The Law and Politics of Engaging Resistance in Investment Dispute Settlement

Ibironke T. Odumosu
The Law and Politics of Engaging Resistance in Investment Dispute Settlement

Ibironke T. Odumosu*

I. Introduction: The Phases of Investment Dispute Settlement

The international law on foreign investment, like other areas of international law, 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 more pronounced than in investor-state arbitration.1 Historically, developed states catalyzed and responded to occurrences in the international economic order, while Third World states largely reacted to the changes that emerged. However, the 21st century has shown a more pronounced Third World (groups and peoples) engagement with investment activities that have

---

* Ph.D. Candidate and Sessional Lecturer, Faculty of Law, University of British Columbia, Canada. I immensely appreciate the ongoing conversations with Professors Karin Mickelson, Obiora Okafor and James Gathii on the Third World’s engagement with international law. Many thanks also to Mosope Fagbongbe, and to all those who graciously responded to my interview questions.

1. While most of the cases discussed in this article are investor-state arbitration cases, the broader term—“investment dispute settlement”—is often adopted because it has the capacity to capture state-state disputes, state-investor disputes as well as investor-state disputes. In some specific instances in the article, references are made mostly to investor-state dispute settlement and sometimes to state-state dispute settlement.
appeared in investor-state arbitration jurisprudence. This Third World involvement threatens the status quo of investor-state arbitration as an institutionalized and depoliticized system that is reserved exclusively to states, foreign investors, and recently, non-disputing parties that are granted *amicus curiae* privileges before tribunals. The changing locus of interaction has been largely resisted by the tribunals constituted under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"), the institution that forms the focus of analysis in this article.²

Before ICSID’s establishment in the decolonization/early postcolonial era, investment dispute settlement mechanisms had commenced their emergence in the colonial era, and beginning in the mid 1990s, there has been yet another era, which I term, the new phase of investment dispute settlement.³ Each phase—the colonial era, the decolonization/early postcolonial era and the new phase/era—proceeds with a common purpose, mostly articulated in the form of protection of global capital and states’ economic well-being. While the distinct investment protection purpose still predominates, it competes with the new agenda of some developed 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.⁴ Before proceeding with an analysis of these technologies, a brief exposition of these phases (with a focus on ICSID) is necessary as it sets the background for an analysis of the law and politics of investment dispute settlement in the present era.

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

---


⁴. The use of the term “technologies” in this article 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.
Anghie to allude to the "colonial origins of foreign investment law as an academic discipline." Many of the customary international law rules that apply to foreign investment, especially regarding the protection of the property of aliens, were developed in this era.

During the colonial era, foreign investment protection was assured through the instrumentality of merging 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, foreign investment protection was assured through gun-boat diplomacy. As a result of this colonial paradigm, the need for an international dispute settlement institution was minimal. This was the age when states espoused the (commercial) interests of their nationals. Because of the power asymmetry that prevailed in this era, and the reality of colonization, many states that now self-identify as part of the Third World did not directly and effectively participate in the development of international foreign investment law, even though the law emerged through interactions with these states.

At this time, 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. In spite of this situation, some Latin American states adopted the Calvo Doctrine, which maintains that the host country has jurisdiction to settle foreign investment disputes. Arbitration as a means of settling international commercial disputes with some states, has its antecedents in this era.

However, 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 they embarked on, including

6. See Vandevelde, supra note 3, at 159.

the perceived need to rewrite the rules of international law, after the end of direct colonial domination.

B. The Decolonization/Early Postcolonial Era

In the early postcolonial era, a new mechanism of investment dispute settlement—institutionalized investor-state 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. When ICSID was established in 1966, at the height of the decolonization era, it represented an attempt to provide a treaty-based international mechanism for settling investment disputes between newly independent Third World states and foreign investors.\(^{10}\) As a result of ICSID’s establishment, dispute settlement between investors and states was institutionalized for the first time, as a depoliticized dispute settlement mechanism.\(^{11}\)

Several factors shaped the emergence and character of ICSID. In the post-WWII period, investment disputes became increasingly internationalized because they were subject to international arbitration and international law emerged as the primarily applicable substantive law.\(^{12}\) This shift was mainly due to the perception of transnational corporations ("TNCs") and their home states, that the application of the host state’s law and adjudication by domestic tribunals might be prejudicial to their interests.\(^{13}\) By placing investment disputes within the international domain, former colonial powers could ensure that their economic interests remained within structures that were accessible to (and dominated by) them at that time. Therefore, investment arbitration has been rightly described as a "Third-World type" discipline, even though the system is beginning to incorporate developed states within its purview.\(^{14}\)

---


14. See Walde, supra note 8, at 28.
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. In addition to the changing views of Third World states in international fora in the early postcolonial era, demonstrated by the United Nations General Assembly’s New International Economic Order (“NIEO”) project, the wave of nationalizations that accompanied the decolonization movement posed threats to the economic interests of erstwhile colonial powers and necessitated the development of investment protection mechanisms separate from the domestic jurisdiction of host states. ICSID was established in the euphoria of these ideologically charged times. It filled the need to protect foreign investment in the Third World and suggested that the promise of investment protection would attract foreign investment to the Third World.15 In spite of the suspicions surrounding international arbitration, a considerable number of Third World states, excluding most of Latin America, signed the ICSID Convention at its inception in the hopes of reaping the benefits of the institution.16 Thus, with developed countries’ need to protect foreign investment and the Third World’s desire to increase private capital flows, ICSID found its place in the multifarious world of international investment dispute settlement.

C. The New Phase of Investment Dispute Settlement

The mid-1990s signaled the beginning of the present dispensation in the international investment order, where there has been a proliferation of investor-state dispute settlement cases, and where developed states have emerged as defendants in some of these proceedings.17 In this era, the locus of interaction has expanded to include states, foreign investors, and non-disputing parties that are granted limited privileges as amicus curiae. More significantly, this is an era in which developed states are once again significantly engaging in re-development of the rules governing the system. Like the crop of investment law that applied during the colonial and postcolonial eras, there is a reiteration of the development of international investment law in a manner that systematically resists peculiar Third World influence. However, unlike

15. See ICSID Report, supra note 10, at arts. 9,12.
17. Although developed states have defended some investment cases, it does not suggest that they form the majority of defendants that appear before investment dispute settlement tribunals. Rather, Third World states still form the overwhelming majority of defendants.
the colonial and decolonization periods, the rules are not being reformulated in this era solely to protect foreign investment in the Third World, but also seek to protect the interests of defendant states in investor-state arbitration proceedings. The rationales for the emerging rules are strikingly familiar as they echo earlier Third World arguments (which were not favorably received) 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 rules formerly applied almost exclusively to the Third World in dispute settlement proceedings were extended to developed-state defendants. Suddenly, the rules appeared inadequate and biased in favor of investors, 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. There are now appeals to the prevalent discourse of humanitarianism that pervaded international law in the second half of the 20th century. The changes in the new phase of investor-state dispute settlement smacks of the general trend in international economic law where accepted rules mostly derive from the initiative of economically powerful states, or are at least sanctioned by these states. One of the changes that have emerged in this phase of investment dispute settlement is the admission of non-disputing parties', primarily nongovernmental organizations ("NGOs"), limited participation as amicus curiae where such privileges are granted. With this participation, investment law is infused with public interest concerns, such as environmental and human rights causes.

The changing investment dispute settlement order is mostly a brain-child of the North American Free Trade Agreement ("NAFTA") developed-state parties. 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. One cannot but acknowledge that investment arbitration in its present state has the

19. The definition of the term "NGO" varies. In this article, the term "NGOs" mostly refers to not-for-profit, non-governmental expert organizations that sometimes participate in investment dispute settlement cases.
potential to benefit all states and that it is relatively more sensitive to the position of states generally, compared to the earlier fixation on foreign capital. However, as this article will show, it still remains largely insulated from Third World sensibilities, and does not necessarily take Third World struggles, resistances and perspectives into account. As changes crystallize in the present phase, and as the illustrations in this article demonstrate, it is imperative that Third World views, interests, and voices are taken seriously. Barring deliberate engagement with these “voices,” the present crop of international investment law will be a reiteration of the challenged rules of the colonial era and the manner in which they became codified.

Given the nature of the emerging changes described above, the balance of the article 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. On a general level, 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 apparent. This is a mode of analysis that pervades investment law in general, as commercial interests and issues predominate. This article’s reading of the institution’s jurisprudence suggests that ICSID tribunals’ attitude involves a three-fold mode of analysis. First, the tribunals adopt a depoliticized (or apolitical) conception of the law. Second, while the foreign investor includes the corporation and the shareholders, the state party is often constructed in this forum as an abstract, artificial entity separate from and divorced from its population. Third, there has been a focus on formal participation by institutionalized non-disputing parties. Proceeding on the basis of these three technologies of investment arbitration, this article questions the validity and effects of a depoliticized legal regime (as opposed to a depoliticized institutional apparatus) and a narrow construction of persons entitled to justice that tribunals adopt. It suggests that such technologies effectively exclude peoples’ means of engagement with their domestic legal systems from the international arena and result in a construction of states’ responses to resistance as political acts outside the purview of investment arbitration. Yet, the impacts of these responses on investments remain subject to tribunals’ scrutiny.

In analyzing ICSID’s engagement with the Third World, this article situates it within a broader socio-legal framework of North-South relations. It discusses Third World peoples’ influence (or lack thereof) in international investment law, interprets ICSID’s depoliticization agenda in two ways, and reads one of the interpretations as having the potential to exclude Third World resistance, and discusses ICSID’s prevailing
conception of relevant interests. It is pertinent to state in this introductory part of the article that not every form of domestic populations' engagement with investment activities is covered within the purview of this article. Rather, the article focuses on those forms of resistance that inform, either wholly or partially, the actions or regulatory measures that governments adopt. This article essentially represents an attempt to read some ICSID decisions in light of domestic resistance.\textsuperscript{22} The ICSID case of \textit{Tenicas Medioambientales Tecmed S.A. v. United Mexican States}\textsuperscript{23} ("Tecmed v. Mexico") forms the major subject of analysis in this regard. The purpose is to assess the nature of the law that develops through the process of interaction among relevant actors in this area of the law. In engaging in an inquiry of this nature, 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 favorable. But with increased activism on the part of communities and domestic groups, and parties' (sometimes inadvertent) pleading of these resistance activities in investment dispute settlement proceedings, a re-construction (albeit limited) of the international investment order might be developing.

II. The Face of Third World Peoples in International Investment Law

Even though the international law on foreign investment is significantly visible to Third World peoples, engagement between Third World peoples (as opposed to states) and international investment law has been limited. This area of the law has been considered as an exclusive domain of states, foreign investors, and dispute settlement bodies, and this construction largely remains unchanged. However, starting with \textit{Methanex Corp. v. United States} ("Methanex v. United States"),\textsuperscript{24} NGOs argued their way to formal participation in investor-state arbitration, following similar advances at the World Trade Organization ("WTO").\textsuperscript{25} Whether such participation by NGOs (and


\textsuperscript{23} Tenicas Medioambientales Tecmed S.A. v. United Mexican States, 43 I.L.M. 133 (2004) [hereinafter \textit{Tecmed v. Mexico}].

\textsuperscript{24} Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345 (2005) [hereinafter \textit{Methanex v. U.S.}].

sometimes, even individuals) leads to substantial consideration of the impacts of foreign investment on peoples qua peoples is yet to be seen. Cautionary notes on the impact of NGO participation are necessary because earlier attempts to incorporate a peoples' perspective in international economic law, mostly visible in the form of international resolutions like the General Assembly Resolution on Permanent Sovereignty over Natural Resources, and the NIEO declaration are some of the most contested in international law. Even though these resolutions make several references to "peoples," they did not translate to direct substantive considerations of the impacts of foreign investment on Third World peoples. The civil society outcries against investment treaties in the late 1990s and at the turn of the 21st century are partly a form of backlash against this neglect.

In spite of investment law's frequent failure to directly address particular Third World concerns, 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 resistance and 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 in the cases they consider. Perhaps one of the most prominent and well-publicized popular protests against what was considered an unfavorable investment policy was the "Guerra del Agua" ("Water War") in Cochabamba, Bolivia. In 1999, the Government of Bolivia and a

---


consortium—Aguas del Tunari—concluded a forty-year concession contract for water services in the city of Cochabamba. Several relevant sectors of the Cochabamba community had complaints about the concession, including complaints about astronomical tariff rates increases that were mostly unaffordable for the local population.29 Within a month of the concession contract’s conclusion, several community groups, including farmers, labor groups, environmentalists, factory workers’ unions, organizations of business, political groups, and several other coalitions of workers, commenced protests in the form of farmer blockades and general strikes. They also organized peaceful demonstrations that erupted in violence (termed the “taking of Cochabamba”), and a final “four day standoff” that resulted in several injuries and the death of a seventeen year old student.30 Eventually, the government declared a nation-wide state of emergency and cancelled the concession contract. The government granted most of the protesters’ requests, although the subsequent state of the water services in the city was reportedly less than satisfactory.31 The foreign investor initiated arbitral proceedings against Bolivia,32 but the case was later settled for a paltry sum of less than the value of one U.S. dollar.33 The civil society groups that were the most vocal in these protests 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.34 In sum, the Cochabamba protests were as close as one usually gets to hearing the subaltern’s voice in the foreign investment law debate.35

While the Cochabamba water war is perhaps the most pronounced engagement of citizen groups with foreign investment activities that have been the subject of ICSID proceedings, there have been other similar courses of events, albeit with less publicity and intensity but no less

29. See Woodhouse, supra note 28, at 324-36.
30. See id. at 324-36.
31. See id. at 336-37; see also Finnegan, supra note 28, at 45.
34. See Woodhouse, supra note 28, at 339-40.
seriousness. In *Metalclad Corp. v. United Mexican States* ("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. In another ICSID case, *Tecmed v. Mexico*, which forms the subject of analysis in the fourth part of this article, the local population also raised concerns about the site and operation of a landfill. Unlike the tribunal’s near avoidance of the local population’s opposition in *Metalclad v. Mexico*, and the cursory remarks on the issue in *Aguas del Tunari SA. v. The Republic of Bolivia* ("AdT v. Bolivia") (perhaps because it was a decision on jurisdiction), the *Tecmed v. Mexico* tribunal paid significant attention to the citizens’ protests. These three cases provide examples of dedicated grassroots engagement with investment activities at the local level that are transmitted to the international realm through dispute settlement cases. ICSID tribunals’ reactions to local opposition have varied, and as discussed in this article, such cases are not entirely without precedent.

As stated earlier, even though investor-state arbitration is currently witnessing NGO participation as *amicus curiae*, it is important that this is not taken as adequate representation of the views of Third World masses. Like the postcolonial state and Third World elite that emerged during the decolonization era, it is not conclusive that NGOs adequately capture the interests of Third World masses in their work. This does not imply that non-disputing party participation in investor-state arbitration does not serve useful and positive purposes. Nevertheless, it is important to note, as subaltern studies have shown, that there is a tendency to subsume dissenting voices under views represented as the universal interests of a particular country. Because investor-state arbitration is legally the domain of states and foreign investors, Third World peoples’ views and interests have been expressed through the postcolonial state, which has mostly focused on economic development. However, recent popular

37. See id. at ¶ 56.
38. See *Tecmed v. Mexico*, supra note 23.
39. Part IV of this article analyzes the tribunal’s attitude toward the protests.
40. See *Elettronica Sicula S.p.A. (U.S. v. Italy)*, 1989 I.C.J. 3, 115-17 (July 20) [hereinafter ELSI Case]. Unlike ICSID cases, the ELSI Case involved two states.
protests and expressions of opinion in some Third World states have shown that peoples' interests transcend the single economic development paradigm that it has been constructed to be. Investment dispute settlement tribunals seldom articulate even the single development concern of states in their decisions, for in spite of the focus on economic development at the treaty and contract negotiation levels, investment dispute settlement cases do not often reflect this major interest area of Third World states in practice. Additionally, empirical research suggests that IIAs, while ensuring investment protection, do not necessarily fulfill the promise of investment promotion and development for the Third World or foster investment flows.\footnote{See World Bank, Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract FDI? Only a Bit... and They Could Bite, Working Paper No. 3121 (2003); U.N. CONF. ON TRADE & DEV. (UNCTAD), BILATERAL INVESTMENT TREATIES IN THE MID-1990s, at 122, U.N. Sales No. E.98.II.D.8 (1998); Jennifer Tobin & Susan Rose-Ackerman, Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties, Research Paper No. 293 (May 2, 2005) (on file with Yale Law School Centre for Law, Economics and Public Policy). For research that found a strong connection between bilateral investment treaties and investment flows see, Eric Neumayer & Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?, 33 WORLD DEV. 1567 (2005); Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 HARV. INT'L L.J. 67 (2005).} Thus, even the much touted economic development focus of the postcolonial state and IIAs hardly form significant parts of the discussion in investment dispute settlement cases.

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.\footnote{World Trade Organization, Doha Declaration on the TRIPS Agreement and Public Health ¶4, WT/MIN(01)/Dec/2 (Nov. 14, 2001).} Also, the aftermath of protests against the World Bank, for instance, facilitated the establishment of the World Bank Inspection Panel. Investment dispute settlement in general 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 with some trickling effects on the international level. Resistance by popular movements and the need for adequate international responses to them have become absolutely important in an era where it is more or less acceptable that "legal norms
do not arise in a vacuum, but are socially contested, promoted and legitimized.”

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.”

As this article demonstrates, 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 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.

III. The Technologies/Politics of the New Phase of Investment Arbitration

The new phase of investment dispute settlement borrows from the strategies of the earlier eras of this area of the law. As previously mentioned, in addition to the protection of developed-states defendants, which is largely new to this phase, the investment protection purpose remains even if the strategies change. A perusal of the recent occurrences in investment arbitration and of some ICSID decisions suggest that Third World peoples acquire a peripheral position in investment law through at least three strategies that I refer to as the technologies or politics of the new phase of investment arbitration. They are, in effect, technologies of exclusion, as they are not necessarily designed to accommodate purposes beyond those outlined above. Each of them has antecedents that precede this phase of investment arbitration, but are presently more pronounced given the purposes and actors that shape the development of the law in this era.


A. Institutionalization

It is evident that the recent NGO excursion into the realm of investor-state arbitration is no longer news. In some fora, this signals the arrival of the golden age of civil society participation in investor-state arbitration. In practice, this movement is largely driven by Western NGOs, with significant participation by Third World NGO groups. Three of the most prominent examples of cases where Third World groups have sought participatory status are the Bolivian groups’ (and individuals) application inter alia for amicus curiae status along with Western NGOs in AdT v. Bolivia, the involvement of three Tanzanian groups in Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania (“Biwater Gauff v. Tanzania”), 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.

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 investor-state arbitration is mostly elite. From the elite capturing of the decolonization movement, Third World peoples have learned to be wary of groups, even domestic, that seem to appropriate their voice, or claim to project their interests at national and international levels.

47. See Methanex v. U.S., supra note 24, at Part IV, Chapter B ¶ 27, 1446 (showing the tribunal’s acceptance and brief consideration of amicus curiae briefs in its decision on the merits).

48. Unlike the other examples cited in this article, this case is one of the very rare instances where the domestic groups that petitioned the panel were mostly grassroots movement groups. The groups’ application was rejected. See AdT v. Bolivia, supra note 32 (noting that several Bolivian civil society groups and even individuals applied inter alia for amicus curiae status in AdT v. Bolivia. Earthjustice and the Center for International Environmental Law acted as counsel for the petitioners). See also Non-Disputing Parties’ Petition (August 29, 2002), available at http://www.ciel.org/Publications/Petition_Revised_Aug02.pdf.


51. See generally SUBALTERN READER, supra note 41.
even more relevant is the fact that the NGO movement in investor-state arbitration sometimes reiterates that it does 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 to an extent, subscribe to the views of NGOs that possess the expertise and the financial resources to participate in the ICSID dispute settlement process. In this regard, it is noteworthy that there is no ICSID case involving NGO participation that has been exclusively orchestrated by groups from the Third World. Due to the aforementioned limitations of the NGO model in capturing grassroots resistance, this article focuses on grassroots movements and their influence on investment dispute settlement, without diminishing the relevance of NGO involvement and its potential for addressing relevant Third World concerns.

As stated earlier, NGO involvement as amicus curiae in investor-state arbitration is one of the innovations of the present era. It represents investment law’s (institutionalized) concession to incorporate non-traditional actors. In its present incarnation, the amicus curiae model does not necessarily accommodate grassroots social movements in the Third World that challenge investment activities and rules that are inimical to Third World interests. Two of the most prominent reasons are that 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 may only proceed as amicus curiae and not as parties to the dispute. 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 address immediate needs and perspectives of Third World communities. Thus, investment arbitration’s procedural advances remain limited in addressing questions of resistance. Because of the limitations of institutionalization, Third World states remain the direct representatives of their citizens in this area of international law.

B. Representation: A Focus on Technical Justice

So far, this article has advanced the position that ICSID tribunals


53. In AdT v. Bolivia, the local groups that protested the terms of the investment that was the subject of the dispute sought participatory status in the proceedings.
have been largely unable to incorporate "uninstitutionalized" Third World groups and communities in their decisions because of a focus on institutionalization. Another reason proffered in explanation of this attitude and explored in this section, 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 parties are unveiled. Generally, parties to ICSID proceedings are narrowly 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 being a system of settling commercial disputes between (mostly) private parties, while the latter necessarily 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 interest." Based on such statements, the tribunals' frequent lack of engagement with the interactions between grassroots movements and foreign investment suggest that they see themselves as serving only very limited interests. Clearly, tribunals are constituted to serve the interest of justice; however, this begs the question: justice for whom? This article advances two possible responses to this question in this section. The possibilities lead to similar conclusions on the need to re-conceptualize and re-appraise the interests that shape the course of 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, 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 143 contracting state parties (and 155 signatory states), nearly as many as the


55. Alvarez & Park, supra note 18, at 394.

56. For a nuanced analysis of the international status or otherwise of ICSID, see STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 233-45 (1990).
The treaty presupposes a commitment to the development of an international order that takes the broader interests of the international community into account. The ICSID Convention asserts "the need for international cooperation for economic development." Second, the institution seeks 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 relatively easy and appropriate to conclude that arbitral tribunals are obliged, if not obligated, to take communities' interests and expectations into account during decision-making.

Because it can be argued that the suggestion that tribunals have been formed in the interest of justice for the international community would over-extend the reach of the ICSID, the position that tribunals have been established in the interest of justice for the parties and 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. Investor parties have included corporate entities and shareholders. 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 alike—form the crux of investment disputes.

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 subdivision or agency to

58. ICSID Convention, supra note 2, at pmbl. (emphasis added).
59. See id. at Reg. & Rules 22(2).
60. See Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic Decision on Jurisdiction ¶¶ 46-51 (August 3, 2006), available at http://www.worldbank.org/icsid/cases/pdf/ARB0319_DecisiononJurisdiction03-19.pdf (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).
ICSID), although this has not been a frequent occurrence.\(^6\) 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, the state parties are specifically identified as the government and in others, identified as the state.\(^6\) 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."\(^6\) 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 in this article 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.\(^6\) Second, even if governments are named as parties to investment disputes, it does not necessarily 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 arguably act, or should act, in the interests of citizens. Therefore, they are entitled to protect the interests of the people they represent, just as the foreign investor protects its commercial interests and those of its shareholders.

The concept of statehood as defined mostly 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 article does not participate in the debate on the

---


62. In all the ICSID cases mentioned in this article, except (the Canadian cases and) those initiated by or against constituent subdivisions or agencies of states, proceedings are initiated against the state.


64. See ICSID Convention, *supra* note 2, at art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.").
utility of statehood in the international order. Rather, the article considers statehood to the extent that the state may qualify as a suitable entity for incorporating peoples’ perspectives and interests in investment law. As laid down in the first article of the Montevideo Convention, the criteria for statehood include not only a defined territory, a government, and the capacity to enter into relations with other states, but 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 very definition of statehood, arbitral tribunals are by implication entrusted with the interests of a states’ population in settling investment disputes.

A call for a reassessment of the technical justice paradigm that has prevailed, in favor 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 popular protests (both at domestic and international levels) organized against allegedly harmful investment activities resonates with

---


67. CRAWFORD, supra note 66, at 52.

68. 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, 41 HARV. INT’L L.J. 503, 519 (2000), 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.”
technologies of exclusion that were prevalent during the colonial and early postcolonial eras, as well as during the contemporary period.\textsuperscript{69} Professor Orford captures 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."\textsuperscript{70} By discounting popular protests in investment dispute settlement, the state is read as separate from the people 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 states from its people, the former is stripped of its population with all its appendices—the public interest, dissenting voices, and needs that do not equate with global capitalist ideology—and is left with a not-so-abstract but artificial construct, known as government and territory.\textsuperscript{71} 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.\textsuperscript{72} Even though the separation argument is compelling in relation to 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,\textsuperscript{73} by the act of separation of 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.

\textsuperscript{69} 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, 13 \textit{Leiden J.Int’l L.} 749, 798 (2000).
\textsuperscript{70} Anne Orford, The Uses of Sovereignty in the New Imperial Order, 6 \textit{Austrol. Feminist L.J.} 63, 72 (1996).
\textsuperscript{71} For arguments regarding the substantive nature of statehood, see Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Analysis 170 (2000). I acknowledge that equating the state with its peoples might sometimes yield negative results. See e.g., ICSID, Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2 (1999) (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 forcible possession of the claimant’s property).
\textsuperscript{72} See e.g., Pahuja, supra note 69, at 798, 800.
\textsuperscript{73} On the postcolonial state’s complicity “in the silencing of subalternity” see Otto, supra note 27, at 339.
Thus, a separation of state and peoples in investment dispute settlement, like in some facets international human rights law for example, is only meaningful where peoples’ agency is recognized as separate from that of states. However, since investment law has not proceeded in this direction, it is imperative to adopt, at least within the category of cases considered in this article, a robust construction of the state as a category that represents the interests of real 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 that implicate the public interest, as well as those 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 arbitration is the exclusion of a foreign investor’s home state from formal participation in dispute settlement once a claim has been submitted to ICSID.74 The 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.75 In ICSID parlance, this is generally referred to as ICSID’s ability to depoliticize 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.76 The second view entails a separation of “law” from its socio-economic, cultural and political origins and ramifications. It is this second seldom-acknowledged view that rejects Third World resistance as extra-legal. In the same vein, domestic rules adopted in response to such opposition are usually deemed to be in violation of the law, as was demonstrated by Tecmed v. Mexico. Such interpretation generally proceeds from the adoption of the liberal ideal of ensuring a public/private divide and a

74. See ICSID Convention, supra note 2, at art. 27(1).
76. See generally SHIHATA, supra note 9.
politics/law divide.\textsuperscript{77} Even though the depoliticization agenda, in the first sense described above, is a laudable goal, given the general nature of international investment law, investment dispute settlement always remains politicized to an extent, at least, at the international level. For instance, investment dispute settlement engages in 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 adopted by the NAFTA Free Trade Commission, which comprises the three state parties to NAFTA, in 2001.\textsuperscript{78} Of course, it might not be ICSID’s role to address the politicization of investment disputes on a general international level, especially between Third World states on the one hand, and foreign investors and developed home states on the other hand. However, one cannot ignore the reality that international 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 against the provisions of IIAs sometimes necessitates such investigation. Often, IIAs dictate that tribunals determine whether measures violate most favored nation treatment (MFN), national treatment (NT), and fair and equitable treatment clauses and so on. The nature of some of these clauses requires an inquiry into the origin and nature of laws and regulatory measures. This is however, limited to interpretation of actions in light of applicable law, and not a questioning of the wisdom of domestic policies. 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. Thus, it is one thing to deem a regulatory measure illegal,

\textsuperscript{77} For an insightful interpretation of arbitral awards in light of the (neo)liberal public/private divide, see Shalakany, supra note 9, at 453-56.

it is another to interpret it as arbitrary or unreasonable because it was adopted in response to public demand.

The second conception of depoliticization described above partly accounts for the inability to incorporate robust Third World perspectives, articulated by Third World peoples' movements, in investment dispute settlement. 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.79 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.80 This insight is not new, as the social, political and historical contingency of law has been the subject of much scholarly debate.81 Even international law and international relations scholars carved out spaces of dialogue toward the end of the 20th century to discuss, analyze and systematically address international law's interaction with politics and how one informs, shapes and disciplines the other.82

To the extent that law is indeterminate and international actors seek

79. See MARGARET DAVIES, ASKING THE LAW QUESTION 228 (1994) (stating that "we are never free from our social environment.").
80. See Balakrishnan Rajagopal, International Law and the Development Encounter: Violence and Resistance at the Margins, 93 ASIL PROC. 16, 26 (1999) (noting that the creation of the World Bank Inspection Panel was driven by several factors including the struggles of India's Narmada Bachao Andolan).
81. 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 AMERICAN LEGAL REALISM (William W. Fisher, Morton J. Horwitz & Thomas Reed eds., 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, 36 STAN. L. REV. 199, 206 (1984). Hutchinson and Monahan note that for CLS scholars, "law is simply politics, dressed [up] in different garb." This article 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 (1987); KOSKENNIEMI, supra note 65.
determinacy, especially in dispute settlement, a rulebook conception of law is at once necessary but, at the same time, inadequate and inaccurate.\textsuperscript{83} 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, 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."\textsuperscript{84} Beyond politicians tinkering with laws, there emerge situations where popular opinion suggests the adoption of domestic legal rules. As the next part of this article demonstrates, international investment law's interaction with such domestic legal rules, has been at the very least, problematic.\textsuperscript{85}

The idea that international law provides an apolitical means of settling international disputes has been the subject of much criticism, prompting Professor Martti Koskenniemi to suggest that international law oscillates between apologetic arguments on normativity and utopianism.\textsuperscript{86} On the one hand, international law is apologetic 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."\textsuperscript{87} 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

\textsuperscript{83} On the indeterminacy and the rulebook conceptions of international law, see Shirley Scott, International Law in World Politics: An Introduction 121-28 (2004).

\textsuperscript{84} Martha Finnemore & Stephen Toope, Alternatives to "Legalization": Richer Views of Law and Politics, 55 Int'l Org. 743 (2001). See also Stephen Toope, Emerging Patterns of Governance and International Law, in The Role of Law in International Politics: Essays in International Relations and International Law 102 (Michael Byers ed. 2000) ("[L]aw arises in the interaction between ideas (which may be political, philosophical, sociological, or other types of ideas) and practice, but . . . becomes itself through specific juridical processes that serve as part of its independent justification.").

\textsuperscript{85} For a call to look beyond a structuralist conception of law and legal relations, see Roderick A. Macdonald, Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism, 15 Ariz. J. Int'l & Comp. L. 69 (1998).

\textsuperscript{86} See Koskenniemi, supra note 65, at 50.

vulnerable to the charge of utopianism. And, any argument based on close connections between international law and state behavior 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, also address such issues as 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 the law. This insight necessitates a politics of international law—a broad framework of a “mutually constitutive relationship” between international politics and international law. It necessitates the development of an international investment regime that engages with issues of social pressure related to investment activities, for these social pressures are often the immediate causes of investment disputes. At this point in the development of international law, it is difficult to maintain otherwise.

IV. The Politics of Reading Resistance in Tecmed v. Mexico

Few ICSID tribunals have been directly confronted with the incidence of grassroots movement opposition to investment activities or the consequences of governmental responses to such activities. The Tecmed v. Mexico tribunal was one of such tribunals. The 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”), where the World Court concluded that Italy was not liable for breaches of the Italy/United States’ Treaty of Friendship, Commerce and Navigation of 1948 even in the face of government responses to popular protests. However, in Tecmed v. Mexico, the tribunal found the opposite to be true.

The ICSID tribunal in Tecmed v. Mexico, after engaging in an analysis of responses to social pressure, found that the government’s

88. See id.
89. See id.
91. See, e.g., AdT v. Bolivia, supra note 32.
92. See ELSI Case, supra note 40.
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 *Metalclad v. Mexico* and *AdT v. Bolivia*, which mostly ignored the resistance question, and the ELSI case that granted due deference to the realities of the situation that led to the investment dispute. *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, whether the definition of investment includes both tangible and intangible property, and whether prior, existing and future investments qualify as covered investments. It is not the focus of the following analysis to consider the rightness or wrongness 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 public protests that preceded the government's action, which the tribunal considered expropriatory and in violation of the fair and equitable treatment provision in the bilateral investment treaty (BIT).

Prior to the dispute, Cytrar, a company incorporated in Mexico, was owned and controlled by another Mexican company, Tecmed Mexico, which was in turn, owned and controlled by a Spanish parent company, Tecmed Spain.\(^9\) Cytrar operated a hazardous waste landfill in the municipality of Hermosillo, Mexico.\(^4\) On November 25, 1998, the relevant Mexican authority denied Cytrar's application for renewal of the landfill's operating permit.\(^5\) Tecmed Spain, as the parent company, initiated arbitral proceedings under ICSID's Additional Facility Rules\(^6\) pursuant to the Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the United Mexican States (Spain-Mexico BIT/the BIT).\(^7\) Tecmed Spain claimed *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.\(^8\) Mexico disagreed, arguing that the refusal of the permit was not in the nature of an expropriation, the claimant did not suffer discrimination, and was not denied national treatment.\(^9\)

---

94. See id. at ¶ 35.
95. See id. at ¶ 39.
98. See id. at ¶ 45.
99. See id. at ¶¶ 46-51.
The claimant 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. The community mostly opposed the operation of the landfill because of its proximity to a city of about one million people and the manner in which hazardous toxic waste was transported and confined. 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." Mexico asserted that it acted within its obligations in the BIT in relation to the claimant’s investment, in view of the social pressure, and also sought to find solutions to the problems resulting from such pressure.

It is important to recall the principle that the mandate of an arbitral tribunal is limited to disputed issues that the parties specifically submit to the tribunal. The principle does not however, curtail tribunals’ power of interpretation on issues they are seized of. 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.

The contested resolution refused renewal of the permit on several grounds, including environmental considerations. The claimant successfully contended that one of the grounds, the violation of some conditions of its permit, had been addressed by another Mexican

100. See id. at ¶ 42-43.
101. See id. at ¶ 49.
102. Tecmed v. Mexico, supra note 23, at ¶ 46.
103. Id. at ¶ 97.
104. See id. at ¶ 50.
105. See id. at ¶ 56.
106. 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.
authority, which only required the claimant to pay a fine. 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.” Despite its later holding that the protests were insufficiently serious, the tribunal admitted that the “community’s opposition to the Landfill, in its public manifestations, was widespread and aggressive, as evidenced by several events at different times.” In addition, a relocation of the landfill was also contemplated because of the growing concerns on environmental safety, in view of the rapid growth of the Hermosillo municipality. The tribunal mostly ignored this consideration focusing mostly on government reports that the landfill did not compromise ecological stability. There were definitely unaddressed environmental issues that the protesting groups sought to address through their activism.

For all their disagreements in this case, the parties and the tribunal agreed that Cytrar had agreed 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 even after the permit was denied, at least, during January 2000, but at the time of the ICSID arbitration, such discussions had ceased. However, this article is not concerned with the party who bears fault for the failed relocation; it focuses squarely on the tribunal’s attempt to undermine the protests and their impact, and on the law/politics tension inherent in the decision.

In consonance with the practice of many arbitral tribunals, the Tecmed v. Mexico 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

108. See id. at ¶ 100.
109. Id. at ¶ 105.
110. Id. at ¶ 108.
111. See id. at ¶¶ 110, 124.
112. See Tecmed v. Mexico, supra note 23, at ¶ 110.
113. See id. at ¶ 143.
114. See id. at ¶ 121.
115. See id. at ¶¶ 120-21.
in international investment law on the balancing of public interest and investors' economic interests, 116 from a public interest perspective, it is difficult to conceive that the interests of millions of people can be supplanted for any reason. Recognizing the impacts of its sweeping comment above, the tribunal argued that having established that regulatory actions and measures, even though beneficial to society as a whole, will not be excluded from the definition of expropriatory acts, 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." 117 By this statement, 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. That there were undoubtedly socio-political considerations involved in the resolution's conclusions 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, and 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."118 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."119 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

---

118. Id. at ¶ 128.
119. Id. at ¶ 129.
deprivation.”  

In essence, for the tribunal, the “mischief” that the regulatory measure sought to “cure” was a socio-political circumstance, which was unacceptable in light of the BIT.  

In the tribunal’s view, the resolution was not proportionate to the community pressure 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.” 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.” Yet, the tribunal had referred to the protests as “widespread and aggressive.”

Several questions arise from the tribunal’s decision in Tecmed v. Mexico. First, what qualifies as “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 pitched its juridical and intellectual tent with the latter option. The tribunal was of the opinion that no matter how “intense, aggressive and sustained,” the protests were in no way “massive” because they represented the position assumed by some individuals or members of some groups. 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 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 protests. Even if responsibility were relevant, one would be reading out relevant facts to assume that Mexico was solely

120. Id. at ¶ 122, 128-32.
121. Heydon’s Case 3 Co. Rep. 7a (1584); 76 E.R. 637. See also Smith v. Hughes (1960) 1 W.L.R. 830.
123. Tecmed v. Mexico, supra note 23, at ¶ 133.
124. Id. at ¶ 139.
125. Id. at ¶ 108.
126. See id. at ¶ 144.
127. Id. at ¶ 144.
responsible for the actions that triggered the protest because it located the landfill in such close proximity to an urban center. The protests also challenged the claimant’s transportation of hazardous waste, in addition to the landfill’s proximity to the municipality. However, the relevant issue addressed here is the tribunal’s choice of a quantitative analysis of the protests, not the party responsible for the acts that triggered the protests.

The quantitative approach does not adequately capture the sustained public manifestations of the protests. 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 State Commission of Human Rights against the authorities for ending the town hall sit-in. Finally, in October 1998, there was a “family demonstration for the defense of health and dignity” against the landfill. Yet, from the perspective of the tribunal, the protests were not massive enough to be considered a “genuine social crisis.” Ironically, 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 protesters contesting unfavorable 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.

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." 137 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/occupation of the plant. 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 Tecmed v. Mexico. 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. Thus, in determining proportionality, it is a serious and arduous task to seek to quantify peoples’ suffering, the strength of their opposition, and the impact of their voices. 138

It appears that a major challenge for the tribunal in Tecmed v. Mexico was the delicate balancing and characterization of the issues as either legal or socio-political. 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 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. 139

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

---

137. See id. at ¶ 147.
139. Tecmed v. Mexico, supra note 23, at ¶ 164.
dimensions of the case is reminiscent of and constitutes a re-enactment of the "law" and "politics" tensions inherent in the Libyan oil nationalization cases. In a sophisticated rereading of the nationalization cases, Amr Shalakany notes that Libya lost the cases not because it did anything illegal, but because it engaged in a political act. This position becomes 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 stated earlier, one of the recognized 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 article focuses on the importance of recognizing that law is not as neutral as it is sometimes projected to be and that it cannot be divorced from its socio-political environment. Conversely, this is not meant to 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. 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.” In spite of the ICJ’s approach in the ELSI case, the predominant approach in arbitral decisions is to adopt a strict application of legal rules mostly devoid of equitable factors. The initial tribunal’s award in Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon & Société Camerounaise des Engrais (“Klockner v. Cameroon”) sought to apply equitable principles like frankness and loyalty in its examination of the relationship between the state and a

141. See Shalakany, supra note 9, at 455-56, 461.
142. ELSI Case, supra note 40, at ¶ 126 (emphasis added).
foreign investor.\footnote{See Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon & Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, 2 ICSID Rep. 3, at 26, 59-60 (1994). In addition, the tribunal seemed mindful of Cameroon's economic situation at the time.} The ad hoc committee that annulled the award in its entirety held \textit{inter alia} that the initial tribunal failed to correctly apply the law of Cameroon to the dispute.\footnote{See id. at 95 (stating that the initial tribunal correctly identified Franco-Cameroonian law as the applicable law).} 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.\footnote{See id. at 124-25.} One of the major lessons of \textit{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. \textit{In American Manufacturing \& Trading, Inc. v. Republic of Zaire}, equitable principles were adopted in favor of the foreign investor's position.\footnote{See American Manufacturing \& Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, 36 I.L.M. 1534, 1553-54 (1997).} The tribunal found that 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.\footnote{See id.} Another case, \textit{World Duty Free Co. Ltd. v. The Rep. of Kenya ("World Duty Free v. Kenya")},\footnote{See id. at 138-57.} is often cited as an example of a successful application of the principles of equity. In \textit{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.\footnote{World Duty Free Co. Ltd. v. The Republic of Kenya, ICSID Case No. ARB/00/7, 46 I.L.M. 337, Oct. 4, 2006.}

Essentially, this article does not suggest that regulatory measures adopted in response to social pressures are necessarily legitimized by the interaction of popular will and government action, especially, where international rules are involved. Rather, it advances the position that politics of exclusion—positions that exclude peoples' engagement with investment law and reads them out of its realm—should be excluded when settling foreign investment disputes.\footnote{While social pressure is generally unacceptable, writers adopt the view that in some limited instances, environmental regulation will not be considered as regulatory...} As the ICJ decision in the
ELSI case has shown, governmental action in response to social pressure may not be arbitrary, although by an interpretation of many IIAs in force, it may be expropriatory. Thus, 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 acts, thereby obscuring the real 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, the Tecmed v. Mexico decision 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.

Beyond the likely practical effects of the Tecmed v. Mexico decision, it has potential positive impacts, even though the situation is not close to 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 protests, which was the determining factor behind the dispute.\(^{151}\) 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 Tecmed v. Mexico tribunal seemed inclined to give effect to regulatory measures adopted as responses to social protests if the measures were 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, it could

---

\(^{151}\) 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.
develop a legal regime that is sensitive to the positive and negative impacts of investment activities.

V. Conclusion

As this article 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.  

However, ICSID, like many international institutions, is not the most hospitable place for Third World communities of resistance. Third World communities may have the attention of the World Bank and the WTO (after the Seattle protests of 1999) even though this attention has not produced significant changes, but 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 even from the relatively slow progress made in other areas of international law.

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 triggered the investment disputes in some cases to the analysis in *Tecmed v. Mexico*. Despite its imperfections, *Tecmed v. Mexico* represents the first 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 and written out of 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 realm of the legal), 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 the other.

As long as international actors perpetuate the current structure of investment dispute settlement, lawyers must become more sophisticated in including peoples’ concerns in their legal arguments, and carefully couching their positions in legal terms and language.

---


153. For example, recent *amicus curiae* briefs plead investor responsibility and the applicability of human rights norms to investment dispute settlement cases. See the *amicus curiae* briefs in Biwater Gauff v. Tanzania, (March 26, 2007), [http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf](http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf); and in Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine
an even greater responsibility to interpret the law in a manner that directly incorporates the interests of peoples in investment dispute settlement. If lawyers and tribunals follow this path, we may begin to witness the first sightings of robust international rules on foreign investment.

Republic (April 4, 2007) http://www.ciel.org/Publications/SUEZ_Aminus_English_4Apr07.pdf. The latter brief specifically refers to the "massive social upheaval" in Argentina due to the country's economic crisis. The crisis informed the policies that made Argentina a defendant to about thirty ICSID proceedings.