples within a multiple-actor framework may contribute to the re-construction of the present system. It examines the provisions and the ideas behind investment agreements from a perspective that captures interests that exceed those of states qua governments, and of foreign investors. Chapter five commences a substantive analysis of the relationship between ICSID and the Third World qua peoples. It identifies and examines one major issue area of relevance to Third World peoples – economic development. This chapter problematizes the development discourse and examines ICSID’s development agenda enunciated in the ICSID Convention as a balancing mechanism. It examines some ICSID cases that could have generated substantial discussion of the economic development concept, noting that the languages and strategic discourses that Third World peoples have adopted in this regard are not always articulated in the development language, but may instead be expressed for example, as the provision of affordable services. In addition, attention has begun to turn to the human rights language in couching peoples’ concerns and perspectives and in locating legal language for engaging the dispute settlement system.

The detailed discussion of select ICSID cases continues in chapter six. This chapter examines some ICSID cases that have witnessed active and explicit resistance from Third World peoples. In its TWAIL constructivist formulation, the chapter’s focus is on Third World peoples’ resistance and the strategies that they adopt. It analyzes ICSID’s attitude towards
these mechanisms of resistance, and discusses several strategies by which tribunals have sought to exclude these methods of engagement. The interactions of these peoples with the investment system provide avenues for re-reading the developments within the system. In the spirit of this thesis’ somewhat optimistic outlook, the concluding chapter engages in reconstructive arguments. Drawing from the interaction between Third World peoples and the system, it formulates a norm-level analysis of developments within the system. It also re-reads some ICSID decisions that have been studied in the earlier chapters in a manner that suggests that further interaction of Third World peoples sometimes in partnership with NGOs within the system, might show some promise for a reconstruction of the investment dispute settlement order in a manner that would allow the development of a robust system that reflects the multiplicity of identities and interests in this area of the law.

III. Methodology of the Study

As demonstrated in the preceding discussion, the issues that this thesis investigates are multifarious in their disciplinary allegiances. They do not lend themselves to analysis from any single discipline, although law assumes prominence in the analysis. Thus, while the theoretical underpinning of this research is interdisciplinary, it draws its methodological inspirations from TWAIL – “a critical internationalist movement that trains its lenses squarely on the experiences of third-world peoples”. The TWAIL perspective is instructive for the work that this thesis undertakes because it offers an academic, ethical and even political outlook on the history, structure, institutions and processes of international law from the standpoint of the peoples of the Third World. TWAIL represents and presents a challenge to the dominant hegemonic construction of the international system and seeks a counter-hegemonic reconstruction of this system. Following TWAIL proponents, the suggestion in this study is for a robust approach to the international investment order that is “antihierarchical,” and “counterhegemonic.”


54 Mutua, ibid.
A TWAIL approach to the international law on foreign investment offers several methodological and theoretical insights. First, the TWAIL project is partly a historical project. It fosters an understanding of the colonial experience and the imperialistic mission that was partly founded on economic relationships, including foreign investment. Second, it is a school of thought that enables assessments that draw on continuities in the international legal order. TWAIL scholars have been apt to identify continuities between the initial colonial encounter, technologies of empire, and the concepts that the world currently grapples with including development as a discourse or practice, good governance and globalization. These concepts influence the perceptions of actors on the international law on foreign investment. Third, discourses and strategies of resistance are central to TWAIL. TWAIL is itself an approach of resistance that employs (a counter-hegemonic perspective on) international law as a tool of resistance. TWAIL’s attention to resistance captures much of the work of Third World peoples’ engagement with international investment law. Fourth, TWAIL provides and allows space for healthy and constructive activism that has come to define alternative perspectives to the international law on foreign investment. This form of activism includes the work of academics, NGOs and grassroots movements that seek alternatives of varying degrees to the current organization of the investment dispute settlement order.

On a theoretical level, the thesis draws insights from constructivist IR theory’s intersection with international law. The next chapter of this thesis outlines the core positions of international relations theories and offers a perspective that I refer to as “TWAIL constructivism.” This TWAIL constructivist perspective informs this thesis’ discussion of the international investment order’s engagement with Third World peoples and vice versa. The perspective allows recourse to a reconstructive conception of power. That conception is one that is socially constructed – a dynamic and mutually constituted concept that is not frozen in time; one that recognizes that all actors in the international order can exert some form of


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power.\textsuperscript{58} It recognizes that power could be material, as well as relational. In the relational sense, power is not necessarily possessive and neither is it owned. Rather, it is acquired within relationships.\textsuperscript{59} One of the insights that constructivism also offers suggests that ideas could be important \textit{qua} ideas and that they form a basis for determining the interests of international actors.\textsuperscript{60} The opportunity to engage in an exposition of alternative ideas with a view to balancing investment protection with other interests is a fundamental form of justice that emerges from the type of interaction that this thesis focuses on. In sum, a perspective that captures ICSID’s responses to diverse interests, and the activities of Third World peoples, in the construction of the international investment order, is necessary. The TWAIL constructivist perspective allows an analysis of tribunals not only as dispute settlement bodies but as sites for the construction of the investment order, and spaces of interaction for actors that make up this realm.

This thesis’ methodology is also principally analytical. First, the major part of the research involved reviews of primary – arbitral decisions and investment agreements – and secondary materials including analyses of scholarly books, articles and reports. Primary materials, especially BITs, provide a basis for analyzing the types of agreements that drive the system and the interests considered relevant enough to be covered in those agreements. As well, archival materials from the School of Oriental and African Studies of the University of London on early investment arbitrations, and \textit{travaux preparatoires} of the \textit{ICSID Convention} provide relevant information. In conducting this research, there were also substantial reviews and analyses of literature on the international law on foreign investment. In addition to the usual utility of these sources for legal analysis, this research expresses particular interest in their analysis of ICSID decisions and the positions that scholars take on the decisions. Also, the discussion of the theoretical foundation for the research mostly relies on scholarly literature.

\textsuperscript{60} For a discussion of this thesis’ approach to ideas and the insights that it draws on, see the analysis on ‘ideas’ in chapters two and four of this thesis.
Second, I supplement the reviews of literature and investment agreements by detailed studies of three ICSID decisions and the backgrounds to those disputes. Since ICSID is this thesis’ focus, decisions of ICSID tribunals inform the analyses and conclusions in the thesis. In addition, relevant case law including decisions of international tribunals like the International Court of Justice, arbitral awards, and domestic Court decisions that review arbitral awards, provide materials for analysis. The cut-off date for the ICSID case law discussed in this thesis is August 2008. These arbitral decisions and other case law assume a place of importance when one considers the history of investment dispute settlement. History demonstrates the relevance of arbitral jurisprudence to the development of the international law on foreign investment. Many of the investment rules that currently dominate international investment law were developed through arbitral jurisprudence. In the 1950s, three arbitral awards – Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi (Abu Dhabi Arbitration), Ruler of Qatar v. International Marine Oil Co. Ltd. and Saudi Arabia v. Arabian American Oil Co. – facilitated the internationalization of investment disputes and arbitration. These cases mostly had recourse to bodies of law beyond particular domestic jurisdictions, thereby contributing to the delocalization of foreign investment disputes and to their transference to the international realm. By the 1970s, internationalization of investment contracts had become rather widespread. The 1977 award on the merits in Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic was a major quasi-judicial contribution to the principle of the internationalization of investment disputes and arbitration.

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61 For an example of the domestic court decisions, see Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1) Judicial Review, Supreme Court of British Columbia, 2001 BCSC 664; (2002) 5 ICSID Rep. 236.


63 Ruler of Qatar v. International Marine Oil Co. Ltd. (1953) 20 I.L.R. 534 [Qatar Arbitration].


67 See chapter three for a discussion of the Texaco Arbitration’s contribution to the internationalization doctrine.
In spite of the contribution of arbitral jurisprudence to the law, investment arbitration, and in fact, international law in general, has traditionally lacked a doctrine of binding precedent. This position mostly stems from the formal sovereignty of states and the undesirability of making one sovereign state bound by the decision applied to another sovereign state. Since the doctrine of precedent is of common law origin, it is appropriate to avoid an attachment to a common law perspective that is not applicable under civil law systems. Within ICSID’s context, article 53(1) of the ICSID Convention provides that particular awards shall be binding on the parties and this position has been interpreted as excluding the applicability of the doctrine of binding precedent within ICSID jurisprudence. Nevertheless, in practice, ICSID tribunals adopt something akin to a system of precedent, even if not binding. In Metalclad Corporation v. United Mexican States (Metalclad v. Mexico), the tribunal noted that “[a]lthough the decision… does not bind this Tribunal, it is a persuasive authority and the Tribunal is in agreement with its analysis and its conclusion.” Even early non-ICSID arbitral tribunals were open to this approach. In his concluding observation in the Abu Dhabi Arbitration, Lord Asquith of Bishopstone referred to another arbitral award between Petroleum Development and the Ruler of Qatar, where Lord Radcliffe rendered the award. Lord Asquith noted that there was little connection between the two arbitrations as the issues were different. However, he stated that “[i]f Lord Radcliffe instead of merely recording his conclusions had expounded the principles on which he had reached them, I should have

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68 See article 59 of the Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, 1060, T.S. No. 993, which states that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”. See also article 1136(1) of NAFTA, supra note 8.

69 Schreuer, supra note 19 at 1082. Some ICSID tribunals have referred to the non-binding nature of ICSID decisions as precedent. See e.g. AES Corporation v. Argentine Republic (ICSID Case No, ARB/02/17), Decision on Jurisdiction, (April 26, 2005), online: IISD <http://www.iisd.org/pdf/2005/investsd_aes_vs_argentina.pdf> especially at para. 23(d). However, at paras. 27-33, the tribunal expressed a view that suggested that it could consider the decisions of other tribunals. At para. 31, it noted that “precedents may … be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.” It concluded at para. 33 as follows: “From a more general point of view, one can hardly deny that the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or jurisprudence constante, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features.”


71 Abu Dhabi Arbitration, supra note 62 at 160. One major difference was that there was no allusion to sea waters in the Qatar agreement.
derived invaluable and authoritative guidance from such an exposition…“\(^{72}\) The International Court of Justice has also expressed a similar opinion. In the *Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application, 1962) (Belgium v. Spain)*, Sir Gerald Fitzmaurice in his separate opinion noted that “judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development…“\(^{73}\)

At a minimum, tribunals consider and refer to the earlier decisions of other tribunals before making their conclusions on the case at bar. McLachlan *et al* refer to this development as *de facto* precedent (that excludes a doctrine of hierarchy and awards only have variable influence), and not *de jure* doctrine of precedent.\(^{74}\) As such, in addition to the similar, although not entirely synonymous, provisions of IIAs, ICSID tribunals contribute to the development of a uniform system of dispute settlement and the crystallization of similar principles in the international law on foreign investment. This practice of tribunals makes it possible to glean principles applicable in this area of the law, and to suggest mechanisms for reconstruction. It allows an examination of the legal norms that are generated through investment arbitration.\(^{75}\)

Because this research focuses on ICSID in its examination of Third World peoples’ place in the investment dispute settlement order, I engage in a detailed study of three of ICSID tribunals’ decisions. After a perusal of ICSID cases, many of which are also discussed in the course of this thesis, these three cases emerge as illustrations of two points – the utility of the discourses of economic development and human rights protection, and the strategic mechanisms that Third World peoples adopt in their interactions in this area. The purpose of this detailed analysis is to provide an opportunity to assess the effect of peoples’ engagement with the law on ICSID decisions. In this regard, recourse is had to the general circumstances surrounding the investment dispute in order to understand the rationale behind the actions of

\(^{72}\) *Abu Dhabi Arbitration*, *ibid*.


\(^{75}\) See the discussion in the concluding chapter of this thesis.
the various actors. For example, for Argentina’s ICSID cases, of relevance are the broader framework of its economic crisis and the socio-political implications of that crisis not only on the investment system but on the country and its peoples as well. The three cases are discussed in chapters five and six. Each case is discussed in four categories in order to facilitate analysis – the background to the dispute, the language that the actors adopt, the ICSID dispute, and finally, an analysis of the tribunal’s decision.

Chapter five analyzes the discourse of economic development and its challenges as a strategic discourse for Third World peoples. Generally, most ICSID cases potentially raise issues of economic development, at least from the manner in which “investment” is being defined in recent times under article 25(1) of the ICSID Convention. The potential perpetual resonance of the theme of economic development is similar to investment arbitration’s potential to raise public interest considerations in almost all cases. Hence, depending on the manner in which cases are pleaded before tribunals and the issues that form primary areas of focus, the economic development and public interest themes have the potential to run through the gamut of ICSID cases. The major economic development focus in ICSID jurisprudence – the definition of “investment” to include development and the laudable but limited nature of focusing on development in this manner – and the relevant cases, preface the discussion in chapter five. The Argentine case of Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (Suez v. Argentina) forms the major example in studying the economic development theme in this chapter. Given Argentina’s recent socio-

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77 For example, in its initial decision on amicus curiae participation, a tribunal noted as follows:

In examining the issues at stake in the present case, the Tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. (Emphasis added)


78 Suez v. Argentina, supra note 44.
economic crisis and its over forty ICSID cases, many of them generated from that crisis, the Argentine cases form an interesting example for the study of foreign investment dispute settlement and economic development. Of all Argentina’s ICSID cases that were generated by the country’s economic crisis, *Suez v. Argentina* stands out for this study because it not only involves the disputing parties but also involved a series of *amicus curiae* submissions, responses of the tribunal to these submissions, and the tribunal’s initial pronouncement on *amici* participation appears to be ICSID’s *locus classicus* on this point. Of particular relevance for this choice is that cases that involve public interest *amici* are conducted in such a manner, at least in the *amici* proceedings, that the direct consideration of peoples’ perspectives is foregrounded. Without suggesting that all *amici* adequately represent the views of Third World peoples, these public interest *amici* are willing to make direct arguments that states and foreign investors may not articulate because of their strategy for conducting defences or claims.

In chapter six, the focus of the study is *strategic mechanisms of interaction* that Third World peoples adopt. Here, two ICSID cases are used to illustrate these strategies and ICSID tribunals’ responses. The first case, *Aguas del Tunari S.A. v. Republic of Bolivia (AdT v. Bolivia)*, is one of ICSID’s most publicized cases. In this case, the domestic groups that participated in the grassroots activism that preceded the dispute applied to participate in the ICSID proceedings. The second case, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Tecmed v. Mexico)*, differs from *AdT v. Bolivia* in that while both had incidences of grassroots activism and clear expressions of peoples’ opinion, the peoples’ groups in *Tecmed* did not seek formal participation before the ICSID tribunal. Of all ICSID cases, this case is the one that engaged in a most detailed discussion of the place of Third World grassroots activism in investment dispute settlement cases. These two cases are of

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79 One other Argentine case involves the participation of *amicus curiae*: *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17). Here, the tribunal basically relied on the decision in *Suez v. Argentina* in order to come to its decision. In addition, the composition of the tribunals is the same and *Suez v. Argentina* has witnessed two orders in response to the *amicus curiae* petitions.

80 *AdT v. Bolivia*, supra note 42.

81 *Tecmed v. Mexico*, supra note 43.

82 Most of the other cases where grassroots activism was pleaded either did not pay much attention to it – *Metalclad v. Mexico*, supra note 70 – or they discussed the phenomenon as incidental to another legal rule but did not engage in the direct and detailed discussion that occurred in *Tecmed v. Mexico*, ibid. For example, in
immense relevance because of the tribunals’ treatment of the actions of Third World peoples in relation to foreign investment. The cases demonstrate ICSID tribunals’ attitude towards the role of these groups in the foreign investment system, whether domestically or in the international realm. In addition, the cases enunciate perspectives on international investment law – for example, *Tecmed v. Mexico*’s discussion of proportionality of governments’ actions vis-à-vis foreign investment – that are instructive.

My visit to ICSID’s secretariat in Washington D.C. in March 2007 was also instrumental to an understanding of the procedural aspects of investment dispute settlement. Discussions with ICSID counsel allowed for an informed understanding of the challenges that tribunals face in engaging with a constantly changing international legal system. This thesis also benefited from interviews with some arbitrators, counsel, and NGO representatives that have participated in ICSID cases. The interviews involved information gathering on the disputes, the background to the cases, the interviewees’ thoughts about factors that influenced the cases, and ICSID tribunals’ contributions and ability to respond to the cases. Where relevant, and especially in chapters five and six, the details of the interviews are disclosed. Since some participants requested confidentiality, interviewees are identified by categories and the dates of the interviews only. The information gathered from the interviews are supplemented by available primary materials that document the events that occurred prior to the initiation of ICSID proceedings and the perspectives that the parties and the Third World peoples involved adopted. The discussions analyze these documents in light of the peculiarities of the ICSID system.

In sum, this thesis has drawn from diverse methodological approaches. It adopts an interdisciplinary theoretical perspective and develops an approach that is appropriate for understanding the issues raised. Also, since the research addresses the dispute settlement system of a particular institution – ICSID – it is necessary to engage in substantial analyses of several ICSID decisions in addition to the traditional doctrinal reviews of relevant literature.

The substantive provisions of investment agreements also inform the research and conclusions drawn in this study. These methodological approaches have been supplemented with interviews with actors that participate in the process of dispute settlement under the auspices of ICSID.

IV. Originality of the Thesis

Many commentators have turned their attention to ICSID as a dispute settlement institution, especially since it assumed a prominent status following initiations of proceedings against the United States under the NAFTA Chapter 11. Nevertheless, most of these important works have focused on technical analyses of ICSID tribunals’ decisions. These works are of immense importance because they are building blocks for a study such as this present thesis that focuses on ICSID and Third World peoples. This thesis broadens the analysis and situates ICSID more explicitly within a broader international relations/international law framework that allows an analysis of how the institution fares in a system that takes diverse actors and interests into account. This section briefly outlines some factors that make this thesis original and examines its potential contributions to existing literature.

While investment arbitration recognizes states and foreign investors as the participants in this realm (and as a result, I dedicate significant amount of space to analyzing their place in the system) this thesis’ major contribution revolves around its focus on Third World peoples as actors in the investment dispute settlement system and its examination of their contributions to this area of the law. In attempting to locate the position of Third World peoples within the system, the thesis’ approach allows an analysis of the categories of norms that are developed in investment dispute settlement. By these norms, I refer not only to the substantive contents of investment treaties, but also to new developments that are driven by the interaction of actors that transcend the traditional conceptions of the international investment order as only including states and foreign investors.

Adopting an approach that extends the discussion beyond states and foreign investors challenges the hegemony of investment arbitration. Of course, it is not new that critical

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83 For example, see Schreuer’s stellar work, supra note 19.
perspectives to political and economic issues challenge the representative nature of dominant ideologies. Like neo-Gramscians, TWAIL scholars argue against hegemonic power; hegemony conceived of as “subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense.”84 Often, the law is complicit in entrenching hegemony because of its “ability to induce submission to a dominant worldview,”85 a situation evident in the existing international investment system. This study situates itself within counter-hegemonic legal, political and economic perspectives in assessing the constitutive nature of diverse interactions in the ICSID framework.

The counter-hegemonic approach also extends to the analysis of investment agreements. A single neoliberal paradigm cannot adequately account for and determine the contents of agreements between countries at different stages of development and with different needs. Hence, there is a need to rethink the dominant ideology of investment agreements and dispute settlement, or at least, to entertain Third World peoples’ perspectives on international investment law. This work does not concern itself much with the long standing conflicts between economic liberalism and economic nationalism. Rather, it works out a framework that that incorporates the multiple actors that are effectively impacted by these agreements. It suggests that such a framework might develop from the dispute settlement realm through the participation of Third World peoples’ groups.

One could question how the position advocated in this study is different from the prescriptions of the 1970s NIEO and why this has some potential to effect changes where the NIEO did not achieve a majority of its suggestions.86 While it is important to exercise some caution in


85 Litowitz, ibid. at 516.

adopting an optimistic perspective on the ability to effect changes in the international investment system, with some limitations, such a perspective is not completely out of order. It is arguable that the NIEO was a grand approach that was largely state driven, whereas the present approach is a piecemeal case-by-case approach and is not only state driven but is people and even NGO driven. It is an approach that recognizes that this is an age where there is a confluence of factors and actors that shape international law, including peoples’ groups that may be able to contribute to some meaningful changes. Thus, the aim of this study is to discuss the nature of the law that develops before ICSID tribunals through the process of the interaction of Third World peoples with the system, within a broader framework that recognizes the legitimacy of the claims of states and foreign investors, and the participation of NGOs. It does not disregard the efforts that states make in opposing unfavourable investment prescriptions but provides insights into one other way by which counter-hegemonic responses might be proffered.

In addressing the research questions stated in the introductory chapter, this study will make some contributions to the literature on investment dispute settlement. The academic commentary that I have researched does not adequately review ICSID’s impact on the Third World peoples or the potential contributions of these peoples’ participation at domestic or international levels to the international law on foreign investment. In addition, there is hardly any literature that analyzes the international investment order from an interactional legal perspective that seeks to integrate Third World peoples into the investment dispute settlement system and consider ICSID’s contribution to the international investment order in the process. This research work will contribute these perspectives to investment dispute settlement in addition to the focus on examining ICSID tribunals’ ability to balance competing interests. In sum, assuming that ICSID can fulfill its self-declared mandate of ensuring mutual benefits for the Third World and foreign investors, some of the arguments that I develop through this research are two-fold. First, is a tribunals’ initiative that suggests active ICSID tribunals’ engagement in adopting a more robust analysis of investment disputes, of actors in the domestic and international investment order, of multiple interests arising from disputes; and a conscious disinterested development of the international law on foreign investment. This

initiative does not suggest that tribunals should adjudicate on matters that are not presented before them or effectively rewrite investment agreements. Rather, while encouraging a robust reading of rights, obligations, and actors, it recognizes that tribunals need to work within the dictates of investment treaties, legislation and contracts as well as situate their decisions within applicable law. Second, is a peoples’ initiative that not only expresses opinion at the local level but seeks more active participation on the international level, thereby re-enacting the AdT v. Bolivia-type framework. Where necessary, such people-driven initiatives could be in partnership with the NGO community, since peoples qua peoples may not qualify for participation under the ICSID Arbitration Rules. This people/NGO partnership is only meaningful where the affected peoples are allowed to frame the issues without the NGOs taking over the agenda. It appears that ICSID is ready for such people-driven initiatives if peoples could demand them. In this manner, at least, ICSID tribunals and the ICSID system generally, could be afforded the opportunity to reconsider the actors that it affords participation to, as it reconsidered NGOs participation as amicus curiae.

V. Expected Findings of the Study

This thesis proceeds based on the hypothesis that the international investment dispute settlement system is still mostly shaped by traditional actors, that is, states, foreign investors and ICSID tribunals that interpret agreements. This position is not surprising since the law has designated these actors as the formal and legal participants in the investment dispute settlement system. However, while recognizing the centrality of the role of these actors, this thesis suggests that a robust re-construction of the investment dispute settlement system requires a broader interpretation of relevant actors and relevant interests.

In light of the centrality of traditional actors, this thesis incorporates the perspectives of Third World peoples who are categorized here as non-traditional actors because they have not been formal participants in the international law on foreign investment. It is expected that in spite of the limitations that attend their participation in the international investment dispute settlement system, the activities of peoples’ groups have a unique contribution to make to this system, even if modest. It is also expected that transformation for peoples’ groups along the norm levels that this thesis outlines, might require sustained interaction, continued resistance and the
adoption of strategic discourses and arguments. If the international investment dispute settlement system takes the perspectives of Third World peoples that are mostly affected by FDI activities seriously, then the balancing suggested in the *ICSID Convention* might come to fruition. The opportunity for a meaningful inclusive agenda for the international law on foreign investment lies in these interactions.

The benefits of this thesis stem from its contribution and originality. In sum, the thesis involves an examination of the ICSID system, not in a legalistic/positivist manner, but as a process of socio-legal interaction that incorporates a broad range of actors that shape the realm and discusses how the realm in turn affects, defines, impacts upon, and changes the actors. The thesis also allows an assessment of constructivist IR theory’s ability to respond to the challenges in the international system. However, because it is mostly focused on Third World peoples in the international investment order, the perspective that it develops and follows exceeds a purely constructivist perspective. Rather it adopts a TWAIL constructivist perspective. Thus, on theoretical, methodological, and empirical levels, this thesis hopes to make an original contribution to the advancement of knowledge and to counter-hegemonic discourses in international law.
CHAPTER 2: THE LAW AND POLITICS OF INVESTMENT DISPUTE SETTLEMENT’S ENGAGEMENT WITH THE THIRD WORLD

The Core of the Chapter’s Arguments
This chapter develops a theoretical basis for the analysis in the thesis. The theoretical perspective that it adopts is an interdisciplinary one that relies on insights from constructivist international relations theory and Third World Approaches to International Law (TWAIL). From a combination of some strands of these two schools of thought, the chapter develops an interactional theory of law – referred to as “TWAIL constructivism” – that can capture the multiplicity of actors that engage in the investment dispute settlement process either formally or indirectly. All these formal and indirect participants are referred to as actors, while only states and foreign investors in particular disputes get the appellation, ‘parties’. The TWAIL constructivist perspective enunciated in this chapter serves as an optic from which to examine the position of actors, especially Third World peoples, in the international investment dispute settlement system. The four-fold components of the TWAIL constructivist perspective developed are the identity of the actors; power relations within the international system, among the actors and emanating from ideational resources; the origin and role of socio-legal norms and other ideational factors; and the actors’ methods of engagement. These four components inform the analysis in this thesis and define the interactions within the investment dispute settlement system. Each of them forms a significant part of the discussion in this thesis.

I. Introduction

The history of international law’s construction of economic engagement with the Third World is one of the richest and longest of the interactions between international law and the Third World. It is trite that the colonial encounter was accompanied by imperialistic agendas, which made economic interactions between European colonialists and the Third World necessary. These encounters for the most part, defined the identity of the Third World during the colonial period. Indeed, they continue to define that identity and the interests of the Third World as a normative/definitive category, and of international law as a normative construction. Not only did they define the Third World, the encounters also shaped the course of the development of
the international law of economic relations including the international law on foreign
investment and the international institutions that assume a prominent place in investment
dispute settlement.¹

This chapter analyzes the construction of the Third World’s place in the international
investment system and the role that international law plays in that construction and system. As
noted in chapter one, this chapter is interdisciplinary. It draws from the recent disciplinary
allegiances that international relations and international law (IR/IL) scholars have forged in
determining the role of international law in the relations between actors in the international
system.² It also relies on the work of scholars working within the Third World Approaches to
International Law (TWAIL) tradition.³ TWAIL scholarship engages international (legal)
structures and their effects on the construction of the identities and destinies of international
actors, especially, Third World actors and international institutions. Proponents of the TWAIL
optic share the view that many international concepts are not objectively true, but contingent
and socially constructed.⁴ TWAIL focuses on the silences in the international order, the
excluded voices, marginalized views, and the politics involved in the decision to identify the
silences, exclusion, and marginalization. For this approach, structures and identities are not a

¹ Commentators assert that international law is a creation of the colonial encounter, and that decolonization and
its aftermaths, catalyzed the creation of international institutions. See Antony Anghie, “Francisco de Vitoria
Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance
(Cambridge: Cambridge University Press, 2003) [Rajagopal, International Law from Below].

² There is growing literature on this interdisciplinary approach. See generally Kenneth W. Abbott, “Modern
International Relations Theory: A Prospectus for International Lawyers” (1989) 14 Yale J. of Int’l L. 335
Theory: A Dual Agenda” (1993) 87 AJIL 205; Robert O. Keohane, “International Relations and International
Law: Two Optics” (1997) 38 Harv. Int’l L.J. 487; Anne-Marie Slaughter, Andrew Tulumello & Stepan Wood,
92 A.J.I.L. 367 [Slaughter et al]. For a critique of joint IR/IL research, see Martti Koskenniemi, “Carl Schmitt,
Hans Morgenthau, and the Image of Law in International Relations” in Michael Byers ed., The Role of Law in
International Politics: Essays in International Relations and International Law (Oxford; New York: Oxford

³ For literature that outline the tenets of the TWAIL perspective, see generally, Mukau Mutua, “What is
Reform in Our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall L.J. 171 [Okafor, “Newness”]; James
Thuo Gatihia, “Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries
International Law: A Manifesto” in Antony Anghie et al eds., The Third World and International Order: Law,
Politics And Globalization (Leiden, Martinus Nijhoff, 2003) 47.

⁴ On the social backgrounds of legal order, see Phillip Allott, Eunomia: New Order for a New World (Oxford;
consequence of natural evolution but a product of historical, socio-political and legal construction that developed through a process of interaction and consequent domination.

Reliance on TWAIL perspectives in this chapter as well as the rest of the thesis is principally, though not exclusively, methodological. The choice to engage TWAIL as methodology was a difficult one given TWAIL’s contributions to international legal theory and its ability to respond to challenges that other international legal perspectives have not yet adequately addressed. TWAIL is adopted as a methodological perspective in this thesis because it best serves the purpose for which it is employed in that capacity. Methodologically, TWAIL offers the opportunity to assess investment dispute settlement from the perspective of the peoples of the Third World, who are the largest category of persons affected by decisions of investment tribunals. Yet, this methodological engagement inevitably produces TWAIL theory.

At first glance, it might seem paradoxical or even counterproductive to combine insights from international relations (IR) theory and the TWAIL perspective. While TWAIL is anti-colonialist and anti-imperialist, traditional IR theory for the most part, ignored and/or failed “to confront seriously the role of colonialism, neocolonialism, and various postcolonial responses to colonialism and its legacies.” Nevertheless, more recently, some commentators have ventured to the peripheral realm of substantial engagement with Third World issues in IR theory. Even more so, a strand of IR theory that this chapter draws on, constructivism, offers insights that have the capacity to capture Third World issues, challenges and resistance in the international system.

Constructivist IR theory is amenable to an intersection with a largely non-legal positivist approach to international law that allows a focus on the law’s sociological backgrounds and identity constituting factors that are relevant to TWAIL scholarship. Its insight into the sociological construction of the law and international relations is its main attraction for this thesis. This insight allows an analysis of the contributions of the actors that shape investment

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dispute settlement. Constructivist IR scholars note that international norms, including legal
norms, develop from interaction among agents in the international system. However, they do
not necessarily take the nature of legal norms generated through such interaction into account,
whereas, the nature of these norms are vital. In spite of its amenability to social issues, the
indifference towards the nature of legal norms betrays a parochial view of imperialism and its
consequences, on constructivist IR theory’s part. The TWAIL perspective shows some
promise in filling this gap. The combination of these two perspectives – TWAIL and
constructivism – in elucidating an interactional legal perspective is what I refer to asTWAIL
constructivism.

While constructivists emphasize the role of ideas and norms in IR, one of recurring critiques of
constructivism has been the theory’s focus on “good” or “progressive” norms. In
constructivist research, there has been a near absence of analysis of those issues initiated by
groups from the Third World that challenge Northern hegemony and seek to change the
behaviour of Northern states, even though there are a few examples of these incidences in
practice. Mostly, constructivist work has focused on how the North has adopted normative
arguments (and not always material power) in convincing other Northern or non-Northern
international actors to effect changes; how Northern non-state actors have been successful in
exercising ideational power in seeking change by powerful Northern states; or how Southern
non-state actors have convinced their governments to adopt normative changes. One
explanation for the focus on “good” norms is that constructivists engage in such empirical
work to prove the irreducibility of international relations to the interests of powerful states as a
response and challenge to realist IR theory’s arguments. This explanation is however,
insufficient to capture the absence in constructivist analysis, of non-Northern groups’ clamour
for normative change that specifically targets the ideas, actions, and behaviour of not only

7 On the role of norms in IR, see Friedrich Kratochwil, “How do Norms Matter” in Byers ed., The Role of Law in
International Politics, supra note 2 at 35; Audie Klotz, Norms in International Relations: The Struggle Against
Apartheid (Ithaca; London: Cornell University Press, 1995); Martha Finnemore & Kathryn Sikkink,
“International Norm Dynamics and Political Change” (1998) 52 Int’l Org. 887 [Finnemore & Sikkink,
“International Norm Dynamics”].
8 Martha Finnemore & Kathryn Sikkink, “TAKING STOCK: The Constructivist Research Program in
“Taking Stock”].
9 I am indebted to Professor Richard Price for the insight on constructivism’s challenge to realist claims by
focusing on “good” norms. See also Finnemore & Sikkink, “Taking Stock,” ibid. at 403-404.
other international actors, but also of the North. One of the contributions of this thesis would be to show how TWAIL constructivism can incorporate (quasi) constructivist/strategic social constructivist insights in promoting a re-construction of relationships in the international legal order; or show the limitations of constructivist arguments if this cannot be achieved.10

The balance of this chapter adopts a joint TWAIL and constructivist perspective in outlining a perspective that allows engagement with the place of Third World peoples in investment dispute settlement. Essentially, it allows the articulation of a perspective that might begin to capture erstwhile marginalized voices in investment dispute settlement. The following analysis includes a brief discussion of the tenets of the schools of IR theory and their conceptions of the law, with a focus on constructivism. The chapter concludes with the articulation of the components of TWAIL constructivism – an interactional legal perspective that seeks to accommodate Third World peoples along with diverse categories of actors in the international legal order.

II. International Relations Theories and the Law

In the years that immediately followed World War II, IR scholars were not very optimistic about the role of the law in world politics. These traditional IR scholars were of the opinion that “politics informs, structures, and disciplines” international law.11 International law was seen only as an “epiphenomenon”, a reflection of the political power relationships within IR.12 However, some contemporary IR scholars adopt a reading that reflects a “politics within law” approach that suggests that law is not merely instrumental but informs politics and gives it a distinctive form when the two disciplines are combined.13 This contemporary framework envisages a “mutually constitutive relationship” between international politics and international law.14 With the rise of challenges to realism within IR theory, and particularly constructivism’s focus on norms, there has been a renewed interest in the politics of

10 On strategic social construction or quasi-constructivism, see infra note 75 and accompanying text.
12 Ibid.
13 Ibid. at 14.
14 Ibid.
international law. To situate the discussion within context, I briefly discuss the basic tenets of the principal schools of IR and their relationship or acclaimed lack of relationship with (international) law.

A. Realist IR Conceptions of International Law

Prior to the renewed interest in a combined IR/IL research agenda, there has been a disciplinary separation between international relations and international law. This separation took on a new momentum from the post World War II era until the late 1980s, when the scholarship of realist IR scholars like Hans Morgenthau\textsuperscript{15} and George Keenan\textsuperscript{16} dominated IR theory. Realism was the dominant school of IR theory after World War II. It focuses mainly on the relevance of material resources to the politics among sovereign states.\textsuperscript{17} In a realist world, states are the major actors in IR. In this world of states’ relations in the international order, international law is either irrelevant or reflective of the power politics between states. Because of the focus on state consent, realists stress the importance of treaties and do not concern themselves much with customary international law.\textsuperscript{18} As such, realism would lend credence to many of the bilateral investment treaties that drive the current investment regime, while many of the non-treaty means of ordering, including customary international law, will be at best less consequential, or at worst, immaterial. It would also be particularly interested in the consent mechanism that drives ICSID tribunals’ acquisition of jurisdiction.

In addition, realists conceive of law as political and reflective of the interests of dominant states. Laws that conflict with the interests of these states are not upheld. As a result, under


\textsuperscript{17} Realism has been the dominant IR theory of over two thousand years. See Abbott, “Modern IR Theory”, \textit{supra} note 2 at 337.

\textsuperscript{18} Reus-Smit, “Politics”, \textit{supra} note 11 at 17.
realist theory, international law cannot be enforced independently of powerful states.\(^{19}\) Realist conceptions of international law have (limited or) no explanations for the influence of some non-state actors like NGOs and social movements within the international system. They fail to explain how international law sometimes constrains powerful states, or how weaker states and other actors are sometimes able to adopt the law in achieving outcomes favourable to them.\(^{20}\)

Realism offers insights into the explanation of the development of an international law that developed largely within the power tussles reflected in the colonial encounter. However, in spite of the clear manifestations of power in colonial relationships, international law was not an isolated development. Irrespective of, or rather, because of its colonial roots, it developed in interaction with colonial peoples. As discussed later in this chapter’s articulation of an interactional perspective on international law, this position reveals that an interactional approach to law might not always yield positive results. Yet, it remains a perspective with some potential to incorporate diverse international and local actors in international legal relationships and negotiations.

**B. Neorealist IR Theory and International Law**

Neorealism takes its intellectual roots from realist IR theory. Yet, neorealist IR theory as represented primarily by Kenneth Waltz’s scholarship was a major challenge to realism within the discipline of IR.\(^{21}\) Neorealists were preoccupied with anarchy as the organizing principle of the international system. Within this framework, states with greater capabilities shape the international system. On their part, less powerful states are obliged to act within this system that powerful states establish.

In the neorealist tradition, norms, including international law, did not exist as independent variables. However, assuming *arguendo* that the international system is anarchical as neorealists suggest, it does not preclude the generation of legal norms from the interaction of

\(^{19}\) *Ibid.* at 16.

\(^{20}\) On social movements and their influence on international law, see Rajagopal, *International Law from Below*, *supra* note 1.

international actors. Thus, this thesis adopts a view that depicts the international system as a society of international actors where norms of behaviour are generated through interaction, and where such norms regulate action.

C. Liberal IR Theory and International Law

While realists did not set their sights on non-state actors, the role of non-state actors in the international order forms the backbone of the work of liberal IR and liberal international law scholars. They theorize the relationship between the international and the domestic, and between the state and (transnational) civil society.  

22 For liberals, an understanding of state behaviour without an analysis of the domestic realm is incomplete. Thus, liberal IR theory has the capacity to capture the activities of Third World peoples’ groups that have begun to influence, albeit in modest ways, the work of international investment dispute settlement tribunals. These groups are also beginning to forge allegiances with transnational non-governmental organizations (NGOs) that the international order has granted some ‘audience’ in order to make their voices heard.

However, like other theories of IR, critiques of liberalism, (including its individualism, instrumentalism, and lack of attention to the constitutive nature of norms) abound.  

23 Liberal IR theory is also unable to capture the multiplicity of actors that this thesis envisages. Although liberalism’s departure from state-centrism resonates with the non-state centric nature of the analysis in this thesis, its inattention to the constitutive nature of (legal) norms as opposed to their regulative nature, and the power discrepancies, for example, between the non-state actors in developed and Third World states that it glosses over, make it inadequate to capture the nature of legal change envisaged in this thesis. In addition, intersubjective beliefs and social norms that have metamorphosed into legal norms do not necessarily resonate with individual beliefs and norms that drive liberal IR theory, for even though some individuals may disagree...
with a legal norm, its intersubjective nature as opposed to an individual nature characterizes it as a legal norm.

**D. Neoliberal Institutionalism and International Law**

In the post-neorealist world, neoliberal institutionalism, and almost simultaneously, regime theory, assumed prominence in IR theory. Neoliberal institutionalists posit that institutions or other formal structures in international relations matter. For regime theorists, regimes are those “principles, norms, rules, and decision making procedures around which actor expectations converge in a given area of international relations.” Irrespective of this broad definition of regimes, which includes rules and norms, most regime theorists did not necessarily provide a framework that could directly incorporate the role of law in IR. For neoliberal institutionalists on their part, cooperation is possible in an anarchical system where there is a hegemon that could influence other states to create and maintain international institutions/ regimes through the exertion of its power; thus synthesising power based and interest based perspectives. From this perspective, multiple converging interests are insufficient to create reciprocal interaction in an anarchical world, hence the need for institutions/ regimes to overcome the obstacles to cooperation through provision of lower transaction costs and the elimination of incentives to cheat. While the fact that means of cooperation like institutions or regimes facilitate cooperation is not contested, an interactional insight would add that these institutions and regimes are also in the first place, creations of interaction and cooperation.

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Under neoliberal institutionalist IR theory, international law serves a functional purpose of solving cooperation problems within the international system. By taking such a position, neoliberal institutionalism does not account for the discursive capacities of international law within international and domestic realms and its legitimizing power. It also does not account adequately for the binding nature of international legal rules which are outside the realm of neoliberal institutionalism’s means of cooperation, for example customary international law, especially, obligations *erga omnes* and *jus cogens*. Also, within the last few decades, international law has acquired a somewhat cosmopolitan status by incorporating some non-state actors within its range of direct authority. Neoliberal institutionalism cannot explain this shift adequately because it is principally statist and heavily based on rational-choice theory.

E. Summary of the ‘Rationalist’ IR Perspectives

Most of the schools of IR theory discussed so far in this section, except liberalism, focus on states as self-interested (principal) actors in the international system. Within these schools, states are unitary actors, egoists and are rational. Categorizing states as “rational egoists” flows from the application of economic approaches and market analysis to international politics. Some rationalists suggest that rules possess specificity and that interpretive authority is delegated to third parties. At first glance, the application of economic and market

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27 Among the IR theorists recently calling for a joint IR/IL research agenda are many influential neoliberal institutionalists, for example, Robert Keohane.


31 Abbott, “Modern IR Theory”, *ibid.* at 348-351.


33 See the special issue of International Organization, “Legalization and World Politics” (2000) 54 Int’l Org. For a critique of this approach to legalization as restrictive and not taking into account “practices, beliefs and traditions
approaches to IR theory may seem like the natural choice for analyzing an area of international law like foreign investment that has mostly shifted to market economics in recent times. However, as noted in the discussion of their general tenets above, these rationalist IR theories do not supply the mechanisms for examining international law that this thesis requires. Based on rationalist analyses derived from economic approaches and market analysis, IR theorists deduce that states enter into cooperative agreements to create institutions and normative regimes that serve their interests. This approach to international law largely excludes the consideration of interactional realities within the international order and how these interactions produce legal norms.

In addition, realist IR scholars and neoliberal institutionalists are not only rationalists but also positivists. Reus-Smit succinctly summarizes the rationalist assumptions of these schools of IR theory as follows. First, they assume that political actors – states or other international actors – are “presocial” “atomistic, self-interested and rational.” Second, rationalists do not consider social interaction as important for determining interests; hence, they view interests as exogenous to social interaction. Third, society serves a functional purpose in rationalist analyses. International actors – which in this view are not “inherently social” nor are products of their social environment – employ society as a site for the realization of predetermined interests. In sum, while neorealists all but deny the existence of an international society, neoliberals acknowledge international society, albeit only as a strategic site for realizing states’ interests by denying that the identities and the interests of these international actors are, in the first place, shaped by social interactions. Hence, in a rationalist world, actors’ behaviour might

34 For a challenge to (neoliberal and neorealist) rational choice and strategic interaction perspectives that mostly take interests as given, see Finnemore, National Interests, supra note 23.

35 For a possible integration of IR theories in relation to regime theory, see Andreas Hasenclever, Peter Mayer, & Volker Rittberger, “Integrating Theories of International Regimes” (2000) 26 Rev. of Int’l Stud. 3. The authors argue that a realist focus on power relations among states as the key variable in IR, a neoliberal analysis of constellation of interests and a (weak) cognitivist preoccupation with actors’ knowledge may be integrated as they “interact in bringing about and shaping international regimes.” Ibid. at 6. They note that constructivism, which they categorize as strong cognitivism, is strictly opposed to neoliberal and realist views and as such, cannot be integrated with the other theories. Apart from constructivism, theories of IR have more in common than one appreciates at first glance.


37 Ibid. at 192.
change, but changes in identities and interests do not matter much, except as determining factors of rational calculations concerning behaviour.

Constructivists, on their part, mark a shift from the analysis of rationalists by focusing on normative (and material) structures, emphasizing identity in political action, and relying on the “mutually constitutive relationship between agents and structures.” Some like Wendt have noted that “constructivists are structuralists”, while others seek to “overcome the structuralist bias in some social constructivist statements.” Generally, just as they take ideational, normative and other structures seriously, constructivists also emphasize the agency of actors in world politics. It is this ideational construction and the agency of the actors that influence the investment dispute settlement system that animate the perspectives adopted in this thesis.

F. Constructivist IR Theory and International Law

There are “many constructivisms.” Like TWAIL and many other schools of thought, it is misleading to present constructivist IR theory as a concise approach to the study of international relations. Its proponents do not necessarily adopt identical theoretical assumptions and arguments. On the contrary, constructivist IR theorists themselves have identified several strands of constructivism. Thus, Reus-Smit notes the distinctions between

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38 Ibid. at 188. For a concise introduction to constructivism’s main arguments, see Ted Hopf, “The Promise of Constructivism in International Relations Theory” (1998) 23 Int’l Security 171.


43 Reus-Smit, “Constructivism”, supra note 36 at 199.
“systemic”,44 “unit-level”45 and “holistic”46 constructivism. In the same vein, Ruggie differentiates between neo-classical constructivism, post-modernist constructivism, and a third variant – “naturalistic constructivism” – located on a continuum between the first two.47 Price and Reus-Smit also note the differences as well as similarities between modernist and postmodernist strands of constructivist IR theory.48 Differences exist with regards to the nature of theory, constructivism’s relationship with rationalist IR theory, methodological approaches, and constructivism’s contribution to critical IR theory.49 Some scholars have also noted a marked similarity between constructivism and other strands of IR theory.50 Thus, this thesis proceeds in recognition of constructivist IR theory’s different strands and their multiple means and levels of understanding world politics. As a result, throughout this work, reliance is placed on some of the theory’s basic assumptions.

Moving along to the basic tenets of constructivist IR theory, constructivists view actors as social, treat actors’ interests as endogenous to social interaction and categorize society as a

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50 Jennifer Sterling-Folker, “Competing Paradigms or Birds of a Feather?: Constructivism and Neoliberal Institutionalism Compared” (2000) 44 Int’l Stud. Quart. 97. I recognize that an overlap in some variations of IR theory cannot be entirely avoided; in fact, they may be desirable. On the long run, it seems that the factors that are important and that set these theories apart include the issues that are bracketed, those that are backgrounded and foregrounded, and those that are not.
constitutive realm. For constructivists, ideational and normative structures (including law) are not only regulative but also constitutive in that they shape the identities of international actors and these identities in turn inform the interests and actions of the actors. The norms that constructivists theorize – the most important of which are “widely shared or “intersubjective” beliefs” – are substantiated and acquire an enduring status through reciprocal interaction. As Wendt notes, “it is through reciprocal interaction … that we create and instantiate the relatively enduring social structures in terms of which we define our identities and interests.” In the process of interaction, identities and interests are not static; rather, they are “contingent and relational.” In the interactions that this thesis analyzes, reciprocity assumes a defining role, especially with regards to the international investment agreements that form the basis for many investment disputes that are arbitrated in this century.

Apart from a focus on interaction, constructivist IR theory reflects an interest in history, which derives from the theory’s focus on social relations. In demonstrating the differences between societies, “constructivists have sought to re-read the historical record, to re-think what has long been treated as given in the study of international relations.” Investment dispute settlement is one of those areas of international law where history continues to drive present occurrences, or at least, inform the methods of dispute settlement that are adopted. For example, as chapter three of this thesis demonstrates, ICSID itself is a creation of the history of this area of the law. That institution that has gained wide prominence was a mechanism that was originally established to respond to the decolonization movement of the 1950s and 1960s and the interests of foreign investors in former colonies that had recently gained independence. In addition, it sought to forge investor confidence in newly decolonized territories in order to encourage foreign investment in these territories.

51 Reus-Smit, “Constructivism”, supra note 36 at 199.
52 Wendt, “Anarchy is what States Make of It”, supra note 44 at 398.
53 Finnemore and Sikkink, “Taking Stock”, supra note 8 at 393.
54 Ibid. at 406.
55 Wendt, “Anarchy is what States Make of It”, supra note 44 at 406.
58 Ibid. at 207.
The project of re-writing histories or writing alternative histories is also not new to TWAIL. TWAIL is anything but ahistorical. In fact, historical readings form a fundamental methodology of TWAIL perspectives. And these historical readings allow the drawing of connections and the identifications of continuities between present international law and the history of the international law and international relations. TWAIL scholars employ historical analyses and method in revealing the inequities within the international system. They draw on history to demonstrate how legal norms and structures, and the identities of international actors – both weak and strong – are/were created and are sustained. Beyond the initial creation of international law, TWAIL scholars engage the narrow construction of history adopted in attempts to redefine international law in this century. TWAIL scholars engage in a different telling of the history of international law. They show that alternative narratives of the development of international law and the constitution of Third World identity exist.

Writing alternative histories of international law and of groups within the international system raises issues of power and hegemony in the re-construction of the international legal system. The study of such history generates interesting discussion and illuminating insights on the construction of the present international system through a lens which reveals alternative views on the identities of international actors, norms, and relationships that are presented as given. Alternative critical histories of international law reveal the fallacy of a mutually constructed international legal order. At best, mutual construction of international legal norms is an ideal, not a historical fact. Thus, (erstwhile) marginalized voices seek to speak through a new international order. In practical terms, the lack of substantive equality and the persistence of


61 For example, Professor Okafor suggests that the attempts to reconstruct international law based on claims of newness in the post “9/11” era, erases the experiences of Third World peoples. Okafor, “Newness”, supra note 3.

62 History is empowering. Based on work on critical history, Rajagopal has been able to write: “we know our history otherwise now.” Rajagopal, International Law from Below, supra note 1 at 81. For a challenge to the Eurocentricity of historical categories like the nation-state, nationalism and historiography itself, see Partha Chatterjee, The Nation and Its Fragments: Colonial and Postcolonial Histories (New Jersey: Princeton University Press, 1993).
asymmetrical power relationships in the international order constitute an obstacle to an all-inclusive international law. However, some marginalized actors could (and have already begun to) exercise non-material power in reconstituting their identities, position, interests and actions, within the investment dispute settlement system. Unlike realist IR, constructivist IR theory focuses not only on material power, but on the power of practice and discursive power – the “power of ideas” – and their important place within international politics. While some IR scholars may dismiss this approach as “dangerous idealism” some international law scholars have begun to recognize the importance of international law as an idea qua idea. Constructivists show that the effects of norms are irreducible to a single explanation based on the interests of powerful states.

Like other theories, constructivism has pitfalls as well as strengths. First, it has been subject to the charge that it lacks clear empirical research programs. This challenge has been largely met through the work of constructivists that have spanned wide areas of research. Second, constructivist IR theory has been criticized for the lack of a mechanism for differentiating between social and legal norms. Recognizing this criticism, Finnemore proffers possible reasons for the distinctiveness of legal norms. Drawing on the work of Lon Fuller, constructivist international law scholars like Jutta Brunnee and Stephen Toope have argued


64 Reus-Smit, “Constructivism”, *supra* note 36 at 207.


66 Finnemore and Sikkink, “Taking Stock”, *supra* note 8 at 396.


68 Ibid. at 392-393.


70 See for example, Reus-Smit, “Politics”, *supra* note 11 at 24.

that law exists on a “continuum of legality.” 72 For Fuller, it is possible to distinguish between social and legal norms based on substantial compliance with the eight desiderata necessary for the “internal morality of law.” 73 Third, constructivism is criticized for its inadequate attention to theorizing change. 74 Some constructivists have responded to this criticism. For example, in their definitive analysis of a strand of constructivism that they refer to as “strategic social construction” Martha Finnemore and Kathryn Sikkink engage with constructivist IR theory’s ability to explain change. 75

While no single theoretical perspective provides complete explanations of relationships within the international order, constructivist analysis largely captures the multiplicity of actors in the international system. It provides mechanisms for assessing the work of international institutions like ICSID, it includes state actors and non-state actors (like NGOs, Third World peoples and foreign investors) within its purview, and it trains its lenses towards both the international and the domestic. Constructivism recognizes the interaction between normative as well as material structures. It also captures the role of intersubjective beliefs – the norms and ideas generated through sometimes complex interactions – and recent strands accommodate power discourses; power conceived of in this regard, as ideational and relational, and not necessarily, though sometimes material. These power discourses, which are discussed as part of the strands of a TWAIL constructivist perspective in the next part of this chapter, are an integral part of law’s legitimizing and disciplining enterprise. In addition, constructivism’s insight into the mutually constitutive nature of agents and structures retains the potential to accommodate views from the periphery. A focus on the role of epistemic communities (scholars and analysts) and activist forces captures areas of engagement that are potentially invaluable to the Third World. Nevertheless, constructivist analyses have not


73 For Fuller’s internal morality of law, see Fuller, Morality, ibid. at chapter 2. The desiderata are as follows: the requirement of generality of law, promulgation of the laws, non-retroactivity of laws, clarity, non-contradictory laws, requiring only that which is possible, constancy of laws, and congruence between promulgated rules and official action.

74 Finnemore & Sikkink, “International Norm Dynamics”, supra note 7 at 888.

focused explicitly on marginalization of Third World peoples within the international legal order, a subject which the TWAIL perspective focuses squarely on and takes very seriously. As noted in the introduction to this chapter, most constructivist analyses are not particularly focused on efforts at change orchestrated by Third World peoples and directed at the international system. Such silences necessitate an engagement with power and its role in the development of norms and ideas. It makes engagement with a perspective like TWAIL that focuses squarely on these silences necessary.

III. TWAIL Constructivism – An Interactional Legal Perspective

Reading constructivism’s relationship with the law from an interactional perspective is not new. In their stellar article on international law and constructivism, to which this present work is indebted for insights on constructivism and law, Professors Brunnee and Toope adopt an analysis that relies on the relationship between constructivism and Lon Fuller’s perspective on legal norms and interaction.76 In a similar vein, this thesis draws from insights derived from the interactional theory of law. However, the variant of the interactional legal theory that this thesis relies on draws from the combined insights that constructivist IR theory and TWAIL offer. In a nutshell, the interactional theory of law is a (social) conception of law, which views law as rules generated from and sustained by human conduct, instead of already laid down rules that regulate such conduct. It emphasizes the origins of law and theorizes about how such origins shape the nature of legal norms that are generated.

Fuller’s interactional theory of law draws from insights offered by customary law. Here, customary law is “the tacit commitments that develop out of interactions.”77 Fuller also

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76 I am indebted to Professors Brunnee and Toope for the insight into the relationship between constructivist IR theory and Lon Fuller’s theory. See Brunnee & Toope, supra note 72. The authors’ forthcoming book that draws on Fuller’s work, Legitimacy and Persuasion in International Law will be published by Cambridge University Press. A draft of the first chapter – “An Interactional Theory of International Legal Obligation” – is available at <http://ssrn.com/abstract=1162882>.

distinguishes between “made law” and “implicit law.” For Fuller, customary law is implicit law because rather than establishing rules and requiring human conduct to conform to them in a legal positivist fashion, the law is expressed through conduct in the first place. Implicit law arises from and is sustained in “intentional, rational interaction.” It constitutes the background of made law, which only represents “the surface phenomena of law.” To understand these “surface phenomena”, one needs to recognize and have a good understanding of the “social depth” of law. Fuller’s interactional theory of law envisages some degree of reciprocity between participants; a reciprocity of benefits and sometimes of hostility. By this conception of law, agreements between actors in a reciprocal relationship must, to some degree, be voluntary, the reciprocal activities between them must be of equal value, and the relationship must be reversible, in the sense that actors may owe one another the same duties at different times. Evidently, the perspective does not subscribe to a hierarchical view of law.

Applied to international law, an interactional legal perspective emphasizes the horizontal nature of authority in the international order in seeking to understand how norms emerge and function within the system. Such an approach suggests a departure from predominant conceptions of both international relations and international law that rely on positivist conceptions of the law. Notwithstanding the oft-articulated acknowledgement that the

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79 Fuller, *Anatomy*, *ibid.* at 44. For an analysis of Fuller’s theory on implicit law and the relationship between implicit law, social interaction and the modern legal system, see Gerald Postema, “Implicit Law” (1994) 13 Law & Phil. 361.

80 Postema, *ibid.* at 364.


83 Fuller, *Morality*, *supra* note 72 at 23.

84 On law and interaction, see generally, Fuller, “Human Interaction”, *supra* note 77; Fuller, *Morality*, *supra* note 72. In Lon L. Fuller, “The Role of Contract in the Ordering Processes of Society Generally” in Winston, *Principles of Social Order*, *supra* note 77 at 187, 195, Fuller states: “The prevailing tendency to regard all social order as imposed from above has led to a general neglect of the phenomenon of customary law in modern legal scholarship. Outside the field of international law and that of commercial dealings legal theorists have been uncomfortable about the use of the word law to describe the obligatory force of expectations that arise tacitly through human interaction.”

85 Brunnee & Toope, *supra* note 72, argue that constructivist IR’s conception of law rely on legal positivist underpinnings. In this regard, see Friedrich Kratochwil, *Thrasymmachos Revisited: On the Relevance of Norms and the Study of Law for International Relations*” (1984) 37 J. Int’l. Aff. 343; Friedrich Kratochwil, *Rules, Norms*
international system lacks a central governing authority, predominant IR conceptions of international law largely rely on legal positivism. Such positivist approaches cannot adequately explain the emergence and role of norms in the international order. It is trite that while some actors exist in a largely horizontal international system, some units within that system operate under some form of formal hierarchy by dominant powers. In the case of states, despite formulations of mechanisms like sovereign equality, many states in the international economic order exist and relate within a hierarchical system. Thus, international law’s prescription of equality does not accurately describe the state of the existing international system. At best, such prescription amounts to an ideal that has not been attained.

Though only one of the body of norms relevant to IR, international law provides an institutionalized avenue for realizing reiterated reciprocal interaction. And more importantly, not only does international law facilitate interaction, it is one of the body of norms constantly in formation through reciprocal interaction. In this regard, the interactions of diverse actors in the investment dispute settlement system possess the potential to foster legal change. Because of the legitimacy (sometimes) extended to international law, it provides an avenue for the realization of constructivist interactional ideals. However, in spite of its reliance on an interactional legal perspective, this thesis adopts the position that neither all the impacts of the interactions facilitated by international legal norms, nor the law produced through this process of interaction provide positive spaces for all actors. It recognizes that international law, like domestic law, has the capacity to create, further and enforce institutionalized power relations


See Alexander Wendt & Michael Barnett, “Dependent State Formation and Third World Militarization” (1993) 19 Rev. Int’l Stud. 321 at 335. Level analysis – systems and units – is predominant within neorealist IR theory. See Waltz, Man, the State and War, supra note 21; Waltz, Theory of International Politics supra note 21. See also the argument on the possible existence of two international systems based on the differing levels of anarchy and hierarchy for different actors in IR in Stephanie Neuman, “International Relations Theory and the Third World: An Oxymoron?” in Neuman, supra note 6 at 1.

to the detriment of some groups. International law served as the mechanism for establishing the present international investment system, it delineated the spaces of this area of the law, it determined those who are able to participate in the process of dispute settlement, and continues to embark on this re-definition. International law defines actors that may contribute to its (formal) formation. And the same law excludes groups, for example, Third World peoples, that are effectively part of the interactional process that re-creates the law.

In spite of international law’s weaknesses and its contributions to subordination and exclusions, an interactional legal perspective allows recourse to an argument that suggests that international law retains the ability for reconstruction within itself. This thesis explores that ability of international law’s self-reconstruction as the basis for an alternative view of investment dispute settlement and the actors that shape its realm. An interactional legal perspective allows a focus on the origins of investment dispute settlement rules and on how the history of this area of the law continues to shape the relations of the major actors. It also fosters a perspective that allows a broader reading of actors that shape the development of the international law on foreign investment through international dispute settlement mechanisms, and how less influential actors may adopt ideational and normative arguments in making their voices heard in this area of the law.

This part of the chapter discusses the core theoretical arguments that this thesis draws on. Like the activities and actors in investment dispute settlement that it seeks to capture, its intellectual roots are multifaceted. First, like other scholars that rely on an interactional legal perspective, this chapter is indebted to Fuller’s scholarship. Second, many of Fuller’s insights have subsequently been articulated and developed in IR theory (perhaps, inadvertently) by constructivist IR scholars. While constructivist perspectives on law fit the agenda in this thesis more than any other IR school, constructivism suffers from the limitations discussed in the first part of this chapter. In the following discussions, the TWAIL perspective offers methodological insights as well as compensates for these limitations of constructivist IR theory. As a result, the interactional legal perspective elucidated in the following pages as a means for understanding the diversity in the present investment dispute settlement order and an alternative reading of the normative development of the area is one that draws on insights from TWAIL and constructivism. Thus, I refer to the perspective as TWAIL constructivism. It
differs from other conceptions of an interactional theory of law in that it focuses on a methodology that allows for interactions that actively incorporate the views of Third World peoples in an area of law that does not actively engage with this group of actors.

The components of the TWAIL constructivist perspective are four fold. These components – relevant legal actors, power relations, the origin and place of socio-legal norms and ideational factors in the international system, and the methods of engagement in the international order – define the interactions between Third World peoples and the investment dispute settlement system. In the order in which they are mentioned above, these components address the questions: who is the actor, does the actor have the capacity to speak and to be heard, what is the actor saying, and how is the actor saying what it purports to be saying.

First, who is the actor? International law’s definition of actors that may participate in the investment dispute settlement process differs significantly from an accurate depiction of the actors that actually shape the system sometimes in varying degrees of relevance. In this regard, investment dispute settlement knows only of states and foreign investors as participants with actual international legal personality. Of course, dispute settlement institutions like ICSID and arbitrators and conciliators also form part of this process, even though their rights are not defined by international law in the way that the rights and obligations of states and foreign investors are determined. Nevertheless, these institutions and their agents constitute important parts of these processes because they participate actively in determining what the law is or is not in this international order. As discussed in this chapter and throughout this thesis, the gamut of actors (without legal personality in the strict sense) with a stake in the process and those who by virtue of their place in the international order engage actively within the system, is much wider than states, foreign investors and dispute settlement institutions, arbitrators and conciliators.

Second, does an actor have the capacity to speak and to be heard? Because of the inequality between actors in the international legal order, one cannot but problematize the power relations that shape that order. These power relations also shape interactions. This is evident in the case of Third World peoples’ engagement with the international economic order and vice versa. This thesis relies on a social/relational conception of power that provides a point of departure
from the classical views on power relations in the international order. It suggests that drawing on insights from the social conception of power, and the work of TWAIL scholars, there remains a possibility that where Third World peoples understand the dynamics of the system, they can relate within, or at least, seek to create an investment dispute settlement order that (significantly) incorporates their interests.

Third, \textit{what is the actor saying}? While acknowledging the effects of the exertion of power in the international order, the analysis in this thesis accentuates ideational opportunities in the international system that constructivists emphasize. It focuses on the origins of socio-legal norms and the role of ideas in shaping the investment dispute settlement order. It, however, recognizes that ideas compete in this realm and some ideas usually prevail over others. Hence, one cannot but note the importance of the discussion about power, and about method, which is the fourth component.

Fourth, \textit{how is the actor saying what it purports to be saying}? Here, the methods that actors employ require attention. From persuasion, diplomacy and negotiation, to protests and various means of resistance and activism, including social and legal activism, one encounters all these methods of engaging with the investment dispute settlement system.

A. \textbf{Constituting Actors in the Investment Dispute Settlement System}

Arbitration as a method of settling commercial disputes has a long history. However, dispute settlement between states and foreign investors was first institutionalized when ICSID was established in 1966, even though disputes had been settled between states and foreign investors before that time on an \textit{ad hoc} basis. The next chapter of this thesis discusses the circumstances under which the institution was established. In the present chapter, it suffices to note that in addition to other factors, ICSID owed its establishment and its nature to the factors

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\footnote{See for example, Michel Foucault’s views that power circulates not only through institutional and political arenas, but through every sphere of life. Foucault, \textit{Power/Knowledge}, \textit{supra} note 63. At page 98, he states that “individuals are the vehicles of power, not its point of application.” Individuals are not the “\textit{vis-à-vis} of power” but “one of its prime effects.” He further points out that: “The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation. The individual which power has constituted is at the same time its vehicle.”}

\footnote{See Michael Mustill, “Arbitration: History and Background” (1988) 6 J. Int’l Arb. 43.}
that prevailed at the time of its establishment, especially the decolonization movement and the implications of that movement for the economies of erstwhile colonies and the commercial interests of former colonial powers. The institution was supported by states that wielded control over the international legal order at the time. It owed its success to the convergence of these actors that supported international arbitration under the auspices of the World Bank. However, industrialized states required the participation of Third World states in the system to ensure its success. It was a system that was mostly interested in engaging the major actors – states and foreign investors – under the institutional mechanism of ICSID. These major actors are referred to as the traditional actors in this thesis. These actors are referred to as “traditional” because they have formal and legal participatory status within the ICSID system.

On their part, non-traditional actors are those actors that were not in the original contemplation of ICSID at its inception. They are actors that have no formal participatory status within the system. These actors – Third World peoples and NGOs – reside on the margins of this area of the law. The Third World peoples category is that which concerns us in this thesis but because of the partnerships often fostered with NGOs, some attention will be directed to NGO participation. As this thesis will demonstrate in chapters five and six, unlike Third World peoples, (transnational) NGOs have carved out spaces of sustained engagement with the investment dispute settlement system for themselves. Admittedly, the terms employed in describing these actors may be rather problematic and as a result, the usage of the category, “Third World peoples” was discussed in chapter one. On its part, the term “NGOs” may refer to a vast category of non-state actors. However, in this thesis, NGOs are those private, mostly transnational, institutional not-for-profit, non-state, expert associations that mostly seek to espouse environmental, labour and human rights perspectives in the international order. These groups might not possess superior military or economic power, but they have acquired an identity, which Third World peoples qua peoples have not acquired, that gives them an influential voice within the international system, albeit to a more limited extent in investment dispute settlement. International law has legitimized the participation of some NGOs within

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the international system. For example, some international institutions grant these groups observer status,\(^93\) while others like ICSID may extend the privilege to participate as *amicus curiae* to them if they meet the standard for such participation.\(^94\)

Distinguished from NGOs, Third World peoples’ groups or grassroots movements refers to that category of actors that do not necessarily possess relevant expertise, but who nevertheless mobilize for the purpose of engaging some investment activities in circumstances where such engagement becomes necessary. These peoples and movements usually have personal stakes in the results of dispute settlement proceedings and on this basis, often actively engage the system at domestic and sometimes at international levels. Thus, while the Center for International Environmental Law and the International Institute for Sustainable Development fall under the NGO category, a coalition of farmers concerned with a particular investment activity in Bolivia, or a community concerned about a landfill in Mexico fall under the Third World peoples’ groups category. Other less visible but no less important actors are the scholars and epistemic communities that drive the science, data, ideologies, and other information applicable to foreign investment.\(^95\) This thesis does not engage with these epistemic communities’ participation but recognizes that they may be influential.

Both traditional and non-traditional actors participate in the interactions that shape the investment dispute settlement order. Some have international legal personality (states), some are legally recognized actors in this realm (foreign investors), while some participate mostly on domestic levels (Third World peoples). These actors often commence interaction with predetermined conceptions of their place in the international order and of the mechanisms of interaction that are open to them. Based on a positivist approach, Third World peoples do not possess legal personalities that categorize them as subjects of international law, even though


\(^95\) For a definition of “epistemic community”, see Peter Haas, “Introduction: Epistemic Communities and International Policy Coordination” (1992) 46 Int’l Org 1 at 3.
they interact significantly with international legal norms and these norms impact on them
directly. International investment law still conceives of these actors in this light. However, an
interactional legal perspective allows thinking outside the box. In this case, the interactional
perspective is not necessarily descriptive but prescriptive. And its prescriptive capabilities are
in and of themselves powerful. The possibilities that it allows facilitates a rethinking of the law
and of actors that drive legal change. The interactional perspective analyzes how the law
develops while also retaining the capacity to accommodate the interests of groups that have
hitherto existed on the margins of the international system. It allows the possibility of
affording groups without international legal personality the opportunity of being heard without
the full trappings and burdens of legal personality.

So far, the investment dispute settlement system has proceeded on the basis of an
understanding that does not adequately contemplate the complexities of the interactions
inherent in the system. Increasingly, Third World peoples engage with investment activities in
ways that the dispute settlement system cannot continue to conveniently ignore. Hence,
conceiving of the law as a process of social interaction gains heightened importance in a world
where grassroots movements and representative resistance groups engage with international
law and contribute to alternative legal and power relations. Hopefully, the process of
interaction contributes to the development of international legal norms that incorporate these
actors’ perspectives. Their reiterative interactions, like those of other actors, provide “the
possibility of reading against the grain, of writing things differently.”96 Reiterative interaction
of this nature presents the possibility of changing the law.

In the realm of investment dispute settlement, reiterative interaction is not a newendeavour.
This perspective was played out in the 1970s efforts to establish a New International
Economic Order (NIEO), and in transnational corporations’ (TNCs) efforts to reiterate ideas
that favour their position at the same time. On their part, TNCs are non-state actors that
reiterate ideas that eventually form part of the rules of international law, further entrancing
the capacity for conflicting positions on the ideas that shape the law. Many of these TNC-

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96 Ruth Buchanan & Rebecca Johnson, “The Unforgiven Sources of International Law: Nation-Building,
Violence, and Gender in the West(ern)” in Doris Buss & Ambreena Manji eds., International Law: Modern
supported ideas, especially on investment protection, have gained significant acceptance in the international economic order. While the NIEO was relatively less successful, it provided an avenue for re-articulating the importance of a principle like permanent sovereignty over natural resources.\textsuperscript{97} Thus, even though competition over the prevalence of some ideas over others in a process of interaction is not new, what TWAIL offers in this regard is the benefit of engaging with calculated, strategic and constant reiterated interactions of Third World peoples in the international system. As such, as this section has discussed so far, a TWAIL constructivist perspective is one that first, takes the interaction of Third World peoples with(in) the international system seriously and seeks to write their experiences into international law. Further, it suggests that in interacting with the international system, these actors contribute to the development of international legal norms.

\section*{B. The Place of Power in the International Legal System}

While the TWAIL constructivist perspective suggests that interaction is necessary, it does not pretend that interaction always provides positive or favourable outcomes for all actors. Neither does it conceive of interaction as devoid of power relations and struggles, for “ideas do not flow freely.”\textsuperscript{98} Rather it proceeds on the basis that power relations are inherent in (social) construction within the international system. The approach deems it necessary to determine the extent to which power affects the choice of some ideas over others, for example, in the case of the NIEO mentioned in the preceding section, and how power affects the constitution of actors’ places, roles and ability to contribute perspectives in the international legal system. While the TWAIL perspective has not developed a concise theory on power relations in the international order, power discourses are implicit in TWAIL literature.\textsuperscript{99} Also, theorizing power is not a traditional constructivist forte although recent constructivist analyses


\footnotesize{\textsuperscript{98} Risse-Kappen, “Ideas do not Flow Freely”, \textit{supra} note 41.}

\footnotesize{\textsuperscript{99} For a related discussion of the relationship between power, identity and ideas, but in the context of the future of TWAIL, see Ibironke T. Odumosu, “Challenges for the (Present/) Future of Third World Approaches to International Law” (2008) 10 Int’l Comm. L.R. 467.}
incorporate some ideas about power. 100 Concern with power in IR theory is usually regarded as “a disciplinary attachment to realism.” 101 The (near) absence of power discourses in early constructivist IR research mostly stems from deliberate challenges to realist arguments, which focused heavily on material power and resources. 102 Also, much of constructivists’ empirical work has not involved Southern efforts to effect normative changes that affect the North. In spite of the absence of a focus on these issues, constructivism cannot but be attractive in an analysis of South-North relationships. Constructivism’s attractiveness stems not only from its ability to capture the social construction of the international order that other IR theorists do not adequately contemplate in their analysis, but also from its analysis of change based on ideational resources and not necessarily on material resources or material power.

As noted earlier, institutionalized norms and repetitive interaction could facilitate social structures that create asymmetrical power relations in the international system. In fact, international law is both a creation and creator of power relations, for it develops through the interaction of actors with different levels of influence within the international system and also subsequently informs further interactional practices. These realities suggest the need to engage with the role that power plays in the international system. While a focus on material power provides a bleak hypothesis, reliance on a social conception of power provides some basis for asserting that the dynamic of negative power relations does not always have to prevail in an interactional process.


101 Barnett & Duvall, ibid. at 40. Barnett and Duvall argue that the tendency to attach power to realist theory stems from the fact that other strands of IR distance themselves from concerns with power relations. Although constructivism has the potential to develop a critical perspective on power and arrive at a rigorous theory of power not only relevant to IR theory but also to international law, there has not been much work done on power partly because of the perceived need to avoid such labeling.

102 See Hans Morgenthau, Politics Among Nations: The Struggle for Power and Peace (New York: Knopf, 1978) 4. Reus-Smit articulates the four interlinked ideas of realist power thus: power is possessed as a tangible resource that states can command individually; it is material, for example, military and economic resources; politics is a struggle for power; and international politics is different from law and the latter is subject to the former. Christian Reus-Smit, “Society, Power, and Ethics” in Reus-Smit, Politics of International Law, supra note 11, 272 at 279 [Reus-Smit, “Society”].
A social conception of power also addresses the relationship between legitimacy, hegemony and norms. This perspective captures the broad category of actors that participate or exert some influence in the investment dispute settlement system. It also has the ability to capture the discursive power that some non-traditional actors have come to wield within the international system as a result of their interaction with the more materially powerful actors. In the constructivist perception of the social conception of power, power is relational as opposed to possessive. It is not owned but acquired within relationships. However, while power may be socially constructed and created through the interaction of agents, it is maintained by legal norms and regimes. These institutionalized forms of power relations eventually shape actors’ interactions.

Michael Barnett and Raymond Duvall enunciate a social conception of power within the international system. They argue that discussions of power in international politics “must” include considerations of “how, why, and when some actors have “power over” others.” Barnett and Duvall define power as “the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate.” Their conception of power is restricted to that which produces effects that affect the capacities of actors to determine the conditions of their existence and not on power relations that reflect more of persuasion, collective choice and joint action. Thus, their taxonomy mostly describes a one-way relationship of advantage or disadvantage between the oscillating categories of dominant and marginalized actors. The taxonomy only partly captures marginalized actors’ potential means for redefining relationships within the international system. However, one of the attractive features of this taxonomy is that even non-traditional international actors could fall within the advantaged group where they exercise normative power that compels other actors to change their behaviour.

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103 Reus-Smit, “Constructivism”, supra note 36 at 209.
105 Barnett & Duvall, supra note 100.
106 Ibid. at 41.
107 Ibid. at 42. They also state that “power is either an attribute of particular actors and their interactions or a social process of constituting what actors are as social beings, that is, their social identities and capacities.”
108 Ibid.
Barnett and Duvall discuss four forms of power – compulsory power, institutional power, structural power and productive power – by which actors can determine their fate and the limitations or enhancement of that ability by their social interactions with others. This multiple approach to power relations integrates several forms of power and at the same time incorporates interactive and constitutive social relations; in Barnett and Duvall’s words, both “power to” and “power over”.109 “Social relations of constitution” characterize actors as particular subjects in the first place. Power relations that arise from this form of social relations define the identity of actors, their capacities, and the practices they may undertake within a particular framework.110 They define actors’ “power to” be, and to do certain things. Social relations of constitution, for example, defined international law’s initial formulation and the positions of actors within the international framework by constituting some as “Europe” and other peoples as “Europe’s other.”111 On its part, international investment law continues to accord international recognition to some non-state actors like foreign investors and deny it to non-institutionalized Third World groups. “Social relations of interaction” assume that preconceived and preconstituted actors are in existence and focus on the actions of these actors.112 In this instance, through interaction with others, actors affect the ability of others to control their fate through their behaviour, and exercise “power over” them. The two conceptions of social relations fit together. Social relations of constitution define actors’ places and roles in the international order, while subsequent social relations of interaction keep these definitions in place.

The first form of power in Barnett and Duvall’s four-fold taxonomy – compulsory power – arises as a result of direct interaction and control by one actor over another. Compulsory power is the traditional form of power where an actor influences another to intentionally alter its position in a situation where there is conflict of interests and the former wields enough material (and normative) resources to get the latter to change its course of action. Contrary to the common opinion, Barnett and Duvall opine that other actors apart from states, for example NGOs, wield compulsory power through their recourse to normative resources and often

109 Ibid. at 44.
110 Ibid. at 46.
111 See generally Anghie, “Vitoria”, supra note 1.
112 Barnett & Duvall, supra note 100 at 45.
compel states to alter their policies.\textsuperscript{113} Second, through \textit{institutional power}, some actors exercise indirect control over others through “diffuse relations of interaction”.\textsuperscript{114} Institutions and the rules that govern them serve as the factors that aid one actor in shaping and constraining the actions of others.\textsuperscript{115} By the third form in the taxonomy, \textit{structural power}, mutual and co-constitutive relational positions define the identities of actors and their interests. These structures that shape actors’ self-understanding can generate inequality within a system through the distribution of unequal privileges.\textsuperscript{116} Structural power attains a level of particular importance in a social conception of power because of the relevance of structures in shaping the identities of actors in IR.\textsuperscript{117} Lastly, \textit{productive power} is “the constitution of all social subjects with various social powers through systems of knowledge and discursive practices of broad and social scope.”\textsuperscript{118} In this form of power, there is a move from structures to systems of meaning and to networks of social forces that shape one another.\textsuperscript{119} It essentially re-defines what is possible or impossible, normal or abnormal, or even what constitutes a problem.

The multiple form approach to power reveals that “power is central to global governance”.\textsuperscript{120} As well, it is relevant to interactions among actors in the dispute settlement processes in the international legal order. The social conception of power allows actors that lack material power to exercise normative and discursive power through an insistence on a reformulation of international legal rules and framework. The exercise of normative and discursive power entails a struggle for ideational power and relevance mostly because such productive power has traditionally been a realm that epistemic communities have occupied.

\textsuperscript{113} Ibid. at 50.
\textsuperscript{114} Ibid. at 43.
\textsuperscript{115} Examples could include legal rules applied by one state over another through the WTO. Another example of institutional power is the creation of legal norms by Third World states through the New International Economic Order (NIEO). However, the success or otherwise of the NIEO is another question. See supra note 97. From these examples, in spite of being within the same form of power, one could garner the effects of social relations of constitution on social relations of interaction. The WTO has encountered more success than the NIEO, which was a creation of weaker states, constituted as such – weaker – from the inception of international law.
\textsuperscript{116} Barnett & Duvall, supra note 100 at 53.
\textsuperscript{117} See Wendt, \textit{Social Theory}, supra note 44 at 257.
\textsuperscript{118} Barnett & Duvall, supra note 100 at 55.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid. at 57. See Wayne Sandholtz & Alec Sweet, “Law, Politics, and International Governance” in Reus-Smit, \textit{Politics of International Law}, supra note 11 at 238.
For TWAIL scholars, power relations in the international system are historical as well as contemporary. In fact, power relationships may be viewed as a continuum with specific points on the continuum assigned different names. Colonialism came into effect through military power and neocolonialism has seen more of economic power exertions. The origins of international law are situated in the relationships of power between the colonizer and the colonized, and law has often been an avenue for perpetuating these relations for centuries. TWAIL scholars suggest that international law was a product of legitimizing force influenced by relationships of power. For some time, colonialism occurred concurrently with imperialism, which was mostly economic (as well as social and cultural) domination and expansion. This imperial encounter has largely dominated the Third World’s relationship with other economic actors such that at the height of the decolonization movement of the 1950s and 1960s and in the early postcolonial era, the Third World sought a redefinition of the international economic order. The international law on foreign investment is not free from these historical trappings, for as Anghie has argued, this area of international law has colonial origins. Even if most constructivists do not pay much attention to power (although some do), a TWAIL constructivist perspective by its very nature of engaging Third World peoples’ issues is one that takes both historical and contemporary power relations seriously.

C. Norms and Ideas in the International Investment Dispute Settlement Order

Actors perceive international law in several ways. They may conceive of international law in a normative sense as legitimate, they may regard it in an instrumental sense as a tool with which to achieve their ends, and sometimes they may interact with it as a norm that is not applicable
or is non-binding because it does not suit the purposes, especially of more materially powerful actors. In this section, I explore the normative capabilities of international law. The section proceeds on the basis that ideas, concepts, and institutions are products of social construction. Institutionalized investment dispute settlement was a product of its time, a product of the occurrences of the decolonization era. Even the changes and the gradual incorporation of non-traditional actors are a result of changes in the attitudes of the international community towards issues like environmental protection and labour standards among others. A critical appraisal of the investment dispute settlement order reveals that the law is a product of its social environment.

While constructivists believe in the primacy of “good” norms, TWAIL scholars share some skepticism about the legitimacy of the whole gamut of international law and its structures. 126 Yet, TWAIL adopts and adapts international legal rules as means of addressing issues that affect the Third World while seeking to reconstruct international law to reflect the struggles and concerns of the peoples of the Third World. In interacting within the international system, actors engage strategically in order to achieve defined purposes. Contrary to many rationalist arguments, these actors do not necessarily strategize in order to maximize utility, but to persuade other actors based on norms that they perceive to be right. 127 For example, some NGOs that participate in investment dispute settlement are not necessarily interested in personal gain but sometimes seek to achieve the dissemination of a particular perspective that they share. Yet, strategic interaction demonstrates the deliberateness of actors’ actions and the relevance of their agency in interactions.

In their work on strategic social construction, Finnemore and Sikkink argue eloquently that a “critical mass” of actors is crucial to putting change into effect. These actors who are “norm entrepreneurs” engage in struggles that eventually “cascade” into social norms. The “norm life cycle” is completed when states (“norm leaders”) internalize the norms. The norm entrepreneurs that are mostly relevant in this thesis are the domestic activists – Third World

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126 See for example, Mutua, “What is TWAIL”, supra note 3

127 See Risse, “Let’s Argue”, supra note 40, for an argument that argumentation, deliberation, and persuasion are modes of social interaction that are distinguishable from strategic bargaining.
peoples’ groups and movements – that demand change in domestic and international rules.\textsuperscript{128} Because of the lack of consensus on several issues in the international economic order, activists’ strategic calculations assume more important proportions.\textsuperscript{129} Such strategic action does not necessarily have to connote purposive rationality in Western terms, for as Finnemore argues, rationality is itself a cultural value.\textsuperscript{130} She notes that Western-style rationality is not natural.\textsuperscript{131} Hence, strategic action for some actors and activists do not necessarily have to be consequentialist, or bureaucracy or market oriented.\textsuperscript{132}

The reiteration of ideas within the international order may develop into norms/intersubjective beliefs that come to regulate socio-legal life and interactions. The factors that determine an idea’s metamorphosis into a norm are diverse. They include the identity of the actors projecting the ideas, the power struggles inherent in the communication and internalization of these ideas, and the receptivity of the international community to those ideas, among others. Mostly, where these ideas are accepted, they may be transformed into substantive regulatory norms. However, before one arrives at the point of substantive norms in investment dispute settlement, the interactions within the system generate several categories of norms. Like the categorization of actors discussed earlier in this part of the chapter, norms that govern actors’ engagement in the investment dispute settlement order exist on different parts of the continuum of norms and law-making. The categories – norms of participation, norms of interaction and regulatory norms – apply to actors depending on their identity in the international investment order. As I discuss in the concluding chapter of this thesis, norms of participation define the actors that may participate in investment dispute settlement

\textsuperscript{128} For a discussion of the role of “principled-issue” or “transnational advocacy networks” see Margaret E. Keck & Kathryn Sikkink, \textit{Activists beyond Borders: Advocacy Networks in International Politics} (Ithaca: Cornell University Press, 1998). See also Sanjeev Khagram, James V. Riker & Kathryn Sikkink eds., \textit{Restructuring World Politics: Transnational Social Movements, Networks and Norms} (Minneapolis: University of Minnesota Press, 2002).


\textsuperscript{130} Martha Finnemore, “Norms, Culture, and World Politics: Insights from Sociology’s Institutionalism” (1996) 50 Int’l Org. 325 at 330.

\textsuperscript{131} \textit{Ibid}. at 331.

\textsuperscript{132} Finnemore argues that for Westerners, the rational means to justice and progress are bureaucracies and markets. \textit{Ibid}. 

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proceedings, norms of interaction define the rules of engagement for legally recognized participants, while regulatory norms are the substantive rules that define the rights and obligations that proceed from dispute settlement proceedings. While most perspectives view the existence of norms as a broad category, proceeding from a TWAIL perspective allows a focus on how the norms derived from the investment dispute settlement order apply to actors differently. Thus, a TWAIL constructivist perspective is one that takes normative and ideational capabilities inherent in reiterated interactions as well as the several categories of norms that could be developed – ‘good’ and ‘bad’ – seriously.

D. Methods of Engagement with the Investment Dispute Settlement System

The call for dialogue may seem insufficient in the face of a powerful question: Why should the dominant heed such a call? … A dialogical response to domination, then, seems misguided – a noble but futile gesture at best, a deadly miscalculation at worst. It appears that we leave the oppressed with only two alternatives: to submit to oppression or resort to violent resistance.133

The fourth and final consideration in the components of a combined TWAIL and constructivist IR perspective focuses on the methods that actors adopt in their interaction within the dispute settlement system. Before Finnemore and Sikkink’s work on strategic social construction, constructivist IR theory regarded strategy as a part of rationalist thinking. Finnemore and Sikkink demonstrate that “social construction and norm emergence repeatedly reveal highly rational strategic interaction.”134 Strategies for both constructivists and TWAIL scholars range from dialogue, naming and renaming, persuasion, arguments and diplomacy, to even non-violent protests.

Depending on the needs and prevailing concerns and attitudes of the times, strategies and focus may vary, and more importantly, as subsequent chapters will demonstrate, identity often determines strategy. Thus, the work of early anti-colonial international law scholarship135 focused on the “liquidation” of colonialism and imperialism, and the formation of an

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133 Inayatullah & Blaney, supra note 5 at 219.
134 Finnemore & Sikkink, “International Norm Dynamics”, supra note 7 at 917.
international order that accounted for Third World interests. 136 These scholars concentrated significant efforts at constructing a New International Economic Order through the UN General Assembly where Third World states were in the majority. In more recent times, the contributions of social movements as well as NGOs to the development of international law have assumed a relevant position. 137 In the present international economic order, the work of both analysts and activists assume important proportions. In categorizing, it is important to note that the division between analysts and activists is not clearly defined because some actors straddle the turf as both analysts and activists. From academics that write about investment dispute settlement, experts within international institutions that contribute to shaping the knowledge and ideas that are applied in investment dispute settlement proceedings, lawyers that present alternative arguments before tribunals, activist arbitrators and judges that seek a redefinition of the rules of international foreign investment law, NGOs acting as norm entrepreneurs and participating in dispute settlement proceedings, to Third World grassroots movements interested in alleviating the plight of affected individuals and communities, all these actors contribute in one way or the other to a reconstruction of international law.

The actors deploy and contest the rules of international law simultaneously, and interact with domestic and international institutions. Sometimes discourses of human rights and development are adopted as discourses of resistance, while grassroots movements are avenues of resistance. 138 Despite the fact that these discourses are often considered part of traditional and hegemonic international law, they have not been particularly prevalent in investment dispute settlement, which may be regarded as part of the same system. In spite of their hegemonic nature, because of their viability as strategic tools and their acceptance in dominant discourse, cast in a counter-hegemonic mould, human rights and development retain the potential for reconstruction and “radical democratic possibilities.” 139 As a result, they continue


137 See Rajagopal, International Law from Below, supra note 1.


139 Ibid. at 769.
to serve meaningful purposes as strategic discourses of resistance. As discussed in chapter five of this thesis, in spite of references to an objective of development in ICSID’s founding documents, the development discourse has not formed a significant part of investment dispute settlement. However, it is not overambitious to suggest that NGOs might be forging an acceptance of the human rights discourse in investment dispute settlement, in very small, but sure strides.¹⁴⁰

In reconstructing the rules that drive the international investment order, activists are becoming increasingly invaluable; hence the focus on Third World peoples in this thesis. These peoples often forge alliances with analysts, for where there is commitment to identical interests, analyst-activist partnerships possess the ability to accentuate subaltern perspectives in articulating Third World peoples’ resistance in international law. It is in this sense that drawing from Finnemore and Sikkink’s strategic social construction, a strand of constructivism that Professor Okafor refers to as quasi-constructivism captures the work of Third World analysts and activists.¹⁴¹

Just as the constitution of actors, power relations, and normative and ideational factors matter, so does the strategy that actors adopt. For Third World peoples, the discourse and the strategy is one that challenges what actors consider as (domestic and international) oppression, “by directly engaging the oppressor in his or her own language and in terms of his or her own self-interest.”¹⁴² It is strategy that rather unfairly requires “a substantial mastery of the vernacular of the dominant.”¹⁴³ It is strategy that requires the deployment of certain language and discourses. And this form of engagement is not ideologically neutral. Alternative ideas are usually met with significant resistance. Often, there is no transformation of subjective meanings to intersubjective, and “agent action” sometimes does not become social structure.¹⁴⁴

These difficulties resonate with the insight that “new norms never enter a normative vacuum but instead emerge in a highly contested normative space where they must compete with other

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¹⁴⁰ See the discussion of Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic, (ICSID Case No. ARB/ 03/19) in chapter five of this thesis.
¹⁴¹ On quasi-constructivism, see supra note 75.
¹⁴² Inayatullah & Blaney, supra note 5 at 220.
¹⁴³ Ibid.
¹⁴⁴ Finnemore & Sikkink, “International Norm Dynamics”, supra note 7 at 914.
norms and perceptions of interest.” The need to situate emerging norms within a “logic of appropriateness” or in the case of legal rules, precedent, where such existing perspectives do not accommodate the alternative positions of analysts, and where relations of power – material and ideational – are present, makes it impossible to ignore the work of activists, for “standards of appropriateness are precisely what is being contested.” Finnemore and Sikkink note: “deliberate inappropriate acts (such as organized civil disobedience) … can be powerful tools for norm entrepreneurs seeking to send a message or frame an issue.”

Engaging within defined, and on the basis of accepted, methods categorized as “appropriate” presents a challenge to Third World peoples that adopt alternative language (for example, depicting issues in terms of needs like reduction of astronomical water rates) and alternative strategy (for example, organizing peaceful protests to communicate their positions). Where methods depart from precedent, it may be labeled in a manner that reads the acts and opinions out of the realm of the legal. At other times, methods may be legitimized based on the identity of the actor engaging in the act and the sensibilities of adjudicators to the methods. Thus, while a TWAIL constructivist perspective takes the work of both analysts and activists seriously, it is particularly interested in the methods that Third World peoples adopt in communicating their message. In this regard, the analysis in this thesis extends beyond state and foreign investor discussions and takes the contribution of Third World peoples and their strategic interaction within the system seriously.

**IV. Conclusion – Summary of the Chapter’s Arguments**

A TWAIL constructivist perspective provides the mechanisms for addressing the issues that this thesis discusses. It allows a focus on Third World peoples as actors in the international investment dispute settlement system, the power relations inherent in the interactions among actors in this realm, the ideational and normative opportunities that are presented, and the methods by which actors engage in the international order. Each of these components will

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147 *Ibid.* at 897.
form a subject of further analysis in this thesis’ discussion of the re-construction of the investment dispute settlement order under the auspices of ICSID.

The TWAIL constructivist perspective is a variant of an interactional perspective on international law, which provides mechanisms for accommodating the work of Third World peoples in international law. These peoples, in the process of interacting with the traditional actors – states, foreign investors, and international institutions – are able to articulate, argue, persuade, and sometimes demand more just conditions of existence, relationship and interaction. The form of interaction suggested in this chapter acknowledges but transcends diplomatic interaction between states and negotiation with some non-state actors like foreign investors and transnational NGOs. The interactional relationship envisaged involves engagement at multiple levels between Third World peoples and the other actors. It captures interactions on the domestic level between peoples’ groups and the government, and transference of this form of interaction to the international level. Without the former form of internal interaction, we again see a silencing of the peoples. While interaction at both local and international levels might appear complicated, a viable alternative does not seem apparent at this time, as the prevailing position where much of the interaction has been limited to traditional actors is less than satisfactory.

Fuller’s criterion of reciprocity is also mostly absent in the prevailing form of interaction among actors in international law. This lack of reciprocity is more problematic when power is only conceived of as material and asymmetrical. Where power’s relational nature is considered, one cannot ignore the fact that Third World peoples deploy some form of (mostly non-material) power in their interactions with traditional international actors. This chapter has shown that while an interactional theory of law has the potential to reinforce power relations, it remains a conception of law that can provide some meaningful changes in the manner in which the investment dispute settlement system operates. It reflects the importance of interactional processes, ideational perspectives, and strategic responses. It holds the promise of re-constructing the international investment order to attain a significant level of robustness.148

148 The theme of robustness runs through this thesis. For an exposition of this theme, see for example, Chapter 3, part V, section B(1).
CHAPTER 3: LOCATING ICSID IN THE INTERNATIONAL INVESTMENT SYSTEM

The Core of the Chapter’s Arguments*

This chapter provides a background to ICSID as an institution that contributes to the development of the international investment system through the work of the tribunals. It also assesses the role of the traditional actors – states and foreign investors – in this construction. In a TWAIL constructivist mould, it engages in a historical analysis of the place of traditional actors in investment dispute settlement, while subsequent chapters turn attention to Third World peoples. Since this thesis seeks to locate Third World peoples’ positionality in the system within the context of the traditional actors’ place, the chapter sets the stage for an understanding of the interaction between states, foreign investors and ICSID tribunals. The chapter argues that in spite of the resistance of Third World states to some investment law principles through the United Nations General Assembly in the 1970s, investment arbitration developed in a largely neoliberal economic mould that has come to define system. And this historical development of the system has shaped ICSID’s work since its establishment.

I. Introduction

The international law on foreign investment has a long history. In spite of this long history, it lacks clear and uncontested rules on investment promotion and protection. Because actors adopt different views and their interests are diverse, this area of the law has always generated opposing rules. However, towards the end of the 20th century, with the constant utilization of ICSID’s dispute settlement facilities and the conclusion of bilateral investment treaties (BITs) with similar yet diverse provisions, states seemed to begin to converge towards the enunciation of some basic principles that drive investment promotion and protection. Yet some actors do

* A version of parts of this chapter, especially parts IV and V and the discussions of the promise of ICSID, was originally published in Ibironke T. Odumosu, “The Antinomies of the (Continued) Relevance of ICSID to the Third World” (2007) 8 San Diego International Law Journal 345. A version of the discussions in part II of this chapter was originally published in Ibironke T. Odumosu, “The Law and Politics of Engaging Resistance in Investment Dispute Settlement” (2007) 26 Penn State International Law Review 251.

not cease to express dissatisfaction with some of these rules and their impacts. These rules are discussed in the fourth chapter of this thesis.

This chapter engages in a two-fold discussion of ICSID as part of the international legal order. First, it presents a brief history of investment dispute settlement and situates it within the broader framework of the development of international law. It situates ICSID in a historical context and discusses the background to its establishment. The chapter argues that the World Bank established ICSID against the backdrop of the need to protect foreign investment through the internationalization of investment dispute settlement, and the position that investment protection would facilitate investment flows to Third World states. It is arguable that when the neoliberal agenda gripped most of international economic law, investment law was not excluded from the changing ideology and ICSID was also co-opted. However, it is perhaps more plausible to suggest that ICSID itself was one of the early manifestations of the adoption of the neoliberal paradigm in international economic law.

Second, the chapter examines ICSID’s continued relevance in a multifaceted 21st century international legal order, especially in the face of non-economic concerns that have challenged international economic law. Because of its focus on international investment dispute settlement as opposed to international commercial arbitration or inter-state arbitration, ICSID is situated in a somewhat complicated position in present international legal discourse. While international commercial arbitration focuses on dispute settlement between private parties, and inter-state arbitration involves only states, investment arbitration oscillates between international commercial arbitration and inter-state arbitration. ICSID sits at the margins of international commercial arbitration and inter-state arbitration and borrows from both types of established dispute settlement mechanisms. Because international investment arbitration involves states and foreign investors, it is more complicated as it implicates the

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commercial interests of private parties, and states’ obligations and rights with all the public interest strings attached. The renewed interest in investment arbitration in the last quarter of the 20th century has not been restricted to the relations between states and foreign investors. Rather, investment arbitration garnered considerable international attention because it implicates international and local public interest, including environmental protection, labour and human rights, and for the Third World, the amorphous development issue. The times have changed since the *ICSID Convention* was drafted and the actors and interests that are relevant to the work of ICSID tribunals transcend traditional actors in this area of the law and their interests.

At the time the *ICSID Convention* was concluded, investment dispute settlement was construed in light of private economic dealings between the parties to the dispute. As a result, the drafters of the *ICSID Convention* did not explicitly contemplate the public interest issues related to foreign investment that have become prominent in contemporary discourse. However, the drafters did consider ICSID’s utility in facilitating economic development, since this was one of the premises on which the institution was promoted to the newly decolonized countries and other Third World countries. ICSID’s ability or inability to facilitate economic development in the Third World, or at least, tribunals’ ability to engage economic development issues forms the subject of the fifth chapter of this thesis. That subject merits separate discussion because the *travaux preparatoires* of the *ICSID Convention* and the document accompanying the *ICSID Convention* – the *ICSID Report* – assigned the work of balancing the needs of the Third World and foreign investors to ICSID. On multiple fronts – investment promotion, investment protection, public interest issues and economic development among others – ICSID’s ability to respond to the inevitable multiple interests that arise in investment dispute settlement is constantly called into question through the interaction of the actors in this area of the law.

Since its inception, ICSID has acquired growing importance both to Third World states and foreign investors for several reasons. First, ICSID specializes in the settlement of foreign investment disputes at a time where foreign investment has become a major contributor to capital by which Third World states seek to fuel their economies. Second, there is a recent proliferation of BITs, which usually include Third World state parties, with ICSID
arbitration clauses for the settlement of disputes. Third, in a bid to attract foreign investment, many Third World states have enacted investment promotion legislation that refer disputes to ICSID. Fourth, ICSID is an arm of the World Bank – an institution that reiterates its commitment to development and is one of the major international financial institutions (IFIs) that make decisions that affect Third World states. In addition, ICSID arbitration clauses are included not only in BITs and domestic investment promotion legislation, but also in multilateral instruments like the North American Free Trade Agreement (NAFTA), the Colonia Protocol for Reciprocal Promotion and Protection of MERCOSUR Investments, and the Energy Charter Treaty (ECT).

In order to understand ICSID’s relationship with the Third World, it is important to recall that like most of the international economic order, ICSID dispute settlement is multifaceted. The institution is not autonomous but is situated at the intersection of law (the ICSID Convention and rules, including applicable procedural and substantive laws, and arbitral tribunals), politics (the broader framework of developed world/Third World relations), and economics (World Bank lending and surveillance, and World Bank administered dispute settlement institution). In addition to these intersections, ICSID dispute settlement addresses investment disputes that often implicate issues of international magnitude that affect the welfare of local populations including indigenous peoples’ rights, environmental protection and human rights. Also, investment

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dispute settlement now includes several relevant actors with different interests. From foreign investors, home states, host states, to peoples’ movements and NGOs, the range of actors is immensely broad. ICSID tribunals have mostly focused on the commercial interests of foreign investors and states. While the protection of foreign investment is a necessary and legitimate endeavour, a lopsided commitment to investment protection without adequate attention to other interests that investment activities affect might not bode well for the continued development of an international law on foreign investment that reflects the interests of all relevant actors. And of course, a neglect of the interests of foreign investors is not the strategy to adopt either. Thus, in order to ensure that ICSID retains its relevance and legitimacy within the international order, ICSID tribunals need to constantly engage multiple and diverse interests in settling investment disputes.

The next two parts of this chapter situate ICSID within broader historical and contemporary contexts of investment dispute settlement. These discussions are intended to aid in locating ICSID’s position in this realm. Part II involves a brief description of the phases of investment dispute settlement, while Part III is a historical account of the development of investment dispute settlement generally, and of ICSID in particular, as an enduring part of the international legal order through the jurisprudence of dispute settlement tribunals. These discussions seek to accentuate the relationship between the Third World and this area of the law and highlight the impacts of the interaction between states and foreign investors on the peoples of the Third World. The balance of the chapter discusses the promise of ICSID and the ambivalence of some Third World states towards the system. In sum, this chapter analyzes the place of traditional actors in the ICSID system.

II. From the Past to the Present: The Phases of Investment Dispute Settlement

Like other areas of international law, the international law on foreign investment has experienced several phases in the course of its development and still continues its metamorphosis in the 21st century. In no area of foreign investment law is this metamorphosis more pronounced than in investment dispute settlement. Historically, developed states adopted leadership roles in the development of the international economic order, while Third World states largely reacted to the changes that emerged. However, the 1970s witnessed active Third
World states’ participation in driving the law-making. Also, the 21st century has shown a more pronounced Third World peoples’ engagement with investment activities and has also witnessed some changes to investment dispute settlement rules.9

Before ICSID’s establishment in the decolonization and early postcolonial era of the 1960s, investment dispute settlement mechanisms had emerged in the colonial era. Beginning in the mid 1990s, there has been another era, which I term the new phase of investment dispute settlement.10 Each phase – the colonial era, the decolonization/early postcolonial era and the contemporary era – proceeds with a common purpose, that is, the protection of global capital and states’ economic well-being. While the investment protection purpose still predominates, it competes with the new agenda of some states to rewrite, or at least, amend applicable rules to accommodate their interests as defendants. In spite of the phases’ similar focus and agenda, international actors adopt different strategies and appropriate ‘technologies’ for achieving their purposes.11 A brief discussion of these phases of investment dispute settlement follows before attention turns to the recent history of investment dispute settlement and the establishment of ICSID in the next part of this chapter.

A. The Colonial Era

Like most areas of international law, the international law on foreign investment developed partly in response to, and as a component of, broader Third World-developed state relations. In the colonial era, the primary motivating factor was developed states’ desire to protect the property of their nationals in Third World countries, prompting Professor Anghie to allude to the “colonial origins of foreign investment law as an academic discipline.”12 Many of the


11 In this thesis, the term “technologies” denotes the strategies and methods that major actors in the international investment order adopt in response to the challenges and developments in each phase of the development of the international investment order.

customary international law rules that apply to foreign investment, especially regarding the protection of the property of aliens, were developed in this era.\footnote{See Vandevelde, \textit{supra} note 10 at 159.}

During the colonial era, foreign investment protection was assured through the merger of the legal systems of the colonized and the colonial power, and where this failed or where the territory in question was independent of a colonial power, gun-boat diplomacy was adopted.\footnote{See M. Sornarajah, \textit{The International Law on Foreign Investment} (Cambridge, England: Cambridge University Press, 2004) 37 [Sornarajah, \textit{International Law on Foreign Investment}].} As a result of this colonial paradigm, the need for an international dispute settlement institution was minimal. This was the age where diplomatic protection extended to the commercial interests of foreign investors. Because of the power asymmetry that prevailed in this colonial era, many states that now self-identify as Third World states did not directly participate in the development of international foreign investment law, even though the law emerged through interactions with these states and their peoples.

During this era, investment dispute settlement was mostly a state-state relationship. This dispute settlement format partially explains the significant exclusion of many colonies from the formal (non-violent) processes of dispute settlement because they were not independent and were largely excluded from organizing their affairs in the international order. During this time, some Latin American states adopted the Calvo Doctrine, which maintains that the host country has jurisdiction to settle foreign investment disputes.\footnote{On the Calvo clause, see generally, Donald R. Shea, \textit{The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy} (Minneapolis: University of Minnesota Press, 1955). Latin American states were not alone in adopting the Calvo Doctrine. Before many developed states became parties to the ECT, they employed similar arguments that excluded oil and gas disputes from international arbitration. See Walde, “\textit{From Dispute Settlement to Treaty Implementation}”, \textit{supra} note 8 at 437-38. For a discussion of the Calvo clause in the ICSID context, see Ibrahim F.I. Shihata, \textit{Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA} (Washington D.C.: ICSID, 1993) [Shihata, \textit{Towards a Greater Depoliticization of Investment Disputes}].} Arbitration as an international commercial dispute settlement mechanism also has its antecedents in this era.\footnote{See Amr A. Shalakany, “\textit{Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism}” (2000) 41 Harv. Int’l L.J. 419 at 431.} However, after the end of direct colonial domination, the use of force and colonial dominance as dispute settlement mechanisms continued to influence the reactions of Third World states to foreign investment and informed the actions that they embarked on, including the perceived need to
rewrite the rules of international law.

B. The Decolonization/Early Postcolonial Era

In the early postcolonial era, institutionalized investment arbitration emerged. At this time, the dominant technologies of the colonial era were no longer legally and directly available. While state-state dispute settlement predominated in the colonial era, the early postcolonial era witnessed the institutionalization of investor-state arbitration. ICSID was established at this time.

Since this chapter discusses the development of the law in this era, not much time will be spent on elucidating the strategies adopted during the era. It suffices to note that the predominant investment protection focus continued to prevail although the mechanisms for dispute settlement involved less recourse to the use of force but to arbitration, mostly through the internationalization of investment disputes and investment arbitration.

C. The New Phase of Investment Dispute Settlement

The mid-1990s signaled the beginning of the present dispensation in the international investment system. Presently, there has been a proliferation of investor-state dispute settlement cases, with some developed states as defendants. In this era, the interaction has expanded to include states and foreign investors as well as Third World peoples groups and NGOs. On the state level, some developed states are once again significantly engaging in re-developing the rules that govern the system. However, unlike the earlier periods, the rules are not being reformulated in this era solely to protect foreign investment. They also seek to protect the interests of defendant states in investor-state arbitration proceedings. The rationales for the emerging rules echo earlier Third World states’ arguments on the invasive nature of some international investment rules.

Before the 1990s, investment rules seemed settled, at least from the perspective of major capital exporting countries, until investor-state arbitration was extended to developed-state defendants. From this time, the rules appeared biased in favour of investors’ interests, and
economically powerful states increasingly adopted formerly untenable Third World arguments. These earlier rejected arguments, including concerns about the erosion of regulatory sovereignty, have gained currency in some fora.\textsuperscript{17} There are now appeals to the prevalent discourse of humanitarianism that pervaded international law in the second half of the 20\textsuperscript{th} century. The changing investment dispute settlement order in the present phase is often regarded as a brain-child of the NAFTA developed-state parties.\textsuperscript{18} This developing investment order is somewhat sympathetic to the views of these states, which have had to defend their policies and actions in investor-state arbitration. In its present state, investment arbitration is relatively more sensitive to the position of states generally, compared to the earlier fixation on foreign capital. In fact, a Government representative interviewed for this thesis, suggested that some investors appear to prefer the open-endedness of other mechanisms, like dispute settlement based on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.\textsuperscript{19} However, another interviewee, a counsel and arbitrator, noted that notwithstanding deficiencies in the ICSID system, investors still prefer an institutionalized dispute settlement system because it mitigates the imbalance of power between states and investors.\textsuperscript{20}

In addition to the growing influence of states, one of the changes that have emerged in this phase of investment dispute settlement is the admission of non-disputing parties’ (primarily NGOs) limited participation as \textit{amicus curiae} where such privileges are granted. With this participation, investment law is infused with some environmental and human rights causes. However, it still remains largely insulated from some Third World peoples’ sensibilities and does not necessarily take these peoples’ struggles, resistance, and perspectives into account. As changes crystallize in the present phase, it is imperative that Third World peoples’ views and interests are taken seriously in order to ensure that the system incorporates all relevant actors.

\textsuperscript{18} \textit{Ibid.} at 366, 370-371.
\textsuperscript{19} Interview No. 301, June 21, 2007. Transcripts on file with author.
\textsuperscript{20} Interview No. 203, March 15, 2007. Transcripts on file with author.
III. The Establishment of a Neo-Liberal Investment Protection Mechanism

In the introductory part of this chapter, I alluded to the point that the investment dispute settlement system was co-opted into the ideology of neo-liberal economics. But even more so, internationalized investment dispute settlement generally, and ICSID in particular, are part of the establishment of this perspective. This part of the chapter traces the establishment of the neoliberal paradigm in the investment dispute settlement system.

A. Reading ICSID’s Establishment in the Context of Early Investment Arbitrations

International investment arbitration has always generated ideological conflicts involving the oscillating categories of capital importers (mostly Third World countries) and capital exporters (mostly developed countries). ICSID was established at a time when the demarcation between these groups of states was relatively better defined. Its creation was partly a reaction to what many capital exporting countries and multinational corporations considered as threats to their economic interests in the Third World. The ICSID Convention was drafted in the heydays of Third World nationalist convergence and at a time when the vestiges of direct colonial domination were crumbling. As noted in the preceding part, before this time, colonialism provided other mechanisms that became illegitimate in the post-colonial era. The earlier mechanisms of colonial domination and gunboat diplomacy as the primary choices for investment protection reflect the power asymmetry that exist(ed) in the international system. Indeed, the development of the international law on foreign investment has involved power exertion and struggles within the international order, not only among states but also with non-state actors like foreign investors and NGOs exerting significant influence in this area of the law.

Early companies like the Dutch East India Company and the British East India Company contributed to colonial expansion. International law doctrines were developed in a bid to accord legal personality to trading companies. These companies asserted sovereign rights over colonized peoples that were not regarded as sovereign by international law. Anghie notes that

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these companies’ charters allowed them to trade, wage war with natives, make peace, and even to coin money.23 Lindley articulates the position of these companies succinctly:

Formed in most cases, at all events from the point of view of the shareholders, for the purpose of earning dividends, these corporations have proved to be the instruments by which enormous areas have been brought under the dominion of the States under whose auspices they were created, and in this way they have been utilized by all the important colonizing Powers. The special field of their operation has been territory which the State creating them was not at the time prepared to administer directly, but which offered good prospects from the point of view of trade or industrial exploitation.24

Subsequently, from the 19th century, European states assumed direct responsibility for colonial territories and dissolved these companies.25 Nevertheless, the imperialistic missions of these companies and the international law that provided room for their legal operations had been established. To some extent, that law, for example on legal personality, continues to endure.

Prior to the development of the investment treaties that drive the international law on foreign investment during the present era, states had embarked on programs of concluding Treaties of Friendship, Commerce and Navigation. In addition, capital exporting states of the colonial era and Latin American countries had diverse opinions with regards to the formulation of the appropriate standards of compensation26 and the ability to situate investment disputes within the international realm.27 The early petroleum concessions provided opportunities for considering these divergences in arbitral jurisprudence and the clamour for a new international economic order in the 1970s also provided a broad forum for a discussion of these issues.

During the 20th century, many capital importing states discovered petroleum within their territories. At this time, petroleum concessions garnered immense international attention and formed the subject of many investment disputes. These capital importing states granted

23 Ibid.


26 See part II of chapter four of this thesis for a discussion of differences in the Hull doctrine and the appropriate compensation standard.

27 See *supra* note 15 for literature on the Calvo doctrine.
concession rights to foreign investors that covered the entire territories over which these states had sovereignty. For example, the contract that was contested in Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi (Abu Dhabi Arbitration), defined the area included in the concession granted to the Petroleum Development (Trucial Coast) Limited as “the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area.”

The definition continued: “And if in the future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area shall coincide with the limits specified in this definition.”

These wide ranging (in terms of geographical coverage) concession contracts were not uncommon. A similar agreement was the subject of the dispute in the Petroleum Development (Qatar) Ltd v. Ruler of Qatar arbitration. In this instance, the Shaikh had concluded an agreement with the Anglo-Persian Oil Company Ltd., whereby the former had granted to the latter, “the sole right throughout the Principality of Qatar to explore, to prospect, to drill for and to extract and to ship and to export, and the right to refine and sell petroleum and natural gases, ozokerite, asphalt and everything which is extracted therefrom.” These agreements were usually construed as beneficial to the host states that, even though they had huge reserves of natural resources, did not possess the technological know-how for exploiting these resources. As such, it is possible that the states thought it better to grant rights covering the whole territory over which they had sovereignty in order to maximize their benefits. However, in current times, other types of agreements like joint ventures, production sharing contracts and service contracts have replaced these types of concession agreements and it is no longer common to grant one company extensive rights over all the petroleum resources within the entire territory of a state. Nevertheless, there is continued recourse to some terms of


29 Abu Dhabi Arbitration, ibid.

30 Petroleum Development (Qatar) Ltd. v. Ruler of Qatar (1951) 18 I.L.R. 161.

31 See ibid. at 161. These concession agreements usually excluded religious sites, cemeteries and other similar lands from their purview.

agreements that applied in some cases during the earlier periods. For example, many Third World states exclude foreign investors from some taxes and duties in order to provide incentives to these investors and to attract more foreign investment. This practice is not new. Article 13 of the agreement that was the subject of interpretation in *Ruler of Qatar v. International Marine Oil Company Ltd. (Qatar Arbitration)* includes a similar provision.\(^{34}\)

While a state might validly adopt tax holidays and tax exemption schemes as part of its foreign investment attraction policy, the lone reference to the obligations of the company in justifying the tax exemption in article 13 (even though the concession agreement also conferred rights and benefits on the concessionaire), suggests that the system is mostly beneficial to the state. However, it is trite that the company would not continue to operate an unprofitable venture.

Partly because of the historical origins of international law, Third World states perceived a need to redefine international economic law. This history produced resistance from these state actors. The earliest of the international gatherings that suggested solidarity among Third World states was the meeting of African and Asian states in Bandung, Indonesia in 1955. Even though Third World states adopt diverse domestic strategies, they emerged from the Bandung conference with some central themes including forging “a common Third World consciousness” and the promotion of decolonization and economic development.\(^{35}\) By the 1970s, the states that coalesced around these themes became larger and formed the Group of 77, which is now really a group of 130 Third World states.\(^{36}\) Thus, in spite of their different views on issues (for example, the more developed G-77 members appear to prefer more conciliatory negotiations, while the others could be more confrontational),\(^{37}\) they manage to adopt similar themes in international fora where necessary. The solidarity of Bandung was


\(^{34}\) The Agreement between the Shaikh of Qatar, and Sir Hugh Weightman & Robert Morton Allan Jr. of August 5, 1949 is available at the Archives (and Special Collections) of the School of Oriental and African Studies (SOAS), University of London; Archived as: Professor Norman Anderson, 1/6 Ruler of Qatar and Oil Co. Arbitration, PP MS 60/1/1-6, Box 1. *Ruler of Qatar v. International Marine Oil Company Ltd.*, (1953) 20 I.L.R. 534 [Qatar Arbitration].


\(^{36}\) “Member States of the Group of 77”, online: Group of 77 <http://www.g77.org/doc/members.html>.

\(^{37}\) Rajagopal, *supra* note 35 at 87.
transported to the United Nations (UN) General Assembly where they espoused views that were usually contrary to those of many industrialized states.

These UN efforts culminated in declarations like the *Declaration on Permanent Sovereignty over Natural Resources*,\(^{38}\) the *Charter of Economic Rights and Duties of States*,\(^{39}\) and the *Declaration on the Establishment of a New International Economic Order* (NIEO).\(^{40}\) The *Charter of Economic Rights and Duties of States* received a vote of 120 in favour, six against, and ten abstentions. Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States entered negative votes, while Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain abstained.\(^{41}\) While the Charter that was supposed to usher in a new international economic order received overwhelming support from the Third World, one of its most problematic provisions for industrialized states was the provision on expropriation and the regulation of foreign investment.\(^{42}\) In addition to the changing views of Third World states at the UN General Assembly, the wave of nationalizations that accompanied the decolonization movement posed threats to the economic interests of erstwhile colonial powers. The nationalizations also fostered the development of investment protection mechanisms separate from the domestic jurisdiction of host states. In the post-World War II era, investment disputes became increasingly internationalized, as they were subject to international arbitration and the application of international law, and not just the municipal law of the host state as the applicable law. This move was mainly due to the perception of foreign investors and their home states that the application of the host state’s law and adjudication by domestic tribunals in the host state might be prejudicial to the investors’ interests.\(^{43}\)

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\(^{38}\) *Declaration on Permanent Sovereignty over Natural Resources*, G.A. Res. 1803 (XVII), (December 14, 1962), 17 UN GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217; and also G.A. Res. 3171 (XXVIII).


\(^{42}\) Ibid.

Internationalization further permeated the system through frequent insertion of arbitration clauses, stabilization clauses, and choice of law clauses into investment contracts. These clauses indicated that investment contracts were not subject to municipal law.\footnote{Sornarajah, Settlement of Investment Disputes, supra note 3 at chap. 8.} In the 1950s, three international arbitral awards contributed to shaping the internationalization of investment disputes. In the \textit{Abu Dhabi Arbitration},\footnote{\textit{Abu Dhabi Arbitration}, supra note 28.} the \textit{Qatar Arbitration},\footnote{\textit{Qatar Arbitration}, supra note 34.} and \textit{Saudi Arabia v. Arabian American Oil Company (Aramco Arbitration)},\footnote{\textit{Aramco Arbitration}, supra note 32.} the contracts had the closest connections to the laws of the host states.\footnote{Sornarajah, Settlement of Investment Disputes, supra note 3 at 251-52. See also \textit{Texaco Overseas Oil Petroleum Co. v. Libyan Arab Republic} (1979) 53 I.L.R. 389 [\textit{Texaco Arbitration}].} \textit{Dicta} in the awards suggest that the arbitrators considered that the applicable law was inescapably the domestic laws of the host states according to prevailing legal authority at the time. Like in the \textit{Qatar Arbitration}, the arbitrator in the \textit{Abu Dhabi Arbitration} – Lord Asquith – found that domestic laws of the host state were not mature enough to deal with petroleum disputes emerging from state contracts and as a result of the perceived lacuna, applied the general principles of law recognized by “civilized nations” to the dispute. On its part, the tribunal in the \textit{Aramco Arbitration} adopted a more sophisticated approach to its application of international law in addition to Saudi Arabian law.

Internationalization of foreign investment disputes was the rational choice for industrialized states and foreign investors at the time, given the colonial history of their interaction with Third World states. Professor Dupuy noted in \textit{Texaco Overseas Oil Petroleum Co. v. Libyan Arab Republic (Texaco Arbitration)} that “[t]he recourse to general principles is to be explained not only by the lack of adequate legislation in the State considered (which might have been the case, at one time, in certain oil Emirates). It is also justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State.”\footnote{\textit{Texaco Arbitration}, ibid. at 454.} Generally, internationalization reflected a discomfort with the laws of Third World states and their ability to ensure justice for foreign investors and to protect the latter’s commercial interests. By placing investment disputes within the international domain, former colonial powers could ensure that their economic interests remained within structures that were
readily accessible to them. While decolonization and the need to continue to protect foreign investment contributed to the internationalization of foreign investment disputes and arbitration, some arbitral awards also facilitated the internationalization of arbitral disputes. They contributed to the foundation-laying processes of the international investment arbitration mechanism that has become prevalent. The *Abu Dhabi Arbitration* was one of those cases that contributed to this legal machinery.

In the *Abu Dhabi Arbitration*, the dispute involved the determination of the extent of the territory (territorial waters and continental shelf) of Abu Dhabi that was part of a concession agreement. Although the decision includes one of the early judicial commentary on the doctrine of the continental shelf in international law, the major part of the award that is of interest to this discussion is the discussion of the proper law applicable in construing the parties’ contract. On this note, Lord Asquith stated:

> This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. … The terms of that Clause [article 17 of the concession agreement] invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations – a sort of ‘modern law of nature’.50

English Law was also deemed inapplicable but Lord Asquith observed that some of the rules of English Municipal Law are “so firmly grounded in reason as to form part of this broad body of jurisprudence – this ‘modern law of nature’.”51 For him, some English rules are principles of “ecumenical validity.”52 In his expert evidence later in the *Qatar Arbitration*, Islamic Law expert, Professor Norman Anderson, disagreed with Lord Asquith’s statement cited above that

50 *Abu Dhabi Arbitration*, *supra* note 28 at 149. Article 17 states as follows: “The Ruler and the Company both declare that they base their work in the Agreement on goodwill and sincerity of belief and on the interpretation of the Agreement in a fashion consistent with reason. The Company undertakes to acknowledge the authority of the Ruler and his full rights as Ruler of Abu Dhabi and to respect it in all ways, and to fly the Ruler’s flag over the Company’s buildings.” See page 148.

51 *Abu Dhabi Arbitration*, *ibid.* at 149.

the “Sheikh administers a purely discretionary justice with the assistance of the Koran.”

Nevertheless, the referee in the Qatar Arbitration cited Lord Asquith’s dictum with approval.

In discussing these cases, the intention is not to suggest any bias against particular actors or in favour of another group during the 1950s. In fact, in the Qatar Arbitration, the state was not only the claimant, the award made was in its favour. What this line of cases reveals is a systematic movement away from the domestic law of Third World states as the source of law for investment arbitration towards more general principles, even if it was not exactly a direct move to international law as a source at this time. The Qatar Arbitration involved a dispute over the amount payable by the respondent under the concession agreement that it concluded with the claimant state. Given that Islamic Law was applicable in Qatar, the referee, Sir Alfred Bucknill, heard evidence from two expert witnesses on Islamic Law, Professor Norman Anderson and Professor Louis Milliot. On the question of the applicability of Islamic Law to the construction of the agreement, Professor Anderson was of the opinion that having heard a recitation of the issues between the parties in the arbitration, there was no reason why Islamic Law should be incapable of providing a solution to the dispute being arbitrated. However, since the parties had failed to stipulate the law applicable in the event that a dispute ensued in their arbitration clause, the issue of the applicable law fell to the referee as an issue for decision.

53 The evidence of Professor Norman Anderson is available at the Archives of the Library of the School of Oriental and African Studies (SOAS): PP MS 60/1/1-6, Box 1, Professor Norman Anderson, 1/6 Ruler of Qatar and Oil Company Arbitration at page 4 [Professor Anderson].

54 See infra notes 61-62 and accompanying text.

55 Qatar Arbitration, supra note 34.

56 The note attached to the Qatar Arbitration stated that the arbitration was not an international arbitration in the strict sense. See the Qatar Arbitration, ibid. at 547. Thus, even though Qatar submitted the case to arbitration, like many capital importing states of the time, it was not necessarily in favour of international arbitration as a means of settling investment disputes.

57 Qatar Arbitration, ibid., at 544. See also Professor Anderson, supra note 53; The Proof of Evidence of Professor Louis Milliot is available at the Archives of the Library of the School of Oriental and African Studies (SOAS): PP MS 60/1/1-6, Box 1; Professor Norman Anderson, 1/4 Professor Louis Milliot [Professor Milliot].

58 Professor Anderson, ibid., at 8. In addition, on page 16, Professor Anderson concluded that he knew of no gaps or omissions in Islamic Law to make it incapable of answering the problems in the arbitration.

59 See section 28 of the Agreement between the Shaikh of Qatar, and Sir Hugh Weightman & Robert Morton Allan Jr. of August 5, 1949 which is available at the Archives (and Special Collections) of the School of Oriental and African Studies (SOAS), University of London; Archived as: Professor Norman Anderson, 1/6 Ruler of Qatar and Oil Co. Arbitration, PP MS 60/1/1-6, Box 1. In another concession agreement that involved Qatar, the
In coming to his decision, the referee applied “principles of justice, equity and good conscience”, which the respondent relied on in its pleaded answer.\textsuperscript{60} He specifically considered whether Islamic Law or the principles of natural justice and equity should be the proper law to be applied in the construction of the agreement. The referee stated the considerations in favour of the application of Islamic Law as follows: “[i]f one considers the subject matter of the contract, it is oil to be taken out of ground within the jurisdiction of the Ruler [of Qatar]. That fact, together with the fact that the Ruler is a party to the contract and had, in effect, the right to nominate Qatar as the place where any arbitration arising out of the contract should sit, and the fact that the agreement was written in Arabic as well as English, points to Islamic law, that being the law administered at Qatar, as the appropriate law.”\textsuperscript{61} However, relying on the decision of Lord Asquith of Bishopstone in the \textit{Abu Dhabi Arbitration}, the Referee noted that “there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments.”\textsuperscript{62} He continued that he was satisfied that Islamic Law “does not contain any principles which would be sufficient to interpret this particular contract.”\textsuperscript{63} But as noted earlier, in his expert opinion, Professor Anderson had suggested that Islamic Law had the capability to settle the dispute in question.\textsuperscript{64} The referee concluded that neither party intended Islamic Law to apply and that they intended that the agreement should be governed by the principles of justice, equity and good conscience.\textsuperscript{65}

The third case in the line of arbitral awards discussed in this section, the \textit{Aramco Arbitration}, resonates more with present-day investment arbitration issues in terms of detail and reasoning. This award involved a declaration on the rights of the parties. It considered state responsibility for interfering with concession contracts and the extent of regulatory power exercisable over private parties to such concession contracts (although the tribunal determined the interference arbitration clause provided that arbitral awards should be consistent with the “legal principles familiar to civilised nations”. See Petroleum Development (Qatar) Ltd. v. Ruler of Qatar (1951) 18 I.L.R. 161 at 162.

\textsuperscript{60} \textit{Qatar Arbitration, supra} note 34 at 541.
\textsuperscript{61} \textit{Ibid.} at 544.
\textsuperscript{62} \textit{Ibid.}
\textsuperscript{63} \textit{Ibid.} at 545.
\textsuperscript{64} See \textit{supra} note 53.
\textsuperscript{65} \textit{Qatar Arbitration, supra} note 34 at 545.
in this case not to be a regulation or in the nature of a regulation, but a contract that cannot have effects on third parties that are not privy to it or on a prior concessionaire). Remarkably, the negotiations of the arbitration agreement and the attempts at the resolution of the disagreement between the parties were embarked upon in “a spirit of conciliation and justice” to which the arbitral tribunal felt bound to pay tribute. Nevertheless, subsequently, Saudi Arabia acquired 25 percent interest in Aramco in 1973, and in 1980, it eventually acquired 100 percent participation interest in Aramco and purchased almost all of its assets. In 1988, the Saudi Arabian Oil Company (Saudi Aramco) was established. Thus, Aramco became Saudi Aramco, which is the state-owned national oil company of Saudi Arabia and is the world’s largest oil company in terms of production and oil reserves.

It was in the Aramco Arbitration that the tribunals moved explicitly from general principles to the application of the whole gamut of public international law in a carefully considered opinion. However, this was not the first time that a tribunal was applying international law in an investor-state dispute. In the Lena Goldfields Arbitration between the Lena Goldfields Ltd. and the Soviet Government, decided on September 3, 1930, the tribunal accepted the contention of the investor that Russian law was applicable to domestic matters but on all other matters, international law (specifically, the general principles contemplated by article 38 of the Statute of the International Court of Justice (ICJ), then the Permanent Court of International

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66 For the discussions and negotiations that preceded the drafting of the arbitration agreement, see “Onassis Agreement – 1955 Discussions” which is available at the Archives and Special Collections of the School of Oriental and African Studies (SOAS), University of London; Archived as: Professor Norman Anderson, 1/7(i)&(ii) Onassis Agreement, PP MS 60/1/7-11 (Norman Anderson) Box 2. During the negotiations of the arbitration agreement, the Government’s representatives reiterated that even though they were submitting the disagreements to arbitration, they could not find an amicable solution between the government and Aramco, the arbitration was to be conducted in friendly manner intended to preserve the cordial relationship between them and Aramco. See for example, page 3 of the discussions cited above. In the preamble to their arbitration agreement, the parties also insisted on “following the traditions of friendship and good will.” The Arbitration Agreement is included after the conclusion of the tribunal’s award. Aramco Arbitration, supra note 32 at 229.

67 Aramco Arbitration, ibid. at 130.


69 Even though the Abu Dhabi and Qatar tribunals did not refer to article 38(1)(c) of the Statute of the International Court of Justice’s (ICJ) “general principle of law recognized by civilized nations”, it is arguable that in referring to general principles, they were in effect, applying international law. In fact, in the Texaco Arbitration, Professor Dupuy noted that “[i]nternational arbitration case law confirms that the reference to the general principles of law is always regarded to be sufficient criterion for the internationalization of a contract.” See Texaco Arbitration, supra note 48 at 453. On this note, he cited inter alia, the Qatar and Abu Dhabi arbitrations as examples.
Justice) was the proper law of the contract.\textsuperscript{70} In its sophisticated consideration of the law(s) applicable to the arbitration and to the construction of the substance of the dispute, the Aramco tribunal was open to the application of quite a range of legal sources. Unlike the earlier cases, the parties to the \textit{Aramco Arbitration} concluded an arbitration agreement when the dispute ensued.\textsuperscript{71} Article 4 of this agreement included a choice of law clause. Since this provision triggered the lengthy discussion of the applicable law issue in the award, I find it pertinent to reproduce it here:

\begin{quote}
The Arbitration Tribunal shall decide this dispute
\begin{itemize}
\item[a.] in accordance with the Saudi Arabian law, as hereinafter defined, in so far as matters within the jurisdiction of Saudi Arabia are concerned;
\item[b.] in accordance with the law deemed by the arbitration tribunal to be applicable in so far as matters beyond the jurisdiction of Saudi Arabia are concerned.
\end{itemize}

Saudi Arabian law, as used herein, is the Moslem law
\begin{itemize}
\item[(a)] as taught by the school of Imam Ahmed ibn Hanbal
\item[(b)] as applied in Saudi Arabia
\end{itemize}
\end{quote}

First, the tribunal noted that breaking up applicable laws on the basis of jurisdiction is problematic. Second, it rejected any suggestions that the first clause (b) was subordinate to the first clause (a). Third, it also rejected the notion that the law of the seat of arbitration should be applicable. Prefacing its reasoning with these statements, it went ahead to consider the laws that may be applicable in the arbitration. It divided the applicable law into two broad groups. First, it determined the law that governs the arbitration, and second, the law applicable to the merits of the dispute, noting that the “law governing the merits is independent of the law governing the arbitration itself.”\textsuperscript{72} On the law that governed the arbitration, the tribunal concluded that the arbitration “can only be governed by international law,” having rejected the applicability of laws of the \textit{lex loci arbitri} – Geneva, Switzerland – because of the jurisdictional immunity of the state involved.\textsuperscript{73} Thus, it introduced international law into the picture of the arbitration through its consideration and rejection of several principles of private international law. It transported the arbitration into the international realm by deeming


\textsuperscript{71} For the arbitration agreement, see pages 229-233 of the \textit{Aramco Arbitration} supra note 32.

\textsuperscript{72} \textit{Aramco Arbitration}, \textit{ibid.} at 156.

\textsuperscript{73} \textit{Ibid.}
international law as the law applicable to the arbitration and setting the stage for the nature of investment arbitration cases that were subsequently decided.

In determining the law to be applied to the merits of the dispute, the tribunal also resorted to the rules of private international law. Aramco contended that the principles of Moslem Law enunciated by the Hanbali School were not sufficiently developed to determine the legal nature of the oil exploitation and the operations involved in the process. It urged the tribunal to “delocalize” the oil concession because of its international connections and assimilate it into an international treaty governed by international law. 74 On its part, the tribunal noted that the “regime of mining concessions, and, consequently, also of oil concessions, has remained embryonic in Moslem law…” 75 It was of the view that the King of Saudi Arabia had the capacity to fill “this lacuna in Moslem law, as taught by the Hanbali school” as he deems most appropriate, for example, through a concession contract. 76 Thus, for the matters governed by the law expressly chosen by the parties – Saudi Arabian law – the tribunal was willing to apply that law in its considerations. 77 Notably, the tribunal curtailed the applicability of Saudi Arabian law by imposing reservations upon its application. It stated that the law of Saudi Arabia, where applicable, “must, in case of need, be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence, in particular whenever certain private rights – which must inevitably be recognized to the concessionaire if the Concession is not to be deprived of its substance – would not be secured in an unquestionable manner by the law in force in Saudi Arabia.” 78

However, for the matters which were not governed by Saudi Arabian law (because of “objective” considerations and the parties’ subsequent conduct), it decided to adopt the law that best corresponds “to the nature of the legal relationship between the parties.” 79 For the

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74 Ibid. at 162.
75 Ibid. at 163.
76 Ibid.
77 Ibid. at 167.
78 Ibid. at 169.
79 Ibid. at 167.
tribunal, the concession was the “fundamental law” of the parties. According to its reasoning, this agreement filled the lacuna in Saudi Arabian law and “has the nature of a constitution which has the effect of conferring acquired rights on the contracting parties.” It also adopted general principles of law in the interpretation of the agreement and in supplementing the rights and obligations of the parties. In sum, the tribunal was willing to adopt a wide range of laws, including a supervised and curtailed application of Saudi Arabian law, without also foregoing the possibility of applying international law “to the effects of the Concession, when objective reasons lead it [the tribunal] to conclude that certain matters cannot be governed by any rule of municipal law of any State…”

The three decisions discussed above and others provided an impetus for the internationalization of investment disputes. They laid the foundation for the establishment of an institution like ICSID. In fact, the discussion of the applicable law in the Aramco Arbitration is akin to similar discussions in present-day investment arbitrations. While not necessarily rejecting the applicability of domestic law, it placed the arbitration in the international realm and gave primacy to the concession contracts, as is done with investment treaties. At a time when investment disputes had been internationalized, the ICSID tribunal in Antoine Goetz and others v. Republic of Burundi noted that:

The internationalisation of investment relationships – whether they be contractual or otherwise – has certainly not led to a radical “denationalisation” of the legal relations springing from international investment, to the point that the domestic law of the host State would be deprived of all relevance or application in the interests of an exclusive role for international law. It merely signifies that these relations relate at once – in parallel, one might say – to the sovereign supremacy of the host State in domestic law and to the international undertakings to which it has subscribed.”

The result of these early arbitral awards was to gradually withdraw investment disputes from the domestic jurisdiction of the host state, regardless of the law that is applicable (domestic, international, or the agreement or treaty) at the international level to which the dispute is

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80 Ibid. at 168.
81 Ibid.
82 Ibid.
83 Ibid. at 172.
transported.

Given their influence in determining the purview of investment arbitration, investment arbitration tribunals are part of the discourse of investment arbitration and are constitutive of the reconstruction that occur within the system. As this section has noted, arbitral tribunals contributed significantly to the delocalization and internationalization of investment disputes. Even though judicial decisions are only a subsidiary source of international law, these tribunals lent their voices to the chorus of their times and hence, contributed significantly to the development of investment arbitration. And they have not backpedaled in their contributions to shaping this area of the law in the 21st century. As I have noted elsewhere, arbitral jurisprudence was a significant factor in the development of amicus curiae participation in investment arbitration, and it was only after arbitral tribunals had determined their legality, that this form of participation was institutionalized. Thus, arbitral tribunals are not passive, neutral arbiters in the evolution and reconstruction of the international law of foreign investment. Rather, they are active participating norm entrepreneurs within the system. The balance of this part of the chapter now turns to a discussion of the establishment of ICSID.

B. ICSID’s Establishment and Third World States

ICSID was established in the euphoria of the ideologically charged times of the 1960s decolonization era and just after the decisions in the arbitral cases discussed in the preceding section were handed down. It was conceived of and created under the auspices of the World Bank. At the time of its establishment, it responded to the need to protect foreign investment in the Third World through amicable dispute settlement. The drafters sought to establish a balance between the needs of investors and Third World states, and exercised caution and care in ensuring that the consultative process included as many Third World states as were willing

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86 Odumosu, supra note 9.

87 Western states included territories under their control – for example, Southern Rhodesia (Zimbabwe) – within the jurisdiction of ICSID within a few years of ratifying the Convention, although some of these territories were initially excluded. See ICSID, Seventeenth Annual Report 1982/1983 (Washington D.C.: ICSID, 1983) 6-7. In 1968, the United Kingdom designated twenty of its subdivisions including Antigua, Belize, Dominica, Hong Kong, and Seychelles as competent parties to disputes before ICSID. See Annex 2 of ICSID, Contracting States and Actions taken by them Pursuant to the Convention (As of November 15, 1975) (ICSID/8/Rev.2) 8-9.
to participate. In spite of the suspicion of international arbitration, a considerable number of Third World states, except most Latin American countries, signed the *ICSID Convention* at its inception. For most Latin American countries, the adherence to the Calvo doctrine was too deeply ingrained to ratify a Convention that effectively displaced the adoption of the doctrine. Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela expressed their disapproval with the proposed *Convention* at the time it was being drafted. The Philippines also adopted a similar position. The departure of these states from other Third World states partly illustrates the point that Third World states do not always adopt identical strategies in engaging within the international legal system. In more recent years, all these states except Brazil and Mexico have ratified the *Convention*. The Dominican Republic and Haiti have only signed but not ratified the *Convention*.

Several reasons could account for the early acceptance of the *ICSID Convention* by many Third World states. These rationales reflect factors that these states could have considered, including the potential benefits and losses from being parties to the *ICSID Convention*. First, without engaging in a normative consideration of the nature of participation, many Third World states probably felt some connection to the institution, having participated in the consultative process that led to the adoption of the *ICSID Convention*. This was not the case with most international institutions of the time, which had been established when many of these states were under formal colonial domination. Second, it is likely that a rationale provided for the establishment of ICSID – attracting foreign investment – contributed to the

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88 For example, twenty-nine African states and the African and Malagasy Organization for Economic Cooperation (OAMCE) were represented at the Consultative Meeting of Legal Experts held at Addis Ababa, Ethiopia from December 16-20, 1963. See ICSID, Analysis of Documents Concerning the Origin of the Formulation of the Convention (Volume 2, Part 1) 236-95 (Washington D.C.: ICSID, 1970). Many other Third World states were included in other Consultative Meetings that were held in Chile (where Latin American countries expressed their reservations on conflicts between the proposed Convention and their constitutions which embodied the equality of foreigners and nationals), and in Thailand. See Documents 27 & 31 respectively, in ICSID, Documents Concerning the Origin of the Convention Vol. 2:1. It is however, possible to query the nature of Third World participation in drafting the *ICSID Convention*, whether it was substantive or merely procedural.

institution’s attractiveness. Third World states sought and still seek foreign investment to fuel their economies and an institution that sought to facilitate the flow of such investment, even if indirectly, could not easily be ignored. Third, a possible explanation for the suspicion of international arbitration and the simultaneous signing of the *ICSID Convention* is that Third World states might have thought that ratifying the *ICSID Convention* would not necessarily amount to being subject to the Centre’s jurisdiction, as further consent is required before ICSID can assume jurisdiction. However, if this was the position, it is highly misplaced given the possibilities of unilateral consent to arbitration that has been referred to “arbitration without privity” that arise from international investment agreements (IIAs) and domestic legislation. Fourth, commentators have argued that ratifying the *ICSID Convention* served as a possible guarantee of obtaining loans from IFIs, including the World Bank, which is the parent body of ICSID. Thus, developed countries’ need to protect foreign investment and Third World states’ desire to increase private capital flows, facilitated ICSID’s establishment. And, through the years, ICSID has become as a major destination for settling investment disputes.

After ICSID’s establishment, nationalizations, and arbitral decisions on these nationalization cases in other fora, continued to shape investment dispute settlement. In addition, Third

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90 Paragraph 12 of the *ICSID Report* states *inter alia* that “adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.”

91 *ICSID Convention, supra* note 1, art. 25(1).


94 Professor Graving asserts that “it borders on an axiom to observe that ICSID arbitration is preferable to any other when its jurisdictional requirements can be met.” He states that ICSID assures a level of efficacy unequaled elsewhere. Richard J. Graving, “The International Arbitration Institutions: How Good a Job are they Doing” (1989) 4 Am. U. Int’l L. & Pol’y 319 at 365.

95 See for example, *American Independent Oil Company (Aminoil) v. Kuwait* (1982) 21 I.L.M. 976. The Aminoil v. Kuwait decision has been cited in some ICSID decisions. For example, it was referenced in *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, (ICSID Case No. ARB(AF)/00/2) (2004) 19 ICSID Rev.–FILJ 158; (2004) 43 I.L.M. 133 at nn. 36 and 228 [*Tecmed v. Mexico*]. The Texaco Arbitration has also
World states also sought to overhaul the international economic system through the espousal of alternative views at the UN General Assembly. The mechanisms of resistance from these states, in addition to the general political climate of the time, contributed to the perceptions that were adopted in the arbitral decisions of the time. Some of these decisions were more influenced by the resistance from the Third World than others. These arbitral decisions – for example, the Libyan oil nationalization cases – contributed to the perceptions of international actors on investment arbitration and to the ideas and principles that drive the investment dispute settlement system. One of the Libyan oil nationalization cases, the Texaco Arbitration, is one of the quintessential neoliberal ideology entrenching cases in investment arbitration. A neoliberal foreign investment regime is one that is *inter alia* supported by a system that emphasizes investment protection, internationalizes investment disputes and arbitration, and operates on the basis of a public/private (and politics/law) divide.

The timing of the Libyan nationalization cases is instructive. While the nationalization cases were being decided, the NIEO was being negotiated at the UN General Assembly, the World Bank and IMF were developing their ideas, and Third World peoples were only at the beginning of a foreign investment saga that came to shape the 1990s and the early 21st century. The events and the cases of the 1970s were outlook changing, and had significant ideational impacts on the investment arbitration system. The discussion of the nationalization cases in this section involves an analysis of the *Texaco Arbitration*, with references to *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic (BP Arbitration)* and

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96 See *supra* notes 38-40 for some of the UN General Assembly Resolutions of the 1960s and 1970s.


Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic (LIAMCO Arbitration)\(^9\) where necessary. These cases were part of the decisions that constructed the investment arbitration system in the 1970s and have remained influential on an ideational level, if not as precedent.

Like the other Libyan nationalization cases, the Texaco Arbitration involved nationalizations of investors’ property, assets and rights that are no longer prevalent at the present time. Instead, most present-day ICSID cases deal with cases involving creeping expropriations, mostly resulting from the exercise of states’ regulatory powers.\(^{10}\) Between 1971 and 1974, the Government of Libya issued legislative decrees nationalizing the property, rights and assets of several oil companies in Libya. Initially, in the case of Texaco, the nationalization had been partial but by the 1974 Decree of Nationalization (Law No. 11/1974), it included all the property, rights and assets of Texaco and its co-claimant, the California Asiatic Oil Company. In all the nationalization cases, the companies initiated arbitral proceedings but the Government refused to participate. As a result, the companies resorted to the arbitration clause within their concession agreements that allowed the President of the ICJ to appoint sole arbitrators to decide the disputes.

The Texaco Arbitration was the quintessential internationalization award.\(^{10}\) In that award, the ingredients that define an international contract or dispute were enunciated. First, in the Texaco award on jurisdiction, the decision subscribed to the principle of the autonomy of the arbitration clause, whereby the arbitration clause survives even if the whole contract is abrogated.\(^{10}\) In the award on the merits, the sole arbitrator, Professor Rene-Jean Dupuy was of the opinion that international law governed the arbitration.\(^{10}\) In interpreting the choice of law clause in the concession, he concluded that international law was also the proper law of the

\(^9\) Supra note 97.

\(^{10}\) See for example, Tecmed v. Mexico, supra note 95.

\(^{10}\) The Liamco Arbitration, supra note 97 differed from the Texaco Arbitration in several respects including available remedies and the legality of the nationalization of the concessions.

\(^{10}\) Texaco Arbitration, supra note 48 at 408.

\(^{10}\) Ibid. at 431-436. In the BP Arbitration, the Sole Arbitrator found that the law of the lex arbitri, Danish law, governed the arbitration. See the BP Arbitration, supra note 97 at 309, 326.
concession contract, without precluding the applicability of the principles of Libyan law where such principles were in conformity with the principles of international law.\textsuperscript{104}

Professor Dupuy’s statements on the internationalization of the concession contracts are instructive in determining the award’s neoliberal leanings. First, he noted that the concession agreements are international contracts.\textsuperscript{105} In this regard, he stated that “[i]t is incontestable that these contracts were international contracts, both in the economic sense because they involved the interests of international trade and in the strict legal sense because they included factors connecting them to different states.”\textsuperscript{106} Thus, for Dupuy it was in the interest of international trade to delocalize investment contracts. Such contracts between states and foreign investors fall within a purview of what he referred to as a “new branch of international law: the international law of contracts.”\textsuperscript{107} This international law of contracts was to ensure neutrality, a central feature of a neo-liberal investment order. And by giving primacy to the domestic law of the host state, it was not certain that such neutrality will be ensured. Also, by placing the state and the foreign investor within an international law of contracts, it was also possible to ensure some form of equality. By the internationalization arguments, such equality would not be possible within a domestic system with all the trappings of state sovereignty and legislative power. In this realm, the sanctity of the parties’ contract is paramount and the contract may be enforceable by the principle of the autonomy of the arbitration clause irrespective of the actions that the sovereign state takes in seeking to abrogate it. The concern for equality comes to the fore in the discussion of the concessions as administrative contracts or otherwise. By their nature, administrative contracts are “essentially unequal” as they enable the state to unilaterally amend the provisions, and in certain cases, allow the state to decide that such contracts will be modified, terminated or revoked when it is in the public interest to do so.\textsuperscript{108}

\textsuperscript{104} Texaco Arbitration, \textit{ibid.} at 450-462. In responding to the question on whether the Libyan Government was required to perform and give full effect to the deeds of concession, Professor Dupuy noted that the question will be examined “by applying the principles of Libyan law and international law…” \textit{Texaco Arbitration, ibid.} at 495.

\textsuperscript{105} \textit{Texaco Arbitration, ibid.} at 441.

\textsuperscript{106} \textit{Ibid.}

\textsuperscript{107} \textit{Ibid.} at 447-448

\textsuperscript{108} \textit{Ibid.} at 463 & 465.
Because the concessions that were the subject of the dispute did not allow for unilateral amendment, they were not construed as administrative contracts.  

Second, for Dupuy, the fact that an arbitration clause is inserted in the contract is sufficient to deem such a contract internationalized. He noted that even “if one considers that the choice of international arbitration proceedings cannot by itself lead to the exclusive application of international law, it is one of the elements which make it possible to detect a certain internationalization of the contract.” Thus, by including an arbitration clause in a contract, the parties situate their agreement within the international law of contracts.

Third, Professor Dupuy was also of the view that stabilization clauses made situating investment contracts within the international system necessary. He noted that stabilization clauses, like that inserted in the claimants’ concessions, “tend to remove all or part of the agreement from the internal law and to provide for its correlative submission to sui generis rules … or to a system which is properly an international system.” In essence, the stabilization clauses and internationalization of investment contracts provided a degree of certainty that foreign investors can be assured of. Thus, even though the state is entitled to organize its economy as it wishes, this certainty requires a state to guarantee “a certain legal and economic status over a certain period of time.”

The neoliberal economic perspective is one that emphasizes the economic development concept and seeks to develop policy mechanisms that contribute to the realization of this goal. In this regard, the Texaco award construed foreign investment agreements as “economic development agreements.” According to Dupuy, these so-called economic development agreements “tend to bring to developing countries investments and technical assistance… they

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109 Ibid. at 465-466. On page 464, Professor Dupuy stated that “in addition to the fact that any idea of operating or exploiting a public service is out of question here, it is obvious that the Government of Libya had intended to deal with its partners on a footing of equality with respect to the Deeds of Concession in dispute and that these contracts do not include any clause going beyond the ambit of ordinary law.”

110 Ibid. at 454-455.
111 Ibid. at 455.
112 Ibid. at 469.
113 Ibid. at 471.
114 Ibid. at 455.
assume a real importance in the development of the country where they are performed… [and they are] associated with the realization of the economic and social progress of the host country.”¹¹⁵ The *ICSID Convention* and the accompanying Report of the Directors also subscribe to the view that investment and investment protection would likely lead to economic development for those states that require it.¹¹⁶ It is not surprising that ICSID adopted this stance since economic development is a mandate that has defined the work of the World Bank. Also, foreign investment in present times is identified with its potential contributions to the development of the Third World. This view is not new. It has been articulated since the early investment arbitration cases and found an avenue for crystallization in the *Texaco Arbitration*. The economic development construction of investment agreements contributes to the perspective that has facilitated the domination of the international law of foreign investment by investment protection principles. From their nature as “economic development agreements”, investment agreements that meet the criteria are internationalized.¹¹⁷ And by internationalization, they merit the protection of international law. In this format, the internationalization reasoning is not about considering the actual economic development impact of an IIA, or of an investment activity, or of investment arbitration, but about rendering an agreement or investment activity subject to the protection of international law because of its potential to contribute to economic development.

The neoliberal economic ideology also supports a public/private divide. In the Texaco dispute, the Government of Libya had interfered in a realm that the arbitral tribunal considered that it was trespassing in. Such public/private divide also entails a law/politics divide.¹¹⁸ This approach is evident in the informative analysis of the General Assembly *Resolution on Permanent Sovereignty over Natural Resources*, *the Charter of Economic Rights and Duties of States* and *the Declaration on the Establishment of a New International Economic Order* in the *Texaco Arbitration*.¹¹⁹ Professor Dupuy examined the legal nature of UN Resolutions. He was of the opinion that Resolution 1803 (XVII) of December 14, 1962 on Permanent Sovereignty

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¹¹⁶ See *supra* note 1.

¹¹⁷ *Texaco Arbitration, supra* note 48 at 460.

¹¹⁸ See the discussion in part IV(B)(4) of chapter six of this thesis.

¹¹⁹ See *Texaco Arbitration, supra* note 48 at 483-495.
over Natural Resources was the most authoritative because it was voted for by industrialized and Third World countries alike. However, industrialized countries and even some Third World states were unwilling to vote in favour of some nationalization clauses in the other Resolutions that excluded references to international law. For Dupuy, while it is possible to state that UN Resolutions have certain legal value, “this legal value differs considerably, depending on the type of resolution and the conditions attached to its adoption and its provisions.” Thus, one of the reasons that he found the Resolutions seeking to usher in a new international economic order less authoritative was that they “were supported by a majority of States but not by any of the developed countries with market economies which carry on the largest part of international trade.” As a result, for Dupuy, Resolution 1803(XVII) reflects the customary international law in the field.

Apart from the method of adoption, which according to Dupuy, denied legal value to some clauses, the Texaco award considered some clauses in the Resolutions as political. On this note, it was observed that article 2 of the Charter of Economic Rights and Duties of States “must be analyzed as political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States.” The political nature or otherwise of this article, is subject to question. In effect, to cast it in a political light was to exclude it from the legal realm and to excuse the tribunal from relying on it. An injection of political considerations into the realm was completely unacceptable by the standards of the Texaco Arbitration, where Professor Dupuy made the order of restitutio in integrum, arguing that damages is a secondary remedy where restitution is possible.

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120 Ibid. at 490.
121 Ibid. at 491.
122 Ibid. at 491-492.
123 Ibid. at 492.
124 Texaco Arbitration, supra note 48 at 497-509. In the BP Arbitration, supra note 97 at 350-355, the Sole Arbitrator thought differently. He found that damages was the principal remedy in public international law matters with essentially economic significance and refrained from ordering a restoration of the full enjoyment of the claimant’s rights as the claimant requested. The claimant challenged the award and requested that the proceedings should be reopened. Based on analysis of Danish law, which was the procedural law of the arbitration, the tribunal found that its award was final and that it was not competent to reopen the proceedings. See the BP Arbitration, supra note 97 at 358-388. In the Liamco Arbitration, the sole arbitrator also refused to award restitutio in integrum or make a declaratory award. See the Liamco Arbitration, supra note 97 at 66. Instead he found that the claimant was entitled to indemnification and compensation for its losses. ICSID proceedings have been mostly concerned with claims requesting damages rather than claims of restitutio in integrum.
Eventually, Libya settled its dispute with the oil companies. First, BP and Libya reached a settlement on November 24, 1977. By the settlement, the Libyan Government paid $41 million dollars in cash to BP and the latter discontinued its arbitration proceedings.\footnote{125}{Robert B. von Mehren & P. Nicholas Kourides, “International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases” (1981) 75 A.J.I.L. 476 at 545.} California Asiatic Oil Company, the other claimant in the \textit{Texaco Arbitration}, announced on September 27, 1977 that it had concluded an agreement that resolved its outstanding differences with the Libyan government. By this agreement, the latter would provide crude oil equivalent in value to $76 million dollars to the company over a period of 15 months.\footnote{126}{\textit{Texaco Arbitration}, supra note 48 at 391, n. 2.} Together, Texaco and California Asiatic Oil Company reached a settlement with the Libyan Government whereby the companies agreed to receive crude oil worth $152 million. They also terminated their arbitration proceedings.\footnote{127}{von Mehren & Kourides, supra note 125 at 546.} On its part, LIAMCO also concluded a compensation agreement with Libya in March 1981 for an undisclosed sum.\footnote{128}{Ibid. In Liamco’s case, it had sought the enforcement of the award in several fora before the settlement agreement was eventually concluded. See for example the Decision of the Swiss Federal Supreme Court in \textit{Libya v. Libyan American Oil Company (LIAMCO)} (1981) 20 I.L.M. 151.} However, before these negotiated settlements resolved the disputes, international legal principles on the settlement of foreign investment disputes that would drive the investment arbitration system for many years had been developed.

Where some or all the factors discussed in the \textit{Texaco Arbitration} are present in an investment dispute, it is likely that the state’s derogations from the terms of the contracts might be expropriatory. Essentially, this is the case not because there is a deliberate decision to render awards against states, but because the investment system operates within an ideational framework that does not necessarily envisage some of the actors, factors and recurrent public interest issues that are discussed in subsequent chapters.\footnote{129}{Shalakany, supra note 16.}

\textbf{C. The Promise of ICSID}

At the time ICSID was established, it was a novel institution charged with facilitating the settlement of investment disputes between states and foreign investors. Its establishment was a
particularly ingenious measure since as non-state actors, foreign investors did not have international legal personality.130 In addition to providing an institutionalized mechanism that allows foreign investors to be parties to ICSID proceedings, the *ICSID Convention* excludes recourse to diplomatic protection and separates its dispute settlement mechanism from municipal legal systems.131 ICSID also established a unique and limited *jurisdiction ratione materiae* (disputes must arise directly from an investment) and *jurisdiction ratione personae* (one disputing party must be a state or constituent subdivision or agency of a state that has ratified the *ICSID Convention* and the other, a national of another ICSID member).132 In addition, it provides for an internal annulment mechanism,133 and a relatively more effective enforcement mechanism compared to other dispute settlement facilities.134

ICSID’s institutionalization of the settlement of investment disputes between states and foreign investors was new, even though the practice on an *ad hoc* level had been occurring for some time.135 At the time of its establishment, the institution sought to establish a balance between the conflicts surrounding the interests and positions of those then categorized as developed capital exporting states and Third World capital importing states. The institution purportedly achieved this balance through some provisions in the *ICSID Convention*. Specifically, it adopted a broader perspective on the applicable law in dispute settlement, and sought to depoliticize investment disputes by excluding diplomatic protection by the home state of the foreign investor once a dispute is submitted to ICSID.136 However, ICSID did not anticipate concerns that emerged in the last quarter of the 20th century. These concerns include the public interests of the local populations in the geopolitical zones that are affected by investment

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131 *ICSID Convention, supra* note 1, art. 26-27.


134 *ICSID Convention, supra* note 1, arts. 53-55

135 The first recorded *ad hoc* investor-state arbitration was the *Lena Goldfields Arbitration*. See *supra* note 70.

136 The concept of depoliticization is further discussed in chapter six of this thesis. On depoliticization, see generally Shihata, *Towards a Greater Depoliticization of Investment Disputes, supra* note 15. See also Augustus A. Agyemang, “The Suitability of Arbitration for Settling “Political” Investment Disputes Involving African States” (1988) 6 J. World Trade 123.
ICSID’s founding documents reveal three broad purposes of the institution. The purposes are investment protection, the facilitation of investment flows, and the promotion of mutual confidence between host states and foreign investors. These purposes reflect the tenets of an institution that subscribes to the neoliberal economic paradigm that became prevalent in the 1990s. ICSID continued in the tradition of the legal/political and the public/private divide by excluding the state from the sphere of foreign investment. The ICSID Convention seeks to project neutrality in investment and dispute settlement, facilitate free markets, and discourage government participation or intervention in foreign investment. Also pertinent to the neo-liberal investment agenda is investor-state arbitration, which provides an avenue for transferring disputes from the political sphere to the legal. However, experience has dictated that it is difficult to completely exclude governmental intervention in foreign investment. While this is true for developed states, it is particularly relevant for Third World states as their economies and populations are more vulnerable to the negative effects of foreign investment. This perhaps, explains in part, the reasons why Third World states constitute the majority of defendants before ICSID. The state of many Third World economies dictates the necessity for some level of government intervention in the economy in ways that sometimes affect foreign investment. The example of Argentina’s effort to deal with its economic crisis of the early 21st century, discussed in chapter five, provides a case in point.

The first of ICSID’s three-fold promise is directed towards investment protection. ICSID was mainly established to protect foreign investment in host states through the provision of facilities for settling investment disputes between contracting states and foreign investors. The vacuum left by the crumbling direct colonial hold on many Third World states in the mid 20th century made the establishment of such an institution timely. Second, one of the major rationales that proponents espouse for the establishment of ICSID – referred to as the “primary

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137 See Shalakany, supra note 16 on the Libyan oil nationalization cases.

purpose” of the *ICSID Convention* – is the promotion of investment flows to states that need it.\(^{139}\) ICSID was established within the first development decade that spanned the 1960s. It was a time when “it became increasingly clear that if the plans established for the growth in the economies of developing countries were to be realized, it would be necessary to supplement the resources flowing to these countries from bilateral and multilateral governmental sources by additional investments originating in the private sector.”\(^{140}\) This was also a time when the World Bank began to have a foothold in the Third World, just after the establishment of the International Development Association (IDA) – the World Bank’s arm that provides development loans – in 1960. Articulating the reason for the establishment of ICSID, Ibrahim Shihata, then Secretary General of ICSID stated that “ICSID should not be viewed merely as a mechanism of conflict resolution. It should be regarded as an effective instrument of international public policy which is meant in the final analysis to secure a stable and increasing flow of resources to developing countries under reasonable conditions.”\(^{141}\)

However, even though it is touted that ICSID was established to both settle investment disputes and facilitate the flows of private capital, the *ICSID Convention* only substantively provides for the former. References to the latter rationale are included in the *ICSID Report* and it has gained prominence mostly through anecdotal repetition.

The *ICSID Report* states that the *ICSID Convention* is premised on the position that guaranteeing investment protection by providing a mechanism for dispute resolution fosters the flow of private capital to host states.\(^{142}\) Based on its *travaux preparatoires*, the *ICSID Report*, and the statements of influential proponents of the institution like Professor Shihata quoted above, ICSID was established to be more than an investment dispute settlement institution. It was meant to facilitate investment flows in addition to its investment protection/dispute settlement purpose. This position was reiterated in *Amco Asia Corporation v. Indonesia*, where the tribunal cited the *ICSID Convention’s* preamble with approval and argued that protecting investments amounts to the protection of the “general interest of

\(^{139}\) *ICSID Report*, supra note 1, art. 12.


\(^{142}\) *ICSID Report*, supra note 1 at para. 12.
development and of developing countries.\textsuperscript{143}

ICSID’s third promise combines the first two promises. ICSID’s founding documents claim that through its work, the institution promotes mutual confidence between host states and foreign investors. Commentators regard ICSID’s Administrative Council – the institution’s governing body – with its one representative per country quota and each having an equal vote, as a reflection of equal representation for all contracting states and a balance of interests.\textsuperscript{144} However, some NGOs have been critical of the World Bank President’s position as the \textit{ex officio} Chairman of the Administrative Council\textsuperscript{145} and his/her ability to appoint some arbitrators in some instances.\textsuperscript{146} They especially criticize this position because of the World Bank’s role in authorizing some of the projects that are the subject of disputes before ICSID.\textsuperscript{147} On its promise of promoting mutual confidence, paragraph 9 of the \textit{ICSID Report} states:

In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of \textit{mutual confidence} and thus stimulating a larger flow of private international capital into those countries which wish to attract it.\textsuperscript{148}

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\textsuperscript{143} Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Decision on Jurisdiction of September 25, 1983, (1984) 23 I.L.M. 351, 369. At pages 368-369, the tribunal stated as follows: “ICSID arbitration is a method of settlement which corresponds to the interests, not only of investors, but of the Contracting States as well, provided that by their adhesion to the Convention they have shown that they considered this method as being effectively in their interest, being it also understood that they keep full freedom to implement it or not, in respect of each particular investment agreement. As to the investors, it goes without saying that they have practically in all cases interest to submit to this international arbitration any and all disputes with the host-state relating to the investment. Thus, the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host-state, not forgetting that to protect investments is to protect the general interest of development and developing countries.”

\textsuperscript{144} Shihata, \textit{Towards a Greater Depoliticization of Investment Disputes}, supra note 15 at 5. See articles 4(1) & 7(2) of the \textit{ICSID Convention} for the provisions on the administrative council.

\textsuperscript{145} \textit{ICSID Convention}, supra note 1, art. 5.

\textsuperscript{146} \textit{ICSID Convention, ibid.}, arts. 30 (appointment of conciliators) & 38 (appointment of arbitrators). By article 52(3) of the \textit{ICSID Convention}, the Chairman of the Administrative Council is also responsible for appointing all members of \textit{ad hoc} annulment committees.

\textsuperscript{147} Petition of La Coordinadora de la Defensa del Agua y de la Vida, \textit{et al.}, to the Arbitral Tribunal in \textit{Aguas del Tunari v. Republic of Bolivia}, ICSID Case No. ARB/02/03 (filed August 29, 2002), online: Center for International Environmental Law <http://www.ciel.org/Publications/Petition_Revised_Aug02.pdf> at page 9.

\textsuperscript{148} Emphasis added. Paragraph 13 of the \textit{ICSID Report} also states that “while the broad objective of the Convention is to encourage a larger flow of international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States . . . .”
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Professor Toope captures the critique of the mutual confidence argument adequately in his challenge of the mutual confidence position as articulated in the *ICSID Report*. He states that the assertion of balanced interests is “at best, disingenuous.”149 For Professor Toope, the position that a larger flow of private capital is desirable can be legitimately challenged, given the coexistence of a variety of economic systems. He also argues that the idea of confidence is a Western, market oriented conception of economic policy; that the *ICSID Convention* does not “increase a developing state’s “confidence” that a foreign private investor will behave in a manner consistent with public policy or national aspirations”; and that the foreign investor is the only party whose “level of confidence is significantly enhanced.”150 Others have also expressed views about the mutual confidence role of ICSID. One of the interviewees for this thesis, an NGO representative, noted that it is not ICSID’s place to assure mutual confidence between Third World states and foreign investors.151 This interviewee was of the opinion that this was a misplaced role that the drafter of the *ICSID Convention* attributed to the institution. Clearly, the mutual confidence role is a potentially problematic one. Irrespective of the views expressed about the mutual confidence role of ICSID, this argument was one of the ‘selling points’ of the institution and it is necessary to engage its accuracy.

Also, ICSID’s economic development rationale for the protection of private capital stems from a subscription to neo-liberal economic theory.152 An economic liberal perspective on foreign investment supports the assumption that foreign investment is beneficial to host states. It flows from the benefits premise that foreign investment should be protected through the provision of investment protection mechanisms including international dispute settlement. While it is pertinent that foreign investment is protected, the arguments that have gained attention in a post-ICSID establishment world is that it is equally important not to ignore the negative effects of foreign investment, to pay adequate attention to the views of the peoples directly impacted by investment activities and dispute settlement decisions, and to extend protection to those affected by the detrimental effects of foreign investment activities and the

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152 For conflicting economic theories on foreign investment, see Sornarajah, *International Law on Foreign Investment, supra* note 14 at 50-65. See also the discussion in chapter four of this thesis.
investment system.\textsuperscript{153}

One of the \textit{ICSID Convention}’s mechanisms that promised a broader outlook on investment dispute settlement is its provision on applicable substantive law. While the \textit{Convention} provides for the potential applicability of domestic and/or international law, in practice, the applicable law has tilted mostly in favour of international law. This is mostly due the interpretation of investment treaties that form the basis for the settlement of most investment disputes. There are, perhaps, only few provisions of the \textit{ICSID Convention} and their applicability in practice that have generated as much debate as the substantive law applicable to disputes. As demonstrated in the historical analysis of the development of investment dispute settlement, the traditional position has been that Third World states have mostly favoured the applicability of their domestic law, while foreign investors and their home states have leaned in favour of the applicability of international law.\textsuperscript{154} Article 42(1) of the \textit{ICSID Convention} seeks to balance these conflicting views by providing that “the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

Commentators have interpreted article 42(1), many of them articulating the position that international law is supreme. Aron Broches, the principal drafter of the \textit{ICSID Convention}, has opined that an ICSID “tribunal will first look at the law of the host state and that will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or the denial of the host state’s law, but may result in not applying it where that law or action taken under that law, violates international law. In that sense, . . . international law is hierarchically superior to national law under Article 42(1).”\textsuperscript{155}

\textsuperscript{153} History is replete with examples of mass disasters that have occurred directly from foreign investment. The Union Carbide disaster in Bhopal in India provides a case in point. See generally Upendra Baxi, \textit{Inconvenient Forum and Convenient Catastrophe: The Bhopal Case} (Bombay: N.M. Tripathi, 1986); Upendra Baxi & Thomas Paul, \textit{Mass Disasters and Multinational Liability: The Bhopal Case} (Bombay: N.M. Tripathi, 1986).

\textsuperscript{154} This discussion is beginning to lose its fervour mostly because of the Third World’s need for investment capital. Sornarajah, \textit{Settlement of Investment Disputes}, \textit{supra} note 3 at 28.

is somewhat similar to the position taken in the **Texaco Arbitration** discussed above, where Professor Dupuy held that international law was the applicable law but Libyan law could be applied where it did not conflict with international law. 156 Professor Weil has also noted that, “the reference to the domestic law of the host state, even if designed only to ascertain whether it is, or is not, compatible with international law, is indeed a pointless exercise, the sole *raison d’etre* of which is to avoid offending the sensibilities of the host state.”157

Where parties have not expressed a choice on the applicable law, ICSID tribunals have taken different positions on the applicability of domestic law, sometimes applying domestic law and at other times, international law. 158 In fact, Third World states themselves have sought to rely on domestic law or international law depending on which one furthers their case. However, in practice, international law has been the most frequently applied law to disputes submitted to ICSID. For example, in **Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt**, the defendant argued that the law of Egypt was applicable given the fact that the tribunal assumed jurisdiction based on a domestic Egyptian legislation. The tribunal found that international law was also applicable to the dispute, as Egyptian law did not cover every point in the dispute. 159 For most Third World countries, their agreements, if they include the host state’s domestic law as the applicable law, are usually accompanied by a reference to international law, 160 or some adopt international law as the dominant applicable law, with...

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Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention" (1994) 9 ICSID Rev.-FILJ 183 at 192 [Shihata & Parra, “Substantive Law”], the authors also adopt a similar view, arguing that under the second sentence in article 42(1) of the **ICSID Convention**, a tribunal could set aside applicable national law where it is inconsistent with international law.

156 See *supra* note 104 and accompanying text.

157 Prosper Weil, “The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a Menage A Trois” (2000) 15 ICSID Rev.-FILJ 401 at 409. *Contra* W. Michael Reisman, “The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold” (2000) 15 ICSID Rev.-FILJ 362 at 363 (arguing that from the drafting history of article 42(1) of the **ICSID Convention**, it was intended that domestic law should be the default applicable law). Professor Reisman argues that the drafting history does not express “an intent for a disguised superordination of international law in all cases.”


159 **Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt** (ICSID Case No. ARB/84/3) (1993) 8 ICSID Rev.—FILJ 328 at 350-351 [**SPP v. Egypt**]. For a commentary on the proceeding, which was subsequently discontinued at the annulment phase, see Georges Delaume, “The Pyramids Stand—The Pharaohs Can Rest in Peace” (1993) 8 ICSID Rev.—FILJ 231.

domestic law playing a supplementary role, where it is in conformity with international law.\footnote{161 See the analysis in the \textit{Texaco Arbitration}, \textit{supra} note 48.} Alternatively, like in NAFTA Chapter 11 and some BITs, the investment agreement in question is designated as the applicable law.\footnote{162 Article 1131 of NAFTA states that disputes will be decided in accordance with the Agreement and applicable rules of international law. In \textit{Asian Agricultural Products Ltd. v. Republic of Sri Lanka} (ICSID Case No. ARB/87/3) (1991) 30 I.L.M. 577, (1991) 6 ICSID Rev.-FILJ 526 at 533, the majority applied the Sri Lanka-United Kingdom BIT as the “primary source of applicable legal rules.” However, in his dissenting opinion, Dr. Samuel K.B. Asante noted that “the second sentence of Article 42(1) of the \textit{ICSID Convention} should prevail and the majority erred in not applying Sri Lankan law as the main source of law together with “such rules of international law as may be applicable.” See \textit{AAPL v. Sri Lanka} (1991) 6 ICSID Rev.-FILJ 526 at 577.

In several instances, Third World states have sought to apply international law to the dispute before ICSID tribunals. In \textit{Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica} (\textit{Santa Elena v. Costa Rica}), the claimant argued for the applicability of Costa Rican law and the state argued that international law was applicable.\footnote{163 See the discussion of Bolivia’s withdrawal from ICSID, \textit{infra} notes 192-197 and accompanying text.} The tribunal found that Costa Rican law was consistent with international law and that both parties’ divergent positions lead to the same conclusion. It applied international law to the dispute and awarded $16 million in compensation to the claimant.

Positions such as that adopted by Costa Rica in the Santa Elena case might suggest that Third World states have embraced the internationalization of foreign investment disputes. Many international actors have internalized the internationalization of investment dispute settlement and usually subscribe to dispute settlement in this forum. Hence, Third World states, with some exceptions like Bolivia, now often seek to adopt arguments that are favourable within the neo-liberal investment dispute settlement paradigm.\footnote{164 See the discussion of Bolivia’s withdrawal from ICSID, \textit{infra} notes 192-197 and accompanying text.} These states, like foreign investors, adopt the legal position that best suits their interests at the point it time, and in the Santa Elena case, Costa Rica believed that the international law position was more favourable to its interests. However, in spite of this practice of frequently having recourse to international law as the law applicable to dispute settlement, the \textit{ICSID Convention} allows recourse to laws other than international law in a bid to provide a somewhat broad outlook on investment dispute settlement.
In addition to its principal purposes, ICSID also performs several secondary functions. These include the design of model clauses that refer disputes to ICSID, formerly facilitating the drafting of investment dispute settlement clauses for BITs, publication of investment treaty and legislation volumes, and the organization of conferences on arbitration and other topics. Thus, apart from facilitating dispute resolution, ICSID offers advisory services. The institution no longer engages in treaty drafting, especially because of lack of resources and states’ growing capacity in this area. Nevertheless, it holds joint training sessions with the United Nations Conference on Trade and Development (UNCTAD) on treaty drafting, but they are only training sessions and not actual help with treaty drafting.

Well over a thousand ICSID model clauses have been included in investment agreements. Most arbitration clauses in investment treaties and legislation provide only for investor-state arbitration, without reference to state-investor arbitration. These types of agreements do not necessarily reflect the balance of interests that ICSID’s founding documents purport to achieve. This position enhances the point that the focus on the protection of foreign investment is more dominant than the balancing of interests between host states and foreign investors. Even the ICSID Convention and the ICSID Report envisage situations where states could offer unilateral consent to submit disputes to ICSID. Under article 25 of the ICSID Convention and paragraph 24 of the ICSID Report, a host state may give consent to ICSID jurisdiction in its investment promotion legislation and the foreign investor may accept this unilateral offer at the time of initiating proceedings. By enacting such legislation, states give blanket and general consent to submit to arbitration without the need for further consent in a contract. These

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165 For example, ICSID’s Secretary General often acts as the appointing authority of arbitrators for ad hoc arbitration usually under the UNCITRAL Arbitration Rules. See online: ICSID <http://www.worldbank.org/icsid/news/n-16-1-5.htm>.

166 This activity no longer forms a significant part of the institution’s work.


169 See for example, art. 1120 of NAFTA, supra note 6.

statutory provisions have sometimes formed the basis for ICSID jurisdiction.\textsuperscript{171} Such unilateral consent often forecloses the ability to initiate legal claims arising from investments that seek to protect the interests of a host state’s peoples before ICSID, or in some cases, to make counterclaims. However, foreign investors retain the right to initiate arbitration proceedings, a privilege which the host state does not have under conditions of “arbitration without privity”.

Although the \textit{ICSID Convention} does not address this point explicitly, paragraph 13 of the \textit{ICSID Report} states that “the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the \textit{Convention} should be equally adapted to the requirements of both cases.” This provision remains relevant in spite of paragraph 24 of the \textit{ICSID Report} and suggests that ICSID contemplates a dual dispute settlement mechanism. As well, the \textit{Convention} in article 46 and the \textit{ICSID Arbitration Rules} in Rule 40 make references to counterclaims. Commentators have started to engage with agreements that could include both investor-state and state-investor dispute settlement clauses. A common example is the International Institute for Sustainable Development’s (IISD) Model Investment Agreement.\textsuperscript{172} However, as McLachlan \textit{et al} note, there is little evidence of the IISD’s broader model that seek to balance the rights and duties of states and foreign investors in state practice.\textsuperscript{173} In sum, one must concede that it is not necessarily ICSID’s place as an institution to influence the terms of investment treaties or domestic legislation. But for those governments and parties to which the institution affords some training on matters of drafting, it is important to point out the benefits of reciprocal dispute settlement clauses.

From a perusal of ICSID cases, one can conclude that ICSID tribunals are constantly presented with the opportunity to fulfill the first promise of investment protection, since foreign investors have seized the opportunity presented by the availability of the Centre to seek redress.


for harms allegedly done to their investments. The materialization of the second promise of increased investment flows is however, more difficult to ascertain. In spite of this difficulty, it is necessary to consider ways that ICSID can keep its third promise of “mutual confidence”. Since the ICSID Convention is still in force and parties have recourse to the institution, host states, especially Third World states, need to find ways of making the most of the institution by seeking to enhance its effectiveness in promoting mutual confidence. Essentially, in order to keep ICSID’s place in the international investment order and to foster the fulfillment of its promises, states should be allowed to determine their own economic policies without being penalized for adopting policies that do not conform to prevailing economic perspectives, as long as such policies ameliorate difficult situations in their countries. Even an ICSID tribunal has recognized this concern. In CMS Gas Transmission Co v. Argentine Republic (CMS v. Argentina), the tribunal held that “[t]he right of the host State to adopt its economic policies together with the rights of investors under system of guarantees and protection are the very heart of this difficult balance, a balance which the Convention was careful to preserve.”174 The argument in CMS v. Argentina and other similar cases is that the issue for decision before the dispute settlement tribunals is not the legality or otherwise of the government’s general economic policies but the extent to which such measures violate specific commitments made to foreign investors in treaties, legislation and/or contracts.175 Preserving the host state’s right to adopt economic policies that it chooses, but finding those policies to be in contravention of commitments to foreign investors, is reflective of the subscription to a single economic perspective in the international economy on the basis of which actions are measured. Whereas in principle, states may adopt diverse economic policies and perspectives, on an international level, their actions are assessed on the basis of neoliberal principles, since for the most part, the investment treaties that they conclude and the international investment dispute settlement system also proceed on this basis. For most Third World peoples, their need and concern is that just as foreign investment provides benefits to the local population and receives protection, states should also have the capacity to address harms arising from foreign investment in protection of their populations. The concern is for an effective recognition that

175 Ibid at paras. 25-29.
foreign investment, like all investments, includes both detriments as well as benefits.176

IV. The Relationship of Ambivalence between ICSID and Some Third World States

As noted in the introductory part of this chapter, the chapter is focused on traditional actors’ place in ICSID dispute settlement. This part of the chapter discusses three examples of the reactions of some Third World states to ICSID. Subsequent chapters explore the relationship between peoples and ICSID tribunals. Generally, when states adopt the ICSID Convention, the relationship is cordial and more often than not, there are no incidences of negative episodes. However, in 2007, in the first incident of its kind, Bolivia withdrew from the ICSID Convention. In July 2009, Ecuador also denounced the Convention.

In spite of what has been a largely cordial relationship, ICSID has been affected by some of the general reaction to the broader international economic order. Like industrialized states sometimes do, many Third World states have simultaneously embraced and rejected the neoliberal economic agenda, as well as investment arbitration in some cases.177 On the one hand, it has been difficult to avoid the adoption of neoliberal economic policies due to the IMF’s post-debt crisis conditionalities,178 and other factors like the prevailing provisions of investment agreements and ICSID dispute settlement; and on the other hand, many of these states have expressed reservations on the utility of neoliberal economic policies for development.179 Essentially, these states have encountered some difficulty in espousing...

176 Professor Louis Wells notes that foreign investment projects have both costs and benefits. Louis T. Wells, “Foreign Direct Investment” in Lindauer David L. & Roemer Michael eds., Asia and Africa: Legacies and Opportunities in Development (San Francisco, California: Institute for Contemporary Studies, 1994) 337 at 341.


179 Commentators have sought to explain the ambivalence of Third World states in relation to the international law on foreign investment. See Andrew T. Guzman, “Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity
alternative economic policies, especially in bilateral relationships with IFIs and in BITs. However, they continue to espouse these alternative ideas (or at least some modification of the neoliberal perspective) in multilateral negotiations, due to their continuous belief in the utility of these alternatives and the strength in their numbers in the latter fora. As stated earlier, many Third World states ratified the *ICSID Convention* when the institution was first established and many more have become signatories over the years. In spite of the inability to measure its benefits in terms of its contributions to investment flows, ICSID provides some benefits to host states. Among other determinants of foreign investment, the inclusion of an ICSID arbitration clause in treaties, contracts, and domestic legislation, potentially has a signaling effect on investment flows, as investors may take the availability of recourse to arbitration under the auspices of an international institution like ICSID as evidence of a favourable investment environment. However, in spite of ratifying the *ICSID Convention*, there have been situations where some states have advanced arguments that are contrary to the position that many traditional proponents of investment dispute settlement espouse. In seeking to defend ICSID disputes, the initial most common reaction of states has been to challenge ICSID’s jurisdiction over disputes. Sometimes though, the reactions exceed this accepted means of engaging with ICSID.

Third World states are not alone in adopting ambivalent stances towards investment arbitration as some developed states have started to retreat from liberal access to investment arbitration and have sought ways to restore their regulatory sovereignty. For example, Canada and the United States, the developed country parties to the NAFTA, have been at the forefront of the movement to infuse investment arbitration with humanitarian concerns. However, some Third World states have provided increased access to investment arbitration lately. For example, most Latin American states that did not ratify the *ICSID Convention* at the institution’s

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inception due to their commitment to the Calvo doctrine,\textsuperscript{183} have gradually embraced the Convention.\textsuperscript{184} This phenomenon has been explained as being due to the perceived benefits of ratifying the \textit{ICSID Convention}. For example, Professor Baker states that since Peru ratified the \textit{Convention}, it has become more appealing to foreign investors.\textsuperscript{185} Moreover, ICSID might be relevant even to states that do not ratify the \textit{ICSID Convention}, as an ICSID tribunal may assume jurisdiction in a dispute that involves such a state through the \textit{Additional Facility Rules}. Mexico provides a case in point. Even though it has not ratified the \textit{ICSID Convention}, by being a state party to NAFTA and other IIAs, by August 2008, Mexico had been a defendant in nine concluded and four pending cases under ICSID’s \textit{Additional Facility Rules}.

The first example in the instances of ambivalence is the early incidence with Jamaica. In spite of the fact that Jamaica was one of the states that ratified the \textit{ICSID Convention} at the institution’s inception, it unilaterally withdrew from three simultaneous ICSID proceedings citing technicalities and rejected ICSID’s jurisdiction.\textsuperscript{186} The disputes arose because contrary to an agreement that stabilized local taxes in relation to aluminum producers for 25 years – the entire period of the bauxite mining concession in question – the Jamaican government levied a tax on bauxite mining. The ICSID tribunal made a ruling on jurisdiction but the cases were discontinued before the tribunal could render a decision on the merits of the cases. Baker states that “most economic analysts at that time forecast that the Jamaican Government’s actions in this area would be costly to that country’s development. The international stigma attached to the withdrawal by a government from an internationally sanctioned procedure after accepting that procedure certainly has long term ramifications for Jamaica.”\textsuperscript{187} It would have been instructive if the tribunals had expressed their opinion on the stabilization clauses and the apparent tensions that they generate, had Jamaica defended the cases instead of settling. Jamaica’s action in this case is not very common in ICSID experience but is reminiscent of Libya’s

\textsuperscript{183} For literature on the Calvo doctrine and its effects in relation to ICSID, see \textit{supra} note 15.

\textsuperscript{184} See \textit{supra} note 89 and accompanying text.

\textsuperscript{185} Baker, \textit{supra} note 168 at 179.

\textsuperscript{186} \textit{Alcoa Minerals of Jam., Inc. (U.S.) v. Jamaica} (ICSID Case No. ARB/74/2), (1979) 4 Y.B. Com. Arb. 206; \textit{Kaiser v. Jamaica}, \textit{supra} note 160; \textit{Reynolds Jam. Mines Ltd. v. Jamaica}, (ICSID Case No. ARB/74/4). All three cases were discontinued and settled.

\textsuperscript{187} Baker, \textit{supra} note 168 at 75. While the impacts of Jamaica’s actions may not have been measured at the time or even fully measurable, it is possible that there were initial panic reactions by foreign investors. However, it is uncertain that Jamaica lost investment flows that could have accrued to it.
attitude to the oil nationalization cases.

Second, by August 2008, Argentina had about thirty-four ICSID cases pending against it, plus some of the cases that had been concluded prior to this time. Some of the concluded cases were settled and discontinued on the parties’ request. Most of these cases are offshoots of the effects of Argentina’s economic policies on foreign investments in the country. In 2001, Argentina experienced a severe socio-economic crisis. In response to the crisis, it adopted policy choices that resulted partly in the “daunting” task of defending more ICSID cases than any other country.188 Commentators have estimated that Argentina is likely to lose most of these cases and faces millions of dollars in compensation, although it has not lost all of these cases.189 Compensation has been awarded in some of the cases beginning from CMS v. Argentina where US$ 133.2 million was awarded in CMS’ favour.190 In reacting to the prospect of continuing to pay millions of dollars in compensation, the Argentine government has adopted the legal position that its treaty obligations are unconstitutional and therefore unenforceable under domestic law. There is “growing opposition” to ICSID in Argentina because of the interpretation of the impacts of economic policies that it adopted in order to revive its failing economy.191 Argentina’s crisis is further discussed in chapter five with a focus on economic development.

Third, in the most extreme of the reactions discussed so far, two states withdrew from the ICSID Convention. On May 2, 2007, ICSID received a notice from the Government of Bolivia denouncing the ICSID Convention and Ecuador recently withdrew from ICSID in July 2009.192 Pursuant to article 71 of the ICSID Convention, the denunciation would become

189 Ibid. For example, the tribunal held that Argentina’s actions were not responsible for the claimant’s loss in Metalpar S.A. and Buen Aire S.A. v. Argentine Republic ICSID Case No. ARB/03/5, online: Investment Treaty Arbitration <http://ita.law.uvic.ca/documents/MetalparAwardEng.pdf>.
effective six months from the date of receipt of the notice. The impacts of a withdrawal are not exactly clear, especially when read in light of other provisions of the *ICSID Convention*, especially article 72,\(^{193}\) domestic legislation with ICSID arbitration clauses, and existing investment treaties that the country seeking to denounce the *ICSID Convention* has concluded. Thus, Bolivia also announced its decision to renegotiate its investment treaties.\(^{194}\) Professor Schreuer opines that investors must consent to ICSID’s jurisdiction prior to a country’s submission of a notice of withdrawal to ICSID. In this case, unilateral consent by the host state in treaties or domestic legislation, without corresponding acceptance of the consent by the investor will not suffice.\(^{195}\) However, on October 31, 2007, ICSID registered a request for arbitration by Euro Telecom against the Republic of Bolivia, despite the latter’s objections.\(^{196}\) Since the jurisdiction of an ICSID tribunal over this case is not clear, it is up to the arbitral tribunal to determine its jurisdiction and to clarify the legal position on the effects of a denunciation of the *ICSID Convention*. Although the tribunal was constituted on October 17, 2008, the claimant discontinued the proceeding in October 2009. Nevertheless, as long as the investment treaties are still in force, foreign investors may have recourse to other dispute settlement mechanisms provided under those treaties. On a final note on denunciation of the *ICSID Convention*, Bolivia and Ecuador’s attitude towards ICSID may not be isolated occurrences. The institution is “under scrutiny in Latin America” due largely to the increase in investors’ claims against these countries and the discontent generated by the awards against

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193 Article 72 provides as follows: “Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”

194 See Christian Leathley, “Bolivia’s Withdrawal from ICSID” (2007) 2 Global Arbitration Review 13, online: Cliffordchance <http://www.cliffordchance.com/expertise/Publications/details.aspx?contentitemid=12446>. Leathley expresses the view that the “bad news for states looking for a quick exit from such treaties is that they typically contain termination provisions providing that any investment made before the date of the termination will be protected for a number of years (the Bolivia-US treaty for example stipulates 10 years, the Bolivia-UK treaty, 20 years, the Bolivia-Netherlands treaty, 15 years, and the Ecuador-US treaty, 10 years).”


These examples of ambivalent reactions towards ICSID, especially the last one, reflect the legitimacy issues that ICSID faces and the ambivalence sometimes manifested towards investment arbitration from states. Such ambivalence may be attributed to the adoption of a predominant economic rationale for investment protection and tribunals’ insufficient attention to interests that do not necessarily conform to the neoliberal paradigm. The argument is not that ICSID tribunals should decide cases where states clearly breach their obligations in favour of those states. Rather, the argument urges recognition of diverse interests, ideas and perspectives. Within the parameters of the applicable law, there may be explanations for a state’s actions that do not fall within traditional preoccupations of investment arbitration tribunals. In the interest of justice and robust decision-making, these considerations could legally and validly be factored into decisions without finding for the state party to the dispute. As subsequent chapters and their case studies will demonstrate, multiple considerations are not entirely foreign to dispute settlement before ICSID and in fora like the ICJ. More of these robust considerations will signal the arrival of an era in investment dispute settlement where tribunals adopt robust analyses that incorporate diverse legitimate interests and ideas in their decision-making.

V. Towards the Accommodation of Multiple Paradigms and Interests: The State and Foreign Investor Dimension

It is trite that like all law, international law is changing. The extent to which changes are occurring, and the impacts of these changes, are debatable. For example, within the sub-disciplines of international human rights law and even in international economic law, the law has achieved remarkable strides in its relationship with marginalized peoples and groups. Even if limited and heavily criticized, the World Trade Organization for example,
now recognizes the relationship between trade and the environment. Over four decades after ICSID’s establishment, international law has gone further than the *ICSID Convention* contemplated. NGOs have proliferated and have become a force to be reckoned with in the international order. More importantly for this thesis, Third World peoples groups have been subjects of discussion before ICSID tribunals, albeit infrequently. Human rights and international environmental law have become major areas of international law, and the rights of natural persons have garnered considerable attention. The economic development of the Third World has also assumed a magnitude beyond what it was when ICSID was established.

Even though there have been some impressive changes in international law and in investment arbitration, the latter remains premised on a positivist conception of international law that does not adequately capture the interactional capacities of the law that a TWAIL constructivist perspective contemplates. This positivist view cannot adequately accommodate the diversity of actors that are beginning to garner attention in investment dispute settlement and the changes in international law without some deliberate re-conception. In order to maintain ICSID’s relevance in an “evolving global society,” ICSID tribunals need to accommodate diverse actors’ and interests in settling investment disputes. If tribunals cannot serve as a site for this robust interaction, actors cannot continue to reckon with ICSID as the premier international investment dispute settlement institution. Some may argue that by such robust interaction, one is seeking to radically alter the character of ICSID and ascribe to the tribunals tasks that they cannot perform. While it is true that the face of investment arbitration is changing and more demands are being made on the system, these demands are not out of place because investment arbitration implicates public interest matters. The fact that these matters have not been addressed until recently does not imply that they are out of place or will cause the system to collapse. Rather, the demands only bring to the surface, issues that should have been part of the system from the commencement of ICSID.

The balance of this chapter provides some suggestions for a broader and more robust approach to dispute settlement before ICSID. In addressing states and investors relationships, it focuses

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200 See for example, *Tecmed v. Mexico*, supra note 95.
on developing a robust system that takes public interest seriously. Attention turns to the involvement of Third World peoples in the later chapters. The analyses in the following sections are referred to as ‘suggestions’ for want of a better term. They could more accurately be regarded as thoughts that emphasize the need for a robust consideration of actors and interests in investment dispute settlement. It is effective to address these suggestions at this point rather than leave them for the concluding chapter because the conclusion to this thesis adopts an analysis that is broader than the states and foreign investor dimension that this chapter addresses. Since ICSID tribunals emphasize investment protection already, I will not address investment protection in these modest suggestions. Rather, the focus will be on interests that have not been adequately represented and which threaten the continued relevance of the system.

A. Towards Enhancing ICSID’s Effectiveness

Apart from discussions about incorporating an appeal mechanism into ICSID, which the institution decided not to adopt in the most recent amendments of its Arbitration Rules in April 2006, most of the suggestions for enhancing ICSID’s effectiveness have focused on procedure. However, a few commentators have addressed substantive effectiveness. In the concluding chapter of his book on the ICSID system, Moshe Hirsch makes some recommendations for enhancing ICSID’s effectiveness. His suggestions largely turn on possibilities for broadening ICSID’s substantive and personal jurisdiction. He argues that any changes to ICSID’s substantive jurisdiction to allow it to settle non-investment disputes will substantively change ICSID’s character contrary to the aim of its founders. On broadening personal jurisdiction to allow ICSID to settle disputes that arise between parties other than states and foreign investors, he argues that this will not detract from ICSID’s character as an

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investment dispute settlement mechanism. However, he does not recommend that the tribunals should settle state-state disputes as this could amount to politicizing disputes. Nevertheless, Hirsch suggests that a state should be allowed to initiate proceedings against another state where the claimant state has substantially participated alongside the private investor in the investment project in the host state. He bases this suggestion on the rationale that “the present jurisdictional limitation of the Centre to settle only bilateral transactions, on one side of which is the private investor, with the host state on the other side, is likely to frustrate the comprehensive and final settlement of the investment dispute among all the parties to the dispute.”203 I do not subscribe to such jurisdictional expansion for two reasons.

First, such expansion of jurisdiction may amount to formal politicization of investment disputes, which ICSID seeks to avoid, and will detract from the purposes of the Convention. I use the term “formal politicization” because in chapter six of this thesis, I argue that investment dispute settlement is always politicized to an extent. To focus on formal politicization for now, the ICSID Convention expressly states that there should be no interference from the home state of the foreign investor where a dispute is before ICSID. The argument on comprehensive and final settlement of a dispute is not strong enough to make ICSID detract from one of its primary aims. Also, even where a home state and a foreign investor carry out an investment in the host state together, a settlement of the dispute in relation to the foreign investor should be sufficient disposal of any claims by the home state, since they would be acting in concert.

Second, Hirsch’s argument seems biased in favour of a position where the claimant is always a foreign investor and the defendant, a state. He does not envision a situation where an investor (and its home state) is in breach of an investment contract. In that case, can the host state bring a claim against both parties before ICSID too? He does not raise this question; neither does he proffer an answer to it.

Hirsch also suggests that personal jurisdiction may be broadened by allowing ICSID to deal with disputes arising between foreign private investors and private individuals or companies in the host state. Given the present case load of ICSID and its focus on disputes involving a state party or entity, private parties that enter into agreements should be able to settle their disputes through ad hoc international commercial arbitration, without implicating an international treaty-
based mechanism like ICSID that retains its validity as such, through the involvement of states in the dispute settlement proceedings. It is understandable that such suggestions would have been made in 1993 when ICSID’s caseload was not as heavy. Presently, with its caseload, ICSID does not need to expand its jurisdiction; rather, it needs to be effective in discharging its duties in relation to its current jurisdiction.

In considering the arbitrability of disputes, Professor Sornarajah has suggested that some categories of investment disputes should be settled by domestic courts or the ICJ.\textsuperscript{204} He argues that the ICJ may be a more appropriate forum where international public interest is involved; and domestic courts may constitute better forums, where national interest is at stake. Even though the argument is meritorious, it is limited for two reasons. First, states are unwilling to submit investment disputes to the ICJ,\textsuperscript{205} and even more so, the ICJ’s jurisdiction is limited to inter-state dispute settlement. Second, on a point which Professor Sornarajah readily concedes, investors are skeptical about the domestic legal systems of host states. Further, considerations of sovereign immunity and private international law rules on \textit{forum non conveniens} make the submissions of disputes to home states of foreign investors difficult.\textsuperscript{206} Thus, until a time when states are willing to submit inter-state investment disputes to the ICJ and when sufficient rules on private international law allowing access to home states’ courts are fully developed, one needs to consider the possibility of addressing public interest claims within ICSID. Next, I outline some thoughts on enhancing ICSID’s effectiveness in this regard.

\textbf{B. Some Preliminary Thoughts on Balanced Dispute Settlement}

\textbf{1. Achieving Robustness in Analyses of Investment Disputes}

First, it is important to distinguish between dispute settlement under the auspices of ICSID

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\textsuperscript{204} Sornarajah, \textit{Settlement of Investment Disputes}, supra note 3 at 174-76.

\textsuperscript{205} For example, one of the few investment cases that have been submitted to the ICJ, the \textit{ELSI Case}, was submitted to a chamber of the ICJ and not the full court. See \textit{supra} note 95.

\textsuperscript{206} This does not mean that some states have not assumed jurisdiction on claims initiated by private individuals against TNCs. However, this has not always been on the basis of domestic legislation providing for such jurisdictional foundations. For example, the United States’ court assumed jurisdiction in \textit{Doe v. Unocal}, 395 F.3d 932 (9th Cir. 2002) based not on the \textit{Alien Torts Claims Act}, but on the basis that there is a universal jurisdiction over violations of \textit{jus cogens} principles of international law, irrespective of nationality.
and *ad hoc* international arbitration. ICSID is a creation of treaty that has a level of international legitimacy that regular *ad hoc* arbitration does not share. In addition, ICSID settles investment disputes involving at least one state party or a constituent subdivision of a state. It does not settle commercial disputes between private parties. In recent dispute settlement cases, some tribunals have noted the public interest nature of disputes that ICSID tribunals settle.\(^{207}\) These features suggest that ICSID occupies a unique position in the international economic order that exceeds the settlement of purely commercial disputes. This position makes a robust analysis of disputes in a manner that captures the multiple actors and interests that are present in each investment dispute necessary.

A more encompassing consideration of investment disputes settled under the aegis of international institutions like ICSID would be one that takes matters of international concern and public interest seriously in addition to the commercial interests of the disputing parties. These matters of international concern and public interest are not extra-legal since they form aspects of international law. And the bulk of the law applicable in ICSID proceedings is international law. So far, environmental issues have been the most prevalent public interest matters that ICSID tribunals have addressed.\(^{208}\) Proposing a robust consideration of disputes is not synonymous with the inclusion of Third World peoples as parties to dispute settlement proceedings or according them the capacity to initiate such proceedings. The argument is not for an expansion of ICSID’s *jurisdiction ratione personae*. Rather, it is a call to pay attention to the diversity of actors that inhabit the realm of investment dispute settlement, and are affected by the occurrences in the system, and to take their cause seriously.

One could find some support for an effective public interest engagement from the *ICSID Report*’s concern with promoting “mutual confidence” between states and foreign investors.\(^{209}\)


\(^{209}\) Some ICSID tribunals have alluded to the responsibility of foreign investors in addition to their rights in some decisions, although not to the substantial degree that this thesis suggests. In this regard, see *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) (May 25, 2004), online: American Society of International Law <http://www.asil.org/ilib/MTDvChile.pdf>; International Institute for Sustainable
However, it is possible to argue that the “mutual confidence” clause is not effective because it is not included in the Report and not the Convention. Such contention could be resolved by the application of the rules of interpretation in articles 31 and 32 of the Vienna Convention on the Law of Treaties, which recognizes supplementary means of interpretation. Moreover, the ICSID Report is attached to the ICSID Convention and has been adopted as the document that describes the provisions of, and explains the need for, the Convention. Apart from the ICSID Report, the preamble to the ICSID Convention alludes to the need to encourage “international cooperation for economic development” and if ICSID is to continue to have much relevance and de facto legitimacy in the multifaceted 21st century investment environment, the tribunals need to take matters of immense importance to the majority of the peoples of the world into account. The OECD’s proposed Multilateral Agreement on Investment (MAI) negotiations provides a case in point on this issue. Because of the MAI’s inability to address diverse interests even among developed states, and the clamour of NGOs, the negotiations were eventually derailed. International actors of diverse orientations now actively engage international mechanisms and may also actively resist mechanisms that they deem incapable of reflecting interests that they consider important.

The suggestion is not that ICSID tribunals should address purely human rights, economic development or environmental issues, as to do so would be to exceed their jurisdiction if these issues do not arise from an investment. Rather, ICSID tribunals should not refrain from considering these issues where they constitute legal disputes arising directly out of an investment as contemplated by article 25(1) of the ICSID Convention and especially where they are pleaded before tribunals or introduced by non-disputing parties that have been granted participatory status. Investment disputes between states and foreign investors by their nature implicate non-commercial interests. It is a disservice to those affected to keep mute about these public interest matters. However, if some argue that considering non-commercial interests in


addition to commercial interests, amounts to overstretching article 25(1), recourse could be had under ICSID’s *Additional Facility Rules*, which allow the settlement of disputes that do not arise directly out of an investment. The limitation is that by article 3 of the *Additional Facility Rules*, the *ICSID Convention* and its potential benefits do not apply to such proceedings.

2. Disinterested Development of the International Law on Foreign Investment

The international law on foreign investment is still largely a contested site and one that is amenable to construction by dominant voices like ICSID tribunals. As noted earlier, while ICSID tribunals are arbiters in the investment dispute settlement system, this thesis argues that beyond this construction, they are one of the actors that constitute and shape the investment dispute settlement system. ICSID’s privileged position in the system is enhanced by its gradual assumption of the status of a *regime* in foreign investment dispute settlement, as a significant number of investment treaties, domestic legislation, and investment contracts refer disputes to the institution. 212 Its position also allows tribunals to contribute to the development of the international law on foreign investment. In fact, Regulation 22(2) of *ICSID’s Administrative and Financial Regulations* explicitly envisages the institution’s contribution to the development of the international law on investments. As discussed in chapter one, even though arbitral awards are a subsidiary source of international law, and even though it is usually argued that arbitral tribunals are not subject to the doctrine of precedent, ICSID tribunals occupy a position that allows them to facilitate the development of clear rules on international investment law.

While ICSID’s ability to contribute to the development of the international law on foreign investment is not usually disputed, commentators often note the difficulty of adopting consistent decisions in investment treaty arbitration. 213 Although the inconsistency issue is a legitimate

212 The term ‘regime’ is used in this sentence in the technical manner that international relations (IR) scholars working in the regime theory tradition use the term. For the basic tenets of the regime theory in IR, see the discussion in chapter two, part II(D) of this thesis. On a developing investment regime, see Sornarajah, *Settlement of Investment Disputes, supra* note 3 at 163-172.

concern especially considering the host of dispute settlement options available in the investment regime, for ICSID, if appropriately managed, there is room for the development of rules that eventually metamorphose into foreign investment laws. However, a lopsided support for any economic perspective or any side of the debates in this area of the law will not bode well for the development of the international law on foreign investment. Like Article 1 of the Charter of Economic Rights and Duties of States provides, “every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.”

It recognizes the rights of states to determine their own destiny, although states’ international obligations acquired under IIAs suggest that exercising this right would require the delicate balancing of several competing interests. On a less optimistic note, even if states domestically adopt economic perspectives that they deem workable, their decisions are subject to assessment based on the prevailing international economic perspective(s).

In spite of this limitation, which also extends to other areas of international law, one cannot but seek means to make the international law on foreign investment as inclusive as possible. In this regard, the international law on foreign investment could achieve a disinterested perspective on the development of the law by not writing off the applicability of domestic law. Through this approach, states are not precluded from expressing economic conceptions developed locally, and neither are they precluded from maintaining their identities and their differences. States are more likely to take responsibility for the effects of the policies that they adopt if they make such decisions based on the needs of the state and its peoples and not based on the imposition of models or standards. An expression of domestic economic policies that may facilitate socio-economic well-being is an important factor that ICSID tribunals cannot afford to rule out without backlash from state parties to dispute settlement. The optimistic reading is that ICSID tribunals can be more proactive in developing a robust international law on investment. Such law is one that should consider all the necessary actors, interests, facets and effects of investment. This approach is necessary in order to maintain ICSID’s effectiveness and continued relevance. ICSID tribunals’ ability to engage in a disinterested contribution to the international law on foreign investment is one that is driven by the interaction of the actors

214 Charter of Economic Rights and Duties of States, supra note 39.
in this area of the law, including Third World peoples’ through their resistance, arguments and strategic positioning. These actors’ interactions in ICSID’s reconstruction of the international law on foreign investment cannot be overemphasized.

3. Constitution of Panels

A supplementary point that is related to the two points made above is the constitution of the ICSID panels that engage in the reconstruction of the law. In order to accommodate diverse actors and interests, some might argue that ICSID arbitrators are not competent to address issues like human rights and environmental questions that arise directly out of an investment. This argument might derive from the qualification of ICSID arbitrators and the fact that the system, like other arbitral systems, is a consensual one where the parties select the arbitrators.\(^{215}\) However, it is important to assume that arbitrators are independent and impartial and will discharge their duties to the best of their ability. The question of qualification is different though. According to article 13 of the *ICSID Convention*, arbitrators and conciliators are to be “persons of high moral character” having “recognized competence in the fields of law, commerce, industry or finance who may be relied upon to exercise independent judgment.” This provision envisions mostly commercial disputes. However, other legal disputes may arise directly out of an investment and in order to enhance ICSID’s effectiveness in addressing legal (public interest) disputes that arise out of investments, there is a need for deliberate constitution of panels to reflect this concern. Some ICSID panels have included arbitrators with expertise in other areas of the law. For example, in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Suez v. Argentina*), where human rights related issues have been raised, one of the arbitrators, Professor Pedro Nikken has extensive experience in the area of human rights law, including holding the position of President of the Inter-American Court of Human Rights.\(^{216}\) Of course, having experts on a panel is one thing and reflecting this expertise in dispute settlement is

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\(^{215}\) Howard Mann & Konrad von Moltke, *A Southern Agenda on International Investment?: Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* (Winnipeg, International Institute for Sustainable Development, 2005) suggest that arbitrators should be selected in a neutral manner and not by the parties to the dispute. In this chapter, the focus is not on who selects the arbitrators, rather, it is on the qualifications of arbitrators that are selected, irrespective of the identities of those that do the selection.

\(^{216}\) *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19).
another. Nevertheless, the inclusion of these experts on the panels is a first step towards a reconstruction of the international investment system in a manner that effectively incorporates the multiple interests that are implicated in dispute settlement.

The identity of the arbitrators and their areas of expertise are relevant. However, the position that only developed country-arbitrators settle investment disputes is no longer supportable. ICSID panels are constituted by tribunal members from all over the world and the bias argument can hardly be substantiated. Perhaps, the relevant issue on the constitution of panels is that arbitrators’ views are often shaped by their areas of expertise and subscription to some economic/legal means of ordering. While most of the interviewees for this thesis, expressed the opinion that the important factor is that an arbitrator should be a good arbiter rather than a technical expert, one of the interviewees, a counsel, noted that “who” the arbitrators are determine the outcome of the case. Another interviewee, an NGO representative, also stated that a lot depends on who the tribunal members are. The “who” involves questions of identity that exceed nationality. The interviewed counsel was of the opinion that sometimes there is a generational issue, and some older arbitrators are not used to introducing public interest issues into investment arbitration. This counsel also expressed the view that the president of a tribunal has a lot of clout and contributes in a large measure to determining the course of a case. Also of relevance according to this interviewee, is the area of expertise. Thus, the opinion was expressed that it is better to have a public international lawyer on the tribunal, especially as President of the tribunal, because commercial lawyers are not as conversant with international law and its many facets that transcend commercial law and interests. For this interviewed counsel, the nationality of the arbitrator also matters in the constitution of a tribunal. On this note, ICSID does not preclude the appointment of nationals of the states involved in the arbitration. But having a defendant’s national on a panel does not necessarily imply that this person will be sympathetic to the cause of states. As the interviewee noted, some Latin American jurists are interested in seeing the rule of law entrenched in their states, having witnessed less than satisfactory legal systems growing up, and as such, feel like it is their duty to “straighten these states out.” Thus, it appears that expertise and outlook is quite

218 Interview No. 101, supra note 151.
determinative in this area. Below I discuss the identities of the arbitrators on the panels of the ICSID cases that are used as case studies in chapters five and six.

In the *Suez v. Argentina*, the President of the tribunal, Professor Jeswald Salacuse was appointed by ICSID. His remarkable achievements are too numerous to be reproduced here, and only some of them are mentioned below. Professor Salacuse, who holds a J.D. from Harvard Law School, is a United States national. He is Henry J. Baker Professor of Law at the Fletcher School of Law and Diplomacy at Tufts University, where he was Dean for nine years.\(^{219}\) He has extensive experience in international development, higher education, legal practice and specializes in international investment law, international negotiation, international business transactions, and law and development. With numerous books on negotiation, Professor Salacuse also has impressive experience working in Third World countries. He was a lecturer at the Ahmadu Bello University, Zaria in Nigeria, a Professor of Law and Director of Research at the National School of Administration in the Congo, Ford Foundation’s Middle East Advisor on Law and Development in Beirut, Lebanon, and Ford Foundation’s representative in the Sudan. He has written books on introduction to law in French-speaking Africa and on Nigerian family law. He also served as President of the International Third World Legal Studies Association. He is a public international lawyer that has been a consultant to multinational companies, government agencies, international organizations and so on. He has held chairmanship of several international associations, including the Institute of Transnational Arbitration, and has been a lawyer on Wall Street. Some of Professor Salacuse’s articles are cited in later chapters of this thesis.

One of the other arbitrators in *Suez v. Argentina*, Professor Pedro Nikken, is Venezuelan. He was appointed to the tribunal by Argentina. Apart from being a former judge and President of the Inter-American Court of Human Rights, he is also a Professor of Civil Law and International Law at the Law School of the Universidad Central de Venezuela in Venezuela.\(^{220}\) A member of the International Commission of Jurists, Professor Nikken holds a Ph.D. in Law from the University of Caracas and acted as adviser to the Venezuela Minister of Foreign

\(^{219}\) For Professor Salacuse’s bio and curriculum vitae, see online: <http://fletcher.tufts.edu/faculty/salacuse/default.shtml>.

\(^{220}\) The information on Professor Nikken in this paragraph is culled from the International Commission of Jurist’s website, <http://www.icj.org/article.php3?id_article=103&id_rubrique=13&lang=en>.
Affairs from 1979 to 1984. In addition to being an international lawyer and Professor, he is a partner in a law firm in Caracas. Apart from serving on the Inter-American Court of Human Rights, his interests in human rights protection is evident from his work as President of the Steering Committee of the Programa Venezolano Educacion Accion en Derechos Human, which is an NGO that is active in the promotion of human rights protection, education and diffusion. Professor Nikken has held other numerous international positions including holding the position of Special Envoy of the UN Secretary-General to Burundi in order to ensure the Establishment of a Truth Commission or an International Judicial Commission of Inquiry in 1995. He served as Legal Adviser to the UN Secretary-General on the El Salvador peace process from 1990 to 1992.

The trio of Professors in Suez v. Argentina was completed by Professor Gabrielle Kaufmann-Kohler, who was appointed by the claimants. A Swiss national who is a partner at Schellenberg Wittmer, she is also a member of the New York bar.221 Professor Kaufmann-Kohler holds a Ph.D. in Law from the University of Basle and is a Professor at the University of Geneva who teaches international arbitration, international litigation and international contracts. Her areas of expertise include international commercial and investment arbitration. She has participated in about 140 international arbitrations as panel member, presiding arbitrator and as counsel. Professor Kaufmann-Kohler is Honorary President of Swiss Arbitration Association, as well as a member of the International Council for Commercial Arbitration and the Board of the American Arbitration Association. Among her publications is an article on ICSID’s reform proposal for transparency and consistency.222 It was this group of international law professors that delivered the first ICSID decision allowing the participation of amicus curiae submissions in the ICSID system. In the process, their decision also emphasized the public interest nature of the arbitration. Their final decision on the merits of the dispute has not been delivered. That decision will be an instructive one and is most anticipated.


The constitution of the arbitral tribunal in *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Tecmed v. Mexico)*, also involved three people with expertise in international commercial arbitration, but with varying degrees of focus on investment arbitration.\(^{223}\) The President of the tribunal, Dr. Horacio Grigera Naon is an Argentine national who holds LL.M. and S.J.D. degrees from Harvard Law School and a LL.D. from the University of Buenos Aires.\(^{224}\) He also holds a J.D. from the University of Buenos Aires. He is a member of the bar in Argentina as well as in New York and the District of Columbia in the United States. Although an independent international arbitrator, he is a distinguished practitioner in residence at the American University Washington College of Law and Director of its International Commercial Arbitration Program, specializing in international business and international arbitration. Unlike in the case of the arbitrators in *Suez v. Argentina*, Dr. Grigera Naon’s expertise is in the area of international commercial arbitration, which is distinct from international investment arbitration. His course on international commercial arbitration at the American University is principally focused on the settlement of commercial disputes between private parties based on provisions such as the Rules of the International Chamber of Commerce (ICC).\(^{225}\) As well, he is not a career academic but a widely-published practitioner that brings remarkable practice experience to the international arbitration program at the American University. Dr. Grigera Naon was a former Special Counsel with White & Case LLP and Senior Counsel with the International Financial Corporation. He has also been the Secretary General of the International Court of Arbitration of the ICC.

*Tecmed v. Mexico* was a case where the defendant, Mexico, appointed a Mexican national to the tribunal, and the claimant, a Spanish company relying on the Spain-Mexico BIT, appointed a Spanish national. Dr. Jose Carlos Fernandez Rozas, a Spanish national, was appointed to the tribunal by the claimant. He received a Ph.D. in law from the University of Oviedo.\(^{226}\) He is a Professor of private international law at the Complutense University of Madrid. His expertise lies in the areas of private international law and international business. He has been a

\(^{223}\) *Tecmed v. Mexico*, supra note 95.

\(^{224}\) See Dr. Grigera Naon’s curriculum vitae online at <http://www.wcl.american.edu/faculty/cv/grigeranaon.pdf?rd=1>. Also, see his faculty profile at the American University Washington College of Law at <http://www.wcl.american.edu/faculty/grigeranaon/>.


\(^{226}\) For Dr. Fernandez Rozas’ curriculum vitae, see <http://www.ucm.es/info/derinter/fernandezrozas.htm>.
representative of Spain at the Hague Conference on Private International Law and a visiting professor at several universities, including Texas Tech University in the United States. The final arbitrator in the case was Mr. Carlos Bernal Verea, a Mexican national. He is Professor at the Autonomous Technological Institute of Mexico and holds a LL.B. from Cambridge University. Professor Bernal Verea was an advisor to Noriega and AC Escobedo and has served as a member of Mexican delegations to international organizations and as Minister of Mexico’s Permanent Mission to the United Nations.

In Aguas del Tunari, S.A. v. Republic of Bolivia (AdT v. Bolivia), the tribunal’s composition resembled that in Tecmed v. Mexico – one legal academic, a practicing lawyer, and a professional consultant on economic and financial modeling. The President of the tribunal, Professor David D. Caron, was appointed by the Chairman of ICSID’s Administrative Council, when the parties failed to reach a consensus on this position. A United States national, Caron is C. William Maxeiner Distinguished Professor of Law at the University of California Berkeley School of Law. He holds a J.D. from Boalt Hall and a Dr. jur. and Doctorandus in International Law from Leiden University. Professor Caron is an international law expert that teaches public international law, resolution of private international disputes and other courses. He has been actively involved in the American Society of International Law, serving as its Vice President, and is also a member of the U.S. Department of State Advisory Committee on Public International Law. Among his international practice work is serving as legal assistant at the Iran-U.S. Claims Tribunal, and as counsel for Ethiopia before the Eritrea-Ethiopia Claims Commission.

Henri C. Alvarez, Q.C., a Canadian, was appointed to the tribunal by the claimant foreign investor. He is a partner with the law firm of Fasken Martineau in Vancouver and also teaches international commercial arbitration as an Adjunct Professor at the University of British Columbia. Mr. Alvarez, who holds a LL.B. from the University of Ottawa, has over 20 years of experience. His practice includes international arbitration, dispute resolution, and commercial law.

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227 For Professor Bernal Verea’s bio, see <http://www.consejomexicano.org/index.php?id=17,6227,0,0,1,0>; <http://derecho.itam.mx/facultad/facultad_completo_bernal.html>.


229 See Professor Caron’s profile at <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=145>.

years experience in international commercial arbitration. He is Co-Chair of Fasken Martineau’s International Law Practice Group. A member of the London Court of International Arbitration, Mr. Alvarez has designed and drafted arbitration and mediation clauses. He has also acted as both arbitrator and counsel in commercial arbitrations and published several articles on international commercial arbitration.

Bolivia’s appointee, Dr. Jose Luis Alberro-Semerena, is a director and professional consultant with LECG, a services and consulting firm that “provides independent expert testimony, original authoritative studies, and strategic advisory services to its clients.”231 A Mexican, Dr. Alberro-Semerena was awarded a Ph.D. in economics from the University of Chicago.232 He was the founding Chief Executive Officer of one of the ten largest companies in Mexico, PEMEX Gas and Basic Petrochemicals. He was also PEMEX’s chief representative in the NAFTA negotiations. Dr. Alberro-Semerena has served as a public official in the Mexican Government, including as chief of staff of the secretary of commerce and industry and as chief economic advisor to the secretary of the treasury. He has also served as consultant to the UN on Latin American issues and has taught economics at U.S. and Mexican universities. A widely published economist, he has worked on high profile merger and antitrust matters before the Mexican Federal Competition Commission. Dr. Alberro-Semerena rendered a dissenting opinion in the decision on jurisdiction in AdT v. Bolivia.

Some features are common in all of the tribunals discussed above. They all comprise both developed and Third World nationals, at least one full time professor is included on the tribunals, and they all include at least one person with expertise in international commercial arbitration. However, not all these arbitrators spend a significant amount of their time working on international investment arbitration issues and only one of them is a committed international human rights lawyer. Thus, the provisions on arbitral tribunal constitution in the ICSID Convention have accommodated a diverse group of experts, perhaps, with their areas of expertise playing a role in their perception of issues that require attention in the settlement of disputes. Still, it is important to note that one cannot over-generalize on these matters. So, to suggest that arbitral tribunals form part of the traditional actors in the ICSID system is not to

232 For Dr. Alberro-Semenera’s profile, see <http://www.lecg.com/jose_alberro/>.
make an argument about the under-representation of any group, but to note that like states and foreign investors, tribunals have been formal participants in the dispute settlement system.

There is no immediate need to amend the *Convention* on the point of panel constitution (more so, the procedure for amending the *Convention* is rigorous) or to include an additional mechanism as was done in 1978, when the *Additional Facility Rules* were included. Environmental and human rights lawyers, for example, are covered by article 13, as competence is not restricted to any particular area of law. In the absence of an amendment, the responsibility falls on the parties to the disputes to select arbitrators with relevant expertise. Any additional responsibility accrues to the Chairman of ICSID’s Administrative Council, who is the President of the World Bank, to select arbitrators in those instances where the Chairman assumes responsibility for selecting arbitrators on behalf of the parties where they do not appoint the arbitrator(s) or in annulment cases.233 In the conduct of investment arbitration, just as the identity of the arbitrators is important, the parties’ pleadings, modes of strategic interaction, and the contents of investment treaties are also important. None of these factors on their own determine the outcome of a case. For example, as some Argentine cases discussed in chapter five demonstrate, it is evident that it is possible to have rather similar facts and the same investment treaty and even one arbitrator common to two or more cases and arrive at a different conclusion on the liability of the parties.

**VI. Conclusion – Summary of the Chapter’s Arguments**

This chapter has engaged in a historical analysis of the development of the international investment dispute settlement regime. It has discussed the position of states and foreign investors in the ICSID regime. The brief historical analysis, which a TWAIL constructivist perspective on investment dispute settlement emphasizes, demonstrates that a neoliberal approach to dispute settlement permeates the system. In addition, the chapter has broadened the ICSID discussion beyond purely commercial issues, by relying on ICSID’s own reference to enhancing mutual interests, thereby setting the stage for subsequent discussion of Third World peoples in later chapters. It has suggested that the lack of adequate attention to non-commercial interests in cases within ICSID’s jurisdiction is not excusable. Rather, this position reveals the failure of ICSID, and

233 *ICSID Convention, supra* note 1, arts. 38 & 52(3).
international law generally, to develop speedily enough to meet the challenges of balancing competing interests in a globalized world. Or perhaps, it reveals the unwillingness to shed positivist leanings and actively adopt a robust approach to investment dispute settlement.

Accommodating multiple interests is not necessarily a task beyond the reach of ICSID even if such accommodation will require a fundamental shift in the processes and attitudes towards relevant actors and interests that drive the work of the tribunals. The question remains whether the tribunals will be willing to adopt such a course. As this chapter has discussed, ICSID has the potential to put changes into effect. The institution and the tribunals have demonstrated abilities to adapt to changes in some circumstances. For example, as an institution, ICSID established Additional Facility Rules in 1978. Also, procedurally, ICSID has commenced the development of a system that relies on transparent investment dispute settlement in recognition of the diverse rights that are implicated. For example, the recently amended ICSID Arbitration Rules, which came into force on April 10, 2006, allow ICSID tribunals to accept written amicus curiae briefs. These rules were a response to the clamour for transparency in cases like AdT v. Bolivia and Suez v. Argentina.

While some of the changes that ICSID has embarked on are laudable, this thesis raises more fundamental issues that may require some time to substantiate. These issues relate to ICSID’s continued relevance to the Third World and would involve challenges to dominant voices on investment dispute settlement. If the system ceases to be relevant, designing effective rules of procedure, as important as they are, becomes pointless. As a result, subsequent chapters engage the inclusion of Third World peoples into the discussion. Meanwhile, the next chapter turns attention to an analysis of investment treaties that usually form the basis for ICSID tribunals’ assumption of jurisdiction, since it is often contended that these agreements drive the decision-making interpretations that tribunals adopt.


235 Supra note 228.

236 Supra note 207.
CHAPTER 4: THE THIRD WORLD AND THE DYNAMICS OF INVESTMENT TREATIES

The Core of the Chapter’s Arguments

In this chapter, the discussion focuses on the place of investment treaties in the investment dispute settlement order. The chapter discusses the relationship between ideas and the interactions of actors in concluding investment treaties that inform the decisions of arbitral tribunals. In a TWAIL constructivist reading, the chapter focuses on the role that ideas play in interactions among actors. Recognizing that there are several ways of conceptualizing investment treaties, the chapter offers an alternative perspective on these agreements that mostly form the basis for contemporary ICSID dispute settlement. Having discussed ICSID’s place in the international investment order in the preceding chapter, this chapter offers a critique of the dominant ideological paradigms that drive the international foreign investment system. It argues that the historical development of the treaties in capital importer/capital exporter dichotomies, contributed to the ideas that now drive the system, even though those dichotomies have become largely blurred. The chapter suggests a movement towards more inclusive perspectives on investment treaties. It emphasizes the potentially effective interaction of Third World peoples with the system, without losing sight of the limitations that attend such participation.

I. Introduction

Almost everything is contested in the international law on foreign investment. Even the very site of the discipline – its scope, ideological bases and purposes – is contested. Like most areas of the law, it undergoes constant changes. By the 1990s, the international investment order increasingly sought to displace the state and entrench the market in greater measure. The liberalization trend was evidenced by the proliferation of international investment agreements

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investment agreements/IIAs/investment treaties)\(^2\) including bilateral investment treaties (BITs) and regional investment agreements.\(^3\) The IIAs movement developed partly in response to the absence of clear customary international law rules on investment promotion and protection and partly out of dissatisfaction with the existing rules.\(^4\) These IIAs now form the major basis for ICSID jurisdiction in disputes. An analysis of the ICSID system would be incomplete without an assessment of these agreements. In this regard, almost all the experts interviewed as part of the research for this thesis were of the opinion that IIAs are of immense importance in the international investment system. To a significant extent, the contents of IIAs have the potential to impact on the relationship between ICSID and Third World peoples.

The overarching purposes of IIAs are investment liberalization and protection of established investments. Although enforceable mechanisms are not included in the agreements to this effect, it is assumed, mostly anecdotally, that IIAs facilitate increased investment flows. The majority of the parties to these agreements, especially the BITs, are Third World states, although there are BITs among member states of the European Union and some North-North agreements that incorporate investment protection provisions.\(^5\) Third World states seek to increase their investment flows by concluding South-North IIAs and some South-South IIAs.\(^6\) Even though IIAs enjoy significant support in some quarters, they have been greeted with

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\(^2\) In this chapter and in this thesis generally, the term IIAs does not include double taxation treaties (DDTs). In some usage, the term includes DDTs. See e.g. UNCTAD, “Systemic Issues in International Investment Agreements” IIA Monitor No. 1 (2006), online: <http://www.unctad.org/en/docs/websiteiia20062_en.pdf>.

\(^3\) See note 11 and accompanying text in chapter one of this thesis for the number of concluded IIAs.


\(^5\) Michelle Potesta, “Bilateral Investment Treaties and the European Union: Recent Developments in Arbitration and before the ECJ” (2009) 8 Law & Prac. of Int’l Cts & Tribs. 225 at 230-231 notes that there are about 190 BITs among European Union (EU) members. Prior to 2004, there were only two BITs among EU member states. Following the expansion of the EU in 2004 and 2007, the number of BITs grew. In the 1990s, the former Socialist states entered into BITs with the first-generation EU members in order to attract foreign investment.

\(^6\) On South-South IIAs, see infra note 109 and accompanying text. Although it is often suggested that South-South IIAs incorporate a more comprehensive framework that seeks to balance the competing nature of IIAs and the needs of Third World peoples, some of these South-South IIAs are similar to South-North IIAs. For example, while the Investment Agreement for the COMESA Common Investment Area (23 May 2007), http://www.comesa.int/ [COMESA Investment Agreement] – an agreement among some African states – included some comments on balancing investors’ rights and duties and states’ rights and duties, its substantive provisions are not far-reaching enough to suggest that it achieved that purpose. For an analysis and critique of the COMESA Investment Agreement, see Ibironke T. Odumosu, “Towards Mechanisms for Assessing the Impacts of Foreign Direct Investment Law and Policy in Post-Conflict Rwanda” in Obijiofor Aginam et al, eds., Foreign Direct Investment in Post-Conflict Societies (2010) (Forthcoming).
protests in other quarters. The reactions of the actors that are impacted by IIAs inform some of the analysis in this chapter. First, I provide a background to the analysis.

By the beginning of the 21st century, foreign direct investment (FDI) flows had become the largest source of external finance to the Third World. The relevance of FDI for the Third World became increasingly pronounced in the wake of the debt crises and the significant reduction in private lending. With the growing need for FDI came the proliferation of IIAs. It is trite that IIAs vary in content but beyond the often different provisions of the agreements, their orientation sometimes depends on reciprocity of rights and obligations between capital importers and exporters. Agreements are framed in reciprocal terms in that any party to the agreement might acquire any of the obligations if they import capital. However, capital exporter/capital importer dichotomies in practice appeared to affect the agreements’ contents historically as the capital importer acquires most of the obligations. Hence, this chapter emphasizes the balancing of benefits and burdens between the oscillating categories of capital importers and exporters in practice. At the early stages, BITs were mostly concluded between somewhat readily identifiable capital importers and capital exporters. Major capital exporters of the time were powerful states that emphasized principles which usually prioritized protection of their economic interests. The clearer dichotomy dictated the extent to which IIAs addressed issues like investment protection, without much consideration of issues like economic development, and human, labour and environmental rights. Even though the capital importer/capital exporter categories are no longer clearly defined, states have internalized the ideas that drove the establishment of the IIAs regime and continue to reenact them in recent times.

As capital exporters, states traditionally subscribe to the prescriptions of liberalized markets but sometimes depart from this paradigm when they are capital importers. In more recent

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7 Since the 1990s when liberalization assumed a prominent place in international affairs, the negotiations of the Organization for Economic Development and Cooperation’s (OECD) Multilateral Investment Agreement (MAI) have been derailed; there have been popular protests against the World Trade Organization (WTO), most notably at the Seattle Ministerial Conference in 1999; non-governmental organizations (NGOs) have adopted a significant vocal position in relation to investment agreements; and even industrialized states have adopted reactionary arguments to their obligations under some investment agreements, especially NAFTA.


9 For reciprocity, see nn. 76-83 and accompanying text in chapter two of this thesis.
times, where there is a possibility of being both a capital importer and capital exporter under the same carefully negotiated agreement, the interests that are incorporated are more far-reaching. Essentially, the potential that one state might be on the far end of the capital importer part of the capital importer/exporter continuum contributed to the establishment of a system that supported the inclusion of investment protection principles without much consideration of wider factors. Because the ideas that informed the early IIA system have become deeply entrenched, there are parties with a balanced relationship that still conclude lopsidedly focused IIAs. The relationship between the ideas that dictate the contents of IIAs and the interaction of relevant actors are paramount in re-constructing the international investment order. In sum, this chapter finds that IIAs have acquired their present nature because of an ideological reliance on a liberal investment protection paradigm that flourished due to a historically clearer dichotomy in relationships.

By concluding IIAs, capital importing states incur significant costs and shoulder heavy burdens in exchange for the promise of investment flows. The attention to Third World states’ IIAs in this chapter flows from this thesis’ focus on the Third World. Under most South-North BITs, where many Third World states, except states like China, are the major capital importers, the majority of obligations apply to these states. The type of agreements that earlier relationships generated, read like almost all the benefits from foreign investment accrue to host states. In light of the experiences of the past two decades since IIAs proliferated, this chapter subscribes to the familiar argument that IIAs that envisage investor obligations in addition to rights, reflect a more inclusive multiplicity of interests. The argument suggests that in order to ensure an equitable distribution of benefits and burdens in the global investment order, the need to balance the rights and obligations of both capital exporting and importing states, and foreign investors, is essential. This view eschews an imbalance that lopsidedly favours any purpose over the other. It advances the position that IIAs should not effectively preclude host states’ rights to regulate foreign investment in the public interest and argues that states maintain the ability to adopt domestic policies in furtherance of their socio-economic development.
Several insightful scholars have suggested that reforms that demonstrate inclusiveness are necessary for a robust investment order. However, these suggestions conflict with the liberal foundation of many IIAs. As such, in order to achieve significant advancement in a re-conceptualization of IIAs that inform ICSID tribunals’ decisions, a reappraisal of the agreements’ ideological bases is essential. Such reappraisal is fundamental as the allocations of rights and duties in the agreements turn on this background. Addressing the ideas that drive IIAs draws from the TWAIL constructivist insight on the importance of ideas in the international order and the challenge of operating at this fundamental level of international relations. This chapter advances the position that the incorporation of a broader community of interests that extends beyond states and foreign investors to include Third World peoples enhances the possibility of effecting changes in the international investment order. This could occur when these actors engage in a reiterative exposition of their ideas in order to ensure that more robust IIAs are concluded. However, as previous responses to expressions of alternative ideas have shown, possessing ideas and seeking to project them in international fora does not, by itself, catalyze changes. Thus, this chapter recognizes that multiple factors contribute to successful projection of ideas in the international investment order. One of those factors is an interaction between states and foreign investors, and broader communities of interest. This is pertinent in an international order that continually seeks to de-center the state in international economic relations but reinforces its authority in terms of human rights and security issues in a post-9/11 world. It is important to include the views of Third World peoples that are directly impacted positively as well as negatively, because a single political-economic perspective can only offer so many answers to the multifarious issues that are implicated.

The chapter proceeds in six parts including the introduction and the conclusion. Part two sets out the major ideas on foreign investment and provides a background for understanding the reasons why most IIAs are drafted with a major focus on investment protection without

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11 See e.g. the Declaration on the Establishment of a New International Economic Order (NIEO) G.A. Res. 3201 (S-VI) (May 1, 1974).
significant consideration of other necessary factors. Part three briefly discusses the substantive contents of IIAs. The fourth part focuses on an analysis of investment flows and economic development, state sovereignty, and general public interest impacting issues like labour, the environment, and human rights protection, as points of challenge to IIAs have been based on these issues. The fifth part sets out an interactional agenda for a more inclusive framework on IIAs and part six concludes.

II. The Ideology of International Investment Agreements

Ideas change. They are products of the interaction of social forces. Because societies are dynamic and they evolve, ideas are immensely susceptible to change. Nevertheless, some ideological strands have enduring capacities because they emerge from, and are supported by, dominant social actors. These ideas that take on the form of ideologies, dictate courses of action and regulate relationships. Due to the existence of conflicting ideas on foreign investment, it is not surprising that there have been several failed attempts to conclude a global investment agreement.12 Both industrialized and Third World states have at one time or the other, rejected multilateral instruments that seemed biased in favour of particular ideological positions; yet, BITs have proliferated. The traditional ideological rifts in international investment law between capital exporters and capital importers have been tempered since the liberalization era of the 1990s. However, the debate retains some of its vigour due to recent retreat from liberal perspectives in both the developed and Third Worlds, and civil society’s involvement in the international law on foreign investment.13

States organize their affairs based *inter alia* on several economic and socio-political ideas. Within the international order, more acceptable ideas usually reflect the position of dominant

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12 The first major attempt at drafting a multilateral investment agreement was the 1948 Havana Charter on the International Trade Organization. On the Havana Charter, see James Fawcett, “The Havana Charter” (1949) 5 YBWA 320. The United Nations Commission on Transnational Corporations (UNCTC) drafted a Code on Multinational Corporations, which favoured the interests of the Third World at about the same time that the NIEO Declaration gained prominence. The Code failed due to non-acceptance by developed states. More recently, there have been further attempts to draft multilateral investment agreements under the auspices of the OECD and the WTO. The former failed mostly due to concerns raised within the OECD itself, and concerns by Third World states and NGOs. The latter is also facing similar opposition.

actors. Historically, dominant ideologies have been maintained through the exertion of power—military, economic, and ideational power.\(^\text{15}\) They become embedded in social consciousness through a process of continuous reiteration. Although some actors in the international order might have alternative ideas, the ability of dominant actors to exert influence through asymmetrical power as well as through the instrumentality of the law, plays a major role in projecting and maintaining certain ideologies.\(^\text{16}\) Commenting on this subject, Professor Chimni has noted that:

[D]ominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised. Force is only used when absolutely necessary, either to subdue a challenge or to demoralize those social forces aspiring to question the “natural” order of things. The language of the law has always played in the scheme of things, a significant role in legitimizing dominant ideas for its discourse tends to be associated with rationality, neutrality, objectivity and justice.\(^\text{17}\)

Yet, it will read against the grain of any meaningful hope for reform that purports to include dominant and peripheral actors, to suggest that only the ideas of materially powerful actors can dictate the course of the law. As argued in chapter two, international law is Janus-faced. While it has the capacity for domination, it also retains the ability for emancipation if actors tap into

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\(^{14}\) For example, during the Cold war, most of the former Soviet Union’s dominated areas subscribed to communist ideas while the supporters of the United States are mostly capitalists.


\(^{16}\) For example, the debt crises played a major role in entrenching liberal views in Third World states. See Virtus Chito Igbokwe, “Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes” (1998) 15 J. Int’l Arb. 99 (arguing that in spite of the anti-stabilization clause argument and Third World countries’ unequivocal rejection of the internationalization theory, factors such as the debt burden have resulted in the acceptance of these clauses in practice, as measures to establish an extremely secure and favourable legal regime to foreign investors that have the skill, capital and technology for the extraction of mineral resources). See generally Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism (Toronto, Alfred A. Knopf, 2007).

its resources for liberation. These resources are available within the realm of ideas.\(^\text{18}\)

Historically, the enunciation of alternative ideas without the support of dominant actors has been an uphill task, but the position of a TWAIL constructivist perspective on this issue is that constant reiteration of alternative perspectives can yield modest results.

Three principal ideological perspectives on the political economy of foreign investment – economic liberalism, (Marxist) dependency theory and economic nationalism – have garnered considerable attention in recent history.\(^\text{19}\) Although not exhaustive, these perspectives reflect the conflicting ideas on foreign investment to which states have subscribed. Since the liberalizing trend of the 1990s, some may contend that the perspectives are no longer important. However, such a position does not accurately capture the historical and present position in the international investment system, as IIAs are not drafted in a theoretical vacuum but largely reflect an ideological bias for the prevailing neo-liberal economic system. More so, recent challenges to and backpedaling from neo-liberalism, especially by some Latin American states, and more nuanced TWAIL, Marxist, and other perspectives keep the debate on the effects of conflicting political economic perspectives alive.\(^\text{20}\) The discussion now turns to a brief analysis of these perspectives. Because these perspectives have wide internal variations, what the discussion below presents is a general overview of the central tenets of the perspectives without laying claims to exhaustive or comprehensive enunciation of their tenets.

The first ideological perspective on foreign investment discussed in this chapter – economic liberalism – proceeds based on the assumption that foreign investment is significantly beneficial to the host state. It suggests that foreign investment is necessary for economic development and has been one of the major drivers in the conclusion of IIAs.\(^\text{21}\) It prescribes


\(^{21}\) Sornarajah, International Law on Foreign Investment, supra note 13 at 268.
minimal government intervention in markets based on a subscription to the public/private
divide thesis. Economic liberalism is mostly championed by (industrialized) capital exporting
countries, transnational corporations (TNCs) and international financial institutions (IFIs), and
widely practiced in various forms by many Third World countries. Because of its focus on the
benefits of foreign investment, the perspective suggests that the resources of international law
should be brought to bear to protect investment. This view has been held for many decades and
was widely articulated in the internationalization cases of the 1950s and the Libyan
nationalization cases.\footnote{See the discussion in part III of chapter three of this thesis.} Its policy rationale includes the view that investment protection will encourage investment flows which will in turn further the development of host Third World
countries. The drafters of the \textit{ICSID Convention} shared this conviction and some ICSID
tribunals hold a similar view.\footnote{See notes 142-143 and accompanying text in chapter three of this thesis.}

A liberal investment regime rests on three principles – investment neutrality, investment
security and market facilitation.\footnote{Kenneth Vandevelde, “Investment Liberalization and Economic Development: The Role of Bilateral
Vandevelde, “Political Economy”, \textit{supra} note 19 at 628.} This perspective facilitates the prevention of arbitrary
seizure of property and other forms of expropriation without the payment of adequate
compensation. Due in part to its contribution to investment security, it also has the potential to
contribute to investment promotion because the perceptions of security for investments might
aid the decisions whether or not to invest in a particular jurisdiction. Like other perspectives
on foreign investment, a liberal foreign investment regime involves some potential pitfalls. It
sometimes ignores the fact that engaging in foreign investment is a more profitable venture for
investors compared to investing in their home states.\footnote{See John R. Oneal & Frances H. Oneal, “Hegemony, Imperialism and the Profitability of Foreign Investment”
(1988) 42 Int’l Org. 347.} The perspective also often fails to
measure the level of benefits that really accrue to the vast majority of people in Third World
countries as a result of FDI flows.

Economic nationalists enunciate further critiques of liberal investment policy. First, the
concern of nationalists (and Marxists) is that foreign investment may not produce the promised
increase in efficiency and second, even where increased productivity materializes, it does not necessarily lead to economic development. The second point relies on the premise that development requires both maximized productivity and equal distribution of wealth. Because economic liberalism mostly promotes the former, it may not be essential to development.26 The critique of economic liberalism is not limited to the Third World. In developed states, economic nationalists may resist inward foreign investment especially from other developed states for the same reasons marshaled by Third World economic nationalists.27

Positioning itself as an opposite of economic liberalism, (Marxist) dependency theory adopts the view that foreign investment benefits developed states to the detriment of Third World peoples, and as such, cannot be relied upon to promote development.28 In fact, according to dependency theory, foreign investment is inimical to development and perpetrates the cycle of imperialism. Without diminishing the importance of its insights into cyclical imperialism, one of the major problems with dependency theory’s postulations is that it largely ignores the potential benefits of foreign investment.29 Although there has been a shift away from dependency theory especially by Latin American countries that were its major proponents, Professor Sornarajah notes that there is a possibility of its reemergence because the adoption of economic liberalism has not necessarily culminated in development in Latin America, and a country like Argentina has experienced severe economic crisis despite the adoption of neo-liberal principles.30

26 Vandevelde, “Investment Liberalization”, supra note 24 at 515. Professor Vandevelde, however, suggests that a strand of investment liberalism – sustainable liberalism – can provide some measure of not only growth but also equality. He deems covering both grounds important, because otherwise, “skepticism and ultimately apostasy” over liberalism will not be far behind. See Vandevelde, “Sustainable Liberalism”, supra note 19 at 390.

27 For critiques of liberal investment policy, see Vandevelde, “Political Economy”, supra note 19 at 625-627.


29 The potential benefits of foreign investment include technology transfer and market expansion. However, the actual benefits vary across jurisdictions and sectors and are usually the subject of heated debates. On the benefits of foreign investment, see Magnus Blomstrom, “Host Country Benefits of Foreign Investment” (1992) NBER Working Paper No. 3615. But for the myths surrounding these benefits, see James Petras, “Six Myths about the Benefits of Foreign Investment: The Pretensions of Neoliberalism” July 2, 2005, online: Global Policy Forum <http://www.globalpolicy.org/socecon/ffdi/2005/0702sixmyths.htm>.

30 Sornarajah, International Law on Foreign Investment, supra note 13 at 58.
In the early post-colonial era, economic nationalism emerged as a major ideological perspective in many parts of the Third World. The economic nationalist perspective on foreign investment represents a middle ground between liberal foreign investment theory and dependency theory. It seeks to strike a balance between the beneficial and harmful effects of FDI. It recognizes that FDI is not completely pro-development and neither is it intrinsically inimical to development. Economic nationalist states seek to control inward and outward investment flows in order to ensure that they attract only those investments that will further their investment policy; employ interventionist measures like investment screening, performance requirements, protective tariffs, and tax incentives; and ensure that when established, FDI will continue to operate according to national policies. Generally, this ideological strand favours the regulation of foreign investment but does not completely preclude the entry of foreign investment. It agrees that there are benefits from FDI but seeks to regulate any resulting negative impacts. Like liberalism and dependency theory, nationalism also has its pitfalls. It could preclude the establishment of foreign investment that would otherwise be beneficial if investors perceive that their interests will be unprotected. Also, the controls that government exercises could be applied in an arbitrary and/or unjust manner. In addition, extreme forms of nationalism that manifest in incessant nationalizations of foreign property do not suggest the presence of favourable investment climates. Presently, there is a new wave of nationalism by both developed and Third World states, mostly manifesting when these states are capital importers.

Given that most IIAs focus on investment protection, extensive liberalization, and minimal regulation, they proceed from an economic liberal perspective. In fact, the frequent conclusion of BITs has been regarded as a triumph of liberalism in some quarters. Since many Third

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31 Professor Vandevelde notes that both Third World and developed states subscribe to economic nationalism. Vandevelde, “Political Economy”, supra note 19 at 623. Developed states are nationalist when they are in a position of capital importers and not exporters, but IIAs require Third World states to adopt liberalism as capital importers. Vandevelde describes economic nationalism as seeking to enhance a state’s “position within the international community by protecting or increasing the economic resources available to the State.” Ibid. at 622.

32 A report of the UNCTC that adopts this view is included in Kenneth Simmonds et al, Multinational Corporations Law (Dobbs Ferry, New York: Oceana Publications, 1979).

33 Vandevelde, “Political Economy”, supra note 19 at 622.

34 Sornarajah, International Law on Foreign Investment, supra note 13 at 3.

World states used to favour regulation to an extent that economic liberalism does not support, some commentators suggest that the proliferation of BITs signal that Third World states have abandoned their earlier ideas on foreign investment and embraced liberalism.\footnote{See Kenneth Vandevelde, “A Brief History of International Investment Agreements” (2005) 12 U.C. Davis J. Int’l L & Pol’y 157 [Vandevelde, “Brief History”]. For a view on development models that Third World states have adopted, see Jeswald Salacuse, “From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World” (1999) 33 Int’l Law. 875. See also James Thuo Gathii, “Third World Approaches to International Economic Governance” in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens eds., International Law and the Third World: Reshaping Justice (Milton Park, Abingdon, Oxon; New York: Routledge-Cavendish, 2008) 255.} The policies of these states resonate with the position taken by these authors especially in view of the neo-liberal economic reforms that many of them adopted in response to the debt crises and the prescriptions of IFIs. However, a declaration of the adoption of a single economic liberal agenda excludes the experiences, actions and resistance of many Third World peoples. In an essay explaining the proliferation of BITs, Jason Yackee argues that one “should not be lulled into thinking that developing countries have embraced BITs – and through them, FDI – because BITs and FDI “are,” in the objective sense “good” for them, either individually or perhaps even collectively.” For him, “the current enthusiasm is due at least in part to the subjective (if widely held) belief in the developmental value of BITs and of the FDI they are thought to attract.”\footnote{Yackee, supra note 15 at 197.} As a result, he notes that it should not be taken for granted that the liberalizing trends of the last two decades will continue or that the pro-investment status quo will persist because “ideas and beliefs are imminently susceptible to change, and policies based upon them can be expected to change as well.”\footnote{Ibid. at 197.}

In another explanation for the proliferation of South-North BITs, Professor Guzman suggests that Third World states, while rejecting international law rules on compensation in the event of an expropriation, conclude BITs with sometimes more onerous provisions because they are forced into a prisoner’s dilemma.\footnote{Andrew T. Guzman, “Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38 Va. J. Int’l L. 639 (arguing that Third World states adopt different positions on bilateral and multilateral levels in order to attract foreign investment.)} He argues that as a group, Third World states reject the ideas articulated in the Hull Rule but in order to further their individual economic interests, they conclude BITs in competition with one another.\footnote{Ibid. at 669-671.} Thus for him, BITs do not provide
evidence of coalescence on any customary international rule because they are not concluded on the basis of legal obligations that the states perceive that they are under. Rather, the agreements are entered into as matters of economic interest.\textsuperscript{41}

Despite the proliferation of liberal IIAs, it is misleading and premature to declare the triumph of any single idea, especially if the positions of a broad category of relevant actors are taken into account. The ideology of foreign investment remains a contested site. Although the attitudes of Third World states toward foreign investment have changed, the underlying arguments, needs and expectations remain largely unchanged, at least for peoples. A robust construction of the international community to include Third World peoples suggests that the international investment order has not attained sufficient convergence of interests and ideas to warrant the adoption of a single foreign investment ideology, as groups continue to form “communities of resistance” against international economic policies that they deem unfavourable.\textsuperscript{42} This people-driven resistance is an emerging face of interaction within the international investment order.\textsuperscript{43} Even on a governmental level, as Professor Guzman has articulated, Third World states adopt different arguments in multilateral and bilateral fora.\textsuperscript{44} While they conclude BITs, arguments that eventually took investment off the WTO Doha Development Agenda include some Third World states’ concerns about the utility of any resulting agreement for development. Also relevant were controversies surrounding the definition of investment, policy space issues, focus on investment protection and liberalization in the absence of development-enhancing provisions, and the inclusion of the pre-establishment phase in national treatment obligations.\textsuperscript{45} After Doha, contrary views on investment issues were central in derailing the WTO Cancun Ministerial Meeting in

\textsuperscript{41} \textit{Ibid.} at 684-687.


\textsuperscript{43} One cannot ignore the nuanced and increasingly sophisticated arguments of (Third World) scholars in this regard. For example, these scholars recognize the limitations of the NIEO’s teleological development agenda. See generally Rajagopal, \textit{International Law from Below, ibid.} at chap. 3.

\textsuperscript{44} Guzman, \textit{supra} note 39.

September 2003. Considering the combined effect of states and peoples’ positions, it might amount to overstretched recent history to claim that the international foreign investment system has reached a point of convergence on the suitability of liberal ideals for IIAs.

Essentially, no single economic ideology aptly captures the general attitude to foreign investment especially if North-North and some carefully negotiated South-South agreements with their exclusion of strict economic liberal perspectives are considered. An approach to IIAs that takes cognizance of the multiplicity of actors and interests (which I call a ‘reciprocal’ approach to IIAs in this chapter) would subscribe to several ideas and policies. These kinds of agreements would not sit comfortably with any generalizations on economic ideologies. Thus, although this approach would decry harmful protectionism, it is not completely liberal because it cannot agree that the market is a panacea for all economies and economic problems, especially given the experience of many Third World peoples. It would support regulation in the public interest, and the adoption of domestic policies that further peoples’ interests, where necessary. At the same time, it is not accurate to describe it as altogether nationalist because it would recognize that foreign private interests can play an important role in economic development and would facilitate the establishment, promotion and protection of such foreign investment. Neither does dependency theory aptly capture the view as foreign investment has some benefits, even though the hegemony of major capitalists is a force to reckon with in the investment system.

A ‘reciprocal’ as opposed to a market-centered approach articulates positions that represent peoples needs – whether in seeking significant reduction or elimination of agricultural subsidies in developed states or in justifying governmental interventions where necessary. These examples do not flow from an economic liberal or economic nationalist perspective; hence, one cannot affix ‘liberal’ or ‘nationalist’ labels on the perspective. The approach refrains from infringing on the rights of investors and does not necessarily favour protectionism. Rather, the major rationale is to ensure that regulation in the public interest, adoption of policies that are favourable to developmental objectives, and protection from the detrimental effects of foreign investment are possible, alongside investment protection.

46 Ibid. at 326.
This alternative approach does not subscribe to the view that “free market, private property, or trade values are superior to, or automatically trump, other human values.”47 In a TWAIL constructivist fashion, it opposes the universalization of these ideas and the attempt by powerful international actors to “freeze them as eternal, inflexible truths.”48 It is a holistic perspective that has lacked prevalence partly because of historical dichotomies in states’ relationships and partly because “ideas do not flow freely.”49 It is also an approach that recognizes that categories are not fixed. It does not privilege capital importers over capital exporters or vice-versa, nor does it cast any group as the victim or the perpetrator for all times. It is relatively clear that the state might manifest unfair advantage over foreign investors because of its sovereign powers, just as powerful investors and industrialized states may exert influence over poor states. The one or the other may be at a point of advantage or disadvantage at any point in time. More so, a capital importer in one context might be a capital exporter in another. Hence assignments of rights and obligations and of benefits and burdens, across all spectrums should not be overly burdensome. For example, in addition to the investment protection obligations on capital importers, capital exporting states would also acquire a legally enforceable obligation to ensure best practices from their investors whether through the adoption of enforceable Codes of Conduct or through the provision, in the home state, of enforcement mechanisms for the redress of infringement of the host state’s peoples’ rights. In the absence of full regulatory powers on the part of the host state, the home state might assume some of these obligations. In addition, a reciprocal perspective will allow both investor-state dispute settlement and state-investor dispute settlement. It would recognize that in addition to host states, foreign investors and their home states also acquire immense benefits from investment activities in the host state. For example, where the host state provides tax holidays or exemptions to foreign investors, for those home states that tax their citizens on world-wide income, the benefits of non-taxation by the host state accrues to the home state.

48 Ibid. at 38.
All the ideologies identified above have been constantly resisted by one group of actors or another.\textsuperscript{50} If one ideological perspective prevails despite the attempt to articulate other ideas, such prevalence can be better explained to be a result of power asymmetry in the international order. This partly explains the inability to conclude a global investment agreement.\textsuperscript{51} As a group, dissenting Third World states are able to express views and ideas that do not conform to the dominant paradigm in IIAs.\textsuperscript{52} However, as individual countries, this is a more difficult position to take. While Guzman provides an economic interest or prisoner’s dilemma explanation for this difference in position in different fora, other explanations are also plausible. They provide a clearer picture of the proliferation of IIAs and the prevalence of some ideas over others in the international investment regime. Professor Salacuse’s explanation in this regard is instructive. He notes that developed states usually seek out Third World states for BIT negotiations.\textsuperscript{53} This position does not however suggest that Third World states are not keen to conclude BITs because of the benefits that they perceive that they might garner from such agreements. Some state parties usually have prototype treaties that they work with and the resulting agreements often resemble the prototype to a significant extent. Salacuse notes that the party that controls the draft agreement controls the negotiation, thereby yielding

\textsuperscript{50} See Vandevelde, “Sustainable Liberalism”, supra note 19 at 374, (noting that the “sudden and astonishing consensus” in liberalization is not necessarily permanent but represents a “momentary confluence of several political and economic trends.”) He further argues for states to ensure sustainable liberalism, instead of temporary economic advantage.) Professor Sornarajah argues that there is another wave of nationalism, this time not only from Third World countries, but also from developed countries. For him, the triumph of economic liberalism at the end of the last millennium evidenced by the proliferation of BITs seems to be giving way to yet another swing due to the economic crises in Asia and Latin America and evidenced by the failure of the OECD’s MAI. Sornarajah, International Law on Foreign Investment, supra note 13 at 3-4.

\textsuperscript{51} Commentators have turned their attention to the proliferation of BITs and the conspicuous absence of a multilateral agreement on investment. The reasons proffered for this include the easier negotiation of BITs, the asymmetric nature of BITs’ negotiation between a stronger developed state and weaker Third World state, the ability of Third World states to form coalition blocs in multilateral settings, prospects of investment capital from specific countries, and developed countries’ knowledge that investment liberalization will only apply to the Third World state party because of the unlikelihood of the latter investing in the former in many cases, whereas in the case of a multilateral agreement that includes other developed state parties, such liberalization might cause strong competition for the host state’s own enterprises. Jeswald W. Salacuse & Nicholas P. Sullivan, “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain” (2005) 46 Harv. Int’l L.J. 67 at 77-78; Sauve, supra note 45 at 327 (noting that investment rule making is probably more feasible at the bilateral and regional levels because of the asymmetries of economic and political power between capital importing and exporting states.)

\textsuperscript{52} On explanations for the paradox of Third World states’ different views on foreign investment at multilateral and bilateral levels, see Guzman, supra note 39.

more power, and the Third World state party is usually put in a position that all it can do, at least initially, is to react to the prototype.\textsuperscript{54} However, some Third World states like Ghana have begun to develop prototype BITs.\textsuperscript{55} As such, Salacuse’s other observation in the same article is relevant. He notes that although BITs purport to create a symmetrical legal relationship between two states, in reality, there is an asymmetry because one state will usually be the source and the other, the recipient of foreign investment. Usually, the capital importing state party assumes the bulk of the obligations under the agreements.

In describing the (a)symmetry in some IIAs, one could draw an analogy from Marxian perspectives on exploitation as articulated by Professor Susan Marks. In her edited work, “International Law on the Left”, she notes that “as Marx explains, for labour-power to remain a saleable commodity, its owner must retain ultimate ownership over it. He must give it up only ‘for a definite period of time, temporarily’.”\textsuperscript{56} In this century, it is hardly justifiable that any state ‘made’ another sovereign state to conclude an imbalanced IIA. Nevertheless, as Professor Marks notes in another context that is applicable to the present analysis, “account must be taken of the compulsion that comes not from violence, threats or deceit, but from the limitation of options and the denial of opportunities.”\textsuperscript{57} Third World states retain sovereignty and the ability to conclude IIAs when they want to, but the systemic and structural constraints of the international investment system does not readily allow for alternatives to the current forms of these agreements within the system. The prevailing ideology is one that supports the types of the agreements that are concluded. It is an ideology that fosters a system primarily of investment protection, in what is couched as and purports to be a mutually beneficial agreement. It is also noteworthy that the kind of reciprocity discussed in this thesis does not imply a subscription to what Marks calls the “ideology of mutuality”, that is, a win-win situation that dominant culture subscribes to.\textsuperscript{58} Rather, it envisages a system where there is an assumption of both rights and obligations by the parties to agreements and the beneficiaries of the agreements.

\textsuperscript{54} Salacuse, “BIT by BIT”, \textit{ibid}.


\textsuperscript{56} Susan Marks, “Exploitation as an International Legal Concept” in Marks, \textit{supra} note 20, 281 at 301.

\textsuperscript{57} \textit{Ibid}.

\textsuperscript{58} \textit{Ibid}. at 303.
Given that capital importing states assume significant obligations under IIAs, the primary reason why Third World and developed states sometimes subscribe to different ideas on foreign investment is apparent. It is also not surprising that there are hardly any BITs between developed states as both will likely import capital from each other. Following the outcry against NAFTA Chapter 11 dispute settlement cases, North-North BITs have been generally avoided and it is not surprising that developed states have advanced similar nationalist sovereignty arguments that Third World states have made for years. Thus, the seeming triumph of liberalism in the 1990s and the attendant proliferation of IIAs do not suggest a rigid commitment to liberal investment policies by states or to any other particular ideological perspective for that matter.

Also, the agreements do not necessarily reflect customary international law on investment protection and promotion, for some states and other international actors have always and still hold contrary positions. Rules and challenges to these rules develop at around the same time. Challenges to the Hull Rule that developed in a United States dispute with Mexico arose simultaneously with the development of the rule itself in the 1930s. Contestations about the adoption of the developed country-preferred “prompt, adequate and effective” compensation standard and the Third World’s “appropriate” compensation principle continued and

59 Specific areas of conflict include Third World states’ objection to the definition of investment as including both existing and future investment. However, the agreements usually define investments in this manner, thereby increasing the level of obligation, even though this could arguably prod existing investors to make additional investments. Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (The Hague: Kluwer Law International Law, 1995) 26.

60 Sornarajah, International Law on Foreign Investment, supra note 13 at 343. He notes that “investment treaty formulations were originally intended to be a sword to be used against Third World countries. Their use against developed countries was not foreseen.” See generally Guillermo Aguilar Alvarez & William Park, “The New Face of Investment Arbitration: NAFTA Chapter 11” (2003) 28 Yale Int’l L.J. 365.

61 For example, in his discussion of BITs, the OECD’s MAI and the WTO foreign investment-related agreements as parts of a neo-liberal investment order, Professor Sornarajah states that “the neo-liberal project has so far been unsuccessful and… the norms that were articulated by the developing states remain alive and important.” Sornarajah, “Economic Neo-Liberalism”, supra note 35 at 179.

62 On investment treaties and customary international law, see generally, Bernard Kishoiyian, “The Utility of Bilateral Investment Treaties in the Formation of Customary International Law” (1994) 14 J. Int’l L. Bus. 327; Guzman, supra note 39; Andreas Lowenfeld, “Investment Agreements and International Law” (2003) 42 Colum. J. Trans. L. 123; Salacuse & Sullivan, supra note 51. Some of the authors argue that BITs are lex specialis between the parties to the agreements but a few others suggest that even if BITs do not reflect customary international law, they point toward the development of general principles on the international law of foreign investment. Yet, some like Professor Sornarajah argue that it is fallacious to claim that investment treaties bring about customary international law. Sornarajah, International Law on Foreign Investment, supra note 13 at 436.

63 Guzman, supra note 39 at 646.
culminated in General Assembly Resolutions including the *Resolution on Permanent Sovereignty over Natural Resources*,\(^{64}\) the *Declaration on the Establishment of a New International Economic Order (NIEO)*,\(^{65}\) and the *Charter of Economic Rights and Duties of States*.\(^{66}\) In spite of the conclusion of BITs that adopt the “prompt, adequate and effective” compensation standard, states continue to hold alternative views. Even the provisions of the agreements are not uniform. More so, as Guzman notes, the agreements are not necessarily concluded as a result of legal obligations that Third World states perceive as binding on them at the time that they enter into the agreement but more out of an instrumental economic interest.\(^{67}\) Thus, a difference in actual ideological subscriptions contributes to undermining the customary international law nature of the provisions of BITs, because even though states conclude these agreements in practice, they do not do so out of a sense of legal obligation. And the agreements can hardly coalesce as customary international law given the inability of these agreements to acquire the status of ‘intersubjective beliefs’ among international actors.

III. Ideas and the Substantive Contents of Investment Treaties

Having discussed the challenges of the prevailing ideas on investment treaties, the question remains: what are the substantive rights and obligations that these treaties are concerned with? How do the ideas that drive the present international investment order shape tribunals’ interpretations of the substantive rights and obligations in investment treaties? In the final chapter of this thesis, I will return to this issue. There, I discuss how the substantive contents of investment treaties drive dispute settlement, but with a focus on how a reconstruction of the investment dispute settlement system might reshape the understanding of these contents or of the articulation of the contents. In this part of the chapter, the BITs between Netherlands and

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\(^{65}\) See article 4(e) of the NIEO Declaration, *supra* note 11.

\(^{66}\) See article 2(c) of the *Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), (December 12, 1974), UN GAOR, 29th Sess., Supp. (No. 31) at 50, U.N. Doc. A/3235.

\(^{67}\) Guzman, *supra* note 39 at 684-687.
Bolivia, and between Spain and Mexico, and the NAFTA, form the major points of reference. The choice of the *Netherlands-Bolivia BIT* and the *Spain-Mexico BIT* rests on reliance on ICSID cases that have examined these BITs as case studies in chapter six of this thesis. The NAFTA is also relevant because of the wealth of jurisprudence on the interpretations of the substantive rights and obligations included in the agreement. The treaties mostly fit the description of liberal IIAs discussed above, especially given that the substantive standards are rights of the investor and its investments that are enforceable against the host state. A perusal of BITs reveals that in many cases, all but a few of their provisions are investment protection provisions. As a result, the substantive contents of BITs discussed below are investment protection clauses.

**A. The Definition of ‘Investment’**

While I will not spend much time on the analysis of the definition of investment, because it is arguable that it does not in itself constitute a right, a brief discussion is necessary because the definition of investment shapes the substantive rights and obligations of the parties to the treaties and of foreign investors. In addition, it is also often a foundational question in the determination of tribunals’ jurisdiction over disputes.

The *ICSID Convention* offers no definition of the term ‘investment’ even though by article 25(1) of the *Convention*, the basis of ICSID tribunals’ jurisdiction *ratione materiae* is that there must be a legal dispute that arises directly out of an investment. In his widely referenced commentary on the *ICSID Convention*, Professor Schreuer notes that “[i]nvestment in the sense of Art. 25 of the Convention may cover almost any area of economic activity,” and even loans/promissory notes may constitute investment. Investment treaties have been

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68 The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia (entered into force on November 1, 1994) online: UNCTAD <http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_bolivia.pdf> [Netherlands-Bolivia BIT].

69 Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the United Mexican States (1997) 1965 U.N.T.S. No. 33590 at 170 [Spain-Mexico BIT].


drafted to reflect this position. While not offering a concrete definition of investment, following the tribunal in *Fedax N.V. v. Republic of Venezuela*, Schreuer identifies five characteristics of an investment. According to the criteria, a project that qualifies as an investment has a certain *duration*; possesses *regularity of profit and return* or at least, the expectation of return; both sides assume some *risk*; the commitment is *substantial*; and, the operation has some significance to the *development* of the host state. The last criterion is not necessarily a feature of all investments, but according to Schreuer, the *ICSID Convention* had development as part of its “object and purpose”.

Because the *ICSID Convention* only envisages disputes that arise out of an investment, the definition of investment assumes some importance. In recent ICSID jurisprudence, it has been confirmed that in order to meet the jurisdictional threshold of considering an activity as an “investment”, it has to qualify as such under the relevant IIA and under the features that have been attributed to “investments” by tribunals under article 25 of the *ICSID Convention*. Thus, even if state-investor dispute settlement, which is not a common feature of IIAs, becomes common, the claimant state has to be able to substantiate the claim that the dispute arises from an investment, and not only that a public interest standard has been breached. More so, investments are usually defined to include both existing and future investments, so that even if there are no new investment flows after an IIA is concluded, existing investments remain protected. Also, defining investment sometimes to include movable and immovable property as well as intangible rights and licences, have made the dispute settlement system an interesting one, because the latter category usually has impacts on the regulatory capabilities of states. Thus, even though the definition of investment is not itself a substantive right or obligation, it defines the boundaries of rights and obligations and also of ICSID tribunals’ jurisdiction.

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72 *Fedax v. Venezuela*, ibid. at 1387.


B. Fair and Equitable Treatment

The fair and equitable treatment standard has generated significant discussion because of the open nature of provisions in investment treaties. While the standard seems simple and straightforward, its simplicity allows for diverse interpretations and the treaties are also not uniform in their formulation of the standard. For example, the Netherlands-Bolivia BIT provides that “[e]ach Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.” Whereas, the Spain-Mexico BIT simply states that “[e]ach Contracting Party shall guarantee in its territory fair and equitable treatment, in accordance with international law, for the investments made by investors of the other Contracting Party.” The NAFTA Free Trade Commission has expressed the view that the fair and equitable treatment standard does not “require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” This interpretation of the Free Trade Commission does not necessarily bind ICSID tribunals that are not applying the NAFTA.

In Metalclad Corporation v. United Mexican States (Metalclad v. Mexico), the arbitral tribunal found that Mexico had failed to accord fair and equitable treatment in accordance with international law to the investor because its legal processes were not transparent. Similarly,


76 Netherlands-Bolivia BIT, supra note 68, art. 3(1).

77 See article 4(1) of the Spain-Mexico BIT, supra note 69.


in *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (*Tecmed v. Mexico*), the tribunal’s interpretation of the standard seemed to imply reliance on transparency, absence of ambiguity, and the execution of the investment project in accordance with the parties’ expectations.\(^{81}\) Relying on the good faith principle, the tribunal outlined the foreign investor’s expectations as follows:

The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor’s ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle.\(^{82}\)

The state’s legal processes that come under scrutiny in an interpretation of the fair and equitable treatment standard include court proceedings\(^ {83}\) and administrative procedures of the executive.\(^ {84}\) In recent investment arbitration cases that focus on the regulatory machinery of the host state, the administrative procedures component of the standard appears more visible.

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82 Ibid. at para. 154.

83 See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), (2003) 42 ILM 811, (2005) 7 ICSID Rep. 442 [Loewen] (discussing due process (not) accorded to the foreign investor in the local courts. Even though the local courts were strongly criticized, the claimant was not granted a remedy under NAFTA.); *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), (2003) 42 ILM 85, (2004) 6 ICSID Rep. 192 [Mondev] (noting that the Court’s decision did not breach the fair and equitable treatment standard. The applicant challenged the correctness of the local court’s decision and not the process adopted.)

Rights accruing by virtue of the fair and equitable treatment standard may be triggered where there is a significant change in the law regulating or affecting foreign investment as well as in circumstances where the state withdraws or withholds administrative licences that are germane to the operation of investment activities. From Metalclad v. Mexico to Tecmed v. Mexico, these cases abound in recent investment arbitration jurisprudence. The standard implicates the substantive decisions of the government as well as the process by which such decisions were made. However, it could be inapplicable in certain cases, for example, where the state had adopted a regulation for a “legitimate public purpose”. The definition of a legitimate public purpose might be subject to tribunals’ interpretation as demonstrated by cases like Tecmed v. Mexico. The ability to shape the definition of phrases like “legitimate public purpose” position investment arbitration tribunals as active actors in the re-construction of the international investment order. Notable also is the interpretation that some commentators decipher from the application of this standard that may allow recourse to the conduct of the investor as a defence to the application of the standard on the part of the state. We shall return to a discussion of the role of investor conduct in triggering this standard and the duties that dispute settlement tribunals may attach to the investor in the concluding chapter of this thesis.

C. Full Protection and Security

Like the fair and equitable treatment standard, full protection and security is regarded as a ‘non-contingent’ standard. Again, like the former standard, its formulations in investment treaties vary. The Netherlands-Bolivia BIT provides that “each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the investor.” The Spain-Mexico BIT states that

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86 Tecmed v. Mexico, supra note 81.
87 Professor Muchlinki’s discussion of the role of investor conduct in triggering the fair and equitable treatment standard is instructive. See Peter Muchlinski, “Caveat Investor?: The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard” (2006) 55 I.C.L.Q. 527.
88 Netherlands-Bolivia BIT, supra note 68, art. 3(2)
“[e]ach Contracting Party shall grant full protection and security to investments made by
investors of the other Contracting Party, in accordance with international law, and shall not
hamper, by means of illegal or discriminatory measures, the management, maintenance,
development, use, enjoyment, expansion, sale or, as the case may be, liquidation of such
investments”89

The full protection and security standard relates to the protection of the investor’s property
from damage through the state’s actions or the actions of constituent sub-divisions. This
standard was expressly considered in Asian Agricultural Products Ltd. v. Republic of Sri
Lanka (AAPL v. Sri Lanka)90 and in American Manufacturing & Trading, Inc. v. Republic of
Zaire (AMT v. Zaire).91 It encompasses investors’ property losses that result from violence
within the host state including riots and several forms of armed conflict. It is a standard that
involves an “obligation of vigilance” on the part of the host state.92

In Tecmed v. Mexico, the claimant sought to extend the standard to the actions of grassroots
movements that were opposed to the investment. The tribunal expressed the opinion that:

[T]he Claimant has not furnished evidence to prove that the Mexican authorities,
regardless of their level, have encouraged, fostered, or contributed their support to
the people or groups that conducted the community and political movements
against the Landfill, or that such authorities have participated in such movement.
Also, there is not sufficient evidence to attribute the activity or behavior of such
people or groups to the Respondent pursuant to international law.93

For the Tecmed v. Mexico tribunal, the standard is not one of strict liability and neither is it
absolute.94 Although arbitral jurisprudence has focused mostly on physical damage to the
investor’s property, by a reading of the provision in the Spain-Mexico BIT, it is possible that
full protection and security may be construed as a broader standard that is related to actions

89 Spain-Mexico BIT, supra note 69 at art. 3(1).
90 Asian Agricultural Products Ltd. v. Republic of Sri Lanka (ICSID Case No. ARB/87/3), (1991) 30 I.L.M. 577,
91 American Manufacturing & Trading, Inc. v. Republic of Zaire (ICSID Case No. ARB/93/1), (1997) 36 I.L.M.
93 Tecmed v. Mexico, supra note 81 at para. 176.
94 Ibid. at para. 177.
that “hamper, by means of illegal or discriminatory measures, the management, maintenance, development, use, enjoyment, expansion, sale or, as the case may be, liquidation” of investments.\textsuperscript{95} Irrespective of the \textit{Tecmed v. Mexico} tribunal’s finding on the full protection and security standard, Mexico was found to be in breach of other standards.

\textbf{D. Most Favoured Nation Treatment and National Treatment}

The contingent treatment standards – most favoured nation treatment (MFN) and national treatment (NT) – developed as a result of inclusion in treaties. Unlike fair and equitable treatment, which was a part of the law on the treatment of aliens and diplomatic protection, MFN and NT were not core requirements of customary international law.\textsuperscript{96} These two standards gained prominence in international economic law by their inclusion in the \textit{General Agreement on Tariffs and Trade} (GATT) of 1947,\textsuperscript{97} although they “are of considerable historical antiquity.”\textsuperscript{98}

In instances where the MFN clause is not carefully drafted, it is possible that once a state has concluded one agreement, nationals of other BIT partners may be able to rely on the treatments accorded to investors in the initial agreement. In effect, subsequent treaty negotiations may not suffice to undo the wide treatment offered to investors in one treaty. This was precisely the result of the decision in \textit{Emilio Maffezini v. Kingdom of Spain} (\textit{Maffezini v. Spain}).\textsuperscript{99} McLachlan \textit{et al} refer to the decision in \textit{Maffezini v. Spain} on the applicability of the MFN

\begin{footnotesize}
\textsuperscript{95} \textit{Spain-Mexico BIT}, supra note 69 at art. 3(1).
\textsuperscript{96} McLachlan \textit{et al}, supra note 84 at 212-213.
\textsuperscript{97} \textit{General Agreement on Tariffs and Trade} 30 October 1947, 55 U.N.T.S. 187, art. 1 (MFN) and art. 3 (NT).
\textsuperscript{98} McLachlan \textit{et al}, supra note 82 at 212-213.
\textsuperscript{99} \textit{Emilio Maffezini v. Kingdom of Spain} (ICSID Case No. ARB/97/7) (Decision on Jurisdiction of January 25, 2000) (2001) 16 ICSID Rev.-FILJ 212; (2002) 5 ICSID Rep. 396. At para. 69, the tribunal expressed the view that “the Claimant has convincingly demonstrated that the most favoured nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favourable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts. In the Tribunal’s view, the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case in respect of this aspect of the challenge made by the Kingdom of Spain.” For the full arguments, see paras. 38-64.
\end{footnotesize}
clause to the dispute resolution clause in the *Argentine-Spain BIT*, as a “heretical decision.”¹⁰⁰ The decision has been rejected in *Plama Consortium v. Republic of Bulgaria (Plama v. Bulgaria)*.¹⁰¹ *Plama v. Bulgaria* and *Maffezini v. Spain* only addressed the applicability of the MFN standard to dispute resolution provisions and the “heretical” application of that standard in order to supplant other clearly worded and carefully contemplated provisions of a treaty remains a possibility, except the treaty expressly excludes such application.

With regards to national treatment, local investors may not be treated more favourably than foreign investors. Cases involving breach of the NT standard are more likely to be those that require considerations of a state’s protectionist policies.¹⁰² By the NT standard, it is also possible that a state may be precluded from extending favourable conditions to local investment that may help to boost the development of local industry and local capacity. In spite of the potential effects of these standards of treatment, they have been an abiding force in investment treaties.

Many of the recent arbitral cases on national treatment are of NAFTA origin and involve an interpretation of article 1102 of the NAFTA and the ‘like circumstances’ test in the GATT.¹⁰³ However, the language of the NAFTA or the GATT does not apply to all investment disputes. For example, while the *Spain-Mexico BIT* includes the phrase “similar circumstances” in its MFN provision,¹⁰⁴ there is no similar provision in its NT clause.¹⁰⁵ And the *Tecmed v. Mexico*...
tribunal did not fully consider the NT provision due to the timing of the alleged discriminatory acts.\textsuperscript{106}

While investment treaties include other rights for foreign investors and obligations for host states, the standards discussed above and expropriation provisions are the most prevalent. The treaties usually include preambles that suggest that “agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties”\textsuperscript{107} or that such agreements will intensify “economic cooperation for the mutual benefit of both Countries.”\textsuperscript{108} Nevertheless, the treaties are mostly investment protection treaties enforceable against the state party that is the host capital importing state in any dispute. Next is a consideration of the benefits and detriments of FDI and of investment treaties, and their contribution or lack thereof to the needs of Third World peoples in the investment system.

**IV. Investment Agreements and the Public Interest**

The influence of reliance on certain economic ideas varies from IIA to IIA. Sometimes, the contents of agreements and the extent to which they subscribe to some ideas and principles are a function of the relations between the parties. Historically, South-North IIAs focused on the need for investment protection, and more recently, liberalization. As discussed in chapter three, investment protection emerged as a major focus area in the decolonization era. On their part, some South-South IIAs seem to have a relatively wider range of focus. The results of an UNCTAD research report suggest that these agreements usually reflect a stronger economic development focus, generally refrain from granting free access and establishment rights, do not explicitly prohibit performance requirements, and limit their transparency requirements to the laws and regulations’ post-adoption stages.\textsuperscript{109} However, the overwhelming majority of IIAs do

\textsuperscript{106} Tecmed v. Mexico, supra note 81 at para. 181.

\textsuperscript{107} Netherlands-Bolivia BIT, supra note 68, pmbl.

\textsuperscript{108} Spain-Mexico BIT, supra note 69, pmbl.

\textsuperscript{109} UNCTAD, “South-South Investment Agreements Proliferating” UNCTAD/PRESS/PR/2004/036, (November 23, 2004), online: UNCTAD <http://www.unctad.org/templates/webflyer.asp?docid=5637&intItemID=2807&lang=1>. Some South-South IIAs are not as far reaching as South-North IIAs. The UNCTAD Report states that South-South IIAs “differ from BITs in terms of the depth and breadth of the investment issues covered. Some such South-South treaties are
not explicitly address investment-related issues that are of immense importance to the majority of Third World peoples. This part of the chapter discusses this broader range of issues.

That FDI is an engine of growth is a position advanced by mainstream economic perspectives and IFIs like the International Monetary Fund (IMF).\(^{110}\) Third World states conclude IIAs partly because they require private capital flows to fuel their economies, and partly because of the influence of institutions like the IMF.\(^{111}\) While the influence of BITs on investment flows has been the subject of empirical studies – with conflicting results – their utility for investment protection is more readily decipherable as it has been noted that “BITs [and other IIAs] are principally instruments of investment protection.”\(^{112}\) At the time the agreements began to gain prevalence, the dynamic inconsistency problem was real. This was the concern that states had sovereign power and could unilaterally amend investment contracts, even if they did not initially have the intention to do so.\(^{113}\) Thus, many early BITs were concluded to prevent states from backpedaling on their investment contracts with foreign investors, especially with the spate of post-World War II nationalizations.\(^{114}\) Also, the Hull Rule of “prompt, adequate and effective” compensation had been significantly resisted, and such resistance extended to overwhelming Third World support for the retrenchment of the rule in favour of the “appropriate” compensation rule in the United Nations (UN) General Assembly. In addition to

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\(^{110}\) Gallagher & Zarsky, supra note 10 at 21. Professor Wells has argued that that the hopes with respect to foreign investment are too high and that even though foreign investment can contribute to (Africa’s) development process, it is no “panacea”. Louis T. Wells, “Foreign Direct Investment” in Lindauer David L. & Roemer Michael eds., *Asia and Africa: Legacies and Opportunities in Development* (San Francisco, California: Institute for Contemporary Studies, 1994) 337 at 363. He further warns that that FDI has only served as the major engine of growth in a few countries and it is unlikely to serve as the solution to shortfalls in capital needed for investment.


\(^{112}\) Ibid. at 514. By 2005, Professor Vandevelde had come to assert that in the post-colonial era, investment agreements were designed to protect foreign investment in Third World countries, but in the global era (the present time) investment agreements are intended to liberalize investment flows and as such, have become “instruments of globalization.” Vandevelde, “Brief History”, *supra* note 36 at 183. The OECD’s MAI has been referred to as a “charter of rights of multinational corporations” and even as “NAFTA on steroids” because of its principal focus on the protection of foreign investors. See Gilbert Gagne, “The Investor-State Provisions in the Aborted MAI and in the NAFTA – Issues and Prospects” (2001) 2:3 Journal of World Investment 481 at 487-488.

\(^{113}\) Guzman, *supra* note 39 at 658-666.

\(^{114}\) See e.g. *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic* (1979) 53 I.L.R. 389.
states’ sovereign power relative to private investors, and the dynamic inconsistency problem, emerging rules seemed to favour the regulation of foreign investment and established that states had the right to screen incoming investment.115 Mechanisms were developed to respond to these occurrences. Thus, even before IIAs became prominent, investment contracts were constructed as “economic development agreements”, a term that suggested that the capital importing state was the major beneficiary of the agreement.116 By focusing principally on investment protection, IIAs attempt(ed) to address these concerns of capital exporters and foreign investors, that are difficult to articulate in customary international law due to significant differences in ideas and opinion.

Like all investment, FDI has both benefits and detriments. Essentially, even though FDI is potentially beneficial for development purposes, commentators have argued that its benefits “are exaggerated and … its centrality in development strategies is misplaced.”117 Professor Wells notes that about 60 to 70 percent of foreign investment projects are beneficial to the host country, while in the remaining percentage, the costs exceed the benefits.118 He further states that the net benefits from most of the projects are sufficiently large that it is difficult to believe that the unmeasured negative impacts would offset the measured gains.119 Irrespective of what the exact figures are, even the minutest of detriments should be taken seriously as long as they possess the potential to impact the lives and well-being of people, the environment and the economy, among others. Professor Wells’ argument that many of the negative impacts of foreign investment are effects of industrialization generally does not address the effects that could arise from IIAs. Foreign firms are distinctive because the host state could lose some

115 Sornarajah, *International Law on Foreign Investment*, supra note 13 at 97. See also Judge Oda’s separate opinion in the ELSI Case, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* 1989 I.C.J. Rep. 15 at 90-91. Also, customary international law recognizes the concept of monetary sovereignty of states, and as such, one of the most important provisions in investment agreements – the right of transfers – has evolved mostly through multilateral and bilateral treaty practice, and notably, the IMF’s Articles of Agreement. Dolzer & Stevens, *supra* note 59 at 85.


118 Wells, *supra* note 110 at 341.

regulatory authority over them due to commitments made in IIAs. Acting in excess of these regulatory constraints may lead to claims of expropriation. However, in the case of domestic investors, the state retains regulatory sovereignty and can monitor and curb the negative impacts of industrialization arising from their activities. The difference in government’s regulatory capacity over foreign and domestic firms, and the former’s internationally protected rights are derived from IIAs. Thus, the argument that the detriments would have occurred whether or not the investment was domestic or foreign, does not capture the nuance generated through compliance with IIAs’ provisions.

In discussing public interest components that FDI impacts on, the balance of this part of the chapter discusses the oft-contested benefits and detriments of FDI and IIAs under the following headings: economic development, state sovereignty, and public interest environmental and human rights concerns. The Netherlands-Bolivia BIT and the Spain-Mexico BIT that were discussed in the preceding part of the chapter do not feature here because they are quintessential investment treaties that do not pay much explicit attention to many of these public interest factors. They focus on the rights of investors and the obligations of the host state.

A. Economic Development

Economic development is a highly contested concept. While it is a worthwhile endeavour, problematizing development is an inquiry that is beyond the scope of this chapter. Irrespective of its meaning for several jurisdictions and different actors, economic development is one of the major rationales for concluding IIAs, at least from many Third World governments’ perspective. In addition to the governments’ views on this issue, some Third World grassroots groups have made it a point of activism to vocalize their economic concerns over some FDI projects, even if those concerns are not cast as ‘economic development concerns.’ For example, in *Aguas del Tunari v. Republic of Bolivia (AdT v. Bolivia)*, one of the major causes
of the dispute was the peoples’ complaints that tariff rates for water were astronomical and unaffordable.\textsuperscript{120}

In the global economy, few states are recipients of the bulk of investment flows, and some attract foreign investment even in the absence of investment treaties.\textsuperscript{121} The effect of FDI on economic development is inconclusive, with many commentators suggesting that this relationship depends on a host of several factors.\textsuperscript{122} In a similar vein, the impact of IIAs on investment flows is not entirely certain.\textsuperscript{123} Generally, factors that affect the flow of foreign investment include the country’s geography, endowment with significant reserves of natural resources in commercial quantity, the size of the country’s market, access to international markets, the country’s population, the quality of its infrastructure and work force, and legal and administrative structures.\textsuperscript{124} Even though a combination of these factors affect decisions on investment establishment, IIAs gained accelerated prevalence in the 1990s due to the unavailability of private lending by banks, absence of foreign aid due to recession in developed countries, the rise of free market economics associated with the Thatcher and Reagan regimes, China’s acceptance of an open door policy, the economic advances of some countries in South East Asia, the dissolution of the Soviet Union leading to the emergence of new states that committed to free market economics, and the vigorous espousal of neoliberalism by the World Bank and IMF, many times as loan conditionalities.\textsuperscript{125}


\textsuperscript{121} Salacuse, “BIT by BIT”, supra note 53 at 673 (citing the example of United States’ investments in China amounting to more than $3.5 billion dollars by approximately 350 companies between 1978 and 1989, even in the absence of a BIT between the two countries at the time.)

\textsuperscript{122} Gallagher and Zarsky note that of the eleven studies that they reviewed for their paper, two found positive links between foreign investment and economic growth, one found a negative link and the other eight studies concluded that this link depends on other factors. Gallagher & Zarsky, supra note 10 at 26.

\textsuperscript{123} See infra note 127-137 and accompanying notes.

\textsuperscript{124} Jeswald W. Salacuse, “Direct Foreign Investment and the Law in Developing Countries” (2000) 15 ICSID Rev.—FILJ 382 at 386; Neumayer & Spess, supra note 8 at 1574-1575; Deborah L. Swenson, “Why Do Developing Countries Sign BITs?” (2005) 12 U.C. Davis J. Int’l L & Pol’y 131 (noting that where all the necessary factors are present and relevant issues – controls for timing, intrinsic country attractiveness and investor identity – are addressed, BITs help Third World states to attract FDI).

\textsuperscript{125} Sornarajah, \textit{International Law on Foreign Investment}, supra note 13 at 2.
these factors, Third World states intensified competition for foreign investment, which had become their largest source of external finance.\(^\text{126}\)

1. BITs

A significant number of IIAs are BITs. They aim primarily to protect foreign investment. Other purposes are secondary.\(^\text{127}\) Many authors have turned their attention to the question of South-North BITs’ fulfillment of their “grand bargain” – “a promise of protection of capital in return for the prospect of more capital in the future.”\(^\text{128}\) Generally, though BITs’ preambles sometimes indicate that their purpose is to promote investment flows, state parties to the treaties do not have an obligation to ensure that their nationals invest in the other contracting state. While investment protection is an international obligation, there is only a prospect that BITs will facilitate increased investment flows. Thus, it is relevant to determine, first, whether BITs do in fact result in increased investment flows, and second, whether increased investment flows translates to sustainable economic development; for states do not require investment flows merely for their presence, but seek to attract such investment to fuel their economies. The second question is not frequently addressed in legal literature and even in economics, the results are far from settled.\(^\text{129}\)

\(^{126}\) Neumayer & Spess, supra note 8 at 1569.

\(^{127}\) Vandevelde, “Brief History”, supra note 36 at 184 (stating that one is forced to concede the effectiveness of BITs’ investment protection purpose.).

\(^{128}\) Emphasis in original. Salacuse & Sullivan, supra note 51 at 77.

\(^{129}\) On the relationship between FDI flows and economic growth, see Xiaoying Li & Xiaming Liu, “Foreign Direct Investment and Economic Growth: An Increasingly Endogenous Relationship” (2004) 33 World Dev. 393 (the authors found that FDI has a positive impact on economic growth in both developed and developing countries. They argue that the interaction of FDI with technology gaps has different impacts on developed and developing countries. For developing countries where the technology-absorptive ability is generally low, a wide technology gap exerts a negative impact on economic growth, while in developed countries where the general technology-absorptive capability is high, a larger technology gap would assist FDI in generating more benefits for economic growth.) See also Marta Bengoa & Blanca Sanchez-Robles, “Foreign Direct Investment, Economic Freedom and Growth: New Evidence from Latin America” (2003) 19 European Journal of Political Economy 529 (the authors found a positive relationship between FDI and economic growth); Magnus Blomstrom, Robert Lipsey & Mario Zejan, “Is Fixed Investment the Key to Economic Growth?” (1996) 111 Quart. J. of Econ. 269 (the authors found that FDI has positive growth effects); J. Benson Durham, “Absorptive Capacity and the Effects of Foreign Direct Investment and Equity Foreign Portfolio Investment on Economic Growth” (2004) 48 Eur. Econ. Rev. 285 (the study found that there is no positive relationship between FDI and economic growth). See generally Theodore H. Moran, Edward M. Graham & Magnus Blostrom eds., Does Foreign Direct Investment Promote Development (Washington, D.C.: Institute for International Economics, 2005); Yingqi Annie Wei & V.N. Balasubramanyam eds., Foreign Direct Investment: Six Country Case Studies (Cheltenham, UK; Northampton, Massachusetts: Edward Elgar, 2004).
A series of studies have found that BITs have weak effects on FDI flows. An UNCTAD study conducted in 1998 found that BITs have a weak, though positive, influence on investment flows.\textsuperscript{130} For UNCTAD, BITs play only a minor and secondary role in attracting FDI. In a similar vein, a World Bank-sponsored study published in 2003 found a negative and insignificant relationship between BITs and FDI.\textsuperscript{131} The study concluded that BITs do not increase FDI flows to Third World countries, although they could be effective where a state has established legal institutions. In a 2005 study, the authors’ research found a weak but positive relationship between BITs and FDI.\textsuperscript{132} In analyzing the results of these research studies, Professor Vandevelde argues that the studies that find little or no “correlation” between BITs and FDI flows “may be underestimating the impact of BITs.”\textsuperscript{133} He bases this argument on the premise that it is possible that some BITs are more effective in promoting investment flows than others\textsuperscript{134} or that investments are better promoted under some circumstances, and that these positive results may be obscured when all BITs are examined as aggregates.\textsuperscript{135}

Another group of studies posits that there is a strong relationship between BITs and FDI flows. Neumayer and Spess’ study found that additional BITs increase FDI flows.\textsuperscript{136} Contrary to Hallward-Driemeier’s position that BITs only flourish in environments with high institutional quality, the authors argue that BITs are substitutes and not complements for institutional quality, and as such, are useful where they are most needed. They also note that BITs could have signaling effects – pointing out to potential investors that a state is serious about protecting investment.\textsuperscript{137} Neumayer and Spess conclude that:

\textsuperscript{132} Jennifer Tobin & Susan Rose-Ackerman, “Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties” (Yale Law School Centre for Law, Economics and Public Policy, Research Paper No. 293, 2005).
\textsuperscript{133} Vandevelde, “Brief History”, supra note 36 at 186.
\textsuperscript{134} Like Vandevelde, Neumayer and Spess note that concluding a BIT with major capital exporters like the United States or Germany will have a larger impact on FDI flows than concluding a similar BIT with minor capital exporters like Portugal or New Zealand. Neumayer & Spess, supra note 8 at 1571.
\textsuperscript{135} Vandevelde, “Brief History”, supra note 36 at 186.
\textsuperscript{136} Neumayer & Spess, supra note 8.
\textsuperscript{137} \textit{Ibid}. at 1572.
Whether the demonstrated benefits of signing up to BITs in the form of increased FDI inflows are higher than the substantial costs developing countries incur in negotiating, signing, concluding, and complying with the obligations typically in such treaties is impossible to tell. What we do know is that BITs fulfil their purposes, and those developing countries that have signed more BITs with major capital exporting developed countries are likely to have received more FDI in return.\textsuperscript{138}

In a research conclusion similar to Neumayer and Spess’, Salacuse and Sullivan’s United States’ BITs focused research found that United States’ BITs have a strong and positive effect on FDI flows from the United States and elsewhere, thus realizing the grand bargain of BITs.\textsuperscript{139}

The later studies that find that BITs have strong and positive effects on FDI flows usually find flaws in the research design of those studies that find weak effects. The conclusions drawn in these studies turn on research design, number of countries included in the study, factors considered, and the years in focus. Thus, there is no conclusive statement on the effects of BITs on FDI flows. However, whether or not they increase investment flows, the anecdotal evidence of BITs’ positive effect on FDI flows is very strong as almost every work on BITs suggests that Third World states sign BITs in order to attract foreign investment. Whether this prospect is actualized remains an agenda for further research. Also, if one concludes that BITs promote FDI, it does not mean that BITs promote economic growth.\textsuperscript{140} And even if they do, economic growth does not necessarily translate to (sustainable) economic development if growth is not accompanied by larger social and environmental advancements. As Professor Daly has noted, economic growth and economic development are not synonymous, and sometimes growth might be unsustainable.\textsuperscript{141} While market efficiency might be important, it is not an end in itself.\textsuperscript{142}

\textsuperscript{138} Ibid. at 1583.
\textsuperscript{139} Salacuse & Sullivan, supra note 51 at 111.
\textsuperscript{140} See Gallagher & Zarsky, supra note 10.
\textsuperscript{141} See generally the World Commission on Environment and Development Report – Gro Harlem Brundtland, Our Common Future (Oxford; New York: Oxford University Press, 1987); Herman Daly, John Cobb & Clifford Cobb, For the Common Good: Redirecting the Economy toward Community, the Environment, and a Sustainable Future (Boston, Beacon Press, 1994); Herman Daly, Beyond Growth: The Economics of Sustainable Development (Boston: Beacon Press, 1996); Herman Daly & Joshua Farley, Ecological Economics: Principles and Applications (Washington: Island Press, 2004). On sustainability and international investment, see Konrad
2. Multilateral Agreements

There is presently no global investment agreement. Apart from the conflicting views that international actors adopt on foreign investment and the ability of groups of states to converge and maintain largely similar positions at the multilateral level, one of the major factors that have affected the absence of a global investment agreement is that it might contribute little or nothing to investment flows and economic development. Like BITs, the fundamental basis of the derailed OECD’s MAI, for example, was to provide a high standard of investment protection. However, a major factor in the conclusion of a global investment agreement will be its ability to market its ‘value added’ to the international investment order and particularly to economic development.

Given the derailment of the OECD’s MAI negotiations, several commentators have turned their attention to the conclusion of an investment agreement at the WTO. Proponents of a WTO Agreement on Investment like Professor Schwartz suggest that such an agreement will lead to increased investment flows. Schwartz states, “it would be a service to the people of less developed countries to require their governments – if they wish to remain part of the WTO system – to accept a [WTO agreement on investment] as part of the package.” In making this argument, Schwartz does not take into account, the unacceptable propositions on a WTO

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142 Amartya Sen has noted that an economy can be Pareto-optimal and perfectly efficient and yet still be “perfectly disgusting” by any ethical standards. Amartya K. Sen, Collective Choice and Social Welfare (San Francisco: Holden-Day, 1970) 22. In Beyond Growth, ibid. Professor Daly’s thesis is that it is necessary to have a preanalytic vision of the economy as a subsystem so that the idea of sustainable development of a subsystem that is sustained by a larger system whose limits and capacities it must respect makes sense. He differentiates between growth (the economic norm of quantitative expansion) and development (the economic norm of qualitative improvement) and argues that the latter should be the goal. He challenges the conventional knowledge that growth is always good. See also James Thuo Gathii, “Retelling Good Governance Narratives about Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes between Markets and States” (2000) 45 Villanova L. Rev. 971 (suggesting that markets can be as coercive as the state.)


144 Ibid.


146 Schwartz, ibid. at 462.
investment agreement that Third World states have been presented with – a factor that subsequently led in part to the exclusion of investment from the Doha Round of negotiations.\textsuperscript{147}

For Pierre Sauve, there might be some value added to a WTO investment agreement if it contributes to the “development dimension” of FDI.\textsuperscript{148} He notes that the only way to secure the support of Third World countries is to ensure that the commitments and rules have an impact on such areas as the facilitation of investment flows, and supports the economic and social development priorities of host countries. Sauve opines that FDI has an important role to play in sustainable development and could enhance the development process. He however, concedes that it is not certain that a multilateral investment regime would necessarily bring about these benefits, although international cooperation and negotiation could help facilitate the realization of the benefits. For Sauve, development considerations of a global investment agreement depend on the role of developed countries. These roles include assisting with regulatory reforms and institution building, supporting measures necessary for investment promotion and facilitation, complementing efforts to disseminate information, and committing to making tax advantages available to home country investors that engage in technology transfers, environmental protection and so on.\textsuperscript{149} The principal focus of Sauve’s development agenda is mostly on aid (not necessarily financial) from developed countries. While aid has its place in fostering development, it cannot by itself enhance development, as it relies on concessions that developed states might not always make. In addition to aid, the opportunity to adopt domestic policies that foster economic and social development will be most beneficial to Third World countries, and this is a position which has partly led to the absence of a global investment agreement. Because socio-economic development is a major concern of the Third World that major capital exporters do not always share, negotiating a development sensitive MAI might be an arduous task.

\textsuperscript{147} On this point, see Sauve, \textit{supra} note 45.


\textsuperscript{149} Sauve, \textit{supra} note 45 at 346-347.
3. Regional Agreements – NAFTA Chapter 11

NAFTA serves as an example of a regional IIA in this section. It is a widely discussed agreement and there has been some research on its contributions in Mexico – the NAFTA party to which the economic development consideration is most relevant. In a research on the Mexican experience under NAFTA, Gallagher and Zarsky note that for Mexico, the purpose of NAFTA was to attract FDI.\textsuperscript{150} They state that after signing NAFTA, Mexico did attract foreign investment. In fact, it received the third largest share of FDI flows to Third World countries and in 2001, it overtook Brazil to become second only to China. However, the authors opine that there is an “Achilles’ heel” in Mexico’s “FDI-led integration strategy.”\textsuperscript{151} Even though exports grew fast, imports grew faster, generating a large and persistent current account deficit, and the large FDI inflows seemed unsustainable. Also, FDI crowded out domestic investment and there was little evidence of efficiency spillovers.\textsuperscript{152} In relation to the environment, pollution levels increased faster than both population and GDP growth, although in some sectors, there is evidence of better environmental performance due to foreign presence. In addition to these, there was rising inequality and poverty, and attendant marginalization. Gallagher and Zarsky conclude that “in Mexico, a poster child for success in terms of attracting FDI, rapid growth of manufactured exports has not triggered a process of sustainable domestic growth. Instead, there is a ‘disconnect’ between the globally integrated and the domestic parts of the economy.”\textsuperscript{153}

Although NAFTA fostered large FDI inflows to Mexico, it also had detrimental and unsustainable effects on the Mexican economy. This experience lends support to Gallagher and Zarksy’s view that “structuring investment regimes to serve the interests of and concerns of foreign investors will not necessarily deliver economic, environmental or social benefits to host communities.”\textsuperscript{154} The Mexican experience provides a case for rethinking the premise of IIAs, to allow the opportunity for adopting domestic economic policies that best serve the

\begin{itemize}
\item \textsuperscript{150} Gallagher & Zarsky, supra note 10 at 31.
\item \textsuperscript{151} Ibid. at 32.
\item \textsuperscript{152} Ibid. at 31-39.
\item \textsuperscript{153} Ibid. at 39.
\item \textsuperscript{154} Ibid. at 40.
\end{itemize}
interests of a country’s peoples. Based on empirical evidence, the effects of IIAs and FDI on economic development are not entirely clear. In fact, Gallagher and Zarsky have argued that the “benefits of FDI are exaggerated” and that “its centrality in development strategies is misplaced.” As well, economic development is a consideration that is especially relevant only to some states in the international investment order. Because of inadequate attention to the investment-related concerns of other actors in many agreements, investment law continues to experience a troubled existence in the international order.

B. Constraints on Sovereignty

Sovereignty constraint is not peculiar to IIAs. Generally, many treaties result in the surrender of some level of state sovereignty to varying extents. However, under IIAs, minimal governmental regulation has been more problematic than envisaged. Recently, the drive to weaken IIAs has ceased to be solely a Third World campaign as developed states now seek to achieve the same purpose, because of the potential effects of some treaties. For example, after being named as defendant in several NAFTA arbitrations (although it has not lost any of the cases so far), the United States has started to limit some types of claims that might be initiated against it. Similarly, Canada has included provisions that are wider than similar NAFTA provisions that exempt some investments from the MFN treatment obligation in its Foreign Investment Protection Agreement (FIPA) Model – a step towards a position that Third World states have espoused for many years. Like a Government representative interviewed for this thesis noted, “no one thought that there were going to be investor-state disputes” arising from NAFTA. Also, the 2004 United States-Australia Free Trade Agreement excludes investor-state arbitration, based on the argument that both states have advanced legal systems that diminish the need for such provision in their agreement.

155 Gallagher & Zarsky, supra note 10 at 13.
156 Vandevelde, “Brief History”, supra note 36 at 187.
159 Vandevelde, “Brief History”, supra note 36 at 188.
These examples do not imply that developed states will cease supporting IIAs anytime soon because of the interests of their business communities. Usually, like in some South-South IIAs, developed states make compromises in agreements with other developed countries, as North-North agreements can impose significant costs on them.\textsuperscript{160} Thus, the exclusion of investor-state dispute settlement from IIAs, for example, is generally extended to developed countries and not to the Third World. As a result, even though some changes are emerging due to the sovereignty costs of IIAs, they are limited to, or at least, are commencing from agreements between developed states, where the states are more likely to be both capital importers and exporters. For most of the Third World, constraints on the sovereign right to regulate and the potential regulatory chill that results from the prospect of investor-state dispute settlement continues. A counsel interviewed for this thesis conceded that investor-state arbitration has an impact of regulatory chill. To buttress the point, the interviewee noted that Mexican and Chilean officials have articulated this position. This interviewee noted that the lead Mexican official in one of Mexico’s ICSID cases mentioned that the subdivisions and constituents need to be advised about Mexico’s international commitments and to act accordingly.\textsuperscript{161}

Commentators have noted that the extent of interference with domestic sovereignty that Third World states succumb to in signing BITs is enormous.\textsuperscript{162} Under these circumstances, public policy regulations can potentially be challenged through the dispute settlement mechanism as long as it affects foreign investors and often, exhaustion of local remedies is unnecessary.\textsuperscript{163} Thus, it has been noted that essentially, Third World states “trade sovereignty for credibility.”\textsuperscript{164} Even critics like Professor Vandevelde that argue that BITs are not truly liberal economic instruments concede that they seriously restrict host states’ ability to regulate foreign investment.\textsuperscript{165}

\textsuperscript{160} Ibid. at 190.
\textsuperscript{161} Interview No. 404, May 22, 2007. Transcripts on file with author.
\textsuperscript{162} Neumayer & Spess, supra note 8 at 1571.
\textsuperscript{163} Ibid.
\textsuperscript{164} Ibid.
Severe sovereignty constraints and potential regulatory chill are not peculiar to BITs. It is one of the reasons why developed states could not agree among themselves during the OECD’s MAI negotiations and has resulted in NAFTA parties adopting mechanisms to curtail the effects of the dispute settlement provisions in NAFTA chapter 11. Regulatory chill could arise from the definition of investment in the agreements to include administrative rights – rights conferred by licences and permits – necessary to operate the investment in the host state. By including these rights in the definition of investment, what could have amounted to regular assessment of an investment against the criteria for granting or renewing licences, might amount to a breach of an IIA obligation. While defining rights conferred by licences and permits as ‘investment’ may ensure a considerable level of certainty to investors, it may also restrict governments’ ability to regulate, and increase the possibility of considering interferences with licences as expropriation for which compensation must be paid.

Like IIAs, investor-state dispute settlement could also encroach on state sovereignty. While the mechanism has its merits, it provides an avenue for challenging regulatory measures adopted by host states. In some instances, it could appear as questioning “the very ability of states to regulate in the public interest” as evidenced by the definitions of the fair and equitable treatment standard to include judicial as well as administrative decisions. It is important to note that several challenges to domestic court rulings before investment dispute

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168 Examples include the France-Argentina BIT (1992), art. 1(1)(e); the Germany-Swaziland BIT (1990) art. 1(1)(e); United States-Argentina BIT (1991) art. 1(1)(v); United Kingdom-Barbados BIT (1993) art. 1(a)(v); United Kingdom-Guyana BIT (1990) art. 1(a)(v); United Kingdom-Mongolia BIT (1991) art. 1(a)(v); United Kingdom-Bahrain BIT (1991) art. 1(a)(v). Cited in Dolzer & Stevens, supra note 59 at 26-31. See also article 1(1)(f) of the ECT.


171 Gagne, supra note 112 at 482.

172 See the discussion of the fair and equitable treatment standard in part III(B) of this chapter.
settlement panels have not been successful. Nevertheless, the reality that this option is open suggests a need for cautious assessment of the dispute settlement process’ impact on the domestic legal systems of states.

While the effects of IIAs on regulatory sovereignty might be clear, their impact on sovereignty over natural resources is debatable. With few exemptions like article 18 of the Energy Charter Treaty (ECT), IIAs hardly make explicit reference to sovereignty over natural resources, a principle recognized in the UN General Assembly Resolution on Permanent Sovereignty over Natural Resources. It is understandable that the ECT expressly provides for sovereign rights over natural resources because of its focus on energy resources. In the case of general IIAs, it is possible to argue that encroachment on regulatory sovereignty impacts on sovereignty over natural resources. At the same time, some may argue that the two types of sovereignty are separable. Further still, one could take the position that the precise impact of regulatory chill on sovereignty over natural resources is difficult to measure. Irrespective of the view adopted, sovereignty over natural resources is regarded as a peremptory norm of international law in some quarters. If it is a peremptory norm, by article 53 of the Vienna Convention on the Law of Treaties, states cannot surrender sovereignty over natural resources on the basis of a treaty. Irrespective of the status accorded to permanent sovereignty over natural resources, it is evident that IIAs significantly impact regulatory sovereignty, and these impacts are more or less severe depending on the contents of the agreements.

173 See Mondev, supra note 83; Loewen, supra note 83.


175 Jus cogens form the highest rank of international law rules; no derogation from these rules is permitted. See Ian Brownlie, Principles of Public International Law, 6th ed., (Oxford: Oxford University Press, 2003) 489 (arguing that permanent sovereignty over natural resources is a jus cogens principle of international law.); Thomas W. Walde, Book Review: “Permanent Sovereignty over Natural Resources in International Law: Principle and Practice” (1988) 82 A.J.I.L. 405 at 406 (stating that one of the authors in the edited book under review assigns the status of jus cogens to permanent sovereignty over natural resources.); Margot E. Salomon & Arjun Sengupta, “The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples” Minority Rights Group International, Issues Paper, February, 2003, online: Minority Rights Group International <http://www.minorityrights.org/admin/Download/pdf/IP_RTD_SalomonSengupta.pdf> at 35 (stating that permanent sovereignty over natural resources is an accepted jus cogens principle.). Contra, Francisco Forrest Martin, “Delineating a Hierarchical Outline of International Law Sources and Norms” (2002) 55 Sask. L. Rev. 333 (arguing that there appears to be little if any positive law in support of the view that permanent sovereignty over natural resources can be regarded as jus cogens.)

C. Some Specific Public Interest Considerations

It is widely accepted that investment activities impact on environmental and labour standards and on the human rights of individuals in the territories where investment activities are carried out. This has usually been a major point of NGO challenge of IIAs. Also, many Third World grassroots movements have been vocal on the interaction between FDI and public interest concerns. For example, some of the points of the grassroots movements in Tecmed v. Mexico were based on environmental concerns. Because of the sustained challenge, one would have thought that IIAs would have been replete with provisions imposing enforceable obligations on states and foreign investors in order to protect the environmental, labour and human rights of individuals, but this has not been the case. Even though some IIAs include provisions on environmental, labour and human rights protection, they do not incorporate substantive obligations in this regard for foreign investors. Some agreements exclude provisions on these public interest matters all together or weaken existing standards. It is possible to rationalize the lukewarm interest in public interest considerations on the basis that IIAs are investment agreements and not environmental, human rights, or labour agreements. However, this does not accurately capture the practice as some agreements do eventually include provisions on these concerns – even though the provisions’ substantive effects are contestable – after public outcries. This was the case with NAFTA and a later version of the draft OECD’s MAI.

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177 Tecmed v. Mexico, supra note 81.

178 Given that some IIAs expressly provide that the contracting parties should not reduce their environmental and labour standards in order to attract foreign investment, it might be difficult to make a charge of a race to the bottom against them. However, given the general interpretive contexts of the agreements and the fact that they do not impose obligations on foreign investors but require states – with their curtailed sovereign rights – to conform with environmental standards, the charge of a race to the bottom might not be far off. On globalization and the race to the bottom generally, see David Vogel & Robert Kagan eds., Dynamics of Regulatory Change: How Globalization affects National Regulatory Policies (Berkeley: University of California Press, 2004); David Korten, When Corporations Rule the World (West Hartford, Connecticut: Kumarian Press; San Francisco, California: Berrett-Koehler Publishers, 1995). For an argument that United States’ TNCs encourage a race to the top, see Deborah L. Spar, “The Spotlight on the Bottom Line: How Multinationals Export Human Rights (1998) 77(2) Foreign Aff. 7.

179 One of the charges against the OECD’s MAI was that it would weaken existing labour and environmental standards. See Kelley, supra note 166 at 494-498.

1. **Environmental Protection Clauses**

Unlike economic development that is mainly considered a Third World issue, environmental integrity is attaining the status of a global concern. As a result, even though IIAs might not pay particular attention to economic development, they are beginning to incorporate provisions on environmental protection to some degree. For the NAFTA and the MAI, environmental protection garnered importance, and even for BITs, the magnitude of possible environmental catastrophes has triggered some advances. In the case of NAFTA, in addition to the provision that precludes states from derogating from environmental laws, a NAFTA side agreement on environmental cooperation was concluded.\(^{181}\) Also, the ECT has multiple references to the environment, imposing obligations on the contracting parties to ensure environmental protection. For example, by article 18(3), the contracting parties hold the right to regulate environmental aspects of petroleum exploration and development.

Like the ECT, the United States Model BIT includes provisions on investment and the environment.\(^ {182}\) By article 12, neither party can waive or derogate from its domestic environmental laws or offer to do so in order to encourage the establishment, acquisition, expansion or retention of an investment in its territory.\(^ {183}\) The prototype treaty is silent about instances where environmental protection might conflict with the investment obligations of the parties. One may measure the likely effect of this provision based on NAFTA jurisprudence, as the inclusion of a similar provision in the NAFTA has not precluded the submission of arbitral claims challenging environmental regulation on the basis of states’ obligations in the agreement.\(^ {184}\)

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\(^{183}\) This provision is a reenactment of article 1114 of NAFTA. It is substantially reproduced in the United States-Uruguay BIT (2005).

Generally, the environmental provisions in IIAs impose obligations on states and not necessarily on investors. More so, states’ obligations on environmental protection are interpreted in light of the primary purpose of the agreements – investment protection. As such, environmental concerns, even though generally noted, are not accorded any special position. In this regard, the ICSID authority is that states are required to pay compensation for environmental regulations that impact on foreign investment. The tribunal in *Santa Elena v. Costa Rica* stated as follows:

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference. Expropriatory measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.185

Overall, FDI can improve, worsen or have no impact on environmental quality, as foreign investors sometimes self regulate, but at other times, they could capitalize on absence of substantive obligations requiring them to conform to certain environmental standards.186 For the most part, even though investment dispute settlement tribunals frown upon protectionism, environmental protection is emerging as an area of global concern and is not necessarily a particular interest area of only capital exporters or importers. Its immediate practical impacts on home and host states, is however, a different issue. The idea among some legal scholars and within some international institutions that the Third World is not concerned about environmental protection is simplistic or perhaps, misplaced, especially when the Third World in the investment system is correctly read to include Third World peoples.

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2. Human Rights Protection and Labour Standards

Human rights standards are the least prevalent public interest measures addressed in investment treaties. As Professor Alvarez has noted, there is an imbalance between (NAFTA) investment protection provisions and the rights of individuals affected by investment operations. Principally, human rights laws have been statist. Even though most international human rights instruments confer rights on individuals, they do not impose substantive enforceable obligations on them. And perhaps, this is understandable to an extent. However, in the context of FDI, TNCs are major players that have been implicated in cases of human rights abuses over the years, a condition that warrants them being placed in a category different from those individuals against whom international human rights obligations are unenforceable.

Like human rights, references to labour standards have been infrequent in IIAs. Whereas Canada’s FIPA Model makes no references to labour standards, the United States Model BIT includes provisions on labour to the effect that the agreement’s objectives will be realized in accordance with international and domestic labour standards. Also, NAFTA has a side agreement on labour cooperation. Even though many IIAs hardly reflect concerns on labour standards, this has remained a major point of NGO activism. A case in point is the NGO challenge of the OECD’s MAI partly on the ground that there was a disconnect between the draft MAI and labour standards. Labour standards have potential impacts on both capital importers and exporters, especially in the service industry, albeit, to varying degrees. While many South-North BITs generally exclude the labour protection criterion, it is a force to reckon with in NAFTA and a MAI.

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189 See Kelley, supra note 166 at 510-514 for examples of TNCs’ involvements in human rights violations in Third World countries.


In sum, this part has demonstrated that the attention to investment-related issues vary from issue to issue. Explicit economic development considerations feature less in South-North IIAs compared to some South-South agreements. Sovereignty constraints are being tempered in some agreements that could be frequently applicable to states as both capital importers and capital exporters in practice. Public interest concerns like environmental protection apply across board, irrespective of states’ position in practice – a capital exporter or capital importer or both. As such, environmental protection clauses are becoming a common feature in recent IIAs mostly because of the global concern about environmental protection, but investment arbitration tribunals seem to have a final say on this point. However, labour and human rights do not inhabit the same space as environmental protection in the investment order and have received less attention. Thus, the subscription to and dominance of some ideas in the present international investment system are context-specific. Nevertheless, all the issues discussed in this section are of equal concern to Third World peoples. One of the explanations for the treatment that the issues have received in the international investment system is the inability to conceive of the system as one with a broader application beyond states and foreign investors. And the system cannot lay claims to robustness without a deliberate incorporation of the interests and perspectives of Third World peoples, which is the group most affected by investment law and investment decisions, into the system.

V. Towards an Interactional Perspective on Investment Treaties – Of Wider Consideration of Actors and Interests

International law creates its fictions and realities. These fictions and realities are tools for determining international legal personality and responsibility, or absence of responsibility for acts and omissions in the international order. TNCs and other foreign investors’ international legal personalities have been vague enough to allow them to assume rights in international investment law, and at the same time, to avoid many substantive obligations within the same system. In recognition of this position, IIAs accord TNCs rights, while excluding them from substantive obligations, even though TNCs are distinct power bases that persuade their home states to espouse norms that favour them. NGOs on their part have been clear about their agenda – they intend to influence the law and they do that with all the mechanisms available to them. Peoples _qua_ peoples have garnered considerable clout in some areas of international law.
like human rights, but do not have such direct and legally recognized influence in investment law. States, as the major subjects of international law have usually adopted conflicting stances about principles that are applicable in the international investment order. All these actors have stakes in this system, and one way or another, seek to influence the development of international rules in this area of international law. In light of these actors’ interests and views, the premise of the analysis in this part is that the international order is a site of interaction where actors espouse views and ideas that are beneficial to their interests, and sometimes change the law in the process.

In part two of this chapter, I outlined some of the principal ideas that have shaped the construction of international norms on foreign investment. In this part, I commence the development of an argument that suggests that in the absence of economic power, capital importers (in this part, capital importers include states that engage mostly in the importation of FDI without corresponding exports of considerable amount of capital) and Third World peoples can wield the power of ideas in reconstructing the international investment order in a manner that allows the incorporation of diverse interests. The first premise that I rely on based on this thesis’ TWAIL constructivist theoretical underpinnings is that (international) concepts are usually contingent and socially constructed.192 No political-economic perspective on foreign investment is a natural law. Rather, within certain socio-political, historical, and legal contexts, these ideas represent significant bases of power and are relied upon to construct particular arguments and legal frameworks. Closely related to the premise that international concepts are not objectively true is the need to exercise caution in universalizing international norms. This is particularly relevant in an international order where cultures are different, legal systems vary, and economic structures and ideas are not uniform.

That ideas are in and of themselves powerful is not new to non-law disciplines.193 For these disciplines, the ideas that inform the contents of IIAs and the present construction of the international legal order are fundamental in an assessment of the system and in any meaningful

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attempt to understand its inclusions as well as exclusions. As demonstrated in chapter two, in recognizing the importance of ideas in constructing the interests of international actors, constructivist international relations scholars argue that “the interest of actors are constructed by shared ideas rather than given by nature.” Ideas also generate their own form of power, which many times is backed by material manifestations of power. TWAIL constructivist insights suggest that power is dynamic and mutually constituted, and appreciates that power could be material as well as ideational. A TWAIL constructivist perspective on material power recognizes the challenge that poor states and peoples face because of their lack of significant economic power and influence. Yet, it also refuses to conclude its analysis at this point but suggests that less economically well-off actors could exert ideational influence within the international order.

The TWAIL constructivist perspective on ideational power asserts that power relations are created, maintained and changed within the international order with the interaction of agents. It is one that takes Third World peoples’ agency seriously. When conceived of in this light, ideational power is an avenue for challenging and maybe even changing international law and the provisions of investment treaties. However, the universalization of some ideas and their historical origins make this an arduous task. Historically, economic liberalism emerged as the dominant ideological basis for IIAs because the international actors that dominated the international order at the time international law was in its formative stages subscribe to this view. In addition, it resonates more with capital exporters, and at the earlier stages, many powerful international actors were mostly capital exporters. And it has become a perspective that is well entrenched in the international system even though it has been subjected to serious challenges.

The ideas that drive the international investment system were established through the process of conscious reiteration of those ideas in interaction with the international community. However, the international law on foreign investment is not only formed in this manner, it is also so reformed. Thus, although one concedes that their influence might remain minimal for a

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195 See the discussion of Lon Fuller’s interactional theory of law in chapter two of this thesis.
long while, the interactions of Third World peoples with the international investment order cannot be ignored. And in order to garner significant voice within the system, ICSID tribunals need to take their agency, concerns and perspectives seriously. One of the contributions that these actors may offer includes clamouring for, and fostering more reciprocal interactions within the investment system. Optimal interaction envisages reciprocity of benefits and of obligations. However, in many IIAs, one state party mostly assumes the position of capital importer and the other, the position of capital exporter. Hence, the consideration of the investment system as one that has benefits and detriments on people might foster the development of dispute settlement mechanisms, and conclusion of IIAs in a manner that captures multiple interests.

The conception of law as a process of social interaction in its descriptive as well as prescriptive forms has the capacity to accommodate the interests of marginalized groups. This conception of law accommodates a broad range of actors in the international investment order, changes the locus of interaction, and in the process, changes the law. In recent times, these broader communities of interaction have taken the initiative to express their disagreement with investment activities that they consider inimical to their interests. The Cochambamba protests that formed part of the background to AdT v. Bolivia is one example of these reactions to internationally protected investment activities.196 NGOs have also fashioned means to actively and overtly participate in investment dispute settlement. Through this process, they impact on the re-construction of the international law on foreign investment. This broader locus of interaction is a phenomenon that can no longer be ignored in the international order. Such interaction has contributed to recent changes in procedural rules that regulate ICSID arbitration197 and in a case like Tecmed v. Mexico, the arbitral tribunal seemed to suggest that the interaction of peoples groups with investment activities and law might make the adoption of a different optic for assessing disputes before tribunals necessary.198 In addition, some BITs are beginning to include procedural rules on non-disputing party participation199 but as

196  AdT v. Bolivia, supra note 120. See Woodhouse, supra note 120.
198 Tecmed v. Mexico, supra note 81. For an extensive discussion of Tecmed v. Mexico, see chapter six of this thesis.
199 For example, article 39 of Canada’s FIPA Model, supra note 157 and article 28(3) of the US Model BIT, supra note 182, confer on tribunals the authority to accept written amicus curiae briefs. Some US BITs and Free
demonstrated in chapter six of this thesis, these rules do not necessarily capture non-institutionalized Third World groups. Nevertheless, they provide an avenue for reading investment dispute settlement from a broader optic than that of states and foreign investors only. While these interactions are yielding procedural changes in BITs, they are also contributing to procedural as well as substantive changes in investment dispute settlement cases, even if the changes are still modest.

An interactional perspective lends credence to the work of Third World grassroots movements. While engaging with international law, these actors produce alternative legal and power relations and develop international legal norms in the process of interaction. The interactional perspective also recognizes the role of vocal capital importing states in resisting investment rules that they regard as unfavourable at multilateral levels like the WTO, even though they might conclude agreements with similar rules in bilateral fora because they lack a united front in that regard. It also relies on the slow but sure advances that Third World requests have met with in international economic law generally. It demonstrates the possibilities that are available through interaction, with examples like the NGO objections to the OECD’s MAI, among other major reasons that contributed to the derailment of the MAI. While mega projects like the NIEO have been perceived as alarming because of magnitude, methods of espousal, and arguments adopted, the effects of consistent reiteration of principles by a coalition of capital importing states and Third World peoples cannot be overemphasized. It might be a slow process, but if it accomplishes nothing else, it provides the possibility of seeing things from another perspective.

Generally, optimal agreements would reflect the interests of capital importers, in addition to investment protection. Given the clamour for reasonable regulation of foreign investment in

Trade Agreements (FTAs) incorporate the rule on *amicus curiae* submissions. See for example, article 28(3) of the Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 25 October 2004, online: Office of the United States Trade Representative <http://ustr.gov/assets/Trade_Agreements/BIT/Uruguay/assetuploadfile748_9005.pdf>. See also the FTAs between the United States and Morocco, Singapore, and Chile, online: Office of the United States Trade Representative <http://www.ustr.gov>.

Obiora Chinedu Okafor, “Poverty, Agency and Resistance in the Future of International Law: An African Perspective” (2006) 27 Third World Quarterly 799 at 809 (discussing Third World campaign for greater access to cheaper medication, especially HIV/AIDS medication, and concessions won over the issue that global patent rules “can and ought” to be broken in order to provided the much needed access to essential life-saving medication.)
some quarters, and states’ needs to choose and maintain their own economic strategies, the inclusion of substantive investor obligations in addition to rights in IIAs will provide mechanisms for controlling possible detrimental effects of foreign investment and further hone their benefits. The international community can benefit from this perspective as a myriad of claims can be espoused based on this idea. A major way to implement the obligations will be through the investment arbitration mechanism that currently interprets rights and obligations acquired and incurred under IIAs. There have been suggestions on how IIAs may balance rights and obligations between foreign investors, host states and home states. These commentators argue for the inclusion of performance requirements in investment agreements, the retention of host states’ right to regulate, domestic dispute settlement and where this fails, international arbitration, the drafting of investment agreements that reflect the Third World’s needs, and the balancing of host states and investors’ rights and obligations. These arguments are plausible and will likely foster sustainable development but they are contrary to many tenets of economic liberalism. The recommendations would hardly result in hardship for foreign investors because they require that the laws against discrimination are maintained, and neither will they result in serious loss in efficiency. These recommendations do not replace one power bloc with another, as it is not apposite to maintain that any single perspective can ensure an optimal distribution of benefits and burdens. While they might involve a re-conceptualization of the interests of foreign investors and capital exporting states, the recommendations do not result in losses on their part. What they do is allow broader interaction, a wider articulation of interests, and a more just international economic order. However, as long as the prevailing ideas continue to dominate, and the locus of interaction is not actively expanded to include Third World peoples, a “Southern agenda” on foreign investment will be a difficult task.

VI. Conclusion – Summary of the Chapter’s Arguments

The international law on foreign investment has come full circle. It has proceeded from a position where arguments on the impacts of IIAs were espoused mainly by Third World states

201 Mann & von Moltke, supra note 10. Gallagher & Zarsky’s recommendation for making the most of FDI is also based on an inward looking development agenda that cannot be achieved within the prevailing international paradigm. Gallagher & Zarsky, supra note 10.
to its present incarnation where other actors – including NGOs and some developed states like the United States and Canada under NAFTA Chapter 11 – are beginning to appreciate the impacts of IIAs. This chapter has noted that while IIAs ensure investment protection, their benefits to host states are not as clear. At the same time, Third World states require FDI as one of the means by which they fuel their economies. As a result, this chapter subscribes to the position that since IIAs hold potential benefits for both capital importers and exporters, and also for investors, the optimal position for the Third World is to strive to negotiate agreements that reflect the interests of all these actors.

However, because IIAs are based on deeply rooted ideas about foreign investment, this chapter has advanced the position that one means of making the agreements more equal is to engage in wider interaction within the international order, with the aim of presenting alternative ideas on investment promotion and protection. The discussion has proceeded from a discussion of several ideas on foreign investment and the articulation of an alternative perspective on IIAs, to the substantive contents and public interest enhancing features of IIAs. It concludes on the note that robustness lies in wider interaction and the accommodation of alternative perspectives on foreign investment promotion and protection.
CHAPTER 5: ICSID AND THE THIRD WORLD I: THE DEVELOPMENT DISCOURSE, ALTERNATIVE STRATEGIC ARGUMENTS AND POTENTIAL TRANSFORMATIONS

The Core of the Chapter’s Arguments

This chapter and the next analyze ICSID’s role in shaping the Third World’s place in the international investment order and vice versa. The focus is on some discourses that are adopted as means of directly incorporating the interests of Third World peoples within the ICSID system. In this chapter, economic development forms the focus of the discussion as an example of sustained interaction between the Third World and ICSID. The chapter demonstrates that in spite of its touted relevance to the Third World, the development discourse has not formed a major focus of ICSID decisions. Rather, in adopting strategic arguments, actors have had recourse to human rights (and sometimes, the concept of sustainable development) as a strategic discourse of resistance to laws that do not incorporate all relevant interests. In a TWAIL constructivist formulation, the chapter focuses on strategic discourses within the investment dispute settlement system when the issue at hand is not one that is a major focus area of the system. It draws materials for its analysis from critical readings of Argentina’s socio-economic crisis and one of Argentina’s ICSID cases that was initiated subsequent to the crisis. It involves discussions of actors’ perspectives on economic development, peoples’ local reaction in Argentina, the strategic arguments adopted, and the responses of ICSID tribunals. The chapter expresses the view that even though economic development was one of the major ‘selling’ points of the ICSID Convention at the establishment of the institution, in practice, this concept has not featured prominently in ICSID decisions. Because of the seeming ineffectiveness of some of states’ approaches, the chapter suggests that the sustained engagements of peoples’ groups and their alternative discourses might be a welcome infusion of energy into the system.

I. Introduction – Problematizing ‘Development’

Until the 1990s, the discussions that actors and tribunals engaged in during international investment arbitration proceedings were rather technically focused on the direct legal and economic questions surrounding the immediate investment dispute. Tribunals did not extend
much consideration to the surrounding circumstances of the disputes, the quasi-constitutional issues that the disputes implicated, and the potential of their (the tribunals’) decisions to affect the lives and livelihoods of peoples. Nevertheless, since the 1990s, the discourses of investment arbitration have widened. However, Third World states and foreign investors’ discourses have remained rather traditional, dealing with quintessential investment arbitration issues. On their part, non-governmental organizations (NGOs) infuse the system with alternative considerations, including human rights and sustainable development. Rather predictably, Third World peoples who directly encounter the benefits and burdens of foreign direct investment (FDI) are quite consistent in their discourses, couching their concerns in plain language – needs, provision of jobs, freedom from poverty and so on. The discourses that are adopted within the investment arbitration system and the extent to which issues like the socio-economic well-being of Third World peoples become acceptable are indicative of the transformations that might be occurring within the system. In the past 60 years, institutions and commentators have subsumed the socio-economic well-being issue under the umbrella of economic development.

As discussed in chapter three, the founding documents of ICSID made some references to the concept of development in demonstrating its potential to mutually balance the interests of capital importing states and foreign investors. However, there has not been overwhelming support for economic development perspectives from tribunals. Much of the tribunals’ statements on the subject are related to the criteria for defining an investment, most of the time as part of the procedural question of determining jurisdiction. Substantive considerations of economic development have remained rather marginalized. Given development’s limitations, this chapter establishes that additional discourses of sustainable development and human rights are adopted as strategic arguments.

As noted in earlier discussions in this thesis, ideas, concepts and institutions are products of social construction. Like most ideas, the concept of development that animated South-North relations for the latter half of the 20th century was socially constructed. ¹ For Gustavo Esteva

and other contributors to the “Development Dictionary” anthology, the political usages of the terms ‘developed’ and ‘underdeveloped’ were coined by United States President Harry Truman in 1949. If Truman could coin the political usages of the terms ‘underdeveloped’ and ‘developed’ in a speech and change the way actors perceive themselves and others, one begins to appreciate the enormity of the social construction of concepts and ideas that drive the international order and domestic policies. However, beyond that coinage, and for development to attain its level of acceptance, the development discourse had immense institutional support from the World Bank and the International Monetary Fund (IMF). ‘Development’ was entrenched in popular discourse when it became a major project of the World Bank.\(^2\) The development concept demonstrates that social construction within the international order is accelerated where international institutions and epistemic communities that formulate the policies of the institutions support such construction, and when the ideas are advanced by materially powerful states. However, as the preceding chapter suggested, ideational resources are also available to non-materially powerful actors, albeit under more arduous circumstances that require the adoption of several strategic stances in order to establish their perspectives.

Over the years, development has acquired different meanings for several groups. For World Bank economists, development is mainly synonymous with somewhat linear and teleological economic development. For scholars like Gustavo Esteva, the idea of development and underdevelopment is a social construct, an invention of the West. Development envisages a form of progress, “a favourable change, a step from the simple to the complex, from the inferior to the superior, from worse to better. The word indicates that one thing is doing well because one is advancing in the sense of a necessary, ineluctable, universal law and toward a desirable goal.”\(^3\) But in the context of the Third World and the West, the term “development” is more complex. As Esteva observes in an intervention that is akin to a post-development take on the development discourse, the meaning of the word “development” for the Third World “is a reminder of what they are not. It is a reminder of an undesirable undignified condition. To escape from it, they need to be enslaved to others’ experiences and dreams.”\(^4\) In practice, most

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\(^3\) Esteva, *supra* note 1 at 10.

\(^4\) (Emphasis in original) Esteva, *supra* note 1 at 10.
of the Third World choose to adopt a less critical view of development and in many cases view it mostly in terms of poverty reduction and the ability to meet basic needs.

To commentators like Professor Stiglitz, development encompasses a wide range of issues. For Stiglitz, it involves a “transformation of society.”\(^5\) It is a “movement from traditional relations, traditional ways of thinking, traditional ways of dealing with health and education, traditional methods of production, to more “modern” ways.”\(^6\) In a revised version of this definition, Stiglitz substitutes the movement from “traditional ways of thinking” for movement from “traditional cultures and social mores.”\(^7\) As noted in chapter two of this thesis,\(^8\) development is often critiqued as a part of hegemonic international law.\(^9\) On this note, Rajagopal asserts that the “content of development has expanded to include every goal that is seen as desirable for the Third World, from poverty alleviation, democratization, rule of law, human rights, environmental sustainability to anti-corruption, with the result that the idea has come to assume a hegemonic function.”\(^10\) Nevertheless, the development discourse retains some transformative potential within a counter-hegemonic international law.\(^11\) In spite of the discourse’s current location within a hegemonic international legal framework, this chapter’s analyses of its treatment in ICSID’s jurisprudence as a strategic discourse of interaction stems from three reasons. First and most importantly, ICSID’s founding documents relied on the concept in seeking to establish the institution’s relevance. Second, significant weight is placed on the concept in the conclusion of international investment agreements (IIAs). Third, the adoption of liberal rules on foreign investment at domestic and international levels often rely on the economic development potentials of these rules as a rationale for their adoption.


\(^6\) Ibid.


\(^8\) See notes 138-139 and accompanying text in chapter two of this thesis.


\(^10\) Ibid. at 769.

\(^11\) Ibid.
Read as socio-economic ‘growth’ and ‘progress’, the development concerns of Third World states do not form a significant and explicit part of investment dispute settlement. However, considered as Stiglitz’s transformation of society, where almost any concern may fit, it is arguable that ‘development’ constantly features before ICSID. Cast in Stiglitz’s broad terms, the disciplining of states’ attitudes to investment in accordance with the dominant economic paradigms and practices could be considered as an incorporation of development in investment dispute settlement. However, the form of development considered in this chapter is that which formed a minute part of the decision in Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (Klockner v. Cameroon). It is that form of development that contributes to measurable changes in the socio-economic well-being of Third World peoples.

The discussion of Argentina’s socio-economic crisis before ICSID tribunals and the involvemement of substantial numbers of the Argentine population in the crisis illustrate recent attitudes towards the economic development discourse and the adoption of other arguments. For reasons enunciated in chapter one, I adopt Argentina’s socio-economic crisis in general and Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic (Suez v. Argentina) in particular as an illustration of the strategic arguments that are adopted in addressing socio-economic crises before ICSID tribunals. The discussion commences from an assessment of the development concerns of Third World states within the ICSID regime. Next, it evaluates the attention that is paid to the Third World individual as “the main participant and beneficiary of development”. It explores peoples and

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13 This draws from the Declaration on the Right to Development’s recognition that “[t]he human person is the central subject of development and should be the active participant and beneficiary of the right development”. United Nations (UN) General Assembly’s Declaration on the Right to Development, G.A. Res. 41/128 of December 4, 1986 at art. 2(1).

14 Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic (ICSID Case No. ARB/03/19) [Suez v. Argentina]. See http://www.worldbank.org/icsid for the decisions that have been rendered in this case. The case commenced as Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic at the time the claim was filed and remained so until after the tribunal made the Order in Response to a Petition for Transparency and Participation as Amicus Curiae on May 19, 2005. On April 14, 2006, Procedural Order No. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Argentinas S.A. was issued at Aguas Argentinas’ request. Subsequent to that order, the case became known as by its present title.

15 Declaration on the Right to Development, supra note 13 at pmbl.
groups’ adoption of discourses that have currency within the international system as strategic arguments to address pertinent issues that affect peoples of the Third World. In sum, the chapter’s arguments proceed in the following order: First, ICSID’s founding documents rely on the institution’s potential to foster economic development as one of its contributions to mutually balancing parties’ interests. Based on this claim, this chapter examines how the development discourse has fared in tribunals’ decisions using cases like *Klockner v. Cameroon* that could have generated sustained engagement with the discourse as examples. Second, although the discourse has its limitations, it has the potential to be adopted as a discourse of resistance, hence the discussion of states and tribunals’ reliance or non-reliance on the discourse. Third, while states and tribunals continue to rely on economic development in procedural discussions, peoples often go beyond this concept in articulating economic concerns. Using Argentina’s socio-economic crisis and its ICSID cases as examples, the chapter discusses other arguments that actors adopt in incorporating peoples’ interests directly before ICSID tribunals. It concludes that Third World peoples and the alternative discourses exist in a mutually reinforcing and dynamic relationship. The intervention of these peoples in ICSID-related occurrences allow the consideration of alternative arguments that can incorporate their perspectives while these alternative discourses also open up wider spaces of interaction between Third World peoples and ICSID tribunals.

II. **ICSID, Third World States and the Development Discourse**

For many years after the establishment of ICSID, the institution did not have many disputes in its dispute settlement docket. Its dispute settlement work gained momentum with the popularity of IIAs and the disputes that arose under those IIAs. Less than a decade after ICSID’s establishment, the international system focused on the occurrences at the United Nations (UN) General Assembly. The UN General Assembly Resolutions were early examples of Third World struggles in the international economic system. After these Resolutions, ICSID encountered opportunities to discuss the development dimensions of several cases. A brief recap of the Resolutions is next.
A. The New International Economic Order Revisited

Before the debt crises of the 1980s and before neoliberal economic ideas gained prominence in many countries, the newly independent states of the post-World War II era had sought to redefine their economic positions within the global system. About the time that these early transformations were sought through the UN General Assembly, the International Development Association (IDA), an arm of the World Bank Group, was established. The IDA was charged with the primary purpose of reducing poverty through the provision of interest-free loans to poor countries.\(^\text{16}\) While the IDA was working towards fostering economic development in Third World countries, these countries were also adopting mechanisms that they thought could provide some measure of economic prowess for them within their jurisdictions and on the global stage.

Many of the mechanisms that the countries of the Third World sought to adopt through the UN General Assembly have been discussed in chapter three. It suffices to note some of the principles that addressed the dispute settlement system in this section. Most prevalent among these principles was the adoption of the “adequate” compensation standard in the event of an expropriation, the reiteration of the need to regulate foreign investment, and states’ ability to adopt socio-economic systems that they deem appropriate for their development.\(^\text{17}\) One would recall as discussed in chapter three that the decision in *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (Texaco Arbitration)* rejected the applicability of some provisions of the *Charter of Economic Rights and Duties of States* and the *Declaration on the New International Economic Order* as international norms.\(^\text{18}\) For Sole Arbitrator Dupuy, because *inter alia*, these provisions were contested by developed states and a few Third World states, they could not be considered acceptable as applicable principles.\(^\text{19}\) In addition to arbitral awards like the *Texaco Arbitration*,

\(^\text{16}\) Online: World Bank www.worldbank.org/ida/.

\(^\text{17}\) See article 4 of the *Declaration on the Establishment of a New International Economic Order* G.A. Res. 3201 (S-VI) (May 1, 1974); and articles 2 & 7 of the *Charter of Economic Rights and Duties of States* G.A. Res. 3281 (XXIX), (December 12, 1974), UN GAOR, 29th Sess., Supp. (No. 31) at 50, U.N. Doc. A/3235.

\(^\text{18}\) *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic* (1979) 53 I.L.R. 389 [*Texaco Arbitration*].

\(^\text{19}\) *Ibid.* at 483-495.
commentators also declared the failure of the NIEO. Even in practice, principles contrary to the NIEO agenda seemed to prevail after the emergence of the debt crises and the adoption of World Bank and IMF-driven economic policies to remedy economic decline.

Since the NIEO era, Third World states have not embarked on a major attempt to achieve a mega reconstruction of the international economic system. Rather, the attempts to effect changes have been piecemeal and have varied from state to state. Discussion of one of these attempts, the construction of the development concept in ICSID jurisprudence, follows next.

B. Articulating Development Concerns before ICSID Tribunals

1. Procedural Considerations: The Definition of Investment

In spite of ICSID’s claim of strengthening cooperation for economic development, this issue has generally not been a prominent feature in ICSID jurisprudence. One would have thought that being one of the major concerns of Third World states that constitute the majority of ICSID defendants, ICSID jurisprudence would be replete with principles of an international law of development, or at least principles akin to them. Also, given the oft-repeated claim that


ICSID possesses the ability to promote mutual confidence between the Third World and foreign investors, it is surprising that references to economic development are sparse in ICSID’s jurisprudence. Perhaps, one of the reasons for this posture in ICSID’s early history is what one of the counsels interviewed for this thesis referred to as a lack of sophistication in Third World governments’ defence stemming from poorly prepared arguments. This interviewee, who is well versed in the conduct of investment arbitration, was of the opinion that even though some of these governments hire foreign firms, they lack continuity and institutional memory, and as a result, the cases are difficult to argue successfully. While this position probably captures some of the problems with these cases, it does not explain earlier attitudes like that adopted in the Texaco Arbitration where references to economic development in the Charter of Economic Rights and Duties of States were regarded as ideological and political. Also, even if the poorly prepared defence issue was of some significance in the 20th century, many Third World states, especially, Peru, Chile, Mexico and Argentina now have Ministries that handle their ICSID cases. On their part, Peru and Chile have built internal teams to manage these cases.

Like the argument that has been made regarding the ever-present public interest-impacting character of investment arbitration, many ICSID decisions that involve Third World states could generate discussions about the economic development impacts of FDI and of the decisions emanating from the arbitral settlement of investment disputes. In fact, the economic development consideration is arguably implicitly present in most ICSID cases due to the criterion that in order to qualify as an investment under the ICSID Convention, such investment should contribute to the economic development of the state party in question. Under the ICSID system, this criterion applies to all countries, whether they are part of the Third World or not. The definition of investment and the criteria that aid in this definition have been discussed in chapter four.

23 Interview No. 201.1, March 28, 2007. Transcripts on file with author.

24 Professor Dupuy was of the opinion that article 2 of the Charter of Economic Rights and Duties of States “must be analyzed as political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States.” Texaco Arbitration, supra note 18 at 492.


26 Ibid.

27 See Part III(A) of chapter four of this thesis.
On the jurisdictional question of determining whether an activity qualifies as an “investment” under article 25 of the *ICSID Convention*, the economic development criterion and other features have generated some discussion. 28 In *Patrick Mitchell v. The Democratic Republic of Congo (Mitchell v. DRC)*, one of the arguments was that the dispute was not within ICSID’s jurisdiction because the claimant’s activities were not of importance for the Democratic Republic of Congo’s (DRC) economy and as such, did not distinguish themselves from ordinary commercial transactions. 29 A major question was whether there was an “investment” at all to satisfy ICSID’s *jurisdiction ratione materiae*. In the *ad hoc* committee’s decision on annulment, it reviewed the authorities on the characteristics of investment, noting the *ICSID Convention’s* reference to “international cooperation for economic development” in its preamble. In annulling the award for failure to state reasons and manifest excess of powers, the committee noted that:

the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development, is, in any event, extremely broad but also variable depending on the case. 30

The *Mitchell v. DRC* annulment decision has been criticized for resembling an appellate

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28 For a general discussion of these line of ICSID cases, that have sometimes led to the conclusion that the tribunal does not have jurisdiction because of the activity in question is not an “investment” within the meaning of article 25 of the ICSID Convention, see *Malaysian Historical Salvors, SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10) (Award on Jurisdiction of May 17, 2007), online: Investment Treaty Arbitration <http://ita.law.uvic.ca/documents/MHS-jurisdiction.pdf>. Some of these awards including the Malaysian Case are subject of pending ICSID annulment proceedings.


review instead of an annulment as required under article 52 of the ICSID Convention. It has been noted that the *ad hoc* committee “did not only exercise a very tight control over the tribunal’s findings”, the “committee also put forward a very restrictive notion of “investment” for jurisdictional purposes, a narrow standard that runs counter to previous interpretations of Article 25 of the ICSID Convention.”

In particular, stay of execution proceedings pending the consideration of applications for annulment have seen states raising their economic circumstances and in some cases, tribunals have responded to those arguments. For example, in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, in arguing for the stay of the enforcement of the award rendered earlier in that case, Chile contended *inter alia* that making a payment before a decision was reached on the annulment proceedings could have harmful consequences on the economic and social development of Chile.

Although it did not expressly consider the point of Chile’s socio-economic development, the *ad hoc* committee was inclined to grant the stay given Chile’s assurances that the award would be enforceable under its national laws as a final judgment of the Chilean courts.

Similarly, in the stay of execution proceeding in *Mitchell v. DRC*, the DRC suggested that the posting of a guarantee would be a significant burden for a Third World country like the DRC. In its decision, the *ad hoc* committee stated that given the DRC’s sensitive political situation, even though the amount of the award in question appears minimal, it “could constitute today a significant burden for the DRC… the immediate payment by the DRC of this amount may obstruct its plans for the restoration of its authority and for the economic and social development of the country.” Noting that none of the DRC’s arguments would justify the stay of enforcement on its own, the committee was willing to accept the stay of enforcement based on the coexistence of the

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33 Ibid. at paras. 29-35.


35 Ibid. at para. 27. The tribunal also noted that the DRC’s political situation had been described in a UN Security Council Resolution.
factors that the DRC raised.\textsuperscript{36} As the \textit{ad hoc} committee in \textit{Maritime International Nominees Establishment v. Republic of Guinea} put it, “[p]overty as such is not a circumstance justifying a stay any more than it would justify non-payment of an award. The criterion is, rather, whether termination of the stay would have what Guinea calls “catastrophic” immediate and irreversible consequences for its ability to conduct its affairs.”\textsuperscript{37}

Evidently, some consideration of economic development has featured in ICSID decision-making, especially in awards on jurisdiction considering whether an activity qualifies as an investment under article 25 of the \textit{ICSID Convention} and in stay of execution proceedings. However, the question that concerns us in this chapter is not the procedural definition of investment, which has been the more prominent consideration. While this definition is important and its attention to economic development as a relevant criterion is laudable, this chapter focuses on the \textit{substantive} relationship between the impact of foreign investment activities, investment agreements, foreign investment disputes and ICSID decisions on the one hand, and the economic development of Third World countries on the other. The two cases discussed in some detail next, demonstrate tribunals’ willingness to make some references to the substantive economic development impacts of the agreements that they were considering. These cases vary in terms of issues, parties and decisions, but are similar in terms of the tribunals’ references to the economic development dimensions of the disputes. They form the background for the discussion of the recent strategic discourses adopted in engaging ICSID tribunals on Argentina’s socio-economic crisis.

\textbf{2. Substantive Considerations: Klockner v. Cameroon (1983)}

Although early ICSID decisions seldom explicitly considered issues of economic development, \textit{Klockner v. Cameroon}\textsuperscript{38} is a case that is usually cited in discussions of economic development

\begin{footnotesize}
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\item \textsuperscript{36} \textit{Ibid.} at 28.
\item \textit{Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon & Société Camerounaise des Engrais} (ICSID Case No. ARB/81/2) Award on the Merits, October 21, 1983 (1994) 2 ICSID Rep. 9 [\textit{Klockner v. Cameroon, Merits}]. The initial award focused primarily on the foreign investor’s duty of disclosure. The dissenting opinion is reported at (1994) 2 ICSID Rep. 77. Both the majority and dissenting opinions were
\end{itemize}
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within the ICSID context. Unlike most recent ICSID cases, the Klockner v. Cameroon case was not initiated on the basis of an investment treaty, but on the basis of an investment contract.

In 1971, Klockner, a multinational European company, signed a Protocol of Agreement with the Government of Cameroon undertaking to erect a fertilizer plant to be operated as a joint venture between the parties when completed. In conjunction with its European partners, Klockner was to hold a 51 percent share in the joint venture while the Government of Cameroon held 49 percent of the shares. During the course of the decade, the parties entered into several agreements – including the Protocol of Agreement, the Supply Contract and an Establishment Agreement – which all included ICSID arbitration clauses. The Government of Cameroon undertook to provide a site for the proposed factory and to guarantee a loan that Klockner arranged, while Klockner was responsible for technical and commercial management of the venture.

In 1978, Klockner and its European partners refused to subscribe to a capital increase and as a result, they lost their majority control. In December 1977, the Government shut the factory down following a period of unprofitable operation. An attempt was made to restart the factory, but by 1980, that attempt was deemed unsuccessful. In April 1981, Klockner initiated ICSID proceedings alleging non-payment by the Cameroonian Government while the latter alleged that the project was poorly implemented. Klockner claimed CFA francs 10,350 million – the balance of the price of the factory that it supplied to Cameroon. Cameroon urged the tribunal to reject the request and also counterclaimed for CFA francs 12,156 million, being damages for the amount of the losses that it incurred in the fertilizer project.

rendered on October 21, 1983. This initial award was the subject of annulment proceedings in 1984. Pursuant to article 52(6) of the ICSID Convention, the award was annulled. In July 1985, the case was resubmitted to a new ICSID tribunal. This second award was issued on January 26, 1988. On July 1, 1988, the parties filed for annulments of the award on the resubmitted case. On May 17, 1990, the ad hoc committee on the annulment rendered a decision rejecting the parties’ applications for annulment of the award issued on resubmission of the case. For this history, see (1994) ICSID Rep. at 163. An early and brief version of the discussion of Klockner v. Cameroon was originally published in Ibironke T. Odumosu, “The Antinomies of the (Continued) Relevance of ICSID to the Third World” (2007) 8 San Diego Int’l L.J. 345.

40 For detailed facts of the case, see Klockner v. Cameroon, Merits, supra note 38 at 25-58.
41 Ibid. at 12.
42 Ibid.
From the outset, the project had socio-economic development connotations. The tribunal seemed to infer that the performance of the foreign investment contract had to meet the development aspirations of a Third World country like Cameroon. In its outline of the agreements governing the parties’ relationship, the tribunal noted that from the Protocol of Agreement, it was clear that the “Government was not satisfied with the mere supply of a fertilizer plant. According to the Protocol, much more was expected and demanded of the supplier of the plant.”43 The preamble to the Protocol stated that the Government intended to construct a fertilizer factory in consonance with its “IIIr d Plan for Economic and Social Development”, while noting that Klockner accepted to contribute to the realization of the factory by providing financial and technical assistance to the Government of Cameroon.44 The initial arbitral tribunal was of the opinion that the plant’s output was of major importance to the country’s agricultural sector that formed the foundation of Cameroon’s economy. In this regard, the tribunal noted as follows:

This was a joint venture between Klockner, a multinational European corporation, and a developing country. The plant to be built was an example of imported modern technology and engineering. Cameroon had no experience in manufacturing fertilizer products. The factory was to be acquired with the Government’s guarantee of payment; its output being of major importance for the country’s agriculture being in turn the very foundation of Cameroon’s economic ambitions.45

While noting explicitly that the project affected economic and social development,46 the tribunal read the duties of loyalty and confidence into the agreement.47 It was of the opinion that the “factory’s economic difficulties emerged to a large extent as a result of Klockner’s very failure of disclosure.”48 However, in his dissenting opinion, Professor Schmidt found that Klockner had not breached its duty of full disclosure. In fact, he noted that Klockner had nothing to

43 Ibid. at 18.
44 Ibid.
46 Ibid. at 59.
47 Ibid. at 27. At page 30, the tribunal was of the opinion that Klockner’s failures of disclosure were of “capital importance.” According to the tribunal, “in each case, Klockner’s silence may have led Cameroon into error. Klockner’s lack of frankness may have caused SOCAME [Societe Camerounaise des Engrais (SOCAME) was the joint venture company that was established for the purposes of project] to proceed with the project at a point in time when, if it had been appropriately informed by its partner, it could have used its juridical prerogative of halting further investment even before erection of the factory.” See also ibid. at 59-61.
48 Ibid. at 30.
tell about the price of fertilizer that Cameroon did not already have knowledge of. The majority concluded that it was not enough to merely construct a fertilizer plant; the plant had to have the required capacity and be managed in a manner that fulfilled the attainment of its goals. In its decision, the tribunal rejected both Klockner’s claim and Cameroon’s counterclaim.

The Klockner v. Cameroon award on the merits was, however, annulled in its entirety on the grounds inter alia that the tribunal had exceeded its powers and failed to apply the law of Cameroon correctly to the dispute. The ad hoc annulment committee was charged with the consideration of whether the initial tribunal had exceeded its powers and as a result, was not concerned with the merits of the dispute. As such, one cannot look for too much from it on the discussions of the development impact of the contract. Nevertheless, the annulment tribunal categorized the agreements in question as “development” contracts. With the annulment of the decision, it seemed that explicit economic development considerations in decisions were also written out of ICSID jurisprudence. Sometimes, one wonders whether the framing of the claims and states’ responses to these claims curtail tribunals’ ability to examine the development dimension of these cases. Perhaps this is not so. But one fact comes out clearly in the Klockner v. Cameroon annulment decision and that was that in whatever excursions that the tribunals engage in, in seeking to reach their decisions, such decisions have to be grounded firmly in the applicable law to the dispute. And in the case of economic development, this ought not to be an uphill task, for international law, which is prominent as applicable law in settling investment disputes, has principles of an international law on development or at least, of the right to development. It should be acknowledged though that the international law on development has remained contentious and is mostly supported by non-justiceable instruments like the Declaration on the Right to Development referenced in the

49 Ibid. at 79.
50 Ibid. at 66.
51 Ibid. at 76-77.
53 “It is obviously not up to the ad hoc Committee constituted under Article 52 of the Washington Convention [ICSID Convention] to say whether the contested Award’s interpretation is or is not the best, or the most defensible, or even whether it is correct, but only whether the Award is tainted by manifest excess of powers.” Ibid. at 115.
54 Ibid. at 104.
introduction to this chapter. Hence, as discussed later in this chapter, actors have chosen to
have recourse to binding human rights instruments that might support their arguments. On
their part, perhaps, Third World states have to be more proactive in directly pleading broader
public interest-enhancing principles in the cases. However, it is possible that as a strategy, they
may perceive that such pleadings might not favour their cause in the case. It is at this point that
the work of Third World peoples participating in dispute settlement or in domestic investment
processes becomes especially relevant, for they are largely uninhibited by political
considerations in engaging non-mainstream concepts as discourses of resistance.


Like Klockner v. Cameroon, the decision in Antoine Goetz v. Republic of Burundi (Goetz v.
Burundi) is one that could have generated a sustained engagement with the economic
development dimensions of Burundi’s actions, especially as the tribunal alluded to the
“common good” and “interests of the national economy” that the Government’s decision
was meant to serve. The decision turned on the expropriatory effects of Burundi’s actions
based on the Convention on the Mutual Promotion and Protection of Investments between
Belgium-Luxembourg Economic Union and Burundi (Belgium/Luxembourg-Burundi BIT/the
BIT) that formed the basis for ICSID’s jurisdiction.

The dispute arose from Burundi’s withdrawal of a “free zone certificate” that had earlier
granted exemptions from tax and customs duties to the claimants’ company. In August 1992,
the Government enacted Decree Law No. 1/30 that instituted a free zone regime that allowed
some businesses established in the country pursuing activities regarded as non-traditional to
benefit from customs and fiscal exemptions. The regime also allowed exemptions from some
facilitative measures in labour legislation and exchange control. The Decree aimed to
encourage exports and facilitate both domestic and foreign private investment, as well as to


56 For a statement of the facts in the case, see ibid. at paras. 1-18.
generate jobs and stimulate ideas and technology. Members of Burundi’s administrative and governmental staff adopted different views about the legality of the certificate since the texts relating to minerals had not been published. They also questioned the eligibility of activities that related to gold and precious minerals to benefit from the free zone regime. The Commission set up to consider these issues concluded that the investors’ company – AFFIMET – had acquired a valid free zone certificate. It however expressed “strong worries that the law governing this regime was so liberal that the State of Burundi risked not being able to reap all the expected benefits.”

Subsequent to further disagreements over the free zone regime, an international consultancy – Amex International of Washington – assisted by a national team from Burundi, was charged with studying the advantages and disadvantages of making minerals, gold in particular, eligible for inclusion in the free zone regime. On its part, the national team was critical of the conditions of creating the free zone regime and the benefits it accorded to AFFIMET. Nevertheless, it considered it difficult to withdraw AFFIMET’s certificate without damaging the state’s reputation. It recommended maintenance of the status quo and study of the eligibility of minerals for the free zone. It considered that a definitive position on AFFIMET could be taken in light of this proposed study. However, the international consultancy expressed the opinion inter alia that the approval of a company which engages in a traditional activity was the cause of the problem. Consequently, Burundi withdrew the certificate on the grounds that the free zone had ceased to apply to companies engaged in the extraction and sale of ore and the applicant company fell within this category. After protesting to authorities like the Minister for Industry and Commerce, the Burundian Prime Minister and the World Bank, the shareholders of AFFIMET with Belgian nationality initiated ICSID proceedings pursuant to article 8 of the Belgium/Luxembourg-Burundi BIT. The claimants sought the annulment of the decision to withdraw the free zone certificate, or if this was not possible, they claimed substantial damages.

Although the ICSID tribunal was of the opinion that Burundi had to restore the free-zone certificate to AFFIMET or be required to pay adequate indemnity to compensate for the

57 Ibid. at para. 8.
58 Ibid. at para. 13.
claimants’ loss of the certificate and the privileges that it conferred on them, it did not support the view that the certificate was of an absolute character and therefore, irreversible. In considering the non-absolute character of the free zone certificate, the tribunal alluded to the “common good” purposes that the free zone regime was meant to serve. At paragraph 112 it noted that:

[I]t would be contrary to all principle that a certification entailing certain benefits for its recipient, in particular in the area of duties and taxes, could carry an irreversible and absolute character. As the preamble to the decree of 31 August 1992 asserts, the special regime dubbed “the free zone regime” was created for the common good: the promotion of exports of non-traditional products, the encouragement of private investment, the creation of jobs, the circulation of technology, the increased competitiveness of Burundian products on export markets, in particular in relation to those of other development [developing?] countries possessing free zone regimes. From the moment when, in the judgment of the relevant State authorities, the common good for which this last was responsible no longer justified such a stimulus for a given product or activity, it was in their power to modify the texts governing the free zone regime and to put an end – for the future, and without retroactive effect – to previously accorded certification.

While the tribunal’s statement above might be considered remarkable because it made references to the “common good” of Burundians, it did not translate into a concrete discussion of economic development perspectives. Read along with references to the “interests of the national economy” in paragraph 126, these remarks were the closest that the tribunal came to discussing Burundi’s economic needs and situation, referred to broadly in the decision and the Decree as “the common good.” Considered in this light, the statement might not be as far reaching as one would have expected for it did not consider the economic development rationale of Burundi’s action and the economic development impact of its (the tribunal’s) decision.

Based on the parties’ subsequent agreement, the tribunal did not issue an award but rendered a decision on liability. It found that the withdrawal of the certificate constituted a measure tantamount to expropriation, specifically, a measure depriving of and restricting property. Given that the BIT allowed the application of both domestic and international law, it would have been within the tribunal’s power to consider the emerging international law on development. The tribunal’s eventual conclusion is not the focus here and neither is the correctness of the decision. Rather, it is that in the absence of the consideration of the
development impacts of Third World states’ decisions and actions vis-à-vis foreign investors, ICSID tribunals might only be scratching the surface of matters underlying the disputes before them and not dealing with the major catalyst issues behind the disputes. One can garner this from the fact that in spite of the agreement between the parties and the tribunal’s decision on liability, differences subsequently arose between the parties. As a result of the subsequent differences, a new arbitration request was submitted to ICSID in 2001 but a decision has not been rendered on this request. While cases like *Klockner v. Cameroon* and *Goetz v. Burundi* were triggered by actions that had impacts on one sector of the economy, Argentina’s crisis at the turn of the 21st century had widespread impacts on the entire socio-economic fabric of the country. This crisis is discussed next.

III. ICSID, Third World Peoples and the Development Discourse: The Argentine Example

A. Introduction

Argentina’s financial crisis that escalated into a widespread socio-political crisis is one that made headlines in the news media all over the world for a considerable period of time. Before the breakdown of the economy and the social and political apparatus of the country, starting in the early 1990s, Argentina aggressively pursued neoliberal economic policies in order to boost its economy. However, by the final quarter of 2001, it was clear that the Argentine economy had crashed. This crash was quickly followed by a severe social and political crisis that affected the very fabric of Argentine society for about two years. In this part of the chapter, I focus on Argentina’s socio-economic crisis and interpret the ICSID case of *Suez v. Argentina* in light of this crisis. Argentina’s crisis provides a different lens than that in *Klockner v. Cameroon* or *Goetz v. Burundi* for assessing ICSID tribunals’ approach to investment disputes triggered by socio-economic problems in the Third World. One of the major impetuses for this change is the intervention of the Argentine people in the crisis in a manner that made Government action necessary and more importantly in this context, prompted a revised approach of some ICSID tribunals to these issues.

59 Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/01/2).
B. Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.
v. The Argentine Republic (Ongoing)

1. The Background to the Dispute

Since the turn of the 21st century, Argentina has been a defendant in over 40 ICSID cases, and by August of 2008, it had about thirty-four cases to defend. As discussed briefly in chapter three, huge amounts of compensation have been awarded against Argentina in some of these disputes, although Argentina has not lost all its ICSID cases. For example, in Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, the tribunal found that the claimant had not suffered any loss due to Argentina’s actions.60 Most of Argentina’s ICSID cases developed in the aftermath of its socio-economic crisis. One of those cases, Suez v. Argentina, is the focus of this chapter’s discussion.61

From the beginning of the 1990s, Argentina embarked on a massive programme of liberalizing its economy.62 It deregulated economic activities and overvalued its currency by pegging it to the United States (US) Dollar. Unfortunately, these measures facilitated the accumulation of “stiff external deficits, de-industrialisation, and a disarticulation of the chains of production”, and contributed to growing rates of unemployment and underemployment, fall of real salaries and an increase in the number of people that fell below the poverty line.63 In addition, pegging the Argentine Peso to the US Dollar created a situation where Argentina had little or no control over its monetary policy as well as a situation where the exchange rate adopted did not bear much connection to Argentina’s economic situation. The accumulation of external debt also made interest payment a high priority area of public spending. As Vilas notes, since “monetary emission was pegged to the amount of foreign currency reserves, every increase in monetary liquidity was contingent upon additional foreign currency inflows, thus tying the rate

61 See supra note 14.
63 Ibid.
of GDP growth to the growth of foreign indebtedness.\textsuperscript{64} Coupled with this was also the privatization of pension and retirement systems that aggravated “fiscal disequilibrium”.\textsuperscript{65}

By 1998, Argentina’s growth was decelerating and in 1999, it was clear that its economy was in a recession leading to capital flights of huge magnitude by 2001. At the time, the government paid more attention to its commitments to foreign creditors at the expense of investment in infrastructure and social services.\textsuperscript{66} This led to serious economic impacts for retirees and government employees, unemployment and decrease in social welfare. As Vilas notes, the adoption of the convertibility system and subscription to “Washington Consensus” principles caused the Argentinean Government to label the crisis as a fiscal crisis.\textsuperscript{67} Meanwhile, the crisis was more deeply rooted and affected more facets of the country than the financial sector. It was a social as well as an economic crisis.

At the time the country adopted its economic policies of the 1990s, social inequality in Argentina accelerated. It is disingenuous to claim that this inequality was a distinct result of the adoption of these policies since social inequality already existed before the 1990s. However, by the end of the 1990s, this condition was worsened. Commentators take the view that the acceleration of social inequality in the 1990s was a result of the adoption of Washington Consensus policies.\textsuperscript{68} An example of this inequality is demonstrated by the 2001 statistics available on the Buenos Aires region. During this year, the richest 10% of households in this Metropolitan Area had the same portion of income as the poorest 60% of households in the area. The level of the income of the richest ten percent was almost 34 times higher than that of the poorest 10%.\textsuperscript{69} Unemployment also grew and in the same year, 2001, 830,000 people fell within the poverty category.\textsuperscript{70} In fact by the second half of 2002, over half of

\begin{footnotesize}
\begin{itemize}
\item[64] Ibid. at 120.
\item[65] Ibid.
\item[66] Ibid. at 121.
\item[67] Ibid.
\item[68] See Vilas, \textit{ibid.}, for a citation of several commentators’ views on this point.
\item[69] Ibid. at 122.
\item[70] Ibid.
\end{itemize}
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Argentina’s population lived below the poverty line.\textsuperscript{71} These ‘newly’ poor people in conjunction with the “historically” poor formed one of the major components of the social crisis that rocked Argentina in 2001 and 2002.

There were also political dimensions to Argentina’s crisis. In the first quarter of 2001, the Government proposed some policies to deal with what was still being regarded as a financial crisis including “severe cutbacks in the public education budget, further reductions in the already badly shrunken public sector workforce, a variety of cuts in social spending” and so on.\textsuperscript{72} The measures were met with public outcries and opposition, which were only the beginning of more to come in the next year. The Government reappointed Domingo Cavallo, the czar of Argentina’s neoliberal movement, as Economic Minister. However, Cavallo’s policies during his renewed tenure only aggravated the social crisis in the country.

By November of 2001, the Argentine situation had become dire. The major operators in the financial system withdrew significant amounts of money totaling almost half of the reserves of the national economy. This move further aggravated the already pressured exchange rate. Yet, Economic Minister Cavallo was reluctant to revise the economic policies that he had installed about a decade earlier. Rather, he continued to insist on “further implementation of convertibility at any and all costs.”\textsuperscript{73} He proposed cutting public sector wages and the reduction of pensions.\textsuperscript{74} Apportioning some blame to the IMF in pushing the austerity measures, Stiglitz notes as follows about the cuts in expenditures:

\begin{quote}
Not surprisingly, the cuts exacerbated the downturn; had they been as ruthless as the IMF had wanted, the economic collapse would have been even faster. Social unrest would have come earlier. And the calamity that followed the political unrest would almost surely have been every bit as bad. What is remarkable about Argentina is not that social and political turmoil eventually broke out, but that it took so long.\textsuperscript{75}
\end{quote}


\textsuperscript{72} Vilas, \textit{supra} note 62 at 124.

\textsuperscript{73} \textit{Ibid.} at 129.

\textsuperscript{74} BBC News, “Argentina Plunges into Turmoil” (December 20, 2001), online: BBC \textltt{<http://news.bbc.co.uk/2/hi/americas/1720607.stm>\textgtt}.

Further, in December 2001, after massive outflows of capital had already been carried out by the biggest financial actors, Cavallo decided that in order to prevent any further capital flights and the destruction of the banking industry, the *corralito* needed to be decreed. The *corralito* was a measure adopted to freeze bank accounts – cash withdrawals could not exceed more than US$300 per week for each person. Transactions that exceeded this sum had to be conducted through cheques or debit and credit cards. The *corralito* mostly affected small and medium bank customers as well as the poorest segments of the middle class. Many of these poor people did not always have debit or credit cards and sometimes did not hold bank accounts with cheques. The timing of the decision was also imperfect given that it was approaching the Christmas season – a time when people usually make more purchases than usual.\(^76\)

As is widely known, the *corralito* was a major factor in the Argentine crisis that triggered a wide range of public protests. As Vilas eloquently puts it:

> The “*corralito*” represented the end of the fantasy held by millions of Argentines for well over a decade that the country in which they lived somehow belonged to the “First World.” The image of a society whose currency was as worthy as the U.S. dollar and whose citizens lived in a cosmopolitan outpost was abruptly shattered. This was the grand fantasy that had been conspicuously nourished by the official discourse of successive governments, with a concerted collaboration of media networks while the unpleasant ingredients of the convertibility scheme – such as massive poverty, social exclusion, growing unemployment, and deepening social polarization, as well as the increasing fragmentation of the social fabric – were systematically dismissed.\(^77\)

The convertibility scheme was clearly no longer apposite and the people reacted. The Argentine situation revealed “new forms of social mobilization”. People united by poverty and unemployment and by their cause against these problems became known as the *piqueteros* (the picketers movement).\(^78\) They were the most prominent social actors of this time. Their modes of protest were mostly in the form of street and highway blockades. The picketers were sophisticated in their methods and composition. They targeted strategic public places and access routes in Buenos Aires. Their ability to transcend ideological differences in their

\(^{76}\) See Vilas, *supra* note 62 at 129-130.

\(^{77}\) *Ibid.* at 131.

\(^{78}\) *Ibid.* at 125.
coalitions was impressive. Many of these unemployed workers had prior trade union experience, some had the ability to negotiate with the government, and many of these people were highly skilled workers. In fact, many of the leaders of the movement were former union leaders that had very good organizational abilities. In addition to the actions of the *piqueteros*, major labour unions declared a national strike.\(^79\)

Initially, the picketers’ movement demanded employment but this quickly moved to broader demands related to human rights protection from police harassment of the protesters and critiques of the Government’s macro-economic policies. As one Argentine woman noted, “the workers are fighting for their jobs, and that is what I plan to do.”\(^82\) As well, these Argentines expressed their dissatisfaction against banks, privatized corporations and the economic policies that the government had installed at the behest of the IMF.\(^83\) The protests were mostly peaceful and many times involved symbolic pot banging – the *cacerolazo*. However, by mid-December, the mass protests disintegrated into the looting of supermarkets and other destructive activities that were evidence of severe socio-economic exhaustion. Thirty-seven people had lost their lives by December 19 both from the ransacking of business places and the interventions of the police.\(^84\) By this time, it was clear that the social crisis was out of control and the government decreed a state of emergency. This state of emergency has been the subject of discussion in some ICSID cases discussed later in this chapter.\(^85\)

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\(^79\) *Ibid.* at 126.


\(^81\) Vilas, *supra* note 62 at 127.


\(^83\) Carrera & Cotarelo, *supra* note 80 at 202.

\(^84\) Vilas, *supra* note 62 at 131.

\(^85\) See *infra* notes 127-136 and accompanying text.
with brutal force. On December 20 alone, six of the demonstrators lost their lives. By the evening of December 20, President de la Rua of Argentina had resigned. His resignation was followed by a quick succession of Presidents within about two weeks.

Many of the people who participated in the protests found themselves thrust into activist postures. As quoted in Borland & Sutton’s article, Susanna, a factory worker with a fallen standard of living noted:

> Even if we were middle-class at one point – because when my husband had a job and everything, we were middle class – then we got worse and worse, and there comes a moment when you do not have enough to pay for things, you don’t have enough to eat, and well, it makes you rebellious… In one way or another you have to fight and make yourself heard, that things have to change and that they can’t be like that. We can’t be complying any more now, conforming to less and less and less.

The desperation pushed people to the struggle whether or not they were directly affected by the crisis. Lucia, a participant in the *piqueteros* movement who lived in a shanty town with five children stated that she wanted to kill herself. In her words, “to not have anything to feed my kids – that was what changed my thinking.” Jesusa on her part was an employed middle class person who participated in the struggle because for her, “to see women scrambling the garbage, with lots of children, is terribly painful at a psychic [level], and I think that it is also physical… visceral.”

The Argentine people who participated in the social protests were clear in their demands, which ranged from the provision of employment to the ability to eat. Tony Smith includes some of these people’s thoughts in a newspaper article suggesting that they were aware of their potential power to effect change, for as one interviewee noted, “if we are not the people, then who is the people?” Ana Arce, a 75 year old doctor is quoted as saying: “we are fed up with

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88 Borland & Sutton, *supra* note 82 at 708
91 Tony Smith, “Argentina’s Economy Minister Resigns as Thousands Protest” (December 20, 2001) The Independent Newspaper, online: The Independent
corruption, hunger and the poverty we’re living in… I think that if they don’t go, the people will kick them out.” Another woman, Sandra Guttierez, a 28 year old unemployed mother of two expressed her views as follows: “we feel we’ve got no future, for us or for our kids.” It appears that Ms. Guttierez’s statement reflects the state of mind of many Argentineans at that time.

Eventually, the Argentinean Government had to respond to the people’s demands. It devalued its currency by putting an end to the convertibility scheme. The Peso fell by about 70 percent against the US Dollar and created a situation where exports could be boosted.\(^\text{92}\) However, the impact of this devaluation on investments in the country meant that they became less valuable and profits were not as large. This became the bone of contention for many of the foreign investors in the aftermath of Argentina’s socio-economic crisis. This was especially so since dealing in US Dollars had boosted the confidence of many investors in Argentina in the first place.

Like most of Argentina’s ICSID cases, the background discussed in this section was a major contributing factor to the dispute between the Argentine state and the foreign investors, including in *Suez v. Argentina*. This ongoing case – *Suez v. Argentina* – raises questions about the impacts of economic policies on foreign investors and the people alike. It also clearly involves issues of socio-economic development as well as human rights. While *Klockner v. Cameroon* and *Goetz v. Burundi* might be classified as older versions of ICSID cases that involved discussions of countries’ economies from a statist perspective, *Suez v. Argentina* is a recent ICSID case that generated explicit discussion of peoples’ stakes in the investment arbitration system. Compared to the earlier cases that were mostly analyzed at a government and foreign investor level, the analysis in *Suez v. Argentina* is different. Not only does the case raise issues directly related to Third World peoples’ concerns, it involves the intervention of NGOs and has generated two decisions of the tribunal on NGO participation. However, as the discussion in this part demonstrates, the available decisions on this case have not proceeded on the basis of concrete economic development arguments. Rather, other public interest


dimensions of the case seem to have held sway, and this development is welcome. Nevertheless, the focus on the public interest and human rights dimensions of the case to the near exclusion of economic development contributes to the paucity of concrete discussion of economic development impacts of FDI in ICSID cases.

2. The ICSID Dispute

Having set the general background to the dispute, this section discusses the particular dispute between the foreign investors and Argentina in *Suez v. Argentina*. The claimant foreign investors are shareholders in Aguas Argentinas S.A. (AASA), a company incorporated in Argentina. The company held a 30 year concession to provide water services to Buenos Aires and the surrounding areas. Prior to the claimants’ investment, a state-owned company used to provide water and waste services in Buenos Aires and the other surrounding municipalities. By the *State Law Reform Law* of 1989, Argentina launched a broad program of privatization. It also took subsequent measures to attract foreign investment to its territory. As noted in the previous section, in 1991, Argentina adopted the Convertibility Law by which it pegged the value of the Argentine Peso to the US Dollar and established a board that required that the amount of the Peso in circulation be equivalent to the foreign currency reserves that the state held. In addition, Argentina launched an aggressive bilateral investment treaty (BIT) program and by the year 2000, it had concluded 57 BITs. Argentina’s privatization campaign for its water services was intensive. It established regulatory frameworks, enacted the *Water Decree* in 1992, established a rigorous international bidding process, and publicized its desire to privatize the services, including embarking on a road show to Brussels. In response to these measures, the claimant shareholding companies and some Argentine companies formed a consortium in 1992 to participate in the bidding process. On December 9, 1992, the Argentine government awarded the concession to the consortium, which was the largest privatized water concession in the world at the time. The consortium formed an Argentine company, AASA, to hold and operate the concession. According to the claimants, by 2001, AASA had invested $1.7 billion dollars in the concession, including the initial investment, loans from lending institutions, and cash flows generated by AASA.93

93 For the factual background of the case, see *Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19) (Aug. 3, 2006), (Decision on Jurisdiction) online: Investment Treaty
When Argentina began to experience the crisis discussed previously, the Government adopted several measures to deal with the effects. As discussed earlier, one of such measures was the abolition of the currency board that linked the Argentine Peso to the US Dollar, which resulted in a significant depreciation of the Argentine currency. The claimants allege that Argentina’s crisis impacted negatively on their investment. They argue that the measures that the Argentine government adopted in response to its socio-economic and financial crisis injured their investments and were in violation of the commitments that had been made to them in securing the concession. The claimants initiated arbitral proceedings before ICSID on the basis of the 1991 Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments (Argentina-France BIT) and the 1991 Agreement on the Promotion and Reciprocal Protection of Investment between the Kingdom of Spain and the Argentine Republic (Argentina-Spain BIT) on April 17, 2003. The claimants sought to obtain adjustments to the tariffs charged for water distribution and waste water services. They also sought modifications of other operating conditions. The claimants alleged that Argentina’s actions were expropriatory, in breach of the fair and equitable treatment provisions of the BITs, and sought compensation for their alleged loss.

3. The Language that the Actors Adopted

“Policy and politics should not play out because ICSID proceedings are legal proceedings.” Those were the words by which one interviewee, a counsel, commenced discussion of the Suez v. Argentina case during our discussions. This interviewee clearly noted that even though tribunals are sensitive to those cases where the public is directly affected, participants need to make legal points and not political or social points. This view drives the language that

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94 Ibid. at para. 24.
95 The agreement was signed on July 3, 1991 and entered into force on March 3, 1993; 1728 UNTS 298.
96 The agreement was signed on October 3, 1991 and entered into force on September 28, 1999; 1699 UNTS 202.
97 Suez v. Argentina, Jurisdiction, supra note 93 at paras. 1-2.
98 Ibid. at paras. 24-25.
100 Ibid.
participants in ICSID proceedings adopt. They seek to couch their arguments in legal language and sort them into legal categories. While one can hardly fault actors for adopting this position given that ICSID proceedings are legal proceedings, categorization of issues as legal, political or social is itself a matter of political construction. Economic development provides an illustration. To some commentators, economic development is merely ideological (for example, Arbitrator Dupuy in the Texaco Arbitration), while to others it is a legal question (for example, social and economic rights enunciated in the International Covenant on Social, Economic and Cultural Rights could effectively make sound legal economic development arguments).

Having discussed the perspectives that Argentine peoples adopted during the crisis and given the absence of their direct participation in the ICSID proceedings, I only discuss the perspectives and language that the claimants, Argentina, and the intervening NGOs adopted. Since the decision on the merits has not been rendered and the parties’ pleadings are not publicly available, the language of the foreign investors and Argentina can only be garnered from the tribunal’s decision on jurisdiction. These actors’ language and arguments will be considered first and then I will turn my attention to the arguments that the NGOs made in their amicus curiae intervention.

For its part, Argentina made several legal arguments contesting the tribunal’s jurisdiction in Suez v. Argentina. Two of those are relevant to the discussion in this chapter. First, by its second jurisdictional objection, Argentina urged the tribunal to find that the dispute is not a “legal” dispute as required by the ICSID Convention.\textsuperscript{101} For Argentina, the claimants’ case is “based upon Argentina’s failure to adjust the tariff regime and to respect the equilibrium principle whereby Claimants would be assured a fair return on their investment”.\textsuperscript{102} In response, the claimants contended that the dispute is in fact a legal dispute and the tribunal agreed. The formulation of the dispute in this manner was necessary to the founding of ICSID jurisdiction. The generous interpretation of the tribunal on this issue is one that can be instructive for economic development arguments and many of the issues that Third World peoples argue for. In this regard, the tribunal cited Schreuer affirmatively on the position that a

\textsuperscript{101} Suez v. Argentina, Jurisdiction, supra note 93 at paras. 33-37.

\textsuperscript{102} Ibid.
dispute qualifies as a legal dispute if legal remedies are sought and if the legal rights are based on legislation or treaty. Essentially, a dispute might be legal if it can be presented in legal terms. Because the claimants based their case on BITs, the dispute was deemed legal in nature.

Argentina’s first argument in the jurisdictional phase of *Suez v Argentina* is apposite for considering the contributions of foreign investment and investment dispute settlement to economic development. In suggesting that ICSID lacked jurisdiction because the dispute did not arise directly out of an investment, Argentina argued *inter alia* that the dispute concerned the wisdom of general economic measures that the government adopted to deal with the economic and financial crisis that the country faced. They were general measures not directed specifically at the claimants. Adopting a contrary view, the claimants contended that Argentina’s measures “specifically, concretely, and directly” violated commitments that it made to them. The claimants argued that Argentina had failed to “reestablish the concession’s financial equilibrium and to adjust tariffs.” In its response, the tribunal asserted that “the disagreement arises directly out of the investment impacted by governmental measures, not out of the measures themselves.” It stated that it was not concerned with “the wisdom, legality or soundness of the policy measures taken by Argentina to deal with the economic crisis.”

In spite of this reasoning of the tribunal’s, downplaying the fact that Argentina’s ICSID cases arose out of measures it took in response to the socio-economic crisis is a challenge. However, the tribunal insisted that its task is to judge, at the merits stage of the case, whether the effect of the respondent’s actions on the claimants’ investments violates the respondent’s international legal obligations contained in the Argentina-France, the Argentina-Spain, and the Argentina-UK BITs. For the tribunal, “the core of the dispute centers on a basic question: Did the respondent by its actions violate the rights granted to the claimants and their investments under international law?”

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103 Ibid at para. 36.
104 Ibid. at para. 27. Discussion similar to this paragraph is published in Ibironke T. Odumosu, “The Antinomies of the (Continued) Relevance of ICSID to the Third World” (2007) 8 San Diego ILJ 345 at 381.
105 Ibid. at para. 28.
106 Ibid. at para. 29.
107 Ibid.
legality of Argentina’s economic measures, one cannot divorce the dispute entirely from these measures. Thus, any decision that does not take these measures and their effects not only on the foreign investors but also on the Argentine population into account, would only scratch the surface of the dispute and do a disservice to a robust analysis of the case. The tribunal’s decision on the merits will be instructive in this regard.

Given the interests implicated in the Argentine crisis, it is not surprising that NGOs sought amicus curiae participation in this case. NGO participation has not been a frequent occurrence in ICSID cases, but when it occurs, it usually involves a coalition of Third World and Western groups. All the NGO representatives that were interviewed for this thesis noted that Western NGOs seek to liaise with Third World groups and peoples. One of those NGO representatives noted that it was alright for Western NGOs to seek participation in a case like Methanex v. United States, being a United States case in their “backyards”. However, in disputes involving Third World states, these NGOs communicate with and liaise with Third World NGOs. The relationship between Western and Third World NGOs is an interesting one. In the course of the research for this thesis, I learned that sometimes Western NGOs seek out Third World groups for liaison and vice versa. Perhaps, the most enlightening discovery in this regard is that NGO relationships depend on orientation. One of the interviewed NGO representatives expressed the view that when two “anti-globalization” groups wanted to partner with them, they declined and instead sought out the groups that eventually presented amici submissions in that case. As well, this interviewee shared the view that the closer the participants are to the actual location, the more powerful the amici intervention process is. For this interviewee, the disputes are really about international treaties, local groups, local impacts and real people.

In Suez v. Argentina, there was a coalition among Western and Third World NGOs. On January 28, 2005, five NGOs filed a “Petition for Transparency and Participation as Amicus

108 Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits (2005) 44 I.L.M. 1345.
110 Ibid.; Interview No. 102, August 20, 2007. Transcripts on file with author.
“amicus curiae” with the Secretary of the tribunal, asserting that the case involved matters of public interest and the fundamental rights of the people that live in the area affected by the dispute in the case.\textsuperscript{112} The petitioners included four Argentine NGOs and the Center for International Environmental Law (CIEL), an organization that provides legal support to persons and civil society organizations globally. CIEL’s Trade and Sustainable Development Program seeks the reform of the global framework of economic law with a view to promoting human development as well as a healthy environment.\textsuperscript{113} One of the Argentine groups, Asociacion Civil por la Igualdad y la Justicia (Association for Equality and Justice) seeks to contribute to strengthening democratic institutions in Argentina and to defend the basic rights of disadvantaged peoples. It has authority to defend user and consumer rights through legal action. Since 1979, Centro de Estudios Legales y Sociales (The Center for Legal and Social Studies), another one of the petitioning NGOs, has worked to promote and protect human rights in Argentina. Consumidores Libres Cooperativa Ltda de Provision de Servicios de Accion Comunitaria (Cooperative for the Provision of Community Action Services) aims to defend and protect Argentine users and consumer rights. Union de Usuarios y Consumidores (Users and Consumers’ Union) is devoted to defending and protecting Argentine users and consumers as well and by the time of the application, had been active for ten years. It is also a member of Consumers International.

As one interviewed NGO representative noted, most NGO groups “support” the Government’s position but they do not just “adopt” that position.\textsuperscript{114} Nevertheless, as the discussion below demonstrates, the ‘language’ that the NGOs adopt is not always synonymous with that of the Government, and neither is it synonymous with the language of Third World peoples. In \textit{Suez v. Argentina}, the NGOs strategically adopted the discourse that appears to have currency in investment law at this time – the discourse of human rights – in their arguments before the tribunal. Making human rights arguments before ICSID tribunals amounts to a significant

\textsuperscript{112} For the initial decision on \textit{amicus curiae} participation, see Aguas Argentinas, S.A., \textit{Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic}, (ICSID Case No. ARB/ 03/19), (May 19, 2005), (Order in Response to a Petition for Transparency and Participation as Amicus Curiae), (2006) \textit{21 ICSID Rev.---FILJ} 342 [\textit{Suez v. Argentina, Initial Decision on Amici Participation}].


\textsuperscript{114} Interview No. 101, March 15, 2007. Transcripts on file with author.
development compared to the system of investment arbitration that was predominant in the early decolonization era and until the time of the adoption of the North American Free Trade Agreement (NAFTA).115 A “strategic social construction” perspective would recognize the adoption of the human rights discourse by the NGOs in *Suez v. Argentina*.116 Human rights appeared to be the strategic discourse that could give the groups access to the tribunals and the legal language that they require in what seems to be a human rights age. The human rights language is acceptable in multiple fora to diverse kinds of actors and allows for meaningful discussion even if it is not readily accepted or adopted by a tribunal. However, an economic development argument might not be as strategically apposite because of the need to couch arguments in legal terms. Thus, even though the petitioning NGOs alluded to the economic dimensions of the issues in the dispute, their arguments were essentially focused on human rights. They stated as follows:

> The government’s decisions questioned by *Aguas Argentina S.A.* in the present case involve general economic measures adopted by the Argentine state to face a sizable economic crisis. The scope and application of such measures, albeit involving consequences to the complainant and to all the economic activities conducted in Argentina, also determine the way in which inhabitants have access to, and enjoy an essential public service like drinking, water and sanitation.

> The measures at issue in this arbitration, particularly the tariff freeze and the ban on tariff indexation according to the U.S. price index, relate directly to the fundamental human right of access to essential services.117

The petitioners’ arguments turned on the “right to an adequate quality of life and other fundamental human rights such as health, food, housing and education.”118 They also referenced the “widespread and unprecedented poverty faced by Argentina.”119 Their focus on human rights concentrated on social and economic rights although they alluded to civil and

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118 Ibid. at 5. The tribunal accepted that the case involved matters of public interest and that it may raise human rights considerations. See *Suez v. Argentina*, *Initial Decision on Amici Participation*, *supra* note 112 at 8-9.
119 *Suez v. Argentina*, *Initial Amici Petition*, *supra* note 113 at 5.
political rights – suggesting that the right to water is an aspect of the right to life.\textsuperscript{120} As proponents of the human rights approach to development argue, there is a fundamental relationship between social and economic rights and economic development, so that an argument pursuing the one does not necessarily signify an exclusion of the other.\textsuperscript{121} Based on this approach, development and human rights find a common ground in a human rights approach to development or even in the right to development.\textsuperscript{122}

In addition, in their April 2007 \textit{amici} submission, the petitioning \textit{amici} provided a background to the Argentine economic crisis. They argued that the country was experiencing a massive social upheaval and “a sudden three-fold spike in the price of water to 7.740.000 inhabitants and of sewage services to 5.890.000 inhabitants could have had devastating consequences. It would have transformed an economic and social crisis into a full-fledged humanitarian disaster by abruptly depriving millions of citizens of their access to life-giving water. Such increase in tariffs would have triggered further social unrest and riots, thereby aggravating the already severe public order crisis.”\textsuperscript{123} As well, they argued that Argentina’s National Congress’ decision to commence a process to renegotiate all the concession contracts that privatized companies held in the essential services sector including water and sewage services was justified since two critical aspects of the contracts had changed. First, the value of the Argentine Peso had been modified and second, the crisis had a serious impact on fundamental human rights.\textsuperscript{124} For the petitioners, Argentina’s human rights obligation to protect includes the obligation to adopt measures to restrain third parties from infringing on its citizens’ human rights.\textsuperscript{125} Essentially, the argument was that human rights law provides Governments with a legal platform for taking action during crisis situations. For the petitioners, the human rights

\textsuperscript{120} \textit{Suez v. Argentina}, Amicus Curiae Submission, April 4, 2007 online: Center for International Environmental Law <http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf> at 7 [\textit{Suez v. Argentina}, Amicus Curiae Submission].


\textsuperscript{123} \textit{Suez v. Argentina}, Amicus Curiae Submission, \textit{supra} note 120 at 3.

\textsuperscript{124} \textit{Ibid.} at 3-4.

\textsuperscript{125} \textit{Ibid.} at 12.
discourse provided the legal and moral grounds for adopting measures that impacted on investments including those of foreign investors.

The Suez v. Argentina tribunal’s decision in response to petition for transparency and participation as amicus curiae was the first decision where an ICSID tribunal was willing to grant an opportunity to non-disputing parties to make written amicus curiae submissions in an ICSID dispute. In its May 19, 2005 response to the petitioners’ application, the tribunal rejected the claimant foreign investors’ view that the case is simply about the claimants’ right to compensation for the alleged violation of their rights by the Argentine Government. Rather, the tribunal took the position that:

[T]he present case potentially involves matters of public interest. The case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.\(^\text{126}\)

Given the public interest in the case, the tribunal decided that it was an appropriate case for amicus curiae participation. It is instructive that the tribunal expressly acknowledged the public interest inherent in the dispute and the dispute’s potential to affect the public. While the traditional actors – the foreign investors and Argentina – adopted traditional arguments, the NGOs infused the case with new language that may spur the case in a different direction. As well, the actions of the Argentine people prior to the dispute being submitted to ICSID created a scenario where ingenious arguments could be made. While the human rights arguments were strategically apposite given their force in international law at the present time, the near absence of direct economic development language suggests that this discourse does not occupy a

prominent position in the investment dispute settlement system.

4. Analysis of the Case in light of Similar ICSID Proceedings

Given the explicit public interest questions that have been raised in Suez v. Argentina, it is not possible to give a definite word on how the tribunal will decide the case on its merits. Even though previous treatments of Argentina’s crisis in ICSID jurisprudence and some reactions to these decisions are currently available, one may not be able to completely rely on these cases to determine how Suez v. Argentina will be decided. First, Suez v. Argentina adopted the public interest amici approach, which most of the other cases have not adopted. And second, even though the arguments that the parties in some of these other cases have relied on are similar, the tribunals have arrived at different conclusions in spite of the similar arguments and similar backgrounds to the cases. As noted earlier, most of Argentina’s ICSID cases have an identical background, as they were generated by the country’s economic, social and political crisis that made the adoption of some measures that affected the investors necessary. In responding to the claims against it, one of the common arguments that Argentina has proffered has been the state of necessity defence. By adopting the state of necessity defence, Argentina’s central contention has been that the severity of the crisis that affected the country should preclude the tribunals from finding the country liable. In their decisions, tribunals’ responses to this argument have differed.

In CMS Gas Transmission Company v. Argentine Republic (CMS v. Argentina), the tribunal extensively discussed the doctrine of “state of necessity” in international law and the circumstances surrounding Argentina’s decision to adopt the measures that affected the foreign investors. The tribunal found that Argentina indeed faced severe circumstances but the situation did not meet the requirements for finding a state of necessity that precludes wrongfulness or excuse liability under customary international law. In considering the implications of the defence under article XI of the Argentina-US BIT, the tribunal noted that

128 Ibid. at paras. 320-321.
that clause was not self-judging129 and that even though the Argentine crisis was severe, it “did not result in a social and economic collapse.”130

In the subsequent proceedings in LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (LG&E v. Argentina), a case with similar circumstances like those in CMS v. Argentina, Argentina had recourse to the same factual background. The tribunal concurred on a number of legal points on the defence of state of necessity but arrived at a different conclusion.131 In its decision on liability in LG&E v. Argentina, the tribunal held that for the period of time when Argentina faced severe emergency circumstances, it was not liable to the claimants.132 This decision, that some commentators opine should have been guided by CMS v. Argentina, is now the subject of pending annulment proceedings.133

The LG&E v. Argentina decision on liability is remarkable. The tribunal probably came to the conclusion that it did because it engaged inter alia in a detailed examination of the historical background to Argentina’s crisis. Such detailed examination of the background of disputes reveals that disputes could be more complicated than tribunals have been willing to acknowledge prior to this time. The LG&E v. Argentina tribunal’s consideration of the socio-economic impacts of the circumstances on Argentina and its people is instructive to its decision. The tribunal noted inter alia that by the end of 2001, the Argentine crisis had deepened, the government had problems repaying its foreign debt, poverty and unemployment escalated, massive withdrawals of savings from banks occurred, widespread discontent and

129 Ibid. at para. 373
133 Reinisch, “Introductory Note”, supra note 31 at 1820.
public demonstrations including violence that claimed several lives occurred, and by December 2001, the President and his cabinet had resigned, followed by a quick succession of Presidents that also resigned.\(^{134}\) The tribunal discussed the defence of state of necessity extensively in relation to Argentina’s circumstances from paragraphs 226 to 266. At paragraph 231, it noted that:

[T]he conditions as of December 2001 constituted the highest degree of public disorder and threatened Argentina’s security interests. This was not merely a period of “economic problems” or “business cycle fluctuation” as Claimants described… Extremely severe crises in the economic, political and social sectors reached their apex and converged in December 2001, threatening total collapse of the Government and the Argentine State.

The tribunal was willing to exclude Argentina from liability for the period of the state of necessity not only because its economy was in trouble but because in addition to its economic crisis, the country underwent a severe social and political crisis that threatened its security and existence. As the tribunal noted, “[a]ll of these devastating conditions – economic, political, social – in the aggregate triggered the protections afforded under Article XI of the Treaty [the clause akin to the defence of necessity] to maintain order and control the civil unrest.”\(^{135}\) While the decision in this case and its consideration of the broader background to the dispute is welcome, it was not one that was necessarily based on economic development considerations but on general security and emergency considerations.

From recent events and challenges to the ICSID system, it appears that with the infusion of the system with factors, issues and participants formerly thought to be outside this realm, the realm itself undergoes some transformation. While the tribunal in \(LG&E\ v.\ Argentina\) paid attention to some issues that are of interest to peoples of the Third World, from the views that commentators have expressed, subsequent decisions might not be inclined to follow that decision.\(^{136}\) In addition, the state of necessity defence applies to severe emergencies and leaves

\(^{134}\) \(LG&E\ v.\ Argentina, Liability, supra\) note 131 at para. 63. For a discussion of Argentina’s crisis, see also \(Continental Casualty Company v. Argentine Republic\) (ICSID Case No. ARB/03/09), Award of September 5, 2008, online: Investment Treaty Arbitration <http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf>.

\(^{135}\) \(Ibid.\) at para. 237.

open the question about situations where there is no nation-wide emergency but there are pressing circumstances that are of utmost relevance to a community. Under these circumstances, cases like *Suez v. Argentina*, that involved the participation of non-disputing parties, and cases like those in the next chapter that involve the direct participation or pleading of the actions and strategies of Third World peoples, might be of immense interest to consideration of the transformation of the ICSID system. This is especially so in cases where grave circumstances like those that Argentina faced are not present, but circumstances that present severe consequences for particular groups are present.

Thus, while state of necessity arguments may be apposite in cases involving grave social crises, actors intent on transforming the ICSID system might continue to have recourse to human rights and modified economic development arguments. In *Biwater Gauff v. United Republic of Tanzania*, a dispute similar to *Suez v. Argentina* on issues but different on facts, location and treatment, the NGOs that submitted *amicus curiae* briefs relied on sustainable development arguments in addition to human rights arguments. They also referenced the case’s potential to affect the local community and its importance to Third World countries that have privatized or are contemplating the privatization of essential infrastructure services. These petitioners were allowed to file written submissions in the case. Although the tribunal noted that it found the *amicis*’s observation useful and informative to its analysis, in its decision on the merits, it found Tanzania to be in breach of some its BIT obligations but dismissed Biwater Gauff’s claim for damages. In spite of its extensive treatment of the issue of the *amicus curiae* submissions, the tribunal’s decision did not include references to human rights or sustainable development standards. However, it is a welcome step – even if a baby step – that the tribunal could acknowledge that *amicis*’s submission that included human rights arguments and the principle of sustainable development informed its decision. This decision is perhaps as far as the tribunals have been able, or rather, willing to go on the issues discussed in this chapter. Thus, despite its favourable disposition towards the submission of *amicus curiae*

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139 *Biwater Gauff v. Tanzania v. United Republic of Tanzania*, (ICSID Case No. ARB/05/22), (Award, July 24, 2008) at para. 392.
briefs in *Suez v. Argentina*, the tribunal might follow in the steps of the *Biwater* tribunal and refrain from having recourse to public interest considerations in its final award on the merits.

In spite of the fact that the situation is not yet optimal, it seems that issues that were not formerly within the contemplation of ICSID tribunals have begun to garner some limited attention on the margins of the investment arbitration system, although many tribunals are yet to explicitly acknowledge them. As optimistic as one wants to be, it must be conceded that these alternatives are mainstream; they are all readily within the grasp of a hegemonic investment dispute settlement system. The concept of development is itself a creation of this system. However, as noted earlier, the discourses addressed in this chapter have radical counter-hegemonic potential if appropriately formulated and presented before ICSID tribunals.

As demonstrated in the initial award in *Klockner v. Cameroon*, ICSID tribunals have the capacity to infuse awards with development concerns when necessary. However, like in *Klockner*, if such decisions are not founded expressly on the applicable law, they might be annulled for being manifestly beyond the tribunal’s powers. Nevertheless, this does not have to be so, as such considerations can be raised within the context of the law applicable to the dispute. It remains important that some tribunals are willing to explore alternative economic conceptions, particularly those that consider the bigger picture of the needs of the Third World. Even if tribunals’ concept of development remains limited and mostly procedural, the willingness to address the economic needs of countries represents a crucial starting point for addressing development and other relevant concerns. For ICSID, to fail to accommodate multiple interests as contemplated in its founding documents is to fail to transform itself in an international economic order that is constantly evolving, and to adopt a myopic view of investment dispute settlement that will not facilitate the institution’s relevance in the international investment order.140

**IV. Conclusion – Summary of the Chapter’s Arguments**

From the discussion in this chapter, it is evident that there is an uneasy relationship between the utility of development for the Third World and the consideration of this concept in

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140 Odumosu, *supra* note 38 at 367.
investment arbitration. The discourse of development has not fared well as a strategy in ICSID arbitration, hence, the need to welcome the turn to arguments arising from human rights as in *Suez v. Argentina*. This chapter has demonstrated the difficulty of seeking to adopt a robust view of investment disputes that is beneficial not only to the immediate parties to the disputes but to Third World peoples that are impacted by FDI activities and investment dispute settlement decisions.

While this chapter has analyzed the strategic use of the development discourse, and other relevant discourses like human rights, the next chapter turns its attention to the strategic interactive mechanisms of Third World peoples *qua* peoples and *qua* grassroots movements in investment dispute settlement. It engages the resistance mechanisms and strategies of Third World peoples, ICSID’s construction of these activities and its response to them, and the resulting developments in the law arising from these interactions. While the present chapter has discussed an Argentine case that arose due to broader factors that affected foreign investors and were thus the subject of ICSID arbitration, the next chapter focuses squarely on direct Third World peoples’ intervention in specific foreign investment activities.
CHAPTER 6: ICSID AND THE THIRD WORLD II: RESISTANCE AND THE TECHNOLOGIES OF INVESTMENT ARBITRATION

The Core of the Chapter’s Arguments*

In continuing the analysis of the construction of the international investment system, the discussion in this chapter addresses the contribution of Third World peoples’ resistance to this construction in light of the ICSID system. In its TWAIL constructivist formulation, it assesses Third World peoples’ resistance as a method of engagement with the system. The chapter argues that the actions of, and responses to the interactions of, Third World peoples qua grassroots movements have been rather difficult for dispute settlement tribunals to incorporate into their analysis and decision-making. In this regard, the chapter notes that mechanisms of institutionalization, the politics of representation, and alternative readings of depoliticization, are adopted as technologies to engage with these actors, rendering the system less robust than it could be. For their part, Third World peoples continue to engage in activities of resistance that strategically place them within the reach of ICSID tribunals, and inadvertently, a construction of the dispute investment system. In order to illustrate these points, the chapter engages in a detailed study of two ICSID cases. While this chapter appears to have a bleak hypothesis, it concludes on the somewhat optimistic note that dicta in some of the awards suggest that if properly couched, Third World resistance may be written into the international law on foreign investment. And the writing of such resistance might gradually change the law.

I. Introduction: Resistance in Investment Dispute Settlement

“The present state of international law leads to the inadmissible consequence that important interests may go wholly unprotected, and that what may possibly be grave wrongs will, as a result not be susceptible even of investigation.”1

…


Although the ICSID system was established to deal specifically with investment disputes, ICSID tribunals have, to an even greater degree, faced questions of a quasi-constitutional nature, such as the legally permissible responses to a massive economic collapse or the definition of public morality. ... [T]he members of an ICSID panel are often very distant physically, politically, culturally, and socially, from the particular state or circumstances in question. They often lack the fact-finding capacity to fully appreciate the context of government policies. Without the kind of deep connection to the state society, and community impacted by the dispute, such ad hoc panels are poorly positioned to engage in full substantive review of critical state policies that reach beyond pure investment law. Such tribunals are, therefore ill positioned to undertake substantive review that essentially second-guesses core governmental policy. ...  

Compared to the early post-World War II era, the international economy has changed. The nature of foreign investment has changed, and so have reactions by some actors within the realm of the international law on foreign investment. With the privatization of essential resources like water and the establishment of foreign investments in such public infrastructure, it is almost inevitable that some legal changes will occur as well. The ICSID cases discussed in this chapter demonstrate some of the reactions by Third World peoples to these occurrences and ICSID tribunals’ responses.  

If the development discourse discussed in the previous chapter was just gaining currency at the time ICSID was established, resistance to some international investment rules was not an unusual phenomenon at the time of ICSID’s establishment. Yet, while commentators have discussed the development potentials of foreign investment, not much has been written on the transformative potentials of resistance on the international law on foreign investment. The cycle of resistance and reshaping of international legal rules had formed an integral part of the international law on foreign investment from colonial times when peoples in colonial...

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territories sought to protect their property and rights. Thus, resistance in investment law is not a new phenomenon. If emphasis on resistance as a medium of legal change has recently become a relatively common feature in international legal scholarship, it is not because resistance has not significantly impacted international law, but because international lawyers have largely refrained from engaging resistance as a phenomenon that drives the reconstruction of international law.\textsuperscript{5}

Resistance as an abiding force in the international law on foreign investment has been driven by the fact that, historically, the enunciation of dominant perspectives has been met with resistance from whatever group constitutes the periphery at the time. At the time that the Hull Rule of compensation was enunciated, Mexico voiced its disagreement with the concept.\textsuperscript{6} Also, the Calvo doctrine can be regarded as a means of resistance to the international settlement of disputes.\textsuperscript{7} However, it is misleading to construct resistance as a phenomenon solely driven by the Third World. Resistance from the industrialized North contributed to the demise of the Third World-driven New International Economic Order (NIEO).\textsuperscript{8} Nevertheless, because of the manner in which international law developed – as a body of law guiding the acts of ‘civilized’ nations – and the way in which it has continued its metamorphosis, significant amounts of resistance to international legal rules have historically emanated from Third World states. In more recent times however, investment dispute settlement has witnessed developed state parties’ contestation of the application of investor-state arbitration processes to them as defendants.\textsuperscript{9}


\textsuperscript{7} See generally Donald R. Shea, \textit{The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy} (Minneapolis: University of Minnesota Press, 1955).


But beyond states’ resistance to international investment rules that they consider inimical to their interests, it is becoming increasingly clear that it is practically impossible and even disingenuous to disregard resistance from other actors in international investment law.\textsuperscript{10} For example, in recent times, nongovernmental organizations’ (NGOs) resistance is exemplified by their enunciation of views on the relationship between foreign investment and environmental and human rights protection. As this chapter will demonstrate, Third World peoples are also seeking to have more voice within the system. However, peoples’ level of influence is impacted by the fact that the participatory status of actors in investment dispute settlement processes and the procedural and substantive definitions of participatory capacity influence their ability to shape the laws that govern the international investment regime.

Categorization as an ‘actor’ in the international investment system is not synonymous with legal status as a formal participant, or as a disputing party in the investment dispute settlement system. While states and foreign investors are \textit{de jure} participants in the system, Third World peoples \textit{qua} peoples or movements lack formal participatory status.\textsuperscript{11} In spite of the absence of formal participatory status, these peoples, acting on the margins of the dispute settlement process, carve out spaces of interaction with the more traditional actors (states, foreign investors, and dispute settlement tribunals) in contesting and seeking to reconstruct the rules that regulate the international investment regime. Their place within the system has become relevant because over the last twelve to fifteen years, there has been an increasingly pronounced engagement of Third World peoples and groups with investment activities, investment law, and the dispute settlement process, in a manner that has garnered the attention of investment dispute settlement tribunals. Such engagement challenges the construction of investment dispute settlement as an institutionalized, depoliticized system that is the exclusive

\textsuperscript{10} For a discussion of categorization of actors in investment dispute settlement, see chapter two of this thesis.

\textsuperscript{11} In this discussion, references to ‘domestic groups’, ‘domestic activists’ and ‘domestic movements’ do not include established expert NGOs that participate as \textit{amicus curiae} in investment dispute settlement cases. Even though some groups that fit the NGO description participate in the domestic resistance discussed in the following analysis, for the purpose of specificity, the terms are limited to the largely non-institutionalized groups (and sometimes, community organizations) that mobilize for the purpose of contesting particular investment activities. Thus, although the grassroots movements that form the focus of this chapter are ‘non-governmental’ in nature, the term ‘NGOs’ refers to organizations with established expert and institutional status.
preserve of states, foreign investors and recently, non-disputing parties that are granted amicus curiae privileges.\textsuperscript{12}

This chapter analyzes Third World peoples’ resistance within the treaty based, internationalized and institutionalized investment dispute settlement mechanism of ICSID. Drawing from the insights of the TWAIL constructivist perspective developed in chapter two, it examines the law and politics of investment dispute settlement from the praxis of Third World communities’ engagement with foreign investment and tribunals’ responses to such engagement. ICSID tribunals rarely explicitly address the impact of peoples’ engagement with investment activities and, as such, the effects of resistance from this group on the law are not readily apparent. This chapter’s reading of the institution’s jurisprudence suggests that ICSID tribunals’ attitude to resistance from this category of actors involves a three-fold mode of analysis. First, there has been an emphasis on institutionalization. ICSID tribunals have focused on formal participation by institutionalized non-disputing parties. Second, the definition of state parties has not adequately captured the wide categories that states encompass. While the foreign investor includes the corporation and shareholders, the state party is often constructed in this forum as an abstract, artificial entity separate from its population. Third, the concept of depoliticization has been expanded beyond its original contemplation in a manner that effectively precludes the engagement of grassroots movements with their domestic systems from the international realm. Tribunals adopt a depoliticized approach to dispute settlement (the original contemplation) as well as depoliticized or apolitical conception of the law (the expanded connotation).

Using \textit{Aguas del Tunari S.A. v. Republic of Bolivia (AdT v. Bolivia)} \textsuperscript{13} and \textit{Técnicas Medioambientales Tecmed S.A. v. United Mexican States (Tecmed v. Mexico)}\textsuperscript{14} as examples, this chapter questions the validity and effects of these three modes of analysis. Both cases

\textsuperscript{12} Based on arbitral jurisprudence, amendments to the ICSID Rules of Procedure, recent treaty provisions, and other institutional statements, non-disputing parties sometimes acquire participatory privileges in investment dispute settlement proceedings. For example, Rule 37(2) [ICSID] Rules of Procedure for Arbitration Proceedings, ICSID/15 April 2006, codifies the rule on admission of amicus curiae briefs.

\textsuperscript{13} \textit{Aguas del Tunari S.A. v. Republic of Bolivia} (ICSID Case No. ARB/03/02), (2005) 20 ICSID Rev.-FILJ 450 [AdT v. Bolivia].

provide examples of dedicated grassroots engagement with investment activities at the local level that were transmitted to the international realm through dispute settlement cases. Analyses of these cases demonstrate that ICSID tribunals’ reactions to domestic regulation adopted partly in response to local opposition vary.\textsuperscript{15} Unlike the tribunal’s cursory remarks on the local population’s activities in \textit{AdT v. Bolivia}, in \textit{Tecmed v. Mexico} where the local population raised concerns about the site and operation of a toxic waste landfill, the tribunal paid significant attention to the citizens’ opposition. In both cases, the tribunals engaged these three modes of analysis mentioned above. Such analyses result in a construction of states’ responses to resistance as political acts outside the purview of investment arbitration, even though the impacts of these responses on investments remain subject to tribunals’ scrutiny.

Due in part to relevance to this work, and in part to the volume of research that will be generated, not all forms of domestic populations’ engagement with investment activities are covered within this chapter. Rather, the chapter focuses on those forms of resistance that inform, either wholly or partially, the actions or regulatory measures that governments adopt, and on peoples’ requests for participatory status before ICSID tribunals. It assesses the nature of the law that develops through the process of interaction between these peoples and the law, and the transformative and constitutive potentials of this interaction. In an assessment of these interactional processes, the initial reaction is to assume that with the history of investment law, the Third World’s position in this order is not the most favourable. But with increased activism on the part of communities, and parties’ pleading of these resistance activities in investment dispute settlement proceedings, a re-construction (albeit limited) of the international investment system might be developing. At a minimum, this chapter commences an assessment of how investment law and resistance, as seemingly incompatible concepts, shape and inform one another. It also assesses the legal relationships and changes that emerge when the forms of resistance employed by Third World communities of resistance are accounted for.

II. Situating Third World Peoples’ Resistance in Investment Law

On June 19, 2008, South Korean President, Lee Myung-bak, pledged to keep United States’ beef out of South Korea unless the latter country banned beef from older cattle. He adopted this posture in spite of the fact that the legislatures of South Korea and the United States (US) were yet to ratify a free trade agreement that South Korea concluded with the US, an agreement, which could not be ratified if there was a continued rejection of US beef in South Korea. One of the major factors that contributed to the government’s stance was public outcry against US beef out of concern for bovine spongiform encephalopathy (mad cow disease). The beef issue had forced all of the President’s top aides and Cabinet members to offer to resign. It led to weeks of public protests, including an 80,000 people-strong candlelight rally. The South Korean President noted in an address televised nationally that older beef will not be imported “as long as the people do not want it.” He also apologized “for not caring about what the people wanted.” He said: “I and my government should have looked at what the people want regarding food safety more carefully. But we failed to do so and now seriously reflect on the failure.”

Instances of peoples’ interventions like the South Korean example abound. What is relatively less common are governments’ positive or affirmative reactions to these interventions. And even less common are situations where these actions by peoples’ groups form part of the cases that investment arbitration tribunals decide. Most scarce are those instances where tribunals pay pertinent attention to such interventions by peoples’ groups where they are pleaded or form part of the relevant facts before the tribunals. This chapter focuses on this scarce form of arbitral pronouncement. While the South Korean example is an international trade issue, it is

17 Ibid.
18 Ibid.
referenced here because it demonstrates the currency of peoples’ interventions in areas that lawyers, economists and other epistemic communities regard as the exclusive preserve of a few actors and experts.

Although the international law on foreign investment is significantly visible to Third World peoples because many Third World states are capital importers that are relatively more often subject to the international rules relating to foreign investment, engagement between Third World peoples and investment dispute settlement has been limited. Rather, this area of the law has been considered to be an exclusive domain of states, foreign investors, and dispute settlement bodies. Until the present time, this construction largely has remained unchanged. However, starting with *Methanex Corp. v. United States* (*Methanex v. United States*),

NGOs argued their way to formal participation in investment arbitration, following similar advances at the World Trade Organization (WTO).

Whether such participation leads to substantial consideration of the impacts of foreign investment on peoples *qua* peoples is yet to be determined. For their part, Third World peoples and groups have engaged at the domestic level in ways that have been transported to the international level through parties’ arguments in dispute settlement proceedings. Domestic expressions of opinion have forced a situation where tribunals are sometimes compelled to address the actions of domestic groups in order to reach coherent decisions. But this is not always the case as *Metalclad Corp. v. United Mexican States* (*Metalclad v. Mexico*) demonstrates.

In *Metalclad v. Mexico*, the tribunal noted that the reasons for denying a permit, which formed the basis for the dispute, included the local population’s opposition to the operation of the landfill in question. In its decision, the tribunal made a passing reference to this factor and did not accord it any significant treatment. As one of the counsels interviewed for this thesis noted, the landfill in question had a previous history of problems, to which Metalclad was

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privy before it took over the operations. This counsel stated that the landfill was being used as an illegal dumping site for toxic waste and the Mexican Government had refused a complete array of permits to the Mexican company that operated the landfill before Metalclad.\textsuperscript{25} As well, a former coordinator of the Greenpeace-Mexico Toxics Campaign who was directly involved in the case confirmed the problems facing the landfill in his writings, calling it a “history of deception.”\textsuperscript{26} It was no wonder then that protest letters were sent to state and federal authorities demanding that the site be cleaned up and not be reopened. These protests increased when several children were born with birth defects.\textsuperscript{27}

The Metalclad dispute before ICSID involved a juxtaposition of environmental regulation, other public interest considerations, and investor rights. In this case, there were allegations of expropriation by a United States company, Metalclad Corporation, against the Government of Mexico. In January 1993, the National Ecological Institute (INE), an independent sub-agency of the Secretariat of the Mexican Environment, National Resources and Fishing (SEMARNAP), granted a federal permit to construct a hazardous waste landfill to a Mexican company, Confinamiento Tecnico de Residuos Industriales, SA de CV (COTERIN).\textsuperscript{28} In April 1993, Metalclad purchased COTERIN and its permits with a view to building a hazardous waste landfill.\textsuperscript{29} Approximately 800 people lived within 10 kilometers of the landfill site.\textsuperscript{30}

Metalclad alleged that subsequent to its purchase of COTERIN, Mexican local and state government agencies interfered with the development and operation of the site through the adoption of administrative measures and legal action, in violation of Chapter 11 of the \textit{North American Free Trade Agreement} (NAFTA).\textsuperscript{31} It also asserted that shortly after it purchased COTERIN, the Governor of the State of San Luis Potosi (SLP) where the landfill was located

\begin{itemize}
\item \textsuperscript{25} Interview No. 201.2, May 8, 2007. Transcripts on file with author.
\item \textsuperscript{27} \textit{Ibid.} at 23.
\item \textsuperscript{28} \textit{Metalclad v. Mexico}, supra note 23 at para. 29.
\item \textsuperscript{29} \textit{Ibid.} at para. 30.
\item \textsuperscript{30} \textit{Ibid.} at para. 28.
\end{itemize}
“embarked on a public campaign to denounce and prevent the operation of the landfill.”\textsuperscript{32} The construction of the landfill was completed in March of 1995. However, during the inauguration of the landfill, demonstrators blocked the entry and exit of the buses conveying the guests and “employed tactics of intimidation against Metalclad.”\textsuperscript{33} It was also alleged that the demonstration was organized in part by the Mexican state and local governments, with state troopers providing assistance in blocking traffic to and from the landfill site. As a result, Metalclad was effectively prevented from operating the landfill.\textsuperscript{34} After some months of negotiation, Metalclad and two agencies of the government of Mexico entered into an agreement that allowed the operation of the landfill. Eventually, in December 1995, Metalclad’s application for a municipal construction permit was denied. However, in February 1996, Metalclad was granted an additional permit that allowed the expansion of the capacity of the landfill. From May to December 1996, the State of SLP and Metalclad attempted to resolve the issues with respect to the operation of the landfill.\textsuperscript{35}

The efforts at resolution failed and Metalclad initiated arbitral proceedings under Chapter 11 of NAFTA against Mexico under ICSID’s \textit{Additional Facility Rules}.\textsuperscript{36} Subsequent to the initiation of arbitral proceedings, the Governor of SLP issued an Ecological Decree, which declared a natural area for the protection of a rare cactus. That area included the area of the landfill.\textsuperscript{37} Metalclad alleged that Mexico was responsible for violations of the fair and equitable treatment under international law and expropriation clauses of the NAFTA.

In its decision, first, the tribunal held Mexico responsible for the actions of the states and local governments within its jurisdiction.\textsuperscript{38} Second, it found that Metalclad’s investment was not accorded fair and equitable treatment in accordance with international law and accordingly, violated article 1105(1) of the NAFTA.\textsuperscript{39} It found that the denial of the permit based on

\textsuperscript{32} \textit{Metalclad v. Mexico}, supra note 23 at para. 37.

\textsuperscript{33} \textit{Ibid.} at paras. 45-46.

\textsuperscript{34} \textit{Ibid.} at para. 46.

\textsuperscript{35} \textit{Ibid.} at para. 58.

\textsuperscript{36} ICSID \textit{Additional Facility Rules}, ICSID/11, April 2006.

\textsuperscript{37} \textit{Metalclad v. Mexico}, supra note 23 at para. 59.

\textsuperscript{38} \textit{Ibid.} at para. 73.

\textsuperscript{39} \textit{Ibid.} at paras. 74-101.
environmental impact considerations with regards to a hazardous waste disposal landfill was “improper” and so was the denial of the permit for reasons other than those that were related to physical construction or any defects on the site.\(^{40}\) The tribunal was of the opinion that one of the reasons for which the permit was denied included the opposition of the local population as well as concerns about the environmental impact of the operation on the site and surrounding communities.\(^{41}\) However, it appeared that these reasons were insufficient and what the tribunal required was some flaws in the construction, since it was a construction permit that was in question.\(^{42}\) Third, the tribunal found that Mexico had taken actions tantamount to expropriation and in violation of article 1110 of the NAFTA by tolerating the actions of the Municipality of Guadalcazar and by acquiescing in the denial of Metalclad’s right to operate the landfill.\(^{43}\) The balance of the decision focused on the quantification of damages and interest.\(^{44}\) Mexico sought to set aside the award before the British Columbia Supreme Court. The Court set the award aside only in part and revised the amount payable under the ICSID tribunal’s award.\(^{45}\)

_Metalclad v. Mexico_ demonstrates that the incidence of local opposition does not always impact on the decisions of arbitral tribunals and may not always contribute to the reconstruction of international investment law. In this case, the tribunal chose not to accord much consideration to the local opposition and as a result, the decision does not allow a detailed analysis of the impacts of resistance on the development of the law. However, the fact that social pressure did not form a major part of the discussion does not mean that it was not pleaded. A counsel interviewed for this thesis noted that the social pressure in _Metalclad_ was even more sustained than it was in the background events that led to the dispute in _Tecmed v. Mexico_.\(^{46}\) This interviewee stated that Mexico pleaded the facts of the social pressure and

\(^{40}\) _Ibid._ at para. 86.

\(^{41}\) _Ibid._ at para. 92.

\(^{42}\) _Ibid._ at paras. 92-93.

\(^{43}\) _Ibid._ at para. 104.

\(^{44}\) _Ibid._ at paras. 113-131.


\(^{46}\) Interview No. 201.2, May 8, 2007. Transcripts on file with author.
provided thousands of pages of evidence but the tribunal chose to ignore those facts.\(^\text{47}\) Hence, it appears that tribunals have the option of taking certain facts seriously and others not as seriously. In addition, it appeared that as Metalclad asserted in the case, the local opposition in *Metalclad v. Mexico* was coloured by the government’s participation in the opposition, thereby detracting from the popular nature of such opposition.\(^\text{48}\) But some would argue that the activism was mostly led by “people without political affiliation” who “mobilized to pressure municipal presidents to clean up the waste site and prevent it from reopening. Particularly important was the activism by women from Pro San Luis Ecológico, including Dr. Angelina Nunez and Guadalcazar teachers, homemakers, and peasants, who became active when they learned about children with birth defects, miscarriages, and other reproductive health problems.”\(^\text{49}\)

In spite of the approach taken in *Metalclad v. Mexico*, the two case examples in this chapter provide a lens for understanding the interactions between Third World peoples and the investment dispute settlement system. These interactions have taken two formats. In the *AdT v. Bolivia*-type format, the domestic groups that were part of the domestic activism sought participation in the dispute settlement process, whereas in the *Tecmed v. Mexico*-type interaction, the incidence of resistance was pleaded by the disputing parties in the course of the proceedings. For both formats, interviewees continually reiterated the need to tie public interest issues that peoples raise to legal issues.\(^\text{50}\) One interviewee, an NGO representative, expressed the opinion that tribunals can consider public interest issues but it is necessary to frame these issues as legal issues ascertainable before an investment dispute settlement tribunal.\(^\text{51}\) This person insisted that legal issues have to be separated from political issues, rhetoric and anti-globalization issues, and that to the extent that peoples’ concerns can be regarded as legal, ICSID tribunals will hear them. For this interviewee, meaningful interaction will not occur if purely social concerns are introduced in the proceedings without concrete

\(^{47}\) See for example, a courtesy translation of the witness statement of Dr. Angelina Nunez Galvan, online: George Washington University <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/nunez.pdf>. See also a courtesy translation of the witness statement of Fernando Bejarano Gonzalez, online: George Washington University <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/bejerano.pdf>.

\(^{48}\) *Metalclad v. Mexico*, supra note 23 at paras. 45-46.

\(^{49}\) Fernando Bejarano Gonzalez, *supra* note 26 at 25.

\(^{50}\) Interview No. 102, August 20, 2007. Transcripts on file with author.

legal flavour. (S)he appeared to favour the *AdT v. Bolivia*-type format in expressing the view that it is very important to get the people affected by the situation on the ground to be part of the process. However, as demonstrated by the tribunal’s reaction in *AdT v. Bolivia*, peoples’ petition for participation in proceedings does not always guarantee a decision that will allow an analysis of the interactions between these peoples and the dispute settlement system.

The need for meaningful interaction is not lost on Third World peoples organizing resistance movements. As the case examples in this chapter demonstrate, resistance and the mechanisms for effective peoples’ organization are dynamic. First, in order to engage in strategic interaction, people organize around causes common to them. When they do, they do not necessarily engage as formal organizations but as grassroots movements of people with a common cause seeking a voice. The sample cases demonstrate that people are not usually particular about theory or ideology. Theirs is a world of experience and practicality. They do not speak in a bid to be academically or politically correct. They make demands and air concerns as they perceive and experience them. Their language, concerns and demands suggest that their challenges are not often about any economic ideology or model or about foreign corporations. Rather, the challenge is to seek to change policies and practices that do not work in their interests. Because of their immense practicality, the law does not always respond adequately to their demands. It either tries to change them to fit its mould or disregard them completely. Second, in making ICSID relevant campaigns, these grassroots movements adopt either the *AdT v. Bolivia*-type or *Tecmed v. Mexico*-type formats. Either way, the international legal system has to respond to these peoples’ strategic interaction, and in this realm, even silence is a response that can be interpreted.

Even though the application of international law to investment disputes was challenged, it is a body of law that possesses the potential to supply legal backing for public interest arguments. There are visible but small changes in other areas of international law that now recognize peoples’ influence and the interaction of social movements with international institutions. These include the movement to interpret the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights* (*TRIPS Agreement*) in a manner that allows better access to
HIV/AIDS drugs, and medicines for other epidemics like malaria and tuberculosis.\textsuperscript{52} Also, the aftermath of World Bank-related struggles facilitated the establishment of the World Bank Inspection Panel.\textsuperscript{53} Investment dispute settlement has been slow in catching on to such advancements. Popular movements that challenge the effects of investment activities are not prominent at the international level. Rather, these movements are acquiring non-negligible status on the domestic level while generating some effects at the international level. Resistance by popular movements and the need for adequate international responses to them have become important in an era where it is more or less accepted that “legal norms do not arise in a vacuum, but are socially contested, promoted and legitimized.”\textsuperscript{54} Giving due deference to such engagement is even more important at a time when “international law can no longer pretend that mass resistance from the Third World does not fundamentally shape its domain.”\textsuperscript{55} However, such mass resistance has had a troubled relationship with investment dispute settlement institutions. One explanation for the troubled relationship is that institutions like ICSID and the tribunals constituted under their auspices, do not take significant cognizance of the “social origins” of the legal rules and regulations that are addressed in their decisions. This stance is based on the founding purposes of these institutions and their preoccupation with a positivist conception of international law, even though the interactions among the relevant actors in the investment dispute settlement system shape and constitute the realm.

\textsuperscript{52} World Trade Organization, Doha Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/Dec/2 (Nov. 14, 2001) at para. 4.

\textsuperscript{53} See Balakrishnan Rajagopal, “International Law and the Development Encounter: Violence and Resistance at the Margins” (1999) 93 ASIL Proc. 16 at 26 (noting that the creation of the World Bank Inspection Panel was driven by several factors including the struggles of India’s Narmada Bachao Andolan).


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Recalling the discussion of Finnemore and Sikkink’s analysis of socio-legal change in chapter two, the domestic communities of resistance discussed in this chapter are “norm entrepreneurs” that demand change in international and domestic investment rules. These particular norm entrepreneurs usually lack enduring or institutional modes of organization, although some exist in the form of organized labour. Often, they mobilize in response to perceived problems and are usually dissolved once their purposes are or are not achieved. These domestic activists and their end-means strategic calculations assume an important position because of the absence of consensus among the major players in an international economic order that lends itself to much contention. The struggle among actors in the international investment order is hence, mostly a struggle for the construction of meaning; meaning, which in turn determines principles that emerge as legal norms that regulate the relationship between these actors. It is also a struggle to determine the ‘inside’ and ‘outside’ of the international law on foreign investment and to determine participants who may legitimately contribute to the development of legal norms. The mechanisms that dispute settlement tribunals adopt in order to achieve such delineation in a rapidly-changing international legal order are discussed next.

III. The Technologies of Investment Arbitration in the 21st Century

As discussed throughout this thesis, investment arbitration has undergone some changes. However, Third World peoples continue to occupy a peripheral position in this area of the law. A perusal of ICSID decisions suggests that Third World peoples’ resistance is largely unaccounted for in investment law due to three strategies that I refer to as the “technologies of investment arbitration”. They are, in effect, technologies of inclusion or of exclusion. They are mechanisms that delineate the inside and outside of investment arbitration.

A. The Politics of Institutionalization

Categorization is a powerful tool. It delineates the ‘inside’ from the ‘outside’. For example, it separates organized institutionalized NGOs from amorphous Third World peoples’ groups and

The grassroots movements described in the cases discussed later in this chapter are mostly local and uninstitutionalized. They differ in several respects from “transnational advocacy groups”, “transnational advocacy networks” or “transnational coalitions.”

They acquire an international dimension through their impact on treaty protected investment, through pleadings before ICSID tribunals that refer to the movements, and sometimes, by activist groups’ applications for participatory privileges in proceedings. Unlike NGOs, which are accorded some recognition in the international order, most domestic activist groups assume a marginalized position in investment dispute settlement because of their nature and constitution. The extent of their ability to effect (social and) legal change in foreign investment law has been problematic and subject to less approval than the work of the more internationally recognized transnational collective action groups.

The closest that the dispute settlement system has come to incorporating these grassroots movements has been to consider granting *amicus curiae* status to NGOs (and individuals) where they so qualify. It is arguable that the NGO excursion into the realm of investor-state arbitration signals the arrival of the golden age of civil society participation in investment arbitration.

In practice, the NGO movement mostly involves partnerships between Western NGOs and Third World NGOs. Three of the most prominent examples of cases where Third World groups have sought participatory status are the application of Bolivian groups and individuals’ *inter alia* for *amicus curiae* status along with Western NGOs in *AdT v. Bolivia*,


58 See e.g. *AdT v. Bolivia*, supra note 13.

59 This is true also of big projects like big dam building in the Third World. For an analysis of India’s Narmada Valley dams and the failure of grassroots resistance while transnational coalitions eventually encountered success, see Sanjeev Khagram, “Restructuring the Global Politics of Development: The Case of India’s Narmada Valley Dams”, in Khagram, Riker and Sikkink, supra note 57 at 206.

60 See *Methanex v. U.S.*, supra note 21, at Part IV, Chapter B, para. 27, 1446, for the tribunal’s acceptance and brief consideration of *amicus curiae* briefs in its decision on the merits.

61 This case is one of the very rare instances where the domestic groups that petitioned the panel were mostly grassroots movements. The groups’ application was rejected. See *AdT v. Bolivia*, supra note 13. Several Bolivian civil society groups and individuals applied *inter alia* for *amicus curiae* status. Earthjustice and the Center for International Environmental Law acted as counsel for the petitioners. Three individuals along with one NGO
the involvement of three Tanzanian groups in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, 62 and four Argentine groups’ submission of a petition for participation as *amicus curiae* in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* (*Suez v. Argentina*). 63 The NGO movement has contributed to some remarkable ICSID tribunal decisions, including explicit recognition of public interest factors that affect actors other than the immediate parties to the disputes. For example, in the initial order in response to participation as *amicus curiae* in *Suez v. Argentina*, the tribunal noted that the dispute raised potential public interest issues that affect the people. 64 This explicit recognition was prompted by the work of NGOs seeking participatory status in the dispute.

However, while NGO partnership occupies a relevant place in the developing foreign investment order, like any other movement, it has its limitations. Several reasons account for these limitations. First, the NGO movement in investment arbitration is mostly elite and NGOs sometimes reiterate that they do not seek to represent any affected party’s position but to present tribunals with arguments that aid robust decision-making. Second, participation at this level requires groups to have significant funding, and maybe, subscribe to the views of NGOs that possess the expertise and the financial resources to participate in the ICSID process.

NGO involvement as *amicus curiae* in investment arbitration represents investment law’s institutionalized concession to incorporate non-traditional actors within its realm. In its present incarnation, the *amicus curiae* model does not necessarily accommodate grassroots

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movements in the Third World that challenge investment activities and rules that they perceive as inimical to their interests. Unlike the NGOs, the grassroots movements are largely not institutionalized, and do not possess the expertise that is required for participation as amici. Even if grassroots movements metamorphosed to institutionalized groups for the purpose of investment dispute settlement proceedings, they can still only proceed as amicus curiae. Since amici are “friends of the court” and not parties, and because the opportunity is only available at the dispute settlement level when a dispute has already arisen, proceeding as amici might not be able to address immediate needs and perspectives of Third World communities. Thus, investment arbitration’s procedural advances remain limited in addressing questions of grassroots resistance. Because of the overreaching requirements of institutionalization, Third World states remain the direct representatives of their citizens in this area of international law.

B. The Politics of Representation: A Focus on Technical Justice

Apart from a focus on institutionalization, another reason proffered in explanation of tribunals’ attitude towards grassroots movements is the view that tribunals are constituted to serve the interests of the parties to the dispute, a duty that forms the core of their mandates. While this view is not problematic at first glance, complications arise when the components that make up the disputing parties are unveiled. Generally, parties to ICSID proceedings are constructed as the foreign investor (as the corporation and/or shareholders) and the state (as an entity separate from its population). While the definition of the foreign investor is fairly accurate, this construction of the state party mostly stems from the frequent failure to distinguish between international commercial arbitration and international investment dispute settlement. The former is a system of settling commercial disputes between mostly private parties, while the latter involves states with their public interest considerations. The scope of the interests that tribunals serve is of paramount importance, as some commentators have noted that “[q]uite understandably, arbitrators do not normally see themselves as guardians of the public

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65 For example, in AdT v. Bolivia, supra note 13, the local groups that protested the terms of the investment that was the subject of the dispute sought participatory status in the proceedings.

Tribunals’ frequent lack of engagement with the interactions between grassroots movements and foreign investment suggests that they see themselves as serving limited interests. Clearly, tribunals are constituted to serve the interest of justice; however, this begs the question: justice for whom? This discussion advances two possible responses to this question. The possibilities lead to similar conclusions on the need to re-appraise and conceptualize the interests that shape the international law on foreign investment. The first of those responses, and arguably the more controversial, is justice for the international community. The second is justice for the parties.

Considering justice for the international community first, the argument that ICSID tribunals should consider the broader impact of decisions on the international community is plausible for several reasons. First, ICSID is the product of a multilateral international treaty, with 144 contracting state parties (and 156 signatory states), nearly as many as the 153 WTO member states. The treaty presupposes a commitment to the development of an international system that takes the broader interests of the international community into account. The *ICSID Convention* recognizes “the need for international cooperation for economic development.” Second, the institution seeks *inter alia*, to further the development of the international law on foreign investment. Such law can hardly be developed without the consideration of the broader interests of the international community in ICSID tribunals’ decisions, and how such decisions fit within general international law rules. Assuming tribunals are to act in the interest of justice for the international community, it is appropriate to conclude that arbitral tribunals are obliged, if not obligated, to take communities’ interests and expectations into account during decision-making.

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70 *ICSID Convention, supra* note 3 at pmbl. (emphasis added).

71 See *ibid.* at Administrative and Financial Regulations, reg. 22(2).
Because it is arguable that the suggestion that tribunals have been formed in the interest of justice for the international community over-extends the reach of the ICSID, the position that tribunals have been established in the interest of justice for the parties only, may be more plausible. Nevertheless, this does not lead to a different conclusion on the need to clearly address the interests of domestic communities. The *ICSID Convention* (as the principal document) and investment agreements (as supplementary documents) identify parties to ICSID proceedings. Subject to rules on nationality, investor parties have included corporate entities and shareholders.\(^72\) Without suggesting that their claims are always successful, the interests of investors are relatively well catered to, as the commercial interests of investors – corporations and shareholders – form the crux of investment disputes. The decision of the tribunal in *Antoine Goetz v. Republic of Burundi* is instructive in this regard. The tribunal noted:

> Whatever the reasons which drove the Belgian shareholders to act as individuals rather than to lodge the claim in the name of AFFIMET [the company that the shareholders formed], the Tribunal notes that the previous case-law of ICSID does not limit the ability to act only to the legal persons directly affected by the measures causing the litigation but extends it to shareholders in these persons, who are the true investors… That which is true of a foreign company investing and controlling a domestic company must also be of a foreign natural person controlling a domestic company. The Tribunal concludes that the claim of the six Belgian shareholders who control the Burundian company AFFIMET is capable of being heard.\(^73\)

While the definition of corporate entities is relatively straightforward, the composition of state parties to disputes is not as clear. Apart from the state, articles 25(1) and 25(3) of the *ICSID Convention* envisage situations where a constituent subdivision or agency of a state could be a party to dispute settlement proceedings (where the state designates such constituent

\(^72\) See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Jurisdiction of August 3, 2006, online: ICSID <http://www.worldbank.org/icsid/cases/pdf/ARB0319_DecisiononJurisdiction03-19.pdf> at paras. 46-51 (noting that the corporate entity and the shareholders were parties to the dispute and the former could withdraw from the proceedings (with the consent of the state party) without having any substantial effect on the proceedings). However, there is ICSID authority to the effect that a corporate entity might be able to pursue a claim before ICSID, whereas the tribunal might not have jurisdiction over the shareholders in that company because of nationality. See for example, *Champion Trading Co. v. Arab Republic of Egypt* (ICSID Case No. ARB/02/09), Decision on Jurisdiction of October 21, 2003, (2004) 19 ICSID Rev.—FILJ 275. But see the dissenting opinion in *Tokios Tokelės v. Ukraine* (ICSID Case No. ARB/02/18), Dissenting Opinion of April 29, 2004, (2005) 20 ICSID Rev.—FILJ 245.

subdivision or agency to ICSID), although this has not been a frequent occurrence. 74 Otherwise, the state is responsible for the actions of its subdivisions under the rules of state responsibility in international law. Thus, states (as undivided entities) and foreign investors remain the principal parties before ICSID. Before addressing the composition of a state, it is necessary to determine the appropriate state party to disputes, that being the state or the government. This inquiry is not merely academic, for in some cases, state parties are specifically identified as the government and in others, identified as the state. 75 While most cases name the state as the party to ICSID proceedings, in Canada’s NAFTA cases, the proceedings are initiated against the “Government of Canada.” 76 This does not seem to arise from any nuance in the NAFTA, but rather as a preference for a particular style of cause. Irrespective of the proper nomenclature, states, not governments, form the subject of the analysis here for several reasons. First, article 25 of the ICSID Convention, which establishes the jurisdiction ratione materiae and the jurisdiction ratione personae of the institution, addresses contracting states as parties to disputes. Second, even if governments are named as parties to investment disputes, it does not detract from the reality that governments change and regardless of the government that concludes investment agreements or the one that allegedly breaches them, the state, broadly defined, is held accountable. Governments named as the parties to investment disputes act, or should act, in the interests of their citizens. Therefore, they are entitled to protect the interests of the people that they represent, just as the foreign investor protects its commercial interests and those of its shareholders.

The concept of statehood as defined by classical principles of international law has had a troubled history. Yet, the state remains the principal subject of international law, and investment dispute settlement is no different. This chapter does not participate in the debate on the utility of statehood in the international order. 77 Rather, it considers statehood to the extent

74 See e.g. Government of the Province of East Kalimantan v. PT Kaltim Prima Coal (ICSID Case No. ARB/07/3); Tanzania Electric Supply Co. Ltd. v. Independent Power Tanzania Ltd. (ICSID Case No. ARB/98/8) (2005) 8 ICSID Rep. 226.

75 In most ICSID cases, except (the Canadian cases and) those initiated by or against constituent subdivisions or agencies of states, proceedings are initiated against the state.


77 For a critique of statehood and the attempt to re-conceptualize the “global social life” in terms of individuals, while neglecting communal forms of social life, see Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Helsinki: Finnish Lawyers Publishing Company, 1989) at 499 – 500 [Koskenniemi, Apology to Utopia]. See also Martti Koskenniemi, “The Future of Statehood” (1991) 32 Harv. ILJ 255
that the state may qualify as a suitable entity for incorporating peoples’ perspectives and interests in investment law. By the first article of the (Montevideo) Convention on the Rights and Duties of States, the criteria for statehood include a defined territory, a government, the capacity to enter into relations with other states, and also a “permanent population.”

Professor Crawford notes that “[i]f States are territorial entities, they are also aggregates of individuals,” and I would add, constituted by diverse communities and sometimes even nations. These communities’ agencies are not usually recognized as separate from those of state parties (subject to the law on self-determination). Their interests are subsumed under, and equated with those of states in international law’s limited conception of statehood, which mostly denies the plurality of states. Even within this limited conception, by the definition of statehood, arbitral tribunals are by implication entrusted with the interests of a state’s population in settling investment disputes.

A call for a reassessment of the technical justice paradigm that has prevailed, in favour of a more robust analysis that actively incorporates the interests of peoples, is incomplete without a consideration of the representative nature of the states and governments. This consideration is especially necessary since the postcolonial state has emerged as a problematic category with regards to the adequacy of representation of the interests of its diverse populations. Essentially, de-legitimizing responses to popular protests organized against allegedly harmful investment activities resonates with technologies of exclusion that were prevalent during the colonial and early postcolonial eras, as well as during the contemporary period.


79 Crawford, ibid. at 52.

80 This does not imply that I subscribe to the view that “permanent populations” in states is synonymous with the nation, as a sociological reality. See Obiora Chinedu Okafor, “After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa” (2000) 41 Harv. I.L.J. 503 at 519, for a discussion of Asbjorn Eide’s point that from international law’s standpoint “the ‘permanent population’ is synonymous with ‘the nation’” whereas this does not necessarily hold true from “a social or anthropological perspective.”

81 For a similar analysis with regard to the International Monetary Fund, see Sundhya Pahuja, “Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide” (2000) 13 Leiden J.I.L. 749 at 798.
the situation accurately when she states that “the rational, ruthlessly ordered world of
sovereign states has no place for those portrayed as unruly, disordered, subversive, primitive
or irrational.” By discounting responses to popular protests in investment dispute settlement,
the state is read as separate from the people that it represents in order to facilitate an easier
process that avoids the consideration of the public interest and broader socio-political
backgrounds to legal issues. By this implicit separation of the state from its people, the former
is stripped of its population with all its appendages – the public interest, dissenting voices, and
needs that do not always equate with global capitalist ideology – and is left with a not-so-
abstract but artificial construct, known as government and territory. It is noted that this view
is contrary to similar analyses that seek a voice for peoples by arguing for a separation of state
and peoples. Even though the separation argument is compelling in many areas of the law, it
might not achieve the commentators’ purpose in investment dispute settlement.

Without suggesting that postcolonial states have been adequately representative of the interests
of their subaltern communities, by separating state and peoples in investment dispute
settlement, communities, which have no international legal personality, become completely
invisible in international law. While it is difficult to argue for a single public interest in a state,
and doing so would reinforce and re-inscribe the erasure of some views and silence some
voices, foreign investment activities sometimes affect distinct peoples and create situations
where some interests can be specifically identified. This does not, however, imply that the
interests of the same group will be the same for all purposes, but with regards to the
investment activity in question, locating the public interest to be protected may be less
problematic. Thus, a separation of state and peoples in investment dispute settlement, like in
some facets of international human rights law for example, is only meaningful where peoples’

83 For arguments regarding the substantive nature of statehood, see Hilary Charlesworth & Christine Chinkin, The
acknowledge that equating the state with its peoples might sometimes yield negative results. See e.g. Tradex
ICSID Rep. 70 where the tribunal refused to attribute the actions of a group of villagers to the Albanian
government, for several reasons including the lack of adequate proof of forceful possession of the claimant’s
property.
84 See for example, Pahuja, supra note 81 at 798, 800.
85 On the postcolonial state’s complicity “in the silencing of subalternity” see Dianne Otto, “Subalternity and
& Leg. Stud. 337 at 339.
agency is recognized as separate from that of states. However, since investment law has not proceeded in this direction, it is imperative to adopt a robust construction of the state as a category that represents the interests of people and treat it as such.

In sum, irrespective of whether ICSID tribunals are constituted in order to ensure justice for disputing parties, or the international community, or both, their mandate cannot exclude the population of state parties to disputes. Given the inherent interest of Third World peoples in the result of investment cases, it becomes necessary to adequately engage with those cases in which parties directly plead the incidence of resistance at the domestic level before tribunals.

C. Depoliticization: Two Readings

Regardless of what proponents and critics may assert about the institution, one of ICSID’s major contributions to investment dispute settlement is the exclusion of a foreign investor’s home state from formal participation in dispute settlement once a claim has been submitted to ICSID.\textsuperscript{86} The \textit{ICSID Convention} deems the exclusion of diplomatic protection of foreign investors necessary in order to balance the interests of capital importing states against those of powerful capital-exporting states and their nationals who invest abroad. As noted in chapter three, in ICSID parlance, this is referred to as the depoliticization of investment disputes. Although this is the oft-referred-to angle of the depoliticization agenda, one could read depoliticization in more than one way. The first and more common view, depoliticization of disputes, involves avoiding espousal of investors’ interests by their home states.\textsuperscript{87} The second view entails a separation of law from its socio-economic, cultural and political origins and ramifications. Essentially, when adopting this view, decision-makers deem some legal rules or actions political and as a result, extra-legal. In this case, by reading these rules and actions as political, the intention is not to acknowledge law’s political, socio-economic or cultural backgrounds. Rather, it is to effectively remove these rules and actions from the legal realm, thereby simultaneously separating law from its backgrounds. It is this second seldom-acknowledged view that rejects Third World peoples’ resistance as extra-legal. Domestic rules

\textsuperscript{86} See \textit{ICSID Convention}, supra note 3, art. 27(1).

adopted in response to such opposition are usually deemed to be in violation of the law, as demonstrated by *Tecmed v. Mexico*. Such interpretation generally proceeds from the adoption of the liberal ideal of ensuring a public/private divide and a politics/law divide.88

Even though the depoliticization agenda in the first sense is a laudable goal, given the general nature of international investment law, investment dispute settlement always remains politicized to a certain extent. For instance, international settlement of investment disputes involves the political act of internationalizing disputes and largely excluding them from the domestic jurisdiction of states. Also, states have a stake in the interpretations of clauses and the jurisprudence of arbitral tribunals. Although states establish international institutions and conclude treaties among themselves, they effectively retain some supervisory role over these mechanisms. A case in point is the interpretation of the NAFTA adopted by the NAFTA Free Trade Commission, which comprises the three state parties to NAFTA, in 2001.89 Of course, it might not be ICSID’s role to address the politicization of investment disputes on a general international level. However, one cannot ignore the reality that investment dispute settlement can be an arena for power struggles aimed at espousing particular viewpoints as representing the prevailing position on the international law on foreign investment.

Depoliticization in the second sense – stripping law of its socio-economic, political and cultural backgrounds – is partly responsible for the inability to effectively engage resistance in ICSID decisions. It smacks of a re-politicization agenda as the excursion into the rationale for adopting domestic regulatory measures can itself be arbitrary. Yet, tribunals cannot completely avoid such inquiries because measuring governments’ actions by the provisions of international investment agreements (IIAs) sometimes makes such investigation necessary. Often, IIAs dictate that tribunals determine whether measures violate substantive clauses in investment treaties. The nature of some of these clauses requires an inquiry into the origin and nature of laws and regulatory measures. Tribunals contend that this inquiry is limited to interpretation of actions in light of the applicable law, and not a questioning of the wisdom of


domestic policies. Nevertheless, by privileging some reasons for adopting regulatory measures over others, tribunals are involved in highly political inquiries, which they purport to exclude in the first place. And it is one thing to deem a regulatory measure illegal, it is another to interpret it as arbitrary or unreasonable because it was adopted in response to public demand.

The second conception of depoliticization easily holds sway since law as a discipline seeks to preserve the sanctity of its realm and holds itself out as separate from other disciplines. However, by law’s very nature in regulating social life, it is nearly impossible to divorce it from the social.90 Law constitutes society and is, in turn, constituted by sociological factors. Domestic and international law are responses to socio-political and economic circumstances, while also shaping these circumstances. This insight is not new, as the social, political and historical contingency of law has been the subject of much scholarly debate.91 As discussed in chapter two, international law and international relations scholars carved out spaces of dialogue toward the end of the 20th century to analyze and systematically address international law’s interaction with politics and how one informs, shapes and disciplines the other.

To the extent that law is indeterminate and international actors seek determinacy especially in dispute settlement, a rulebook conception of law is at once necessary but, at the same time, inadequate and inaccurate.92 It is necessary because of the need to settle disputes in accordance with the letter and spirit of the law, yet it is incomplete because of the difficulty inherent in divorcing law from society. The effect given to surrounding factors depends on how one defines law, whether in a liberal positivist fashion, in a sociological and interactional manner,

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90 See Margaret Davies, *Asking the Law Question* (Sydney: Law Book Co.; London: Sweet & Maxwell, 1994) 228 for the view that “we are never free from our social environment.”

91 Critical legal studies (CLS) scholars engaged the social contingency of law in the 1970s and 1980s, and before them, realists in the early 1900s. See generally William W. Fisher, Morton J. Horwitz & Thomas Reed eds., *American Legal Realism* (New York: Oxford University Press, 1993). For an exposition of CLS perspectives and their limitations, see Allan C. Hutchinson & Patrick J. Monahan, “Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought” (1984) 36 Stan. L. Rev. 199 at 206. Hutchinson and Monahan note that for CLS scholars, “law is simply politics, dressed [up] in different garb.” This thesis does not completely subscribe to this radical version of law’s engagement with politics. Instead, it adopts the position that law is contingent on many factors, including politics, yet it is different from “mere” politics. For seminal works on CLS-type perspectives on international law, see David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987); Koskenniemi, *Apology to Utopia*, supra note 77.

or in a myriad of other ways. In departing from the liberal positivist tradition, Professors Finnemore and Toope adopt the view that “[l]aw is a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies.” Beyond politicians tinkering with laws, situations emerge where popular opinion suggests the adoption of some domestic legal rules. As the next part of this chapter demonstrates, international investment law’s interaction with such domestic legal rules has been rather problematic.

The idea that international law provides an apolitical means of settling international disputes has been the subject of much criticism, prompting Martti Koskenniemi to suggest that international law oscillates between apology and utopianism. On the one hand, international law borders on apology when conceived of as too dependent on states’ political power, and on the other, it is perceived as utopian when based on a moralistic character that seeks to distance international law from “the realities of power politics.” Professor Koskenniemi argues that international lawyers encounter difficulties in responding to these criticisms. Through the adoption of reconstructive doctrines that emphasize the normative nature of international law and its autonomy, international lawyers are vulnerable to the charge of utopianism. And any argument based on close connections between international law and state behaviour draws international law further away from a normative posture. Thus, in the absence of adequate responses, it seems that international law has to oscillate between apology and utopia in order to retain its normativity, and at the same time, address issues like justice and equality that are not solely determined within the law, but in fields like politics and in other areas of society. It is a reality that international law is itself a discipline informed by politics. Clearly, law does not exist in a vacuum and is not separate from sociological factors. In fact, it cannot exist separate from these factors, or else it will not be rising to its full potential as law. This insight

95 See Koskenniemi, Apology to Utopia, supra note 77 at 50.
97 Ibid.
98 Ibid.
necessitates a politics of international law – a broad framework of a “mutually constitutive relationship” between international politics and international law that this thesis outlines in chapter two. It makes necessary the development of an international investment system that engages with issues of social pressure related to investment activities, for these social pressures are often the immediate causes of investment disputes in the first place. At this point in the development of international law, it is difficult to maintain otherwise.

IV. The Politics of Reading Resistance: The ICSID Cases

Few ICSID tribunals have been directly confronted with the incidence of grassroots movements’ opposition to some investment activities or the consequences of governmental responses to such activities. The cases discussed in this part of the chapter raised such issues before the tribunals. In addition, these cases involved the delicate balancing of domestic regulation, public interest issues and investor rights. Because the nature of the cases implicated the public interest, it is not surprising that the cases also involved grassroots resistance. As mentioned earlier, the attitudes of the tribunals to grassroots movements’ activities have differed. The most comprehensive of the treatments has been that of the Tecmed v. Mexico tribunal. That tribunal addressed the influence of social pressure on the government’s decision that led to the dispute before the tribunal. This phenomenon and the tribunal’s analysis are not entirely foreign to the international law on foreign investment. The International Court of Justice (ICJ) faced a similar situation in the state-state dispute settlement case of Elettronica Sicula S.p.A. (U.S. v. Italy) (ELSI Case). There the ICJ concluded that Italy was not liable for breaches of the Italy/United States’ Treaty of Friendship, Commerce and Navigation of 1948 even with government responses to popular protests. However, in Tecmed v. Mexico, the tribunal found the opposite to be true. In AdT v. Bolivia, the treatment of the grassroots issue was less comprehensive. In this part, both AdT v. Bolivia and Tecmed v. Mexico are discussed.


100 ELSI Case, supra note 15.
A. Aguas del Tunari v. Bolivia (2005)

1. The Background to the Dispute

We’d discuss our plans until dawn. It couldn’t be something we just threw together.
It had to be strategic, so that the pressure got results.101

In the first quarter of the year 2000, the city of Cochabamba in Bolivia grabbed the attention of
the news media. One of the well-publicized popular protests against what was considered an
unfavourable domestic investment policy, the “Guerra del Agua” (“Water War”) occurred in
Cochabamba.102 The events that preceded the dispute in AdT v. Bolivia were widely publicized
and so was the initiation of dispute settlement proceedings before ICSID. In the course of the
research for this thesis in 2007, I exchanged e-mail correspondence with Jim Shultz, the
Director of the Democracy Center in Bolivia, who shared the award for top story from Project
Censored for his reporting on the events in Cochabamba in 2000. Responding to my request to
discuss the events, Mr. Shultz noted that the events were well documented and they are!103

Bolivia privatized the water services in Cochabamba under World Bank conditions for debt
relief and financing for the water system in the city.104 In the 1990s, several government-run
public enterprises including the airline and the railways were privatized in Bolivia. In 1997,

[101] Benjamin Dangl, The Price of Fire: Resource Wars and Social Movements in Bolivia (Edinburgh, Scotland;
Oakland, United States: AK Press, 2007) 66 (quoting Rosseline Ugarte, a resident of Cochabamba, Bolivia).

[102] See generally Erik J. Woodhouse, “The “Guerra del Agua” and the Cochabamba Concession: Social Risk and
Sanchez-Moreno & Tracy Higgins, “No Recourse: Transnational Corporations and the Protection of Economic,
Social, and Cultural Rights in Bolivia” (2004) 27 Fordham Int’l L.J. 1663; Andrew Nickson & Claudia Vargas,

[103] The Democracy Center, located in Cochabamba, has eye-witness accounts of the events on its website.
Although these accounts have been revised and published in books, I have chosen to work from the original
accounts on the Center’s website. Among the published works by people who participated in the resistance
movement are Oscar Olivera (in collaboration with Tom Lewis), Cochabamba!: Water War in Bolivia
(Cambridge, Massachusetts: South End Press, 2004); Jim Shultz, “The Cochabamba Water Revolt and its
Aftermath” in Jim Shultz & Melissa Crane Draper eds., Dignity and Defiance: Stories from Bolivia’s Challenge

[104] Jim Shultz, “Bolivia’s War over Water”, online: Democracy Center
<http://democracyctr.org/bolivia/investigations/water/the_water_war.htm> [Shultz, “Bolivia’s War over Water”].

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the World Bank conditioned the provision of further aid for water development upon the privatization of the public water systems of the capital – La Paz – and Cochabamba. A bidding process, with a single bidder, occurred. It led to the conclusion of a forty-year concession for water services in Cochabamba between the Government of Bolivia and Aguas del Tunari (AdT).\(^{105}\) By September 1999, 55 percent of the AdT consortium was owned by International Water, which was a wholly owned subsidiary of Bechtel Enterprise Holding Inc., a United States company. Riverstar International S.A., a wholly owned subsidiary of Abenogoa Spain held 25 percent of the consortium, while the balance of the 20 percent was held by four Bolivian companies in equal shares of five percent each.\(^{106}\)

There are two facets to social movements’ influence on AdT’s tenure in Cochabamba. First, there was the departure of the company from the city and second, its discontinuation of its ICSID proceedings. While local pressure was the major factor that led to AdT’s departure from Cochabamba, international pressure from civil society groups facilitated the discontinuation of the proceedings. In this discussion of the background to *AdT v. Bolivia*, the first of the facets is that which mostly concerns us.

In 1999/2000, Cochabamba, the third largest urban area in Bolivia, was a city of about 600,000 people, reaching up to a million if the surrounding area is included in the population.\(^{107}\) For decades, Cochabamba has been well known for its shortage of water and the privatization of Cochabamba’s water was one way that the government sought to address this problem. In its bid to foster the privatization, the government enacted Law 2029 in October 1999.\(^{108}\) Basically, the Law created a monopoly over water. One interpretation of the Law identifies at least five of its effects. First, it eliminated guarantees of water distribution in rural areas, a practice that had long been recognized as customary. Second, it rendered distribution *via* existing autonomous water systems that communities had built illegal, such that only the company holding the concession could distribute water. Third, it prohibited peasants from

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107 Olivera, *Cochabamba!*, supra note 103 at 7.
gathering water from the rain, making it a requirement that people had to ask permission from the superintendent to collect rain water. Fourth, local townships could no longer determine the locations of wells to be dug. Fifth, water payments became “dollarized” in that if the value of the Bolivian currency, the boliviano, dropped in relation to the US dollar, water bills would increase to the equivalent price in US dollars. Cochabambinos were stunned by this law and its potential effects.  

In part, Law 2029 was meant to facilitate AdT’s access to water. By the time the concession became effective in November 1999, Law 2029 had already taken effect, having been in force from October 1999. Almost from the inception of the AdT concession, people in the Cochabamba community had complaints. Initially, the complaints were about astronomical tariff rate increases that were mostly unaffordable for the local population. The Democracy Center collected water bills that showed the increases in residents’ payments. For example, for Lucio Morales, the payment was raised by about 60 percent. Morales was classified as one of the poorest people and his bill was about 10 percent of the monthly minimum wage. In the case of German Jaldin whose water use increased by less than 10 percent, his payments increased by more than 90 percent, which was equal to more than 20 percent of the monthly minimum wage that most people in his water rate classification earned. Some whose water use even decreased still faced raises of almost 50 percent. Tanya Parades, who was a mother of four, had an increase in her bill from the equivalent of $5 to $20. She noted that “what we pay for water comes out of what we have to pay for food, clothes and the other things we need to buy for our children.” For some middle class consumers, it is alleged that water bills rose by as much as 200 percent.

In addition to grievances about astronomical increases in water bills, some consumers who had

109 Olivera, Cochabamba!, supra note 103 at 8.
110 See Woodhouse, supra note 102 at 324-336.
113 Democracy Center, “Water Bills from Bechtel”, supra note 111.
114 Shultz, “Bolivia’s War over Water”, supra note 104.
built their own wells were concerned that the company had acquired the right to charge them for using water from the wells that they had dug. For example, in Villa San Miguel, a settlement a few miles south of Cochabamba, the community had organized an independent water cooperative.\(^{115}\) The planning took years and the construction of the well had gone on from 1994 to 1997. The well provided clean water to about two hundred and ten families who paid about two to five dollars a month to the cooperative as the cost of running the pump and for maintenance. When the AdT concession took effect, it could install meters on wells such as that in Villa San Miguel, and charge for the installation of the meters and for the use of the water from a well that the government had not participated in building.\(^{116}\) In addition, many, especially the irrigators, voiced concerns that the new water law and the monopolistic ownership of water that AdT had acquired would abrogate their customary rights to use water.

In November 1999, the Federation of Irrigators led by Omar Fernandez enforced a 24 hour blockade of the highways leading to and from Cochabamba in protest of the forthcoming loss of their water system.\(^{117}\) Within a month of the concession contract’s conclusion, several community groups, including farmers, labour groups, environmentalists, factory workers’ unions, organizations of business, and other coalitions of workers, commenced protests in the form of highway blockades and general strikes. The coalition of citizens’ movements became known as the *Coordinadora de Defensa del Agua y de la Vida* or the Coalition in Defense of Water and Life (the *Coordinadora*). The *Coordinadora* was the most visible face of Cochabamba’s water war. Led by Oscar Olivera, a shoemaker turned trade union activist,\(^{118}\) its membership was both rural and urban and both poor and middle class.\(^{119}\) In January 2000, the *Coordinadora* staged a citywide general strike shortly after the rate increases by AdT.\(^{120}\) During this time, the city was completely shut down for three days. The *Coordinadora’s* banner carried words which echoed the thoughts of the city – *El Agua es Nuestra Carajo!*\(^{121}\), translated, “the water is ours damn it!” In negotiations with the leaders of the *Coordinadora*,

\(^{115}\) Finnegan, *supra* note 102.

\(^{116}\) Ibid.

\(^{117}\) Shultz, “Bolivia’s War over Water” *supra* note 104.

\(^{118}\) Holland, *supra* note 105 at 25.

\(^{119}\) Shultz, “Bolivia’s War over Water”, *supra* note 104.

\(^{120}\) Ibid.
the regional governor intervened and the government signed an agreement promising to review AdT’s contract and the newly enacted water law if the people suspended the protest. They agreed and set a three-week timeline for government to do its part.

By February 2000, the government had not done anything about the peoples’ requests and they refused to pay their water bills, which led to the company threatening to shut off the peoples’ water. In turn, the Coordinadora organized symbolic and peaceful demonstrations termed *la toma de Cochabamba* (the takeover of Cochabamba).121 Although the term take over was symbolic, businesspeople and the government read it otherwise saying that “the Indians are coming to seize the city”.122 The demonstrations were meant to be a “simple lunchtime protest to remind the government that the people were still watching.”123 However, the government refused to allow the protest to take place and instead deployed more than 1,000 heavily armed police and soldiers to the city center. Many of these uniformed persons were from outside Cochabamba because the government could not count on Cochabamba police to take a hard line against their own relatives.124 Cochabamba’s residents understood the military invasion as a “declaration of war.” Indeed, for two days, the city center appeared to be a war zone with police in riot gear and the streets blocked with tear gas canons. Police admitted to being ready to shoot and kill if ordered to do so. In the course of the two days, more than 175 people were wounded by tear gas canisters and police beatings. At the end, the government announced that it had an agreement with the company to invoke a six-month temporary rate reduction.

Until February, the major request was a reduction in water payments. But the Coordinadora leaders, with the help of economists and lawyers, began to scrutinize the AdT concession when they were finally able to get a copy of it from some members of Congress. They discovered that the government had concluded a very bad deal. From that time, the requests changed to a demand that the concession should be repealed. In March, the Coordinadora embarked on a public consultation – the *consulta popular* – to ask residents whether the contract should be cancelled. Of more than 60,000 people (10 percent of the Cochabamba

121 Olivera, *Cochabamba!*, supra note 103 at 32.
122 Ibid. at 33.
123 Shultz, “Bolivia’s War over Water”, supra note 104.
124 Ibid.
population) that participated, over 90 percent answered the question in the affirmative. In April 2000, the Coordinadora embarked on La Ultima Batalla – the final battle. They threatened an indefinite general strike and blockade of the highways if their two fold demands – cancellation of the concession and the repeal of the water law that gave AdT monopoly over water – were not met. Tuesday, April 4, 2000, marked the beginning of La Ultima Batalla. Two days into it, the government decided to negotiate with the leaders of the Coordinadora. In the process of their talks, police from the capital in La Paz interrupted and arrested the Coordinadora leaders, who were later released the next day. Expressing the sentiments of other Coordinadora leaders, Oscar Olivera was of the opinion that the meeting was a ploy to get all the leaders together so that they could be arrested.

By Friday, April 7, residents of Cochabamba began to expect that a military takeover of the city could occur at any moment, especially due to the tensions that the arrests of the night before had created. Another meeting was planned between government officials and leaders of the Coordinadora. This time the Governor failed to attend. The people feared that the worst was ready to happen and stationed themselves in positions where they could alert everyone when they saw evidence of a military invasion. Meanwhile, hearing the angry crowds outside, the Governor decided to call the national government in La Paz informing them that it appeared that the only option at the point was to cancel the concession otherwise a war would break out between the government and the people. When the Governor called the government-Coordinadora mediator to inform him that he had urged the President to cancel the contract, the mediator – Catholic Archbishop Tito Solari – relayed the message but it got transformed into the view that the company would leave Cochabamba.

According to Jim Shultz who was an eyewitness to these events, Olivera approached the third floor balcony of the plaza and announced: “we have arrived at the moment of an important economic victory over neoliberalism.” The people were delighted and staged celebrations on the street and in the Cathedral where Bishop Solari presided. However, the celebrations ended within a few hours when AdT informed the press that it had no plans to leave. By midnight, the Governor announced his resignation on live television saying that he did not

125 Ibid.
126 Ibid.
want to be responsible for a “blood bath.””127 Police began to round up the Coordinadora leaders in their homes and arrested them. Some of them, including Oscar Olivera and Omar Fernandez, escaped arrest and went into hiding. The seventeen that were arrested boarded a plane and were flown to “an infamous military prison in the Amazon basin.”128 The next day, the President declared a state of emergency. Soldiers cut off television and radio broadcasts. The government also instituted a curfew and banned public meetings of more than two people.

Rather than deter the people, the actions of the government further aggravated the discontent. At this time, the protests enjoyed wide support from all facets of Cochabamba’s society. Old women with bent backs constructed street blockades, women collected food items to cook for those camped at the plaza, and young people went to the city center to challenge the troops. This time, the conflict turned violent. It is reported that a local television station’s camera captured footage of an army captain, Robinson Iriarte de la Fuente, who was in plain clothes, shooting live rounds into a crowd of protesters.129 On that day, a seventeen year old boy, Victor Hugo Daza lost his life. He was killed by a gun-shot to the face. Upon the boy’s death, it was apparent that there was no longer any room for negotiations between the citizens and the government and neither was it feasible to continue with the contract.130 On Monday, the government announced that the company had left the country and that the contract had been cancelled. The Coordinadora leaders were released from jail and those who were in hiding came out. The city celebrated. Water rates were reduced to their pre-AdT days and people paid their water bills. The government granted most of the people’s requests, although the subsequent state of the water services in the city was reportedly less than satisfactory.131

In sum, Cochabamba residents, who had endured a history of water scarcity, were concerned about the state of the city’s water and the laws and policies that regulated the provision of such an essential utility. The water war was a struggle for justice, a struggle against the commodification of a resource as fundamental as water. In a broader context, participants

127 Ibid.
128 Woodhouse, supra note 102 at 335.
129 Shultz, “Bolivia’s War over Water”, supra note 104.
130 Woodhouse, supra note 102 at 336.
131 Ibid. at 336-37. See also Finnegan, supra note 102 at 45.
“cited regional pride, general anger at the government and the economic crisis, and rejection of
the neoliberal economic model being followed by the national government” as some of the
reasons for their discontent.132 Both old and young Cochabambinos did not regard the water
privatization favourably.133 Popular resistance was their mechanism of voicing discontent.
According to Shultz, people were not prepared to lose control over their water, for that
appeared to be a loss of control over their lives.134 He also opines that beyond the peoples’
willfulness to take a stand, the government and the company facilitated the organized
resistance; the former by refusing to allow the peaceful February protests to occur and the
latter by increasing rates too quickly. Rather, their actions made every resident of Cochabamba
a “Coordinadora loyalist.”135 By garnering so much popular support, the Coordinadora and
other civil society groups have been described as democratic social movements that became
effective by using symbolism in their work, engaging widespread participation, and obtaining
extensive media coverage of the events.136 In fact, Oscar Olivera was awarded the Goldman
prize for environmental activism.137 According to Shultz, the water war in “Cochabamba
became synonymous with the struggle for global economic justice, a source of great
inspiration and hope.”138 Maude Barlow, national chair of the Council of Canadians, recalls
Oscar Olivera’s visit to the United States a few days after the water revolt ended in
Cochabamba. She said: “when Oscar marched up to the stage, people stood on their chairs and
cheered him with a 10-minute standing ovation. There was not a dry eye in the Church,
including mine. It was one of the most powerful events of my life.”139 Cochabamba had
acquired much international solidarity that continued until AdT instituted the ICSID
proceedings. Woodhouse notes that “measured by the effectiveness of its tactics, the coalition
of civil society groups in Cochabamba utterly vanquished its opposition.”140 Essentially, the
Cochabamba protests were as close as one gets to hearing the subaltern’s voice in the foreign

132 Woodhouse, supra note 102 at 335.
133 Shultz, “Bolivia’s War over Water”, supra note 104.
134 Ibid.
135 Ibid.
136 Woodhouse, supra note 102 at 339-340.
137 Shultz, “Bolivia’s War over Water”, supra note 104.
138 Ibid.
139 Ibid.
140 Woodhouse, supra note 102 at 340.
Apart from local pressure, international solidarity helped immortalize the Cochabamba events, especially for non-Bolivian citizens. The Democracy Center reports that in April of 2000, 500 people from different parts of the world sent an e-mail protest to the Chief Executive Officer of Bechtel demanding that the company withdraws from Cochabamba and in the same month, solidarity protests were held in San Francisco at Bechtel’s headquarters. Subsequent to the filing of a request for arbitration before ICSID, the international solidarity continued. In February 2002, Dutch activists symbolically renamed the street that housed Bechtel’s headquarters in the Netherlands after Victor Hugo Daza, the 17 year old that was killed in the water war. In September 2002, another protest was organized at the entrance of Bechtel’s headquarters in San Francisco that led to the arrest of fifteen people; that same month, 300 organizations from 43 countries signed and filed an international citizens’ petition with the World Bank demanding that the ongoing proceedings be opened to public participation and scrutiny. Further, there were moves to get AdT to drop the proceedings against Bolivia. To that effect, in February 2004, activists in Washington DC protested at the house of Michael Curtin, then AdT’s President, demanding that the consortium drops its case against Bolivia. Also, from December of 2004 to January of 2005, more than 300 people sent e-mails to the headquarters of Abenogoa – the Spanish company that owned 25 percent of AdT – requesting that they drop the case. By the time the ICSID proceedings were initiated and eventually discontinued, the Cochabamba water war had acquired immense international influence and even become legendary.


143 For this petition, see online: Democracy Center <http://democracyctr.org/bolivia/investigations/water/international_petition.htm>.

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2. The ICSID Dispute

Aguas del Tunari (AdT), the claimant before ICSID in *AdT v. Bolivia*, was incorporated under Bolivian law on September 2, 1999.\(^{144}\) By a concession contract concluded in September 1999 and other related contracts, AdT acquired the right to provide water and sewage services for the city of Cochabamba. The concession took effect on November 1, 1999. It provided for a 40 year relationship between AdT and the Bolivian Water and Electricity Superintendencies. As noted earlier, by April 2000, the concession had ceased to be in force. AdT claimed that through various acts and omissions leading up to the cancellation of the concession, and the cancellation itself, Bolivia breached provisions of the *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia (Netherlands-Bolivia BIT).*\(^{145}\) Bolivia objected to the tribunal’s jurisdiction, arguing that it did not consent to ICSID jurisdiction and that based on the definition of the *Netherlands-Bolivia BIT*, AdT was not a Dutch national. The tribunal concluded that the dispute was within ICSID’s jurisdiction and the competence of the tribunal. The ICSID part of the AdT and Bolivia dispute was limited to the jurisdictional phase as the proceedings were subsequently discontinued.

In its presentation of facts and decision on jurisdiction, the tribunal recounted some of the events of 1999 following the award of the concession, including the public’s reaction and the responses of the parties to the dispute.\(^{146}\) According to the tribunal, there appeared to be evidence that the public was aware of the negotiation of a concession and sought more information about the process of the negotiation. On September 3, 1999, the day that the concession was concluded, a news article reported that the negotiations were criticized as lacking transparency. There were also requests that the Bolivian government should publicize the true rates that would apply before it concluded the concession. The tribunal noted that records before it showed that the level of criticism by citizens’ groups became greater after the concession came into effect. By November 17, 1999, news articles were calling for the

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144 *AdT v. Bolivia*, *supra* note 13 at para. 53.
annulment of the concession. In its statement of the facts of the dispute, the tribunal cited Bolivia’s statement that noted that “[i]n fairness, no one negotiating the Concession agreement could have anticipated the intensely hostile reaction that greeted AdT immediately upon the Agreement’s signing.” The tribunal also referred to AdT’s November 28, 1999 “Open Letter” attempting to respond to the criticisms.

The tribunal noted that when the new rates took effect on December 1, 1999, politicians, unionists, neighbourhood leaders of Cochabamba and labour organizations were vocal against the rate increases and some went as far as seeking cancellation of the concession. At this point, the tribunal discontinued its discussion of the dissatisfaction with the concession and turned its attention to the presentation of facts about changes in AdT’s ownership from November 1999. It further noted that the parties agreed that there was significant opposition to the concession after January 1, 2000 although they disagreed over the reasons for the opposition. They also disagreed on breaches of their obligations under the concession by their respective responses to civil society opposition. However, they agreed that the opposition movement was intensified in the early months of 2000 and that the concession was terminated in April 2000 after major protests. The balance of the decision turned on the tribunal’s ability to assume jurisdiction over the dispute. The decision on jurisdiction was the last word from the tribunal on the case because the parties discontinued the proceedings before the merits phase. Eventually, the case was settled for a paltry sum of less than the value of one US dollar.

3. The Language that the Actors Adopted

This section discusses the arguments that each category of actors adopted before ICSID. In discussing the background to this case, I considered the requests and concerns of the people of Cochabamba. In this section, the language of the disputing parties – AdT and Bolivia – the tribunal and the non-disputing parties that sought participatory status is discussed.

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147 Ibid. at para. 64.
148 Ibid. at para. 73.
After AdT initiated the proceedings pursuant to the *Netherlands-Bolivia BIT*, an action which some criticized as forum shopping, several non-disputing parties sought participatory status before the tribunal.\(^{150}\) Of all the ICSID cases that have had non-disputing parties seeking participatory status, *AdT v. Bolivia* is perhaps the only case that has attracted grassroots movements that participated in the activism that preceded the dispute.\(^{151}\) All the groups claimed to have a direct stake in the dispute before the ICSID tribunal. The most prominent group in the Cochabamba resistance, the *Coordinadora*, was one of the actors that petitioned the tribunal. As noted, the *Coordinadora* was a broad based coalition of several community organizations including farmers’ associations,\(^ {152}\) labour groups,\(^ {153}\) human rights organizations, students’ groups and other civil society organizations.\(^ {154}\) In addition to organizing peaceful popular protests and the survey of peoples’ views discussed earlier, it represented tens of thousands of people during negotiations with the government, continued to educate the public and media about the dispute, and conveyed public concerns to officials in the Bolivian government and representatives of international institutions.\(^ {155}\) The spokesperson for the *Coordinadora*, Oscar Olivera, was also a petitioner before the tribunal in his personal capacity.\(^ {156}\)

Another petitioner – *La Federacion Departmental Cochabamba de Organizaciones Regantes* (the Cochabamba Federation of Irrigators’ Organizations) – also represented thousands of small scale producer groups during the grassroots activism that occurred in Cochabamba.\(^ {157}\)

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\(^ {150}\) For a critique of the initiation of dispute settlement proceedings pursuant to the *Netherlands-Bolivia BIT*, see page 2 of a Letter to James Wolfensohn *et al.*, then President of the World Bank, which was signed by over 300 representatives of civil society organizations, attached to the Petition of La Coordinadora de la Defensa del Agua y de la Vida, *et al.*, to the Arbitral Tribunal in *AdT v. Bolivia*, (filed August 29, 2002), online: Center for International Environmental law <http://www.ciel.org/Publications/Petition_Revised_Aug02.pdf> [Petition of La Coordinadora *et al*].

\(^ {151}\) For an analysis of the other ICSID cases that have considered the participation of non-disputing parties, see Ibironke T. Odumosu, “Revisiting NGO Participation in WTO and Investment Dispute Settlement: From Procedural Arguments to (Substantive) Public Interest Considerations” (2006) 44 Can. Y.B.I.L. 353.

\(^ {152}\) The Farmers Union (FEDECOR) was part of the *Coordinadora* but sometimes participated independently in the protests. See Woodhouse, *supra* note 102 at 326.

\(^ {153}\) Specifically, the Federation of Factory Workers Unions participated in the activism. It was integrated into the *Coordinadora* for the purpose of challenging Cochabamba’s water situation.

\(^ {154}\) Petition of La Coordinadora *et al*, *supra* note 150 at 4.

\(^ {155}\) *Ibid*.

\(^ {156}\) *Ibid*.

\(^ {157}\) *Ibid*.
The Irrigators’ Federation was an initiative of small farmers that sought to protect customary water usage rights and the attendant practices in the Cochabamba Valley. The group developed in the mid 1990s. Its members had possessed the customary rights of access to, and management of, local irrigation water resources for generations. They lost these rights upon the privatization of the water system. Meanwhile, these peoples’ livelihoods were mostly based on the irrigation of food crops and they produced a substantial amount of the food consumed in the locality. Omar Fernandez, the President of the Irrigators’ Federation, was a co-petitioner in his personal capacity.

Another organization, SEMAPA Sur, joined in petitioning the tribunal. It was a grassroots organization that provided water to neighbourhoods in Southern Cochabamba. As a result of the privatization, the communities in the South of Cochabamba lost control of the local water systems. The founder, and a member of the Board of Directors of SEMAPA Sur, Father Luiz Sanchez, participated as a petitioner as well. Congressman Jorge Alvarado who was President of the Cochabamba delegation to the Bolivian Congress, and Friends of the Earth-Netherlands, were the other petitioners in the application for participation in the dispute settlement process. Earthjustice and the Center for International Environmental Law were the petitioners’ counsel.

Arguing that the arbitration was likely to have broad public impact, the petitioners suggested that without their participation, the arbitration could not be a legitimate process for resolving the dispute. They argued that they had access to important factual information that might facilitate the resolution of the dispute. They claimed *inter alia*, standing to participate as parties in the proceedings, arguing that their interests were directly at stake in the dispute, and

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noted that such participation would not infringe on the parties’ rights.\textsuperscript{166} The petitioners argued that contrary to the position in \textit{Methanex v. United States} and \textit{United Parcel Service v. Government of Canada}, the AdT v. Bolivia tribunal could not avoid deciding a dispute that would impact on the petitioners’ rights.\textsuperscript{167} Alternatively, the petitioners sought participation as \textit{amici curiae}.\textsuperscript{168} They also requested public hearings, public disclosure of the submissions to the tribunal and a visit by the tribunal to Cochabamba.\textsuperscript{169} The petitioners argued that they had standing since each of them had a direct interest in the subject matter of the claim. They believed that their involvement would increase the transparency of the arbitral process and that they would provide “unique expertise and knowledge” during the tribunal’s proceedings and deliberations.

The petition was the first of its kind before an ICSID tribunal. It implicitly challenged the legitimacy of the ICSID process, expressing concerns that it was shrouded in secrecy. It also expressed reservations about the World Bank President’s role as \textit{ex officio} Chairman of ICSID’s Administrative Council and his/her role in nominating arbitrators to some tribunals.\textsuperscript{170} Such appointment by the Chairman of the Administrative Council is made pursuant to article 38 of the \textit{ICSID Convention} and Rule 4 of the \textit{ICSID Arbitration Rules}. The petition was concerned about the fairness of the ICSID process since the World Bank had encouraged the privatization of the water services. In addition, the petitioners claimed that the World Bank had demonstrated a bias in favour of the privatization and subsequently expressed support for the increase in water tariffs in Cochabamba.\textsuperscript{171}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{166} Ibid. at 14.
\item\textsuperscript{167} Ibid. at 14-15.
\item\textsuperscript{168} Ibid. at 15.
\item\textsuperscript{169} Ibid. at 18. The tribunal restated the petitioners’ requests in its recitation of the arbitration’s procedural history in its decision on jurisdiction. See AdT v. Bolivia, \textit{supra} note 13 at para. 16.
\item\textsuperscript{170} Petition of La Coordinadora \textit{et al}, \textit{supra} note 150 at 9. For references to “secretive international processes”, see page 5, \textit{Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic} (ICSID Case No. ARB/03/19), (Initial) Petition for Transparency and Participation as Amicus Curiae (January 27, 2005), online: Center for International Environmental Law <http://www.ciel.org> at 2 was also critical of the “secrecy” of ICSID proceedings. At pages 3, 12-15, the petitioners also alluded to the “close relationship between ICSID and other World Bank Group institutions.” Most of the processes that were regarded as secretive have now been remedied by the amendment of the ICSID Arbitration Rules, ICSID decisions and other institutional statements.
\item\textsuperscript{171} Petition of La Coordinadora \textit{et al}, \textit{ibid.} at 9.
\end{enumerate}
\end{footnotesize}
I have argued elsewhere that the AdT v. Bolivia case is a “public interest opportunity missed”, not necessarily because the tribunal denied all of the petitioners’ requests but because the unique opportunity to discuss and assess the participation of grassroots movements in investment dispute settlement was lost. In its decision on jurisdiction, the tribunal stated that the petition and its letter in response to the petition were not a formal part of the record of the proceedings in the case. Even though the tribunal’s letter in response is included as Appendix III to the decision on jurisdiction, by its statement excluding the petition and the response to it from the formal proceedings of the tribunal, it effectively exempted the petition, the petitioners and who and what they represented, from the legal realm of investment dispute settlement that ICSID represents. Although later ICSID tribunals have responded more comprehensively to applications for non-disputing party participation, none of these cases possess characteristics as distinctive as AdT v. Bolivia, where most of the petitioners had first hand information and knowledge about the resistance movement that preceded the ICSID process.

The tribunal’s two and a quarter page response to the petitions was brief. Perhaps cognizant of this brevity, the tribunal emphasized that it gave extensive consideration to the petitioners’ requests, subsequently received the views of the parties to the dispute, and that the brevity of the reply should not be taken as an indication that the request was not treated in a serious manner. Instead, the tribunal stated that it had sought to be responsive as well as efficient. Given the petitioners’ non-party status, the tribunal noted that it was careful that the arbitrators did not breach the undertakings that they signed pursuant to Arbitration Rule 6(2) to maintain the confidentiality of the proceedings.

In its letter of response, the tribunal found unanimously that it was beyond its power or authority to grant the petitioners’ requests. According to the tribunal, the “interplay” of the ICSID Convention and the Netherlands-Bolivia BIT, and the consensual nature of arbitration,

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172 Odumosu, supra note 151 at 378-379.
174 See e.g. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19); Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17).
175 AdT v. Bolivia, supra note 13 at 574-575.
situates the control of the requests with the parties and not with the tribunal. It stated that it is “manifestly clear” that without the parties’ agreement, the tribunal did not “have the power to join a non-party to the proceedings; to provide access to hearings to non-parties, and a fortiori, to the public generally; or to make the documents of the proceedings public.” The parties had not given their consent at the time the letter was drafted. Although the tribunal did not have a “clear indication” that the consent might be forthcoming, it stated that it remained open to any initiative by the parties in this regard. The tribunal also expressed the view that there was no present need to call witnesses or seek supplementary non-party submissions at the jurisdictional level of the case, without prejudging the question of the extent of its “authority to call witnesses or receive information from non-parties on its own initiative.” It also alluded to the Singapore-United States BIT that expressly allows amicus curiae participation of NGOs, but noted that a tribunal’s duty is to follow the dictates of relevant instruments that control the case. In effect, the AdT v. Bolivia tribunal did not completely preclude the acceptance of amici submissions at later stages of the case, albeit on its own initiative and request.

Compared to other ICSID cases that considered non-disputing party participation before the amendment of the ICSID Arbitration Rules allowing amicus curiae participation as long as certain conditions are met, AdT v. Bolivia prompts questions on why the requests received the kind of response that they did. Just like the ICSID Convention and the Netherlands-Bolivia BIT did not include express provisions allowing amicus curiae participation, other cases decided before the 2006 amendment of the ICSID Arbitration Rules could also not rely on such instruments. Yet the tribunals were willing to find that such participation could be acceptable. Perhaps the later tribunals were influenced by occurrences in other fora, for example, the NAFTA Free Trade Commission’s Statement on Non-Disputing Party Participation. Further, perhaps the very factors that the petitioners in AdT v. Bolivia had in

176 Ibid. at 575.
177 Ibid.
178 Ibid.
their favour, in terms of first hand experience and particularity as mainly grassroots movements, were also the same factors that acted against their participation. Most of the petitioners were not institutionalized, expert groups. Comparing AdT v. Bolivia to other cases, although the laws were similar and the dispute settlement forum was identical (except for the particular constitution of the tribunals), the nature of the petitioners were different. In AdT v. Bolivia, the actors were mostly non-institutionalized grassroots movement groups that might probably still not ‘pass the test’ of the amended ICSID Arbitration Rules that allow amicus curiae participation. Thus, identity was an important factor in this case. As suggested throughout this thesis, an actor’s identity affects its methods of interaction as well as the international system’s receptiveness to its perspectives, and taken to its logical conclusion, its ability to contribute to the development of legal norms.

While the response to the petitioners was promptly dispatched on January 29, 2003, the major decision in AdT v. Bolivia – the tribunal’s decision on jurisdiction, with one of the arbitrators, Dr. Alberro-Semerena, dissenting on several points – was not delivered until October 21, 2005. There was no award on the merits because on March 28, 2006, the parties discontinued the proceeding pursuant to Rule 44 of the ICSID Arbitration Rules. The issues that formed the major subject of discussion in the decision of the tribunal were very different from those that the grassroots movements were concerned about. At the jurisdictional phase of the dispute, the decision and the parties’ arguments turned on the tribunal’s ability to assume jurisdiction in the case. The claimant maintained that it was a legal person constituted under the laws of Bolivia and controlled by nationals of the Netherlands and since both Bolivia and Netherlands are parties to the ICSID Convention, the tribunal could assume jurisdiction. Bolivia disagreed. According to the tribunal, Bolivia’s objection to jurisdiction could be divided into two major parts. First was Bolivia’s contention that it did not consent to ICSID jurisdiction and second was its argument that AdT was not a national of the Netherlands as defined by article 1(b)(ii)-(iii) of the Netherlands-Bolivia BIT because AdT was not “controlled directly or indirectly” by Dutch nationals. The tribunal further sub-divided the first objection into six aspects as follows:

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*Suez v. Argentina, supra* note 63, expressly acknowledged that it drew on the Free Trade Commission’s statement.

181 *AdT v. Bolivia, supra* note 13 at para. 84.
1. “First, that the circumstances surrounding the negotiation of the Concession and the dispute settlement clause contained in the Concession preclude ICSID jurisdiction,
2. Second, that Bolivia is not the proper party to be named in this proceeding,
3. Third, that the BIT, through Article 2, refers the Tribunal to limits existing in Bolivian law and regulations and those limits preclude ICSID jurisdiction in this case,
4. Fourth, that the Concession fixed AdT’s ownership structure and that AdT’s reorganization in December 1999 breached the Concession and bars jurisdiction of this Tribunal
5. Fifth, certain representation as to the legal implication of a proposed transfer of AdT’s ownership were breached and that these breaches preclude ICSID’s jurisdiction, and
6. Sixth, Bolivia’s consent to the BIT did not encompass the situation presented in this proceeding.”182

In deciding the first point in objection one, the tribunal was of the opinion that although Bolivian Courts had jurisdiction under the concession, dispute settlement proceedings were not initiated under the concession but under the Netherlands-Bolivia BIT by virtue of which ICSID had jurisdiction.183 It noted that “[t]he circumstance that a claim under the Concession against the Water Superintendency and a claim under the BIT against Bolivia could both point to the same set of facts should not blur the legal distinction between the two types of claims.”184 The second point in objection one was also rejected on similar grounds to the first, based on the distinction between claims under contracts and under BITs.185 On the third point in objection one, the tribunal rejected Bolivia’s contention that references to Bolivian law in the BIT precluded ICSID jurisdiction.186 For the tribunal, “the primary objective of the BIT, measured both in terms of the motivation for its conclusion and in terms of its substantive provisions, is agreement upon ICSID as an independent and neutral forum for the resolution of investment disputes in accordance with a substantive applicable law specified in the BIT.”187 Here, the tribunal extended the primary purpose of an investment promotion and protection treaty to dispute settlement under the auspices of ICSID. The fourth point in the first objection was also

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182 Ibid.
183 Ibid. at para. 114.
184 Ibid.
185 Ibid. at para. 136.
186 Ibid. at para. 154.
187 Ibid. at para. 153.
rejected with the tribunal finding that the concession allowed for some change in the upstream
ownership without Bolivia’s consent and that the corporate migration that occurred in the
ownership of AdT was not a breach of the concession.\footnote{188} On the fifth part of the first
objection, the tribunal found that this aspect of Bolivia’s objection failed since the transactions
were not executed and the alleged misrepresentations did not take place.\footnote{189} By a majority
(Arbitrator Alberro-Semerena dissenting), the tribunal found that the sixth part of the first
objection had already been addressed by its discussion of the first four parts of the first
objection. It rejected Bolivia’s construction of the sixth part of the objection as well.\footnote{190}
Finally, on the second objection, the tribunal (by majority) concluded that on the evidence
available, the Dutch company is not simply a corporate shell established to obtain ICSID
jurisdiction over the dispute. It found that the companies indirectly controlled AdT in
accordance with the tribunal’s interpretation of the phrase “controlled directly or indirectly”
found in article 1(b)(iii) of the BIT.\footnote{191}

Arbitrator Alberro-Semerena differed from the majority on the timing of the transfer that
occurred in 1999. He considered the issue to be crucial because AdT did not have access to
ICSID before the restructuring that occurred towards the end of 1999.\footnote{192} The dissent arose
from the fact that AdT’s restructuring broke the balance between the host state’s benefits and
obligations because its obligations became unpredictable as a result.\footnote{193} Notably, Arbitrator
Alberro-Semerena stated that the public had begun protesting the concession agreement as
early as September 1999 and by mid-November 1999, there were explicit public demands to
annul the agreements.\footnote{194} According to Mr. Alberro-Semerena, although the “present record” in
the arbitration might not have established that the severity of the events of the spring of 2000
was foreseeable in November or December 1999, neither did it establish that the severity of the
events was not foreseeable in November or December of 1999. Alberro-Semerena noted that

\footnote{188}Ibid. at paras. 165 & 178.
\footnote{189}Ibid. at paras. 188-189.
\footnote{190}Ibid. at para. 203.
\footnote{191}Ibid. at paras. 322-323.
\footnote{192}See para. 4 of the dissenting opinion in AdT v. Bolivia, supra note 13 at 555.
\footnote{193}Ibid. at 556, para. 8.
\footnote{194}Ibid. at 557, para. 10.
the publication of an “Open Letter” in the Cochabamba press defending its actions was prima facie evidence of the fact that AdT was alarmed about the severity of the public demands. He noted at paragraph 16 of his declaration that:

The evidence on record is inadequate to ascertain the motivations and the timing for abandoning the transaction described by Bechtel in its November 24, 1999 letter (a new direct Dutch ownership of AdT) in favour of the one that was ultimately put into place 27 days later (migration and indirect ownership by Dutch owners). The only difference one can infer from the record between the two is that the first transaction had to be authorized by the Waters and the Electricity Superintendencies while the second one was done without their knowledge after months of social unrest. In both cases, a Dutch company was inserted in the chain of ownership.

Alberro-Semerena asserted that the tribunal should have requested the claimant to produce information showing the dates that the decision on the migration was made.195 He concluded that Bolivia did not consent and decided that the claimant was not entitled to invoke ICSID jurisdiction under the Netherlands-Bolivia BIT.196 On the second objection, he considered that the evidence submitted by the claimant was insufficient to prove that AdT was directly or indirectly controlled by Dutch nationals.197 Thus, for him, the claimant failed to prove that the dispute was within “the jurisdictional reach of the BIT.”198 His was a decision that critically analyzed the impacts of the grassroots activism on the claimant’s actions and the timing of both influenced his conclusions.

4. Analysis of the Case/Conclusion

It is legitimate not only to question the differences in opinion between the majority and the dissenting opinion in AdT v. Bolivia but also to inquire into the reasons for the visibility of the impacts of the grassroots activities in the dissenting opinion. While there might not be a single explanation for this difference, the technologies of investment arbitration discussed earlier in this chapter might proffer some explanations.

195 Ibid. at 558, para. 17.
196 Ibid. at 558, para. 18.
197 Ibid. at 563, para. 41.
198 Ibid. at 564, para. 44.
First, following the discussion on the politics of institutionalization, the characteristics of the petitioners could have been a decisive factor in the tribunal’s decision. Their essentially non-institutionalized nature could have been a contributing factor to the tribunal’s decision not to engage in quasi-judicial activism and ingenuity in conferring *amici curiae* status on these actors. These petitioners were mostly grassroots movements that were directly involved in the dispute, had first-hand knowledge of the events that occurred, and had stakes and personal interests in the tribunal’s decision but were not afforded the opportunity to participate as non-disputing parties.

Second, the politics of representation also informed the tribunal’s views on the dispute. The tribunal was mostly concerned with the actions of the Government of Bolivia. This focus obscures other relevant and interested actors within the foreign investment system. Apart from the few paragraphs on the events that preceded the dispute and its brief response to the petition for participation from the non-disputing parties, the decision was focused on the Bolivian government, who is the actor recognized by the international law on foreign investment. This area of the law continues to give primacy to the government as an entity and to foreign investors as companies and shareholders without much direct consideration of the population that constitutes the geographical locations that governments govern. *AdT v. Bolivia* and the events that preceded the dispute demonstrate the limitations of this focus of investment arbitration.

Third, the apolitical stance towards the law that dispute settlement tribunals usually adopt, could have made it somewhat heretic to ascribe significant importance to the grassroots activism in a manner that makes it partly definitive of the actions of the claimant, and to contribute to the determination of the tribunal’s jurisdiction. However, the decision of the dissenting arbitrator demonstrates that such analysis is not impossible for it is evident that the existence of grassroots activism shaped the dissenting opinion in *AdT v. Bolivia* although it did not impact significantly on the decision of the majority.

Ultimately, because the decision was about jurisdiction, the tribunal was not afforded the full opportunity to consider the substantive impacts of grassroots activism on Bolivia’s investment law and climate and on the international law on foreign investment. However, the tribunal
demonstrated the ability of dispute settlement bodies to construct the international law on foreign investment and to determine the events, groups and actors that are deemed relevant in this international order. While the majority paid scant attention to the grassroots activism in its decision, the same events and actors were part of the determining factors in the dissenting opinion. As well, *AdT v. Bolivia* buttresses the position that the actions of grassroots movements may shape the decisions of foreign investors and governments. According to the dissenting opinion, it seemed that the opposition movement was the decisive factor in the company’s migration. Of course, it was clearly the main factor behind the government’s cancellation of the contract. But more importantly, the grassroots activism implicitly contributed to the enunciation of the views on corporate migration that the tribunal adopted in its decision on jurisdiction.

**B. Tecmed v. Mexico (2003)**

1. **The Background to the Dispute**

The second case example analyzed in this chapter involved a dispute between the Government of Mexico and *Confinamiento y Tratamiento de Residuos* (Confinement and Treatment of Residuals, Cytrar), a company ultimately controlled by Spanish-run *Tecnicas Medioambientales Tecmed, S.A.* (TECMED). Unlike the pre-arbitration events in *AdT v. Bolivia*, the events that led to the dispute in *Tecmed v. Mexico* were not as well publicized although the concerns of the local population were no less serious. However, what it lacks in widely publicized public pressure, *Tecmed v. Mexico* makes up for in tribunal analysis because of all the cases discussed in this thesis, here, the tribunal paid significant attention to the local pressure that was exerted.

Hermosillo, the location of the opposition preceding *Tecmed v. Mexico*, is the capital of the Mexican state of Sonora. About four miles from Hermosillo, a toxic waste dump was being operated by Cytrar. The site was located less than 25 kilometers from some *colonias populares* (working class residential areas). In the late 1990s, Hermosillo became a center for

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199 Anna Ochoa O’Leary, “Women and Environmental Protest in a Northern Mexico City”, Spring 2002 Vol. 6, No. 1, the Arizona Report 1, online: Mexican American Studies and Research Center, University of Arizona,
community pressure relating to environmental and health justice. The community opposed the operation of the landfill because of its proximity to Hermosillo, a city of about one million people, and the manner in which the hazardous toxic waste was transported and confined.\footnote{200} These community groups argued that the toxic waste dump was unsafe, that it threatened to contaminate groundwater and it posed threats to people’s health. In addition, they contended that Mexican law required such dump sites to be situated at least 25 kilometers from cities and that Cytrar’s permit only allowed it to accept waste from Hermosillo, whereas it was receiving waste from “the infamous Alco Pacifico battery recycling plant, located near Tijuana.”\footnote{201} The United States owner of Alco Pacifico abandoned it in 1991 when Mexican authorities temporarily shut the plant down because of violations of environmental regulations. This plant was a nuisance and an “environmental health nightmare” for the nearby community with an estimated 30,000 tons of toxic waste exposed to the winds and rains.\footnote{202} Lead concentrations in this waste are alleged to be at about twenty times the level that professionals consider dangerous to human health. Such exposure is said to have the potential to retard children’s development, and lead to comas, convulsions, miscarriages and birth defects.\footnote{203} It was waste from this facility that was allegedly being transported to the Cytrar dump in Hermosillo and formed part of the concerns of the Hermosillo community. In addition, in the process of transporting the waste, trucks traveled along highways and residential streets and leaked along the way.\footnote{204}

A coalition of Hermosillo residents and NGOs sharing the common cause of contesting these environmental and health hazards began to demand the relocation of the Cytrar dump to a more suitable location and to limit the waste at the dump to waste from the community.\footnote{205} Dr.  

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\footnote{200}{Tecmed v. Mexico, supra note 14 at para. 49.}
\footnote{203}{Ibid.}
\footnote{204}{O’Leary, supra note 199 at 4.}
\footnote{205}{Richard Boren, “Hermosillo Residents Take a Stand”, supra note 201.}
\end{tabular}
German Rios Barcelo, an orthodontist active in one of the major groups in the coalition against the landfill, *Alianza Civica* (Civic Alliance) is quoted as saying that “the main reason I got involved against CTYRAR was my concern about health impacts… Another reason is that I don’t want to see my home turned into a dumping ground for other states and countries.”

The Hermosillo anti-dump movement adopted several mechanisms in their community pressure. *Alianza Civica* lodged formal complaints against the local government for violating laws that regulated the importation, transportation and dumping of toxic waste. Because these petitions were mostly ignored, they extended their campaign to include state and federal agencies like the National Commission for Human Rights and the national environmental agency. They also adopted media outlets (newspapers and radio shows) as means of creating awareness about the dumpsite. People expressed outrage because of the continued use of the facility as a site for dumping toxic waste. When Cytrar and local officials flouted a court ruling that it (Cytrar) was temporarily prohibited from accepting waste from other states, the Hermosillo movement organized a human blockade of the Cytrar facility on January 30, 1998 in order to try to shut down the dump. One of the participants in the blockade was Silvina Ruiz, a 59 year-old grandmother. Richard Boren quotes her thus: “Since I’m older, maybe nothing will happen to me, but I’m afraid this toxic waste will cause my grandchildren to get sick.” She became particularly concerned when she learnt that seventeen head of cattle had suffered a mysterious death on a ranch close to the Cytrar facility. The January 30 blockade lasted for weeks. It was manned by Hermosillo residents for 24 hours a day. They lived at the blockade and at a time, a local priest offered a mass for about 300 people. The blockade did not however go unchallenged. In addition to strategies by Cytrar employees to get their trucks into the facility, early in the morning on March 5, about 150 police dislodged the protesters, clearing the way for 19 truckloads of toxic waste to gain entrance into the facility.

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209 Boren, “Hermosillo Residents Take a Stand”, *supra* note 201.


Having been dislodged, the movement set up a 24 hour permanent vigil outside the city hall. On March 14, they held a rally in the city that was attended by about 700 residents. Seventeen year old Lucia Acuna was the youngest speaker at the rally. Angry at local authorities, Boren quotes her as saying: “I want to say a few words to our authorities… It is said that everyone is the architect of their own destiny. Well, you are not letting us do that. What kind of future are you leaving us with this contaminated land?” During the vigil, the movement had petitions signed by over 30,000 Hermosillo residents. The movement that encamped in front of the city hall was dislodged on September 15 when police forcibly ended their vigil.

Alianza Civica extended their campaign to the international realm. In October 1998, some members of the group filed a petition with the United Nations Environmental Programme (UNEP). However, United Nations (UN) officials responded that the UN could not intervene in contracts between countries. The Academia Sonorense de Derechos Humanos, A.C. and Domingo Gutierrez Medevil added another international mechanism to their strategies. They filed a petition with the Commission for Environmental Cooperation (CEC), a NAFTA agency that addresses environmental issues, alleging that Mexico failed to abide by its environmental regulations. Eventually, the dumpsite was shut down in 1999, with the Government of Mexico citing several reasons discussed below, although the clean-up continued to remain an issue.

2. The ICSID Dispute

As noted earlier, Cytrar was a company incorporated in Mexico. It was owned and controlled

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213 Ibid.
216 O’Leary, supra note 199 at 5.
217 Commission for Environmental Cooperation, SEM-98-005. Two subsequent submissions were filed in 2001 (SEM-01-001/Cytrar II) and 2003 (SEM-03-006/Cytrar III). The CEC terminated all the processes. In the third process, Mexico argued that it had effectively enforced its environmental law because it refused to renew Cytrar’s operating permit due to irregularities. This action of Mexico’s gave rise to the ICSID proceedings in Tecmed v. Mexico for which Mexico was required to pay compensation to Tecmed. See <http://www.cec.org/citizen>.
by another Mexican company, Tecmed Mexico, which was in turn, owned and controlled by a Spanish parent company, Tecmed Spain.\textsuperscript{218} It was not disputed that Cytrar operated a hazardous waste landfill in the municipality of Hermosillo, Mexico.\textsuperscript{219} Rather, the dispute before ICSID arose because on November 25, 1998, the relevant government authority denied Cytrar’s application for renewal of the landfill’s operating permit.\textsuperscript{220} Tecmed Spain, as the parent company, initiated arbitral proceedings under ICSID’s \textit{Additional Facility Rules} pursuant to the \textit{Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the United Mexican States (Spain-Mexico BIT/the BIT)}.\textsuperscript{221} Tecmed Spain claimed \textit{inter alia} that the Mexican authorities’ actions violated several clauses of the BIT, that the refusal to renew the permit was effectively an expropriation of its investments, and that it was entitled to damages and compensation for its economic loss.\textsuperscript{222} Mexico disagreed, arguing that the refusal of the permit was not in the nature of an expropriation, that the claimant did not suffer discrimination, and that it was not denied national treatment.\textsuperscript{223}

\textit{Tecmed v. Mexico} is the quintessential investment dispute settlement case, raising such issues as the expropriatory effects of regulatory measures, fair and equitable treatment, the arbitrariness or otherwise of government regulation, considerations of public interest factors, whether the definition of investment includes both tangible and intangible property, and whether prior, existing and future investments qualify as covered investments. But beyond these regular considerations of dispute settlement tribunals, the \textit{Tecmed v. Mexico} tribunal offered a sustained analysis of the social pressure that occurred in Hermosillo. After engaging in an analysis of responses to the social pressure, the tribunal found that the government’s response was not proportional to the people’s needs and demands on the one hand, and a deprivation of the investor’s investment on the other hand. The decision sits on a margin between \textit{Metalclad v. Mexico} that mostly ignored the resistance question, and the ICJ’s \textit{ELSI}
Case that granted due deference to the realities of the situation that led to the investment dispute. It is not the focus of the following analysis to consider the correctness of the tribunal’s decision to award compensation for loss of the claimant’s investment. Rather, the analysis turns on the tribunal’s treatment of the grassroots activism that preceded the government’s action, which the tribunal considered expropriatory and in violation of the fair and equitable treatment provision in the BIT.

3. The Language that the Actors Adopted

In the ICSID proceedings, neither NGOs nor grassroots movements sought participatory status. Hence, the decision only affords an opportunity to assess the language of the parties to the dispute and of the tribunal. The prior discussion of the background to the dispute already provides an insight into the concerns and demands of the peoples’ groups, that is, their concern about health and environmental safety. In making its case for the alleged breaches of the Spain-Mexico BIT, the claimant raised the incidence of community pressure in Hermosillo. It alleged that the community movement opposed to the landfill, coupled with other political issues at the state and municipal levels, led to the resolution denying renewal of the permit. Its purpose in raising this issue was to politicize the resolution that denied the renewal of the permit. However, it provided an avenue for the discussion of the pressures, allowing glimpses of tribunals’ assessment of such issues within the investment dispute settlement realm. In trying to separate the resolution from political considerations, Mexico contended that the resolution was an exercise of a control measure in a “highly regulated sector,” which was “closely linked to public interests,” and an exercise of its “police power within the highly regulated and extremely sensitive framework of environmental protection and public health.” It asserted that it acted within its obligations in the BIT in relation to the claimant’s investment, in view of social pressures, and also sought to find solutions to the problems resulting from these pressures.

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224 Ibid. at paras. 42-43.
225 Ibid. at para. 46.
226 Ibid. at para. 97.
227 Ibid. at para. 50.
Given the principle that the mandate of an arbitral tribunal is limited to disputed issues that the parties specifically submit to the tribunal, the parties’ pleading of community pressure was necessary for the tribunal’s pronouncement on the issue.\(^{228}\) The principle does not, however, curtail tribunals’ power of interpretation on issues that they have jurisdiction over. It was in the exercise of this interpretative authority that the tribunal addressed the impacts of the public opposition to the landfill, categorized the movement in opposition to the landfill as political, deemed the social pressure as insufficient to amount to a “genuine” social crisis, and distinguished *Tecmed v. Mexico* from the *ELSI Case*. The decision demonstrates that to construct arbitral tribunals as private dispute settlement mechanisms that have no substantial ability to shape the development of international investment law is to turn away from the analysis they engage in and deny that they have a significant impact on peoples’ lives and livelihoods.\(^{229}\)

The contested resolution refused renewal of the permit on several grounds including environmental considerations.\(^{230}\) The claimant successfully contended that one of the grounds, the violation of some conditions of its permit, had been addressed by another Mexican authority, which only required the claimant to pay a fine.\(^{231}\) Mexico also conceded that one of the five factors that had significant effects on the resolution was “the risk that community pressure might increase if operation of the landfill continued.”\(^{232}\) Despite its later holding that the protests were insufficiently serious, the tribunal noted that the “community’s opposition to the Landfill, in its public manifestations, was widespread and aggressive, as evidenced by several events at different times.”\(^{233}\) In addition, a relocation of the landfill was also contemplated because of the growing concerns about environmental safety, in view of the rapid growth of the Hermosillo municipality. The tribunal mostly ignored this consideration

\(^{228}\) *Ibid.* at para. 56.

\(^{229}\) In his dissenting opinion in the ICJ’s *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* 1996 I.C.J. 95, Judge Weeramantry adopted an approach that emphasized the significance of legal rules and the consequences for the case before the Court. By addressing the impacts of nuclear weapons, related applicable laws, and the multicultural and ancient backgrounds of the laws of war, he interpreted international law in a manner that took the consequences of the legal rules for humanity into account.


\(^{231}\) *Ibid.* at para. 100.


focusing on government reports that the landfill did not compromise ecological stability. However, as demonstrated in the discussion of the background to the dispute, there were unaddressed environmental issues that the community groups sought to address through their activism.

In spite of their disagreements in this case, the parties and the tribunal agreed that Cytrar was to relocate the landfill due to the protests, with the latter agreeing to incur all the costs necessary for such relocation, although the relocation was not carried out before the dispute arose. Undoubtedly, the Mexican authorities and the claimant would not have subscribed to such proposed action had the protests not been sufficiently serious to warrant some response and one as drastic as abandoning the contentious landfill site for another. In fact, discussions on the relocation continued after the permit was denied, at least, during January 2000. But at the time of the ICSID arbitration, such discussions had ceased. However, this chapter is not concerned with the party who bears fault for the failed relocation; it focuses on the tribunal’s assessment of the protests and their impact, and on the law and politics tension inherent in the decision.

In consonance with the practice of many arbitral tribunals, the tribunal focused on the resolution’s legality in light of the BIT. It noted that it found no principle that states’ regulatory and administrative actions per se are excluded from the scope of BITs. This remains so even if the actions are beneficial to society as a whole, particularly if they have negative economic impacts on the financial position of the investor. While this seems to be the prevailing position in international investment law on the balancing of public interest and investors’ economic interests, from a public interest perspective, it is difficult to conceive that the interests of millions of people can be supplanted for any reason. The tribunal recognized the impacts of its sweeping comment above. As such, it argued that even where

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234 Ibid. at paras. 110 & 124.
235 Ibid. at para. 110.
236 Ibid. at para. 143.
237 Ibid. at para. 121.
238 Ibid. at paras. 120-21.
regulatory measures are beneficial to society as a whole, they will not be excluded from the definition of expropriatory acts. And in order to determine whether they are in fact expropriatory, it is necessary to consider whether such measures are proportional to the public interests “presumably protected” and to the “protection legally granted to investments.”

Hence, the tribunal realized the need to balance the public interest with investors’ commercial interests. However, in engaging in this analysis, the tribunal adopted a perspective that downplayed the significance of peoples’ voices in these matters, foregrounded the political nature of the protests, and interpreted the resolution as a response to political circumstances, and contrary to the BIT. The politicization of the resolution and the protests was germane to the tribunal’s conclusion. However, that there were undoubtedly socio-political considerations involved in issuing the resolution does not necessarily imply that the resolution itself was inequitable, especially given the resolution’s outlined statute-based rationale for its conclusions, separate from the social pressure.

In addressing the issue of proportionality, the tribunal opined that the relevant political circumstance was the community pressure. It sought to assess the resolution’s proportionality to such pressure and to the “neutralization of the economic and commercial value of the claimant’s investment.” The tribunal adopted the position that the resolution was driven by socio-political circumstances and not the “protection of the environment, ecological balance and public health.” By arriving at this decision, the tribunal went beyond the text on the face of the resolution to consider the factors that influenced the resolution’s issuance. This was in line with its earlier statement that although it would accord due deference to the state’s ability to define its public policy and societal interests, this does not prevent it from examining the state’s actions in light of the BIT to determine “whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation.” In essence, for the tribunal, the “mischief” that the regulatory measure sought to “cure” was a socio-political circumstance, which was

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240 Tecmed v. Mexico, supra note 14 at para. 122.
241 Ibid. at para. 128.
242 Ibid. at para. 129.
243 Ibid. at paras. 122, 128-32.
244 Heydon’s Case 3 Co. Rep. 7a (1584); 76 E.R. 637. See also Smith v. Hughes (1960) 1 W.L.R. 830.
unacceptable in light of the BIT. 245 In this light, one counsel interviewed for this thesis noted that tribunals will consider issues of social pressure depending on how the pressure is presented, noting that Mexico did not make a strong case even though the social pressure was a reality. 246

In the tribunal’s view, the resolution was not proportionate to the community pressure that it sought to address because such pressure and its consequences were not large enough to lead to “a serious emergency situation, social crisis or public unrest, in addition to the economic impact of such a government action, which in this case deprived the foreign investor of its investment with no compensation whatsoever.” 247 Although the tribunal had referred to the protests as “widespread and aggressive”, 248 in its opinion, considering the proportionality between the protests and the resolution, the protests did not give rise to a “serious urgent situation, crisis, need or social emergency.” 249

4. Analysis of the Case/Conclusion

The Tecmed v. Mexico decision is a detailed one that provides material for the purpose of analysis. Several questions arise from the tribunal’s decision. First, what qualifies as a “genuine social crisis”? Second, which is relevant – the qualitative nature of the protests or their quantitative strength? In its analysis of the second question, which runs through a significant portion of the decision, the tribunal adopted the latter option. The tribunal was of the opinion that no matter how “intense, aggressive and sustained,” the protests were not “massive” because they represented the position assumed by some individuals or members of some groups. 250 The tribunal stated that at no time were the protesters more than 400 people strong, and although the series of events “amount to significant pressure on the Mexican

245 Contra S.D. Myers Inc. v. Government of Canada, (2001) 40 I.L.M. 1408 para. 255, (noting that Canada’s indirect motive of ensuring the economic strength of the Canadian industry was understandable, although its methods contravened its international obligations under the NAFTA.)


247 Tecmed v. Mexico, supra note 14 at para. 133.

248 Ibid. at para. 108.

249 Ibid. at para. 139.

250 Ibid. at para. 144.
authorities, [they] do not constitute a real crisis or disaster of great proportions, triggered by acts or omissions committed by the foreign investor or its affiliates.”

Here, the tribunal combined the question of the seriousness of the protests with the party responsible for the actions that triggered the protests. While this might be relevant for other analyses, the question of responsibility is mostly irrelevant to the seriousness of the community pressure. Even if responsibility were relevant, one would be reading out relevant facts to assume that Mexico was solely responsible for the actions that triggered the protests because it located the landfill in such close proximity to an urban center. The community pressure also challenged the claimant’s transportation of hazardous waste, in addition to the landfill’s proximity to the municipality.

As well, the quantitative approach does not adequately capture the sustained public manifestations of the community pressure. In the tribunal’s rendition of the events that occurred, in November 1997, Hermosillo’s Alliance for Civic Affairs publicly denounced the acts and omissions relating to the transportation of the waste. At approximately the same time, about 200 people organized a demonstration, marched to the landfill, and “symbolically” closed it down. Subsequently, community organizations had a meeting with government authorities at all levels. In December 1997, the Sonora Human Rights Academy filed a criminal complaint against Cytrar, claiming that Cytrar had committed “environmental crimes.” In January 1998, members of the community organized a blockade of the landfill. Community organizations then held a sit-in at the town hall lasting 192 days. In September 1998, the Association of NGOs against Cytrar filed a human rights claim before the

251 Ibid.
252 Tecmed v. Mexico, supra note 14 at para. 108. Here, the tribunal noted that some of these events were serious enough to trigger police action.
253 Ibid. at para. 108. The Alliance for Civic Affairs also requested the suspension of Cytrar’s permit to operate a landfill.
254 Ibid.
255 Ibid.
256 Ibid.
257 Tecmed v. Mexico, supra note 14 at para. 108. The blockade lasted until March when the police intervened acting under orders of the Attorney General’s Office.
258 Ibid.
State Commission of Human Rights against the authorities for ending the town hall sit-in.259 Finally, in October 1998, there was a “family demonstration for the defense of health and dignity” against the landfill.”260 Yet, from the tribunal’s perspective, the protests were not massive enough to be considered a “genuine social crisis.” The Cochabamba protests that led to the AdT v. Bolivia dispute began in similar fashion. The situation that eventually amounted to a “genuine social crisis” started out as pockets of Cochabamba residents contesting unfavourable investment activities. The fact that there were 400 protesters at a time in Hermosillo does not imply that they did not represent the popular view.

In its assessment of the nature of the community pressure, the tribunal distinguished Tecmed v. Mexico from the ELSI Case, reasoning that “there are no similar comparable circumstances of emergency, no serious social situation, nor any urgency related to such situations, in addition to the fact that the Mexican courts have not identified any crisis.”261 In the ELSI Case, the ICJ made a finding of serious emergency and social crisis due to the fact that approximately 1,000 people would have lost their jobs. The job losses would have been devastating for the workers and their families. There is no record in the ELSI Case of any protests beyond strikes and the barricading and occupation of the plant in question. Therefore, the ELSI Case is not particularly apposite for use as a yardstick for measuring the seriousness of social pressures and to arrive at the conclusion that there was an absence of a genuine social crisis in Hermosillo. Contrary to Tecmed v. Mexico, there seems to be a continuum of social crises. The location on that continuum relative to other crises should not diminish the genuine nature of a crisis. Even though the social situation in the ELSI Case was arguably not as pronounced as that in AdT v. Bolivia, it was accorded the status of a serious emergency and social crisis. In determining proportionality, as the tribunal sought to do in Tecmed, it is a serious and arduous task to seek to quantify peoples’ suffering, the strength of their opposition, and the impact of their voices.262

It appears that a major challenge for the tribunal in Tecmed v. Mexico was the delicate

259 Ibid.
260 Ibid.
261 Ibid. at para. 147.
262 See Baxi, supra note 5 at xv-xviii, 26-27, 47-50.
balancing and characterization of the issues as either legal or socio-political. Adopting a depoliticization of the law approach in this case, it seemed convenient to construct the relevant issues and surrounding circumstances as socio-political. By this characterization, it was easy to dispose of the resolution and the issues that it sought to address as outside the scope of the “legal” where investment arbitration is located. The tribunal expressed this view when it stated that:

[T]he refusal to renew the Permit in this case was actually used to permanently close down a site whose operation had become a nuisance due to political reasons relating to the community’s opposition expressed in a variety of forms, regardless of the company in charge of the operation and regardless of whether or not it was being properly operated.263

The tribunal addressed the community protests in a manner that suggests that law does not interact with political issues, thereby presenting a false dichotomy between legal and socio-political issues.

The Tecmed v. Mexico tribunal’s discussion of the socio-political dimensions of the case is reminiscent of and constitutes a re-enactment of the “law” and “politics” tensions of the Libyan oil nationalization cases.264 In a sophisticated rereading of the nationalization cases, Amr Shalakany notes that Libya lost the cases not because what it did was illegal, but because it engaged in a political act.265 Whereas Professor Dupuy refrained from explicitly considering the motives that drove the adoption of Libya’s nationalization Decrees in Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic,266 in the earlier BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic Arbitration, the sole arbitrator, Judge Gunnar Lagergren, noted that the taking of BP’s property “clearly violates public international law as it was made for purely extraneous

263 Tecmed v. Mexico, supra note 14 at para. 164.
264 See e.g. Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic (1979) 53 I.L.R. 389 [Texaco Arbitration].
265 See Shalakany, supra note 88 at 455-56, 461.
266 Texaco Arbitration, supra note 264 at 479. The tribunal stated that the plaintiff’s contention was that the government did not act within the general interest but was “motivated by political considerations.” It continued that given “the conditions under which this Tribunal was required, in view of the default of the defendant, to deliver its award and the resulting impossibility of having an opposing statement as to the facts of the case, the Tribunal does not wish to rule on this question of fact.”
The political motivations for Libya’s nationalization are distinguishable from the nuanced tensions that occurred in *Tecmed v. Mexico*. In fact, in the *BP Arbitration*, there were citations to explicit admissions by the Libyan government that the nationalizations were meant as retaliations for Britain’s actions in the Persian Gulf.268 In *Tecmed v. Mexico*, the resolution was informed by wider public interest, was not retaliatory, and was not an abuse of power.

These law/politics tensions become especially vivid in *Tecmed v. Mexico* when ICSID’s background premise on liberal and positivist assumptions of clear dichotomies between the public (state intervention) and the private (foreign investment), and politics and law respectively, are taken into account. As discussed earlier, one of the purposes of ICSID is the depoliticization of investment disputes. However, the subtle form of depoliticization that occurred in *Tecmed v. Mexico* involved a separation of law from its socio-political, economic and cultural background and ramifications. It was not necessarily depoliticization in the context of excluding diplomatic protection of investors by their home states, but a depoliticization of the law itself. By such expressions of legality, the law is presented as neutral and capable of universalization – an expression which in itself is a political act that renders issues that are important to some irrelevant in international fora. In addition to a preference for a depoliticized public/private divide, *Tecmed v. Mexico* also demonstrates a preference for institutionalized forms of engagement and a less robust construction of the constitution of state parties to disputes.

To reiterate, the argument advanced in this chapter focuses on the importance of recognizing that law is not as neutral as it is sometimes projected to be. Law cannot be divorced from its socio-political environment, especially when an interactional perspective that includes a broad range of actors is adopted. However, this does not imply that tribunals should abandon the application of legal rules or principles, or deliberately supplant certainty for indeterminacy, where the former can be reasonably attained. And maintaining certainty does not imply the exclusion of legal considerations like principles of equity. In this vein, some ICJ as well as


268 *BP Arbitration*, ibid. at 315-316.
some recent investment arbitration cases infuse equitable considerations into their discussions. As the Chamber of the ICJ noted in the *ELSI Case*, “[i]t was . . . understandable that the Mayor, as a public official, should have made his order, in some measure, *as a response to local public pressures.*”269 In the *Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application, 1962) (Belgium v. Spain)*, in his separate opinion, Sir Gerald Fitzmaurice referred to “the place of equitable considerations in the international legal field, and the growing need there for a system of Equity.”270

Earlier ICSID cases were quite strict about applying principles of equity. In *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon & Société Camerounaise des Engrais (Klockner v. Cameroon)*, the initial tribunal sought to apply equitable principles like frankness and loyalty in its examination of the relationship between the state and a foreign investor.271 The *ad hoc* committee that annulled the award in its entirety held *inter alia* that the initial tribunal failed to correctly apply the law of Cameroon to the dispute.272 It concluded that the tribunal exceeded its powers because the tribunal applied equitable concepts and principles that were outside the scope of the applicable law.273 Apart from the economic development dimension of the case that was discussed in chapter five, one of the major lessons of *Klockner v. Cameroon* is that investment arbitration can be acutely legalistic, largely precluding the application of equitable principles. And if principles of equity are to be applicable, they have to be founded solidly on the applicable law and explicitly substantiated, even where that would not be necessary for other legal principles.

In more recent decisions, considerations of equity have become valid in arbitral tribunals’ decisions. In *American Manufacturing & Trading, Inc. v. Republic of Zaire*, equitable principles were adopted in favour of the foreign investor’s position.274 The tribunal found that

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269 *ELSI Case*, supra note 15 at para. 126 (emphasis added).
270 *Barcelona Traction Case*, supra note 1 at 65. See also paras. 92-101 (pages 48-51) of the main judgment.
based on “practical reasons founded on equitable principles,” Zaire, now the Democratic Republic of Congo, had the duty to compensate the claimant for losses suffered due to the acts of violence of Zairian armed forces. Another case, World Duty Free Co. Ltd. v. The Rep. of Kenya (World Duty Free v. Kenya), is often cited as an example of a successful application of the principles of equity. In World Duty Free v. Kenya “international public policy” principles were applied when examining charges of bribery against the claimant foreign investor, which had a Middle Eastern alter ego.

Essentially, regulatory measures adopted in response to social pressure are not necessarily legitimized by the interaction of popular will and government action, especially where international rules are involved. However, positions that exclude peoples’ engagement with investment law and reads them out of its realm should be avoided when settling foreign investment disputes. Like other actors, these peoples’ groups have particular perspectives to contribute to the development of the law. As the ICJ decision in the ELSI Case demonstrates, governmental action in response to social pressure may not be arbitrary, although by an interpretation of many IIAs in force, it may be expropriatory. That an action is interpreted as expropriatory, or in violation of other standards when measured against an investment treaty, does not imply that such action taken in the face of public opposition to investment activities is unreasonable, illegitimate, or representative of a significant departure from the norms of law making.

In sum, the likely practical effects of Tecmed v. Mexico are significant. It could stifle government responses to the genuine concerns of its citizens. Further, it could preclude states from advancing public interest arguments for fear of being accused of engaging in political

275 Ibid.
276 World Duty Free Co. Ltd. v. The Republic of Kenya (ICSID Case No. ARB/00/7), (2007) 46 I.L.M. 339. See also Inceysa Vallisoletana S.L. v. Republic of El Salvador (ICSID Case No. ARB/03/26) (Award of August 2, 2006), where the tribunal refused to assume jurisdiction based on an interpretation of a clause in the BIT that required that investment be carried out in accordance with the law and other general principles like good faith, on the ground that the claimant had engaged in fraudulent practices.
277 Ibid at paras. 138-57.
278 While social pressure is generally unacceptable, writers adopt the view that in some limited instances, environmental regulation will not be considered as regulatory taking. See Thomas Walde & Abba Kolo, “Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law” (2001) 50 Int’l Comp. L.Q. 811.
acts, thereby obscuring the reasons for decision-making. In the latter instance, it may become impossible to glean ICSID tribunals’ responses to, and engagement with, the reality of peoples’ concerns. Similarly, it may become difficult to identify the effects of this interaction on the international law of foreign investment. Essentially, *Tecmed v. Mexico* reveals a disciplining of the administrative procedures of a Third World state, a decision on what constitutes (un)reasonable reasons for adopting administrative decisions, a preference for technical decision making divorced from socio-political considerations, and a good governance mechanism in action in investment law. Yet some suggest that the tribunal was somewhat sympathetic to the social pressure in this case. For example, one counsel interviewed for this thesis suggested that even though Mexico was found liable, the tribunal appeared sympathetic to its position because it awarded about ten percent of the amount that was claimed.279 But this might not be a particularly helpful approach if a decision that has the potential to serve as (non-binding) precedent politicizes regulation that responds partly to social pressure only to compensate for that position in its award of damages.

Beyond the likely practical effects of *Tecmed v. Mexico*, it has potential positive impacts, even though the situation is not optimal. First, *Tecmed v. Mexico*’s discussion of social pressure represents a more engaged discussion compared to *Metalclad v. Mexico*’s near zero engagement with the issue and *AdT v. Bolivia*’s negligible mention of the movement that was the determining factor behind the dispute.280 *Tecmed v. Mexico* demonstrates that it is possible to discuss peoples’ engagement with the law when settling investment disputes. Second, although not entirely convincing, the tribunal seemed inclined to give effect to regulatory measures adopted as responses to social protests if the measures are proportional to the seriousness of the social crisis and the investor’s loss. If investment law could get past the measurement of “serious” social crises, there is some potential that ICSID tribunals could read peoples’ interactions and the law derived from such interaction as part of the growing body of international investment law. In the process, a legal system that is sensitive to the positive and negative impacts of investment activities could develop.

280 As previously noted, the *AdT v. Bolivia* decision was a decision on jurisdiction and the stage of the decision before it was discontinued might have informed the tribunal’s response.
Legal principles, on the one hand, teach that it could be counter-productive to suggest that tribunals should as a first course of action, supplant certainty for indeterminacy. On the other hand, studies demonstrate that while it is important to strive for predictability, it is equally pertinent to acknowledge that legal neutrality might in many instances, be a myth; and that if a separation of law from its socio-political backgrounds represents sophistication, the law – even international economic law that seeks to project objectivity – has not attained that form of sophistication. Social pressure plus government action does not always translate to legitimacy. In the same vein, adopting strategies that preclude and exclude peoples’ engagement with investment law is unhelpful for the development of a robust international investment regime.

V. Conclusion – Summary of the Chapter’s Arguments

As this thesis suggests and as scholars that work in the Third World Approaches to International Law (TWAIL) tradition have demonstrated, the Third World transcends the developing state; it is the subaltern voice within such states. Thus, Third World resistance transcends governments’ resistance. It necessarily involves peoples’ resistance. In a TWAIL constructivist interpretation of investment dispute settlement, Third World peoples and groups form part of a robust formulation of the international law on foreign investment. However, ICSID, like many international institutions, is not the most hospitable place for Third World communities of resistance. Third World communities may have begun to capture the attention of the World Bank and the WTO (after the Seattle protests of 1999) even though this attention has not produced significant changes. However, given their quasi-judicial nature, institutions like ICSID that serve as the final arbiter in many investment disputes are mostly insulated from the views of Third World peoples and from the relatively slow progress made in other areas of international law. Although not much interest has turned to the position of Third World peoples in this realm, cases like AdT v. Bolivia and Tecmed v. Mexico provide a lens with which to address the interaction of Third World peoples with international investment law.

In seeking to deal with Third World communities, tribunals have adopted the technologies of

institutionalization, focused on a technical approach to statehood, and have often read the law as apolitical. As this chapter has demonstrated, notwithstanding the troubled history of the Third World’s engagement with the international law on foreign investment, ICSID tribunals have proceeded from near zero mention of peoples’ involvement in the crises that sometimes trigger investment disputes in some cases to the detailed analysis in *Tecmed v. Mexico*. Despite its imperfections, *Tecmed v. Mexico* represents a significant engagement with the activities of Third World peoples in ICSID jurisprudence. It could signal the beginning of an era where peoples’ concerns and activism come to light in investment dispute settlement. Before this time, peoples’ concerns were largely ignored in the history and the picture of investment dispute settlement. Through jurisprudence that discuss peoples’ involvement and place in the international investment order (even in ways that seek to banish them from the legal realm), they unexpectedly acquire a voice in investment disputes. For it is impossible to address what is ignored, but acknowledgement of an issue, occurrence, or people, empowers in one way or another.

As long as international actors perpetuate the current structure of investment dispute settlement, lawyers must seek to become more sophisticated in including peoples’ concerns in their legal arguments, and carefully couching their positions in legal terms and language. Tribunals have an even greater responsibility to interpret the law in a manner that directly incorporates the perspectives and interests of Third World peoples, along with those of foreign investors and states. If lawyers and tribunals follow this path, we may begin to witness the first sightings of robust international rules on foreign investment. Furthermore, the ICSID system’s place in such reconstruction cannot be ignored. Its contribution to the reconstruction is informed and driven by the activities of Third World peoples in the system that dispute settlement tribunals often avoid referencing, but which nevertheless, shape tribunals’ decision-making. The concluding chapter provides an assessment of the contributions of the interaction between Third World peoples and the ICSID system.

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282 See the discussion in Part III(B), section 4 of chapter five.
CHAPTER 7: CONCLUSION – ENVISIONING A ROBUST INVESTMENT DISPUTE SETTLEMENT SYSTEM

I. Introduction

Investment dispute settlement has been a narrowly constructed area of the law. This thesis has sought to incorporate Third World peoples within this realm. Throughout the chapters, it became clear that what an interactional legal perspective requires is a fundamental rethinking of the corpus of investment dispute settlement, and by implication, international investment law. But in engaging in this task, one could legitimately ask the following questions: When we talk about reconstructing the ICSID system, do we not have to fundamentally rethink the dispute settlement structures since the idea of international investment dispute settlement developed on the basis of an ideological strand which we now contest? Can we fundamentally rethink the system without rejecting the very essence of investment dispute settlement? How does one negotiate the relationship between critique and change? Does critique logically lead to an abyss or can we engage in reconstructive criticism? Is there room for mutual co-existence, as ICSID’s founding documents suggest?

Herein lies the challenge of Third World Approaches to International Law (TWAIL) scholarship. While TWAIL critiques the international legal system and sometimes considers it illegitimate, TWAIL scholarship retains some hope in the ability of a reconstructed international system to provide a just legal order for the Third World. In the second chapter of this thesis, I argued that international law is Janus-faced. While it sometimes perpetuates conditions of injustice, it simultaneously presents opportunities for the marginalized, even if such opportunities are small in many cases. Thus, proffering alternatives to the current construction of the international legal order is appropriate. A robust approach to investment dispute settlement that incorporates the perspectives of Third World peoples in addition to the more established actors is one way to rethink the system that has prevailed for a long time. It presents opportunities to ensure justice for actors that have not been adequately incorporated

* A version of the norm-level analysis in investment dispute settlement presented in part II of this chapter was originally published in Ibironke T. Odumosu, “Locating Third World Resistance in the International Law on Foreign Investment” (2007) 9 International Community Law Review 427. Some of the themes expressed in that article have been broadened and articulated in this thesis.
within the investment dispute settlement system. Such robust construction might lead the system in directions that we have not begun to contemplate.

While it critiqued the investment dispute settlement system, this thesis has suggested that it is possible to accommodate diverse and sometimes conflicting interests within ICSID’s dispute settlement mechanism. Although incorporating descriptive and prescriptive elements, this work has been mostly analytical. While some pessimism has been unavoidable, the thesis has adopted an optimistic view of the prospects of reconstructing the investment dispute settlement system. It is undeniable that states need to take a leading role in driving part of the changes. However, as long as states continue to perpetuate the current system, it is necessary to seek ways of making the most of the system. As such, in the absence of grand reconstructive projects, interactions within the system and a robust approach to the construction of actors and interests that takes resistance seriously facilitates changes. The mutually constitutive interactions between the diverse actors and the dispute settlement system allow us to re-imagine alternatives.

The first chapter of this thesis was an introduction to issues that this thesis has addressed. It outlined the research problems and questions and also offered statements of hypotheses that I have worked with. The chapter also set out the methodological and theoretical approaches that the thesis adopts. The theoretical approach was comprehensively analyzed in chapter two. Drawing insights from TWAIL and constructivist international relations theory, that chapter developed a version of the interactional legal perspective that I refer to as TWAIL constructivism. This perspective is particularly apposite because of its ability to engage with the international legal order in a manner that is not state-centric and takes Third World peoples’ concerns seriously. It is cognizant of the way in which history, actors’ identities, and several forms of power relations, affect actors’ place and interests in the international system. While not dangerously idealistic, TWAIL constructivism engages with the ideas that drive the international legal system and the manner in which “intersubjective beliefs” or socio-legal norms develop. It emphasizes actors’ agency and the strategic interactions that they engage in, in the international system, and how the strategies that they adopt constitute the international system.
Chapter three provided a background to the ICSID system with a particular focus on states and foreign investors. It adopted a historical approach that demonstrated the manner in which colonial history and the events that occurred around the time that ICSID was established shaped the development of the institution. It argued that these events contributed to a neo-liberal and positivist understanding of investment dispute settlement. The chapter discussed the ambivalent relationship that has existed between ICSID and some Third World states and concluded with some preliminary recommendations for a balanced dispute settlement system.

In its focus on international investment agreements (IIAs), chapter four adopted a TWAIL constructivist perspective on the ideational backgrounds of IIAs. These treaties provide written consent to submit disputes to ICSID tribunals. They articulate standards by which states’ actions vis-à-vis foreign investors are interpreted. These standards remain relevant in cases where states adopt measures that have significant impacts on their peoples. Hence it was necessary to spend some time analyzing these treaties in a work that addresses the relationship between ICSID dispute settlement and Third World peoples. The chapter analyzed the relationship between ideas and the interaction of actors with the international law on foreign investment. It critiqued the ideologically biased approach to investment treaties and suggested that historical dichotomies in relationships facilitated the conclusion of the prevalent kind of IIAs. That chapter argued that an interactional perspective that incorporates the interests of both traditional actors and Third World peoples finds these agreements unsatisfactory and suggested that more inclusive agreements will facilitate the development of a more robust system.

Chapter five extended the discussion to more concrete examples of the contribution of Third World peoples to the dispute settlement system. It discussed the adoption of strategic discourses within the system and ICSID tribunals’ responses to these discourses. For reasons enunciated in chapter five, it focused on economic development and emerging concepts like human rights and sustainable development. Using the Argentine socio-economic crisis as its study, the chapter demonstrated that the activities of Third World peoples have contributed to the incorporation of the latter concepts as appropriate subjects of discussion before ICSID tribunals. It concluded that the discourse of development has not found a comfortable place in
the decisions of ICSID tribunals and alternative discourses may be more apposite in addressing the perspectives and interests of Third World peoples in this realm.

Chapter six analyzed Third World peoples’ modes of interaction with the investment system and tribunals’ treatment of these methods of engagement. It discussed some of the strategies – institutionalization, the politics of representation, and alternative readings of depoliticization – that have been adopted to exclude Third World peoples’ resistance from investment dispute settlement. Even though the hypothesis seemed bleak, the chapter concluded that there may be a place for robust consideration of Third World peoples’ perspectives in investment dispute settlement. The chapter and the thesis argue that irrespective of the treatment that they receive – favourable or otherwise – once tribunals begin to engage with Third World peoples’ resistance, these actors and their resistance become constitutive of the dispute settlement system. Thus, it is not only the dispute settlement mechanisms that impact on the lives of Third World peoples, the activities of these peoples also shape the realm of investment dispute settlement.

This thesis has demonstrated that many of the changes in investment dispute settlement are still driven by traditional actors. Nevertheless, Third World peoples have begun to contribute (limited) perspectives to the new phase of investment arbitration. However, tribunals have resisted the formal contribution of this latter category of actors to the international law on foreign investment. Tribunals confine peoples’ activities to the realm of politics and exclude their formal participation through the norms of interaction that are developing. Still, it is undeniable that Third World peoples make modest contributions to the reconstruction of investment dispute settlement. Without including them in the agenda, a robust assessment of the investment dispute settlement system will be incomplete. Even though the hypotheses are often bleak because of the power challenges that it addresses, the TWAIL constructivist perspective is reconstructive. As such, it is hopeful. The final two parts of this chapter discuss the categories of norms that have developed from the mutually constitutive relationship between traditional actors, Third World peoples, and the ICSID system; and some emerging re-readings of rights and obligations within the investment dispute settlement order.
II. The Politics of Alternative Norms: The Contributions of Third World Peoples

One of the major points that this thesis has engaged with is the social promotion and legitimization of legal norms. Dispute settlement cases involve some form of contestation or promotion of norms by the parties involved. These forms of contestation and promotion are situated within existing delineated contexts, frameworks and boundaries. Dispute settlement institutions expect parties to the dispute and other actors like domestic activist groups to frame issues or engage in “strategic socio-legal construction” based on existing boundaries and strategies. Those boundaries have been discussed throughout this thesis and the strategies include the technologies of investment arbitration discussed in chapter six. These boundaries and strategies determine the principles that may metamorphose into regulatory norms in the international investment order. For example, an approach to law and legal reasoning that reads depoliticization of disputes as apoliticalization of the law suggests that legal positivist approaches would be more readily embraced than other perspectives. In spite of the adoption of mechanisms that have sought to exclude them from the investment dispute settlement system, Third World peoples have fostered alternative readings of the development of norms in investment dispute settlement.

The prevailing technologies of investment dispute settlement permit actors to adopt language and strategies considered as ‘acceptable’ in the international order. Because the identity of actors sometimes defines the strategies that they adopt, this positioning is unfavourable to Third World peoples. While states and foreign investors have mostly remained within traditional discourses, Third World peoples broaden the discussion to include perspectives that are wider than the system traditionally contemplates. Because of the boundaries and technologies that prevail in investment arbitration, if Third World peoples’ movements are to encounter success within the system, they might need to partner with domestic and, often, international NGOs. While this is a plausible course of action that has been adopted in some instances, due to the limitations of the NGO movement discussed in chapter six, the option is

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not always feasible. In addition, such networking will not exclude the apoliticization hurdle where the government has acted in response to domestic resistance. Nevertheless, transnational coalitions have proven more successful within this framework, for example, in their contributions to the pressure that preceded the settlement of the dispute in *Aguas del Tunari, S.A. v. Republic of Bolivia (AdT v. Bolivia).*\(^3\) However, by themselves, transnational NGOs cannot achieve the purposes that grassroots movements initially seek to achieve. While transnational coalitions exerted pressure that contributed to the settlement, the cancellation of the concession contract that triggered the *AdT v. Bolivia* dispute is testament to the fact that domestic movements are a relevant force in the international investment order. However, their ability to influence the development of norms in this system is limited given investment law’s attitude to their resistance.

Norms and norm-building in investment dispute settlement exist on several levels. For the purpose of the interactional approach that this thesis adopts, these norms may be divided into three levels – norms of participation, norms of interaction and regulatory norms. The norms exist on a continuum. At one end of the continuum are norms that determine participants and level of participation and at the other end are substantive regulatory norms, while rules of engagement are located between both ends. The continuum flows from the level at which the law contends with Third World peoples’ resistance (norms of participation) to the level at which activist groups seek to operate (regulatory norms). These categories of norms assume a particularly vivid position when Third World peoples are included in the analysis in the investment dispute settlement system. They are generated by the interactions of traditional and non-traditional actors with the dispute settlement system, demonstrating that these actors’ interactions constitute the rules that shape the system.

*Norms of participation* identify actors that may legitimately participate in formulating or affecting the international law on foreign investment. The prevailing position relies on the three strategies of institutionalization, the politics of representation, and apoliticization discussed in chapter six. As noted, these strategies effectively determine actors that are included in or excluded from the international investment order. Since the current statement of

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norms of participation is being contested, decisive norms of participation are still emerging and the categories of participants are not closed. Clearly, the participatory status of states and foreign investors is not in doubt. Rather, the mechanisms for determining participatory status and privilege are applicable to non-traditional actors like Third World peoples. Participation in this sense does not need to involve formal participation or legal participatory status in the manner that such status applies to states and investors. It is sufficient that a tribunal may be willing or unwilling to consider the activities of actors that a party to a dispute settlement proceeding pleads, because of the actors’ identity. Tribunals’ constructions of these activities have significant impacts not only on activist groups, but also on the state parties or foreign investors that plead the incidences of resistance. These interpretative exercises in essence, have implications for a broader interactional perspective on the international law on foreign investment.

Several factors affect the development of the norms of participation. First, the identity of actors is crucial. For example, among the non-traditional actors, an actor’s identity as an expert NGO group is more appealing than an identity as a non-institutionalized activist domestic group that specifically mobilizes for the purpose of challenging unfavourable investment practices and government action. Second, the strategies that actors adopt are informative. To reiterate, usually, strategy flows from identity. Some strategies are more acceptable sometimes because those methods are employed by actors with a certain identity in the first place. It is trite that the actions of some state actors in world politics are far weightier and are of more significant consequence than those of other state actors. For Third World activist groups, the state of contention rests first in the realm of norms of participation, and then in regulatory norms. Their ability to engage with foreign investment law is curtailed by the nature of norms of participation that prevail. Nevertheless, with constant activities at the domestic level that are transported to the international realm through parties’ pleadings, it is possible that participatory norms may metamorphose to a level where the actor status of these peoples and movements are recognized. For Third World peoples, norms of participation remain a contentious site and it is one that they need to penetrate in order to effectively contribute to this area of the law. By Third World peoples’ actions on the domestic level, and the consideration of these activities before tribunals, relevant actors and by implication, norms of participation are being widened.
Norms of interaction are derived from norms of participation. These norms are also informed by the technologies of investment dispute settlement, given their close affinity to participatory norms. They develop in the interactive process between actors that are recognized participants in the foreign investment order. These norms determine the rules applicable to actors that engage with foreign investment law and participate within the investment dispute settlement system. For example, the rules applied to non-disputing parties seeking participatory privileges as amicus curiae in investment dispute settlement are approaching the stage of norms of interaction. At this level, one finds a sharp contrast between actors in the non-traditional actors’ category. A major rule that separates these actors is the criterion of expertise, which usually resides within NGOs’ domain. In order to participate as non-disputing amicus curiae, petitioning Third World peoples groups would be subjected to the same norms of interaction as NGOs. Thus, if AdT v. Bolivia were to be decided at this time, these rules would be applicable to the petitioning groups. Rules of engagement that apply to states and foreign investors, for example, the ICSID Arbitration Rules or the UNCITRAL Arbitration Rules, are also norms of interaction. These rules of engagement might also apply to agreement negotiation, but are more visible in investment dispute settlement. In negotiation, governments may consult domestic communities but this is not necessarily a rule that flows directly from the norms of interaction in the international law on foreign investment. It may operate as a discretion or as part of the domestic laws of a jurisdiction. Actors to which institutionalized rules of interaction are applicable are those that are deemed to be legitimate participants with legal status in the international investment order. They may participate in shaping the regulatory rules applicable in the foreign investment order.

Regulatory norms and the ability to contribute to their construction are the target of all actors in the international investment system. These norms primarily dictate the substantive rules that define the roles, rights, duties, limitations, and liabilities of actors in this system. In their activities, domestic movements proceed directly towards this level of norms by protesting, challenging, or sometimes reinforcing regulatory norms; whereas, dispute settlement tribunals mostly engage these actors at the level of participatory norms. NGOs often engage at all levels

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of norms, and it does not require much analysis to suggest that regulatory norms are the *forte* of the traditional actors.

Because domestic movements lack formal participatory status, the law’s engagement with them is incidental to the determination of other issues. For these movements, the aim is to construct regulatory norms in a manner that incorporates their perspectives. This aim represents the source of the contention that is the subject of resistance activities. The contention is pronounced given that the technologies that determine participatory status also inform substantive regulatory norms. Thus, a preference for institutionalization dictates the development of substantive rules that apply to actors as institutionalized entities to the exclusion of grassroots movements. A preference for a technical construction of statehood is more amenable to the development of rules that are state-centric and not people-centered. And an apolitical legal regime presents a false public/private dichotomy that reads grassroots resistance out of its realm. In their interactions with the system and by each act of resistance, grassroots movements simultaneously situate themselves within both participatory and regulatory norm levels. While the investment dispute settlement system still grapples with participatory norms with regards to grassroots resistance, communities of resistance contest, challenge, or in some instances, reinforce some substantive regulatory norms.

As this thesis has demonstrated, resistance shapes the international law on foreign investment. Many states contest the projection of some rules on expropriation, establishment of investment, or sometimes, an issue as fundamental as the definition of investment, as regulatory norms. Public interest NGOs try to steer the course of foreign investment law towards the humanitarian norms that garnered considerable attention in the second half of the 20th century. Resistance from domestic activist groups has been the most problematic because of their lack of formal participatory status or privileges. This position is created and reinforced through the technologies of investment arbitration. The technologies themselves appear to be a case of resisting resistance. The struggle to reconstruct international investment law manifests essentially as a battle over meanings. In that battle, some strategies prevail above others. As a result, norms of participation retain an important position that actors cannot take for granted or gloss over in order to access regulatory norms. Because domestic activist groups lack participatory status in the international investment order, and are usually incorporated into the
international realm through parties’ pleadings before investment dispute settlement tribunals, there remains a dire need for state support in order to forge dispute settlement tribunals’ acceptance of these groups’ frames. Such support is necessary, at least, for as long as norms of interaction do not adequately incorporate Third World peoples’ groups. Coherent strategies, effective labeling and re-naming, and partnership, cannot be overemphasized if Third World peoples’ groups are to engage effectively in the international investment order.

III. Conclusion: Reading Interactions and Obligations in a New Phase of Investment Dispute Settlement

This concluding part briefly sums up the discussion about robust interactions in the investment dispute settlement system. It provides examples of ways in which we may envision or articulate the contents of the three levels of norms that actors’ interactions generate. In broad terms, this new phase of investment arbitration will engage Third World peoples as participants in the system. It will not exclude them where their interests are directly at stake. In order to facilitate this development, investment treaties could include provisions that reflect that this area of the law extends beyond states and foreign investors. They would need to read more like comprehensive treaties that capture the multiplicity in the system rather than as investment protection treaties only. While the changes in the treaty system will be most welcome, a slow catching-up process in that realm does not preclude a proactive stance by investment dispute settlement tribunals. Such proactive approaches are not novel. For example, internationalization of investment disputes was mostly a quasi-judicial development. In addition, the more recent adoption of the participation of NGOs as *amicus curiae* first commenced through arbitral jurisprudence before the rules became institutionalized. Clearly, dispute settlement tribunals are active participants in the development of rules that govern the international investment dispute settlement system. Although the position is not yet optimal, the multiple interactions in the investment dispute settlement system are yielding some modest contributions to restructuring the international investment law. If nurtured, these contributions might be definitive of the characteristics of the investment dispute settlement system. The contribution of each norm level is discussed below.
A. Norms of Participation

The engagement of Third World peoples with investment activities on the domestic level and with investment dispute settlement on the international level suggests that there are emergent norms of participation in this area of the law. It will require a great deal of effort to incorporate these peoples groups as formal, legal participants in the investment dispute settlement system. However, this does not preclude a consideration of the impacts of investment disputes on these actors. Such consideration requires a recognition of the agency of these peoples and of their relevant position in the international law on foreign investment.

While not necessarily conferring party status on them, norms of interaction will refrain from reading Third World peoples’ resistance as extra-legal. Even if the state party is considered to be in violation of its obligations, it is important to engage with Third World peoples’ position and agency within the system. The dissenting opinion in AdT v. Bolivia discussed in part IV(A) of chapter six provides an example of such engagement. In addition, the recognition of grassroots movements like the Coordinadora that had first hand knowledge of the Cochabamba events, in responding to the petition for participation as amicus curiae, might be instrumental in facilitating this engagement.

A tribunals’ initiative as well as a peoples’ initiative are relevant in establishing norms of participation. Peoples are responsible for seeking active participation in dispute settlement where they possess relevant information that may foster a robust dispute settlement process. On their part, even where peoples do not seek participatory status, tribunals could be proactive in engaging with peoples’ domestic interaction with investment activities and incorporate these actors’ interests in their decisions especially where such interactions and interests are pleaded. Both types of initiatives have been discussed in this thesis and both have the potential to expand the norms of participation in investment dispute settlement.

B. Norms of Interaction

Existing norms of interaction include rules applicable to parties to disputes – states and investors – as well as rules that define the participatory privileges of amicus curiae. With
regards to emergent norms of interaction, more openness to a wider variety of claims and counter-claims from the traditional actors might be instrumental in serving the cause of Third World peoples. In this regard, there could be more receptiveness to state-investor arbitration and not only investor-state arbitration, which is the norm. And as discussed in part III(C) of chapter three, although this has not been prevalent practice, a reading of ICSID’s founding documents supports state-investor arbitration where applicable. The members of the Common Market for Eastern and Southern Africa (COMESA) have negotiated an Investment Agreement for the COMESA Common Investment Area (CCIA) (“COMESA Investment Agreement”).

Although not far-reaching enough, in article 28(9), this South-South agreement allows state parties to raise breaches of investor obligations as counter-claims and set-offs. Such counter-claims could allow states to raise issues of direct interest to Third World peoples, beyond raising defences to claims in investor-state arbitration. As well, state-investor arbitration provides a balance within the system and provides opportunities for states to initiate claims as representatives of their citizens where necessary.

There is also a need to formally engage the participation of affected Third World peoples that seek participation in investment dispute settlement. At the present time, the norms of interaction on amicus curiae privileges do not yet adequately accommodate this group of actors. It is important to differentiate between ‘affected’ peoples and groups and ‘concerned’ persons and groups. Actors that may currently qualify as amici are not necessarily affected persons or groups, although they might be. But the Third World grassroots movements that have formed the focus of the discussion in this work are affected groups. There could be a category of rules that apply to these directly affected peoples or groups, even if they do not qualify for participatory privileges in the amicus curiae category.

The development of norms of interaction that provide rules of interaction for groups with direct interest or direct participation in domestic activism like the groups in AdT v. Bolivia

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6 Paragraph 13 of the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) 5 I.L.M. 524 states that “the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.” By article 46 of the Convention and Rule 40 of the ICSID Arbitration Rules, counterclaims may also be permitted.

7 Investment Agreement for the COMESA Common Investment Area (May 23, 2007), online: COMESA <http://www.comesa.int/> [COMESA Investment Agreement].
even though they are not institutionalized, might signal the arrival of a truly inclusive dispute settlement system. It is unlikely that states will take the initiative to include such participation in investment treaties, like they have begun to include the participation of qualified actors as amicus curiae. This category of norms of interaction would probably need to develop as a quasi-judicial initiative, for even the current rules on amicus curiae participation developed in this manner before the rules were included in some treaties.

C. Regulatory Norms

Regulatory norms have always been the major area of contention for all actors. But it is only one of the categories of norms, for actors’ struggles transcend this single but absolutely important category. In order to contribute effectively to reshaping regulatory norms, actors need to interact at the levels of norms of participation and interaction discussed above. Norm generation hardly occurs suddenly. Norms undergo periods of introduction, contestation, acceptance and then promotion. Dispute settlement tribunals are major actors in entrenching the interactions of actors that produce these norms into the corpus of international investment law. In spite of limitations, commentators have recognized the need to engage in the reconstruction of regulatory norms.

On the substantive reforms of regulatory norms, the fair and equitable treatment standard is one regulatory norm that is amenable to broad interpretation. As discussed later in this part, the activities of Third World peoples have the potential to affect the interpretation of the standard. Professor Muchlinski has argued that the fair and equitable treatment standard may be accommodating of arguments that incorporate investor conduct into the consideration of whether host states have breached the standard.\(^8\) This argument provides an example of the recognition of the need to incorporate investors’ duties into the dispute settlement framework. Although investment treaties hardly engage substantively with investor duties, some dispute settlement tribunals seem to be suggesting that investors may have some duties. From an extrapolation from case law that refer to investor conduct, Professor Muchlinksi suggests that

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investor conduct may form a defence for the regulatory actions of states. In this regard, Muchlinski lists emergent duties of investors to include:

... a duty to refrain from unconscionable conduct, a duty to engage in the investment in the light of an adequate knowledge of its risks, and a duty to conduct business in a reasonable manner. Where unconscionable conduct is found, this may have serious consequences for any claim made by the investor. Evidence of such conduct may vitiate any right to a claim, especially if the regulatory response that is being challenged arises out of the application, by the host country, of its powers to punish the conduct through an interference with the investment. On the other hand, given that the second and third duties may be said to lie in a general duty of care in the conduct of foreign investment business, rather than in a strong moral abhorrence of certain types of conduct, the consequences of a failure to comply may be less serious. Here evidence of failure to comply may result in a reduction of compensation commensurate with the causal connection between the investor’s conduct and the degree of loss that can be attributed to that conduct, rather than to any alleged abuse of regulatory powers on the part of the host country.9

With regards to unconscionable conduct, Muchlinksii cited the decision in Robert Azinian and Others v. United Mexican States where the claim failed in its entirety and the tribunal found that the cancellation of the concession was not in violation of Mexico’s obligations under the NAFTA.10 The tribunal noted that the “list of demonstrably unreliable representations” was “uncomfortably long.”11 It also found the claimants’ non-disclosure unconscionable.12 As Muchlinski notes, the duty not to act in an unconscionable manner may not always be successfully pleaded by the state and in many cases the state parties have not been successful in making this defence, for it appears that “conduct must reach a threshold level of unconscionability to negate the improper conduct of the host authorities.”13 Similarly, the decisions in Waste Management v. United Mexican States14 and Noble Ventures, Inc. v.

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9 Ibid. at 530.
11 Ibid. at para. 122.
12 Ibid. at para. 110.
14 Waste Management v. United Mexican States (ICSID Case No. ARB (AF)/00/3), (2004) 43 I.L.M. 967.
Romania\textsuperscript{15} include \textit{dicta} that suggest the emergence of the duties to invest in a host state with adequate knowledge of a risk and to conduct business in a reasonable manner respectively.\textsuperscript{16}

Muchlinski refers to the perspective that recognizes some investors’ duties as “caveat investor.” The investor duties that have been identified point to the possibility of incorporating some limited investor duties into this realm of the law. Notably, it appears that these investor duties may only be used as defences to claims against host states. While very welcome, unlike the duties that states acquire under IIAs, these duties may not be enforceable against investors. They do not fit well into a category of duties that may form the basis of claims by states. Also, one wonders the course of action that may be taken in situations where the public interest outweighs the benefits of the investment project. These are issues to which an interactional perspective turns its attention.

An alternative way of interpreting fair and equitable treatment (that is, denial of justice in the judicial process or in review of administrative action by the executive) and indeed many of the substantive standards in investment treaties could be developed following optimistic readings of cases like \textit{Elettronica Sicula S.p.A. (U.S. v. Italy) (ELSI Case)}\textsuperscript{17} and the potentials of \textit{Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Tecmed v. Mexico)}.\textsuperscript{18} This standard could be contingent on the impacts of such judicial review or administrative action on the interests of the investor \textit{vis-à-vis} the people, in order to establish that the standard has or has not been breached.

In paying due diligence to the social activism that preceded the investment dispute, the Chamber of the International Court of Justice (ICJ) noted in the \textit{ELSI Case} that:

\begin{quote}
This question whether or not certain acts could constitute a breach of the treaty right to be permitted to control and manage is one which must be appreciated in each case having regard to the meaning and purpose of the … Treaty. Clearly the
\end{quote}

\textsuperscript{15} \textit{Noble Ventures, Inc. v Romania} (ICSID Case No Arb/01/11), online: Investment Treaty Arbitration <http://ita.law.uvic.ca/documents/Noble.pdf>.
\textsuperscript{16} Muchlinski, \textit{supra} note 8 at 542-550.
\textsuperscript{17} \textit{Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)}, 1989 I.C.J. Rep. 15, (July 20, 1989) \textit{[ELSI Case]}.
right cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like.\textsuperscript{19}

The Chamber recognized that the investor could not claim not to have foreseen the consequences of the closure of the plant on the people of Palermo. In paragraph 126, it noted that:

> It was of course understandable that the Mayor, as a public official, should have made his order, in some measure, as a response to local public pressures; and the Chamber does not see, in this passage of the Prefect’s decision, any ground on which it might be suggested that the order was therefore arbitrary.

In order to make a finding of arbitrariness or unreasonableness, there has to be a significant engagement with the socio-economic realities on the ground that officials have to deal with. These realities are then read in conjunction with the investment treaties and may sometimes mitigate their impacts on the peoples within the affected territory.

Likewise, despite my criticism of the decision, from the analysis in \textit{Tecmed v. Mexico}, a re-conceptualization of the fair and equitable treatment standard and expropriation could benefit from the proportionality analysis in that case. In the spirit of the analysis in this thesis, such analysis will be one that takes human suffering seriously and does not place lopsided emphasis on economic factors. The discussion of expropriation will require an assessment of the enduring debate on indirect expropriation and state regulation in the public interest, and the protection of the private sphere (especially private property rights) from interference by the state. In paragraph 122, the \textit{Tecmed v. Mexico} tribunal noted that “there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.” Often, this relationship may be easily established, but it is within the duties of host states to refer to the public interest components of their actions and also within the province of arbitral tribunals to take the public interest seriously.

\textsuperscript{19} \textit{ELSI Case, supra} note 17 at para. 74.
A robust consideration of the circumstances surrounding a dispute will foster conclusions that have been urged in some dissenting opinions. In the dissenting opinion in *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (*AAPL v. Sri Lanka*) for example, Dr. Samuel K.B. Asante expressed the opinion that “the decision to sustain the claim against Sri Lanka notwithstanding the … rulings against the Claimant is flawed by… a failure to appreciate the full implications of the formidable security situation and the grave national emergency that confronted the Sri Lankan authorities.” Without suggesting that robust considerations have not occurred in ICSID jurisprudence, some of the considerations that have been accounted for are those that support a neoliberal mode of governance. In *Alex Genin, Eastern Credit Limited Inc. and A.S. Baltoil v. Republic of Estonia* (*Genin v. Estonia*), the tribunal did not hesitate to accept Estonia’s argument that “the circumstances of political and economic transition prevailing in Estonia at the time justified heightened scrutiny of the banking sector.” And for the tribunal, “[s]uch regulation by a state reflects a clear and legitimate public purpose.” This observation was accompanied by the finding that Estonia had not acted in a discriminatory manner or treated the claimants less favourably than local investors.

The litmus test on economic policies that constitute legitimate public purposes could turn out to be the tribunal’s decision on the merits in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* (*Suez v. Argentina*). Whereas in *Genin v. Estonia*, the reforms involved the establishment of neoliberal forms of economic governance after the end of the cold war, in Argentina’s case, its reforms were partly a movement away from this system. It would be instructive to determine whether the tribunal would consider the general circumstances under which Argentina carried out its reforms in a manner which suggests a non-discriminatory application. Meanwhile, in its decision on jurisdiction, in response to Argentina’s assertion that the case questioned the wisdom of its economic policies, the tribunal has noted that its concern was not with “the wisdom, legality

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22 Ibid.

23 Ibid. at 369.

24 *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, (ICSID Case No. ARB/03/19).
or soundness of the policy measures taken by Argentina to deal with the economic crisis.\textsuperscript{25} \textit{Suez v. Argentina} also witnessed some changes in relevant language from the tribunal. As discussed in chapter five, a meaningful discussion of the issues could not occur separate from the interests and perspectives of the Argentine people. Hence, there were references to the discourses of sustainable development, human rights and general public interest considerations.

These cases provide examples of how regulatory norms may be read differently. They demonstrate that contestations and resistance are constitutive of the investment dispute settlement system. The discussions in this conclusion also suggest that a robust interactional approach exceeds the realm of regulatory norms. It commences in the definitive domains of norms of participation and interaction. It is in these realms that the boundaries of investment dispute settlement are delineated and actors that contribute to the development of the system are determined. Like states and foreign investors, the interactions between Third World peoples and the investment dispute settlement system are constitutive of the system.

Investment dispute settlement has come a long way since ICSID’s establishment. Occurrences and prevailing attitudes in the international economic order affect the decisions of the tribunals. As well, the interactions of relevant actors also shape this realm, while the tribunals determine that which is legal or extra-legal. Robust considerations of interaction among these actors and between the actors and the ICSID system are supposed to generate alternatives to the current system that is being operated. As this concluding part has demonstrated, there are a few reforms underway. However, established discourses, realities of power, and ideological dominance continually constrain an effective enunciation of alternatives. Irrespective of these limiting factors, with the iteration of alternative ideas by Third World peoples in the investment dispute settlement system, the system cannot remain unchanged, even if change occurs at a slow pace.

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CERTIFICATE OF APPROVAL - MINIMAL RISK

PRINCIPAL INVESTIGATOR: Robert K. Paterson
INSTITUTION / DEPARTMENT: UBC Law
UBC BREB NUMBER: H07-00067

INSTITUTION(S) WHERE RESEARCH WILL BE CARRIED OUT:

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<th>Institution</th>
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Other locations where the research will be conducted:
N/A

CO-INVESTIGATOR(S):
N/A

SPONSORING AGENCIES:
UBC Faculty of Law

PROJECT TITLE:
Re-Constructing the International Law on Foreign Investment through Dispute Settlement: The Role of ICISD in the Third World

CERTIFICATE EXPIRY DATE: February 5, 2008

DOCUMENTS INCLUDED IN THIS APPROVAL:  

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The application for ethical review and the document(s) listed above have been reviewed and the procedures were found to be acceptable on ethical grounds for research involving human subjects.

Approval is issued on behalf of the Behavioural Research Ethics Board and signed electronically by one of the following:

Dr. Peter Suedfeld, Chair
Dr. Jim Rupert, Associate Chair