# TWAIL AND INVESTMENT LAW – THE PERPETUAL STRUGGLE

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## ABSTRACT

*Investment Arbitration has acquired the center stage in the recent past with the emergence of investment opportunities internationally. Accompanying the growth of investment opportunities is the equally distressing reality of investment protection. In light of the Argentinian crisis and the growing voice of Investment Arbitration Tribunals it is essential to recognize the existence of threats to the Global Financial Market, which poses an obstacle to International Investment law and arbitration. The 'Third World' Approach to International Law ("**TWAIL**") has proposed to ease this situation by promulgating approaches that resonate the developing world's take on International law regimes and this has found its way to International Investment law via the route of arbitration. Disputes arising between investor states and the Third World propose a new set of opportunities and obstacles and this paper attempts to decipher this journey. Judgments of Arbitral Tribunals often turn a blind eye to the existing realities of such countries, further*

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*deepening the divide and continuing to promote the interests of the Imperial West. This paper has analyzed TWAIL and its relationship with International Investment Law to put forward both sides of the story and stresses upon the need to appreciate differences in Investment climates across the world, while celebrating the recent success of decisions aimed at doing the same.*

## I. INTRODUCTION

International law is unquestionably law seen in facets of not only global governance of international relations but is also the adhesive that binds people of different jurisdictions together in order to enable an efficient exchange of capital, thoughts and ideas. This capital may not always be financial in nature, and encompasses in its ambit cultural, religious and linguistic discourses. However, this paper focuses only on the financial interface that international law has and analyses its effects and impact on the objectives of the Third World. International law has been studied through various lenses, and including schools such as the feminist study of International Law and a communist perspective to international law.[1] While it may not be appropriate to term TWAIL a school of thought, it is essential to recognize that it is a counter-hegemonic discourse that attempts to break the perception International Law as is often promulgated by Western Countries, often the promulgators of International Doctrines.

TWAIL is sensitive to the ideological struggles faced by people of the third world, which comprises of developing as well as less-developed

[1]Vasuki Nesiah, *The Ground Beneath Her Feet: "Third World" Feminisms*, 4 (3) J. INTL.WOMEN. STUDIES. 30, 38 (2003).

countries.[2] James Gathii, one of TWAIL's most celebrated advocates rightly declares this third world perspective of international law to be a limitation on the 'universalization' of international Law. [3]Makau Mutua's idea of TWAIL opposing an unjust global order further cements Gathii's declaration and elucidates the long struggle that third world nations have united and put forth to fight the hierarchy in the so called neutral and equal sphere of International Law. [4]

TWAIL's objective can be summarized as an attempt to counter the hegemony of the Westphalian understanding of international law impacts Human rights, cultural identities, sovereignty of states, Taxation policies and Diplomatic protection between States. Further TWAIL's interaction with investment law has exposed the fallacies in this Westphalian understanding of International law, illuminating the domination of the Third World both directly and indirectly through economically unjust policies imposed by 'neo-liberalism of the West. Investment enables the infusion of capital and technology to developing countries, providing them with a chance of robust economic growth and employment opportunities and is often pivotal to such countries due to their inability to invest due to a lack of capital and limited technology research and development.

This limitation is most often exploited by developed nations, empowered by both technology and capital who rely on the natural resources of developing nations and impose unfair investment terms and conditions on their Host state.[5] This not only presents the unequal negotiating power between two so called equals as broadcasted by

[2]Upendra Baxi, *What may the third world expect from International Law,* 27 Third World Quarterly 5, 135 (2006) [Hereinafter Upendra Baxi].
[3]James Thuo, *Rejoinder: Twailing International* Law, 98 Michigan Law Review 2066, 2067 (2000).
[4] W. Mutua Makau, *What is Twail?*, American Society of International Law, Proceedings of the 94th Annual Meeting, at 31-39 (2000) [Hereinafter W. Mutua Makau].
[5]M. Sornarajah, *Mutations of Neo-Liberalism in International Investment Law*, 3 (1) Trade Law and Development Journal 203 (2011) [Hereinafter,M. Sornarajah].

International law, but also strengthens the hierarchy in ideologies and objectives of States impacting not only economic policies but also environment, labor and financial policies. It is this hegemony that TWAIL attempts to counter in presenting the third world perspective vis a vis investment law, most often regulated by Bilateral Investment Treaties in our modern world.[6]

This paper attempts to unravel the ideology of TWAIL while focusing on the differences between nations and noting the essentiality in recognizing differences instead of merely universalizing to enable a fairer world order. The Author recognizes and is in complete consonance with Upendra Baxi's understanding that the third world in itself is composed of multiple identities and histories that impact their objectives, but realizes the need to counter the present hegemony in International Investment law by analyzing TWAIL as a united ideological resistance to the present international law apparatus.[7] Discerning the centrality of investment in today's world, it is only fair to focus and extend this resistance of the Third World and study the hierarchy in International Investment law and critique it to narrow the lacunae in this international gradation of countries. However, it is essential to remember that the interaction of International and Investment Law have their equal share of positives and have undeniably strengthened the global economy.

## II. WHY DO WE NEED TWAIL?

To truly appreciate TWAIL's contribution it is important to understand the contribution of the Westphalian System. This focus on Europe and the writings from a Euro centric perspective is

[6]Jesswald W. Salacuse, *The Emerging Global Regime for Investment,* 51 (2) Harvard International Law Journal, 427 (2010).
[7]Upendra Baxi, *supra* note 2, at 137.

fundamentally opposed by TWAIL scholars as it does not acknowledge the existence of a third world that has had different cultural, historical experiences and therefore has different expectation from international law[8] the need to respect sovereignty of States emerged as a means of controlling War. To control the rise of wars such as World War II in the future, the European nations came together to decide upon principles that would control and protect the interaction and recognition of sovereign states.[9]

In 1648 the Peace of Westphalia for the first time came up with the idea of what has evolved to today's international law by ending the Thirty Years' War between Catholics and Protestants in Europe. It laid on the essential principle of non-intervention of states in the domestic order of other states and by the Seventeenth century evolved to a system of tolerance between European states irrespective of the differences in other state's domestic and legal setups. Unfortunately, World War I followed this development as Euro states once again became intolerant of domestic differences.[10]

World War II on the other hand saw the Soviet Union materializing to be a power that countered Europe and the West's liberal capitalistic approach of expanding to colonies and territories. Further, countries emerging from their imperial past became new actors in International law in this period, leading to a "*Revolt against the West*", which first marked the existence of the Third World and in true terms broadened the scope of International Law.[11] These newly sovereign states

[8]W. MutuaMakau, *supra note* 4.

[9]David P. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 29 CHINESE JOURNAL OF INTERNATIONAL LAW (2003) [Hereinafter David P. Fidler].

[10]"The name is derived from the Peace of Westphalia (1648), which contains an early official statement of the core principles that came to dominate world affairs during the subsequent three hundred years." See, JAN AART SCHOLTE, THE GLOBALIZATION OF WORLD POLITICS, IN: THE GLOBALIZATION OF WORLD POLITICS19, 23 (1997 ed.).

[11]David P. Fidler, *supra* note 9.

exercised International law by entering contracts and creating customs and later in joining the United Nations ensured that their voices were heard so that prejudices of the West could no longer prevail to further their economic interests.

These voices against domination formed the roots of TWAIL and are today applicable to Investment Law that is most often critical in analyzing economically mutual relationships between Sates. In this understanding of investment law, institutions are placed in the context of a formal mechanism without analyzing the effect that global power dynamics have on the negotiating power between nations and their nexus with investment law.[12] Hence institutions spoke to language of powerful States and only accommodated their interests and development.

However with the increase in awareness and legal scholarship in TWAIL, the voices and interests of the third world are being heard, as can be seen in the third world pressure on institutions like the World Bank and the World Trade Organization to address the grievances and aims of third world development via investment.[13] This is fueled by the adverse effects of unfair investment law regimes that often leave third world nations grappling with unsustainable environmental damage, massive unemployment, exploitation of limited natural resources and an ever-increasing spiral of corruption.[14]

Global governance norms such as those imposed by TRIPS force nations to mold their domestic laws to align with such international policies, thereby bringing into doubt the nature of sovereignty these states actually possess.[15] Transnational corporations that control the

[12] B. S. Chimni, *The World of TWAIL: Introduction to the Special Issue*, 3 (1) TRADE LAW AND DEVELOPMENT JOURNAL 11, 15 (2011) [Hereinafter, B. S. Chimni].
[13] *Id.* at pp. 14-15.
[14] *Id.* at 20.
[15] Jan Wouters, Philip De Man & Leen Chanet, *The long and winding road of International Investment Agreements: Towards a coherent framework for reconciling the interests of developed and developing countries,* 3 HUMAN RIGHTS

flow of capital to and from developing nations always lie outside the control of these nations who are forced to change their policies, raising issues on the self-determination of these sovereign states.[16] Further a uniform view of all nations and attempt to standardize trade and investment practices via international institutions ignores the differences that the third world advocates, leaving developing nations with the unenviable option of choosing between isolation or compromise, furthering the questions on self-determination of sovereign third world states.[17]

Customary International Law when analyzed in its own plane also impedes fairness in investment policies as, traditional international law does not recognize individual investors or parties and they are then left with no option but to espouse their grievances through their home State. This Investor State dispute is often weighed on the power yielded by the Investing State, ultimately leaving growing economies worse off.[18] Yet, customary international law's interaction with investment law and disputes occurs only on the concurrence of the breach of the BIT being a breach of the international law standard and does not extend to mere contractual disputes arising from the BIT. Aggrieved individual investors approach their home states (States are traditional actors in international law) to protect their investment claim.

However, to ease the situation home states of investors often indulge in 'gunboat diplomacy' with the Host state. This is a form of diplomatic protection that is exercised with respect to investment claims and is made possible due to the international law obligation

AND INTERNATIONAL LEGAL DISCOURSE 263, 264 (2009) [Hereinafter, Jan Wouters, Philip De Man & Leen Chanet].

[16] See, JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEWSTATES IN POST-COLD WAR PRACTICE, (2013 ed.)

[17] B.S. Chimni, *Capitalism, Imperialism and International Law in the Twenty First Century*, 9 Oregon Review of International Law 19, 21, (2012).

[18] Adeoye Akinsanya, *International Protection of Direct Foreign Investments in the Third World*, 38 International and Comparative Law Quarterly 58, 59 (1987).

imposed upon Host states to protect the property of Aliens' when they are set up in the Host state in furtherance of development and trade. Hence it the home state espousing the investment claims of investors from the Host state and is most frequently used by the first world in cases of expropriation.[19] This form of diplomacy can extend to the use force and is a weapon of domination of the first world as there is no level negotiating power and the repercussions in case Host state fails to address investment claims are appalling and range from economic sanctions by the international community to strained international relationships that limit the flow and exchange of goods and services.

Hence the need for TWAIL is essential in understanding investment law which is bilateral or multilateral in its nature and must give equal protection to not only the capital exporting, but also the capital importing 'Third World' states.

## III. THE TALE OF TWAIL AND RISE OF NEO-LIBERAL INVESTMENT POLICIES

The 21st century has seen the catalyzing impact of neo liberalism and this has been resonated in investment policies and laws across the world. This is true not only in the interaction of the developed and developing states, but also between investment agreements (most often in the form of BIT's) between developing nations themselves. Trade and financial intuitions like the WTO, TRIPS and World Bank

[19]Felix O. Okpe, *Engangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment and the promise of Economic Development of Host States,* 13 RICHMOND JOURNAL GLOBAL LAW AND BUSINESS REVIEW 217, 218 (2014) [Hereinafter, Felix O. Okpe].

advocate for the same and are powerful tools in accomplishing the economic objectives of the West.[20]

Further the emergence of transnational corporations has made matters worse and they find legitimacy in the espousal of their objectives by States in the name of promotion of national interest and global development.[21] Neo Liberal Economic Policies and their impact on investment law are best illustrated by international law's attempt to control and regulate property rights. This attempt is a puppet controlled by the powerful Western States and is insensitive to the resistance of the Third World.

Intellectual Property forms a major stake of gross property value in the World and the centrality of TRIPS in regulating such IP is pivotal of the role of international law in determining the scope and direction of investment policies. TWAIL analyses this internationalization of property in its critique of the impacts of TRIPS policies. India, for instance in its landmark decision on the patentability of the Cancer Drug Glivec by Novartis acknowledged the impact of TRIPS on drug patents and the consequent multiplication in drug prices had the patent been granted to Novartis. Investment, here in terms of pharmaceutical giants investing in India, that helped research and development while setting up industries was seen as the perfect path to development, was emphasizing on the relevance of investment protection extending to patent protection in this context.[22]

This policy of the TRIPS exemplifies the indifference of international institutes and their developed nation partners who control policy regulation while eyeing the sole objective of neo liberal capitalism and

[20] James T. Gatthi, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 Michigan Law Review (1999).
[21] B. S. Chimni, *supra* note 12, at 18.
[22] Leena Menghaney, *The Glivec Precedent: Drop the Case*, XLVIII (32), Economic and Political Weekly, August 10, 2013.

turning a blind eye to the grievances of poverty, health endemics and unaffordability of drugs by the poor masses in the developing nations. The indifference of both developing nations and international institutions in addressing third world grievances and objectives while furthering their neo liberal economic and trade policies is made clear through examples such as this. TWAIL questions this application of international law not only due to its unfairness but also because third world states did not have a say and equal platform to raise their concerns in the making of such laws.[23]

While presenting the grievances of the third world, the Author also wishes to celebrate the small yet relevant changes that TWAIL is bringing about in investment law's neo liberal approach. This counter hegemony has led to questions on the application of absolute protection of investment in foreign countries as this absolute protection is extreme and leaves third world nations vulnerable to claims ranging from expropriation to denial of justice. However, in 2004 when the United States of America (USA has been a great advocate of absolute protection in its promotion of its neo liberal economic policies), amended its Model BIT diluting the absolute standard it had maintained in its previous BIT's with developing nations. This symbolizes a thawing of the hegemony in investment law and must be celebrated. [24]

## IV. THE LATIN AMERICAN STRUGGLE AND ITS RELEVANCE TO INVESTMENT LAW

Another victory of TWAIL centered on the Latin American countries has been their resistance to the American views on investment dispute

[23]M. Sornarajah, *supra* note 5, at 203.

[24]KENNETH VANDEVELDE, A COMPARISON OF THE 2004 AND 1994 US MODEL BITS: REBALANCING INVESTOR AND HOST COUNTRY INTERESTS: YEAR BOOK OF INTERNATIONAL INVESTMENT LAW 212 (2009).

resolution. USA insisted upon the application of an International Minimum Standard of Protection to investments, which includes equal protection to the investor and the right to be governed by equal laws and access to justice in the host state.[25] This International minimum standard was an external standard that was not sensitive to the struggles the third world faces and subjects dispute resolution to this absolute standard that is determined by an arbitral tribunal.

First world countries insisted that this standard was maintained by International Law alone and as third world states were also subject to the same International Law, they were bound by it. Latin American nations rejected this requirement, reiterating the need to recognize differences between the Host and Investor states and endorsed the application of a National Treatment Standard, giving domestic courts the right to adjudicate upon investment disputes by applying the law of the land and not international law principles that Arbitral tribunal relied upon.[26] This standard has been termed the Calvo Doctrine, after Carlo Calvo a Latin American jurist. This doctrine promises the application of the same domestic law on both the host states and investors but has been criticized by the West for being unfair as they believe domestic courts would be prejudiced to support the host nation and sufficient protection would not be accorded to the investor.[27]

Latin American nations were not alone in this struggle and were backed by new states emerging from decades of imperialism in both Africa and Asia and together advanced their New International Economic Order (NIEO) to counter the West's unfair neo-liberal economic model. They agreed upon the universalization of the Calvo Doctrine as it promoted Host States' interests from the might of

[25] R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES, at 9-17 (2005).
[26] B. S. Chimni, *supra* note12, at 20.
[27] Alwyn Freeman, *Recent Aspects of the Calvo Doctrine and Challenges to International Law*, 40 American Jorunal of International Law, 121-123, (1946).

investors. Further, Third World States demanded complete ownership of their natural resources which developed nations[28] were trying to exploit and gain control of via the internationalization of property law as discussed earlier in this section. In order to maintain the hegemony most developed nations stressed upon the importance of previous arbitral awards and writings of Eminent Jurists. We must note that arbitral awards are not binding upon the world at large, as they have no *stare decisis* value and bind only the parties consenting to the dispute resolution.[29]

Dissenting opinions of arbitral values weigh equally to the majority opinion and form only a weaker source of International Law, thereby exposing the desperate but weak argument of the West to control investment laws.[30]

## V. ICSID AND THE THIRD WORLD BRUTALITY

The World Bank was formed after World War II to aid in post war reconstruction of development. It then gradually increased its ambit and began aiding development projects across the world and went beyond being a mere monetary institution. Poverty of the Third World often featured in such policies and investment was endorsed by the World Bank to help this situation as investment in developing nations catalyzed economic growth.[31] This was coupled with a gradual rise in investment disputes that the World Bank was not granted authority to mediate.

[28]Aditya Kutty & Sindhura Chakravarty, *A Mutlilateral Investment Agreement: A Poison or an Antidote,* 22 (1) Sri Lankan Journal of International Law 89 (2010).
[29] Gilbert Gulillaume, *The Use of Precedents by International Judges and Arbitrators,* 2 (1) Journal of International Dispute Settlement 5, 23 (2011).
[30] Frederick D. Sourgens, *Law's Laboratory: Developing International Law on Investment Protection as Common Law*, 34 (2) Northwestern Journal of International Law and Business 184, 185 (2014).
[31]Felix O. Okpe, *supra* note 19, at 217.

In light of this a dispute settlement mechanism was established and is known as the International Convention for the Settlement of Investment Disputes (ICSID) and is composed of a permanent arbitral tribunal that adjudicates upon investment disputes.[32] Parties ratify this Convention and it has been argued by TWAIL Scholars like Sornarajah that the Third World's desire to develop economies has left them with no option but to ratify the ICSID Convention, as it is an incentive for developed nations to invest. Further it also ensures financial aid and loans from the World Bank, as ICSID is merely its arm. [33] Further, ICSID elevates political impacts on the economy to the international legal sphere to enable dispute resolution.

This is counter-productive to the Third World whose economy is dominated by its Government's policy actions and policies and the ICSID catalyze their economic burden in course of the advancement of neoliberal investment protection. [34] Hence the impact of the establishment of ICSID is not only limited to dispute resolution but also influences Third World nations by the indirect impact discussed in this section. Countries like Pakistan who faced bitter experiences at the dispute resolution forum of arbitration have the same displeasure for investment laws and their resolution mechanism that is heavily tilted towards favoring Western Nations. Countries like Australia that are not in the truest sense third world have more openly criticized such BIT's and their dispute resolution clauses.[35]

[32]Ibironke T. Odumosu, *The Antinomies of the (Continued)Relevance of ICSID to the Third World*, 8 SAN DIEGO JOURNAL OF INTERNATIONAL LAW, at 245 (2006-07).
[33]M. Sornarajah, *supra* note 5, at 205.
[34]*Id.* at 358.
[35]In 2010 the Australian Government announced that it would not grant any foreign investor more protection than the local investors are given, thereby challenging the roots of investment law, as we know it. see, M. Sornarajah, *supra* note 5, at 203.

## VI. BIT'S AND THE THIRD WORLD: BOON OR BANE?

Bilateral Investment Treaties today have the obligation of ensuring "*Fair and Equitable treatment*". As discussed in the previous section, this standard has not been defined in absolute terms but is an absolute standard that cannot be breached. This is best understood by through differentiation from National Treatment as espoused by the Calvo Doctrine and it is deciphered according to the circumstances in which it is applied and this must always be done in good faith. The meaning of what is 'Fair and Equitable' is seen in the context of the treaty between the Host and Investor State, in light of the object and purpose of the investment treaty.[36]

This position of the FET has lead to many a disputes and has gained prominence in the TWAIL discourse. While National Treatment doctrines are determined relatively; i.e. The application of domestic law applied to the host state and the investor is contrasted in determining the dispute), FET is absolute and is not dependent on the treatment that other investments are accorded by the host state. Investing states gain an upper hand in this process as host states cannot rely upon a pre-determined standard.[37] FET therefore is also called the "*Objective Rule*" as it ensures the investor a fixed standard of protection that is independent of the circumstances surrounding the investment and it does not take into consideration the position of the Host state. [38]

This inability to acknowledge the difficulties that may be faced by the Host State in the future has troubled TWAIL scholars as in its purest

[36] Astha Mishra &Anand Mishra, *Fair and Equitable Treatment Standard in International Investment Law: An Analysis vis-à-vis Public International Law*, 11Korean University Law Review, at 107, (2012).
[37] A. NEWCOMBE& L. PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OFTREATMENT47, 57 (2009 ed.).
[38] A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 135, 141 (Columbia University Press 1962 edition).

form the FET standard universalizes international law protection without seeing the third world perspective. This stricter form of investment protection also acts as an incentive for other investors to invest in the Host state and spreads the word in a global community. The first world offers an alternative view suggesting that FET ensures transparency in the market and helps economies of both states develop.[39] A lower standard of protection would not provide an incentive to invest nor would it help in maintain a healthy relationship between two states interacting in a commercial capacity often through individual investors whose claims are embraced by their state.[40]

The threat Third World nations face is in the interpretation of this standard being left to arbitrators who view investment arbitration similarly to commercial arbitration, ignoring the plight of the Host state in times of breach of the protection standard as set in the treaty. Further, due to the inconsistencies and non-binding nature of arbitration Host countries continue to feel vulnerable while exploring dispute resolution which often leaves them at the losing end with the burden of paying hefty amounts to investors of the Investing State as has been seen in the most recent Argentinean award.[41]

To allay this predicament Thomas Walde, a renowned investment arbitrator suggested the application of Comparative Public law in investment arbitration. Comparative public law attempts to apply principles of international law in the light of the space and time of the state, thereby combining Public International Law and Administrative Law. This limits the discretion of arbitrators in interpreting the FET standard as they apply international law concepts in the lights of other

[39]Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, TRANSPARENCY IN INTERNATIONAL LAW, ANDREA BIANCHI & ANNE PETERS, (Cambridge University Press, 2013)
[40]ALSCHNER WOLFGANG, THE RETURN OF THE HOME STATE AND THE RISE OF 'EMBEDDED' INVESTOR-STATE ARBITRATION: THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION (Martinus Nijhoff/BRILL, 2014).
[41]Ibironke T. Odumosu, *supra* note 32, at 251.

international regimes like the WTO and the ECHR.[42] This further ensures a higher level of consistency in deterring investor disputes and opens the possibility of more bilaterally acceptable solutions in cases of breaches by the Third World.

This can be done with the aid of General Principles of International Law under Article 38(1)(c) of the ICJ Statute that is referred to in the interpretation of investment treaties as specified in the Vienna Convention on the law of Treaties under Article 31 (3)(c).Considering domestic law and international law regimes in this method can alleviate some grievances of the third world as their context and differences can be accommodated in the various systems studied in dispute resolution .[43] Secondly, on a broader horizon ICSID has only concentrated on dispute resolution while ignoring the social context of investment, ignoring humanitarian and environmental impacts. This restrictive commercial approach is reflective only of economic maximization of the West as witnessed in the era of colonialism. It also suggests the universal application of a set outlook towards protecting investment while ignoring its impacts in the Host state, as this does not disturb the growth and status quo of the Investing First world.[44]

In light of this series of unfortunate events, the end of the 19th century saw a rise in the outcry against unjust investment laws by third world people, mostly through the voices of Non Governmental Organizations (NGO's) and their resistance at the domestic level. This has even had the positive impact of forcing Tribunals to consider the

[42]Astha Mishra & Anand Mishra, *supra* note 36, at 107.
[43] M. PERKAMS, THE CONCEPT OF INDIRECT EXPROPRIATION IN COMPARATIVE PUBLIC LAW - SEARCHING FOR LIGHT IN THE DARK: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 794- 798 (2011 ed.).
[44]Jan Wouters, Philip De Man &Leen Chanet, *supra* note 15, at 263.

voices of the Third world people as was seen in the *Aguas Del Tunari*[45] investment arbitration around the water wars in Bolivia.

On the other hand in *Tecmed v. Mexico*[46], the ICSID truly balanced public interest of those in the Host sates and the commercial interests of the investors while studying the landfill in the middle of the city that had been an investment made by a Spanish company in Mexico. This note of social conditions by the Tribunal shows that ICSID has a silver lining and can accommodate social interests of the Third World and truly symbolizes that legal norms cannot be created in a vacuum but must be in the light of the social and political context of the States, here the Third World and only when this occurs can international law truly succeed. [47]

However, we must recognize that by its very nature arbitration only occurs between interested parties when a dispute arises and NGO's and people protest groups do not have a legitimate voice as they are still considered to be non traditional actors and therefore limit the voice of the Third World in the ICSID, leaving the Third World as vulnerable to the impacts of investment laws.[48]

## VII. CONCLUSION

Investment law has always had the potential of transforming the economies of weaker Host States by importing not only investment capital but also by pumping in talent in resource and labor management, providing vocational training and employment in the investor. However it is unfortunate that these positives of investment

[45]Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3.
[46]Tecmed v. Mexico, ICSID Case No. ARB (AF)/00/2.
[47] CECILIA LYNCH, POLITICAL ACTIVISM AND THE SOCIAL ORIGINS OF INTERNATIONAL LEGAL NORMS, IN LAW AND MORAL ACTION IN WORLD POLITICS 140-142 (2000 ed).
[48]Ibironke T. Odumosu, *supra* note 32, at 252.

law are often balanced or overweighed by the side effects of the same. International law has facilitated both sides of this debate and continues to remain pivotal in global governance. International law is not a sacrosanct medium of governance and is often seen as a vessel of dominance of the more developed and economically, politically and socially more powerful nations. [49]

The internationalization of property and aggressive push for establishing a universal neo liberal economic policy across the globes show the failure of international law in treating every citizen as the same. International institutions like the WTO and World Bank camouflage the economic interests of the First world in their policies and enforce either directly or through indirect pressure Third world nations to ratify or apply the standard principles. It is in this light that the emergence of TWAIL is necessitated. TWAIL attempts to counter the present hegemony and make space to accommodate third world grievances and interests while adopting global policies, especially in the context of investment law.[50] TWAIL argues has been successful in its primitive attempts as the Third World is acknowledged now unlike in the colonial past.

Hence the Author celebrates the small victories of the TWAIL discourse while reiterating that there is a long and demanding struggle ahead of the Third World that wishes to voice the adverse effects of exclusion that Investment policies and International Law have not only economically but also in their environmental impacts, labor dynamics. International Law must independently attempt to move beyond protecting the First World interests instead focus upon the unity in diversity in the World and recognize differences in terms of stages of development, social and political histories and objective for the future of countries of the First and Third world and harmonize

[49]Upendra Baxi, *supra* note 2, at 139.
[50]B.S. Chimni, *supra* note 12, at 11.

such interests by reaching a middle ground through mutual negotiations. [51]

[51]Oloka Onyango &D. Udigama, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights Rights*, Sub-Commission on the Promotion and Protection of Human Rights, ¶ 34, (June 15, 2000).