CONSTRUCTING AND CONTESTING HEGEMONY

Counter-Hegemonic Resistance to the International Investment Law Regime

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws

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Abstract

I examine five international investment cases that embrace the neoliberal vision. This economic model provides a new, contested space between the construction of hegemonic globalisations from above and the contestation of these globalisations from below. The first objective is to describe this space. Each ends the same way: the exit of an unwanted foreign investor after intense social mobilisation. The second objective is to show that counter-hegemonic victories are difficult to achieve: the regime relegates the voice of the subaltern to an inconsequential role, limits public interest state projects that may interfere with investor rights, and often includes a compensatory promise to foreign investors irrespective of the host state’s fiscal capacity. The third objective is to demonstrate the ambivalent role of the state in promoting such neoliberal projects, which necessitate that it adopt a more active role in either policing investment or policing society.
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# Table of Contents

**Chapter One – Constructing and Contesting Hegemony**

1. **Introduction** 1  
2. **Economic Globalisation** 5  
3. **Background to the International Investment Law Regime** 8  
   3.1 **Bilateral Investment Treaties** 9  
   3.2 **ICSID Arbitration Tribunal** 10  
   3.3 **Democratic legitimacy concerns of BITs and Arbitration Tribunals** 12  
      3.3.1 **Expansive Interpretation** 13  
      3.3.2 **Primacy of Hegemonic Systems** 15  
      3.3.3 **Private Arbitration Model** 16  
4. **Counter-Hegemonic Globalisation** 18  
   4.1 **Subaltern Cosmopolitan Legality Approach** 19  
5. **Organisation of Thesis** 22  
   5.1 **Counter-Hegemonic Globalisation against the International Investment Law Regime** 23  
   5.2 **The Role of the State within the International Investment Law Regime** 26  

**Chapter Two - Nos han hecho el baño del mundo**

1. **Introduction** 29  
2. **Environmental Context** 34  
   2.1 **Environmental Consequences of the Maquiladora Industry** 34  
   2.2 **The General Law of Ecological Balance and Environmental Protection** 37
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.3</td>
<td>Changes to the Mexican Constitution</td>
<td>39</td>
</tr>
<tr>
<td>2.4</td>
<td>Environmental Policies Post-NAFTA</td>
<td>41</td>
</tr>
<tr>
<td>3.</td>
<td>The Hermosillo Struggle</td>
<td>43</td>
</tr>
<tr>
<td>3.1</td>
<td>Counter-Hegemonic Globalisation</td>
<td>47</td>
</tr>
<tr>
<td>3.1.1</td>
<td>Institutional Strategies</td>
<td>47</td>
</tr>
<tr>
<td>3.1.1.1</td>
<td>Alco Pacifico Dumpsite Link</td>
<td>47</td>
</tr>
<tr>
<td>3.1.1.2</td>
<td>Permit Violations</td>
<td>49</td>
</tr>
<tr>
<td>3.1.1.3</td>
<td>Demonstration</td>
<td>50</td>
</tr>
<tr>
<td>3.1.1.4</td>
<td>International Mobilisation</td>
<td>51</td>
</tr>
<tr>
<td>3.1.2</td>
<td>Extra-Institutional Strategies</td>
<td>53</td>
</tr>
<tr>
<td>3.1.2.1</td>
<td>Blockade</td>
<td>54</td>
</tr>
<tr>
<td>3.1.2.2</td>
<td>Permanent Sit-in</td>
<td>55</td>
</tr>
<tr>
<td>3.1.2.3</td>
<td>Public Denunciations</td>
<td>57</td>
</tr>
<tr>
<td>3.1.3</td>
<td>Political Opportunity Structures</td>
<td>58</td>
</tr>
<tr>
<td>3.1.4</td>
<td>Transnational linkages</td>
<td>59</td>
</tr>
<tr>
<td>3.2</td>
<td>State – and Investor – Response</td>
<td>61</td>
</tr>
<tr>
<td>3.2.1</td>
<td>Closure of Cytrar Landfill</td>
<td>61</td>
</tr>
<tr>
<td>3.2.2</td>
<td>Relocation of Cytrar Facility</td>
<td>63</td>
</tr>
<tr>
<td>3.2.3</td>
<td>Arbitration Award</td>
<td>64</td>
</tr>
<tr>
<td>3.3</td>
<td>Difficulties in achieving victories</td>
<td>66</td>
</tr>
<tr>
<td>3.3.1</td>
<td>INE denial to renew Cytrar’s permit</td>
<td>66</td>
</tr>
<tr>
<td>3.3.2</td>
<td>Secrecy of Waste Facility (investment) projects continue</td>
<td>68</td>
</tr>
<tr>
<td>3.3.3</td>
<td>ICSID Decision</td>
<td>71</td>
</tr>
</tbody>
</table>
3.3.3.1 State vs. Civil Society 71
3.3.3.2 ICSID vs. Civil Society 73

4. Role of the State 75
4.1 Secrecy of Tecmed Project 76
4.1.1 Right to Information 78
4.1.2 Right to Participate 79
4.2 Blockade 81
4.3 Denial to Relocate Facility 82

5. Conclusion 84

Chapter Three - Because water is a right - not a commodity

1. Introduction 87
2. Argentina: Political and Economic Background 89
2.1 Economic Crisis 95
3. Counter-Hegemonic Social Mobilisations 99
3.1 Vivendi 99
3.1.1 Tucumán 99
3.1.2 Difficulties in achieving victories 104
3.2 Suez 110
3.2.1 Buenos Aires 110
3.2.2 Santa Fe 115
3.2.3 Córdoba 119
3.2.4 Difficulties in achieving victories 122
3.2.4.1 Acceptance of Amicus Curiae submissions 123
3.2.4.2 Taking the Local to the Global 127
3.2.4.3 Renationalisation of Water 130
3.2.4.4 Semi-Direct Democracy? 131

4. Role of the State 133
   4.1 Regulatory Agency 134
   4.2 Secrecy of the Concession Contract 138
   4.3 The Concession Contract 139

5. Conclusion 143

Chapter Four - Conclusion

Conclusion 146

Bibliography 156
CHAPTER ONE
Constructing and Contesting Hegemony

1. Introduction

In an era of global economic integration, a novel set of political and normative dilemmas has arisen, namely how to reconcile territorially-rooted democratic legitimacy with the new global and transnational economic organisation in which the market rules supreme.¹ Two key questions arise. First, what is the role of the state in this new age of economic globalisation? If, in the past, the state was responsible for the regulation of its national economy, as guarantor of social equity, and the production of public goods and cultural identity, has globalisation diminished its role in these areas? It has been argued that economic globalisation involves neither the erosion of the nation-state nor its displacement based on ‘more market, less state.’² If this is true, what is the new role of the state in this era? Second, has the struggle to counter this new world order been successful in its efforts? Economic globalisation, as a top-down, hegemonic globalisation, has been largely successful in the planetary circulation of neoliberal fundamentals such as privatisation, deregulation and liberalisation. However, in the past decade or so, there has been a growing resistance, locally - and transnationally - organised, against the unequal exchanges³ produced or intensified by

³ I use the term “unequal exchanges” to refer to the subordination of less developed countries (i.e. non-Western states) to more developed countries, and the exploitation of the former by the latter through surplus extraction, or in the transfer of commodities. This exchange has intensified with economic globalisation and specifically with neoliberalism, which has deepened the disproportionate utilisation of resources and externalised the negative environmental costs by developed countries, and consequently, declined utilisation opportunities and internalised the environmental burdens within less developed countries. Emmanuel Wallerstein states that, “[o]nce we get a difference in the strength of the state machineries, we get the operation of “unequal exchange” which is enforced by strong states on weak ones… Thus capitalism involves not only appropriation of the surplus value by an owner from a laborer, but an appropriation of surplus of the whole-
economic globalisation. Whether these movements have been successful in achieving their goals, however, is another question.

With these two questions in mind, this thesis examines five case studies of resistance taking place within two national states against the legal regime for the promotion and protection of foreign investment, considered to be tangible evidence of economic globalisation. Many scholars have pointed to the constraints imposed by the international investment law regime on the state. In some cases, the ability of a state to exercise its regulatory power in the public’s interest has been limited due to its pre-commitments to transnational capital, which includes guaranteed returns on investments. As a result, the regime has been met with fierce opposition by an emerging local, national and transnational counter-hegemonic movement, which has challenged neoliberalism – the newest “hegemonic project” assumed by states worldwide. The first case I examine involves a Spanish investor, Tecmed, in the

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6 For example, in Ethyl Corp. (Ethyl Corp. v. Canada, UNCITRAL (NAFTA), Notice of Arbitration, (April 14, 1997)), the investor, Ethyl Corp., sued Canada for expropriation after Canada banned, for public health reasons, a gasoline additive produced by Ethyl. Canada settled the case, agreeing to pay $13 million in compensation to the company. The settlement was precipitated by a non-binding ruling issued by an internal Canadian trade dispute body. See David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise (Cambridge: Cambridge University Press, 2008) at 113, 130-133 [Schneiderman 2008]. A similar issue arose in Methanex Corp., where Methanex claimed that a Californian ban on MTBE, another fuel additive, was (among other claims) an expropriation of its methanol production business, a prime ingredient of MTBE (Methanex Corp. v. United States, NAFTA Ch. 11 Arbitral Tribunal, 44 I.L.M. 1345, Final Award, (August 3, 2005)). Available online: <http://www.state.gov/documents/organization/51052.pdf> (visited: Sept. 4, 2009).
management of a hazardous waste facility in Hermosillo, Mexico. The second case involves a French multinational water corporation, Vivendi, in the operation of a privatised water and sewage system in Tucumán, Argentina. The last three cases involve another French multinational water corporation – Suez – in the operation of water and sewerage services in three provinces of Argentina: Buenos Aires, Santa Fe, and Córdoba. These stories have a number of commonalities: (1) the facilitative role of the state in institutionalising neoliberal reforms, including both state projects with a neoliberal vision and the global project of the investment legal regime; (2) a bottom-up counter-hegemonic resistance that is generated by the community in each locale against the neoliberal institution in question; (3) the ambivalent role of the state during the clash between the hegemonic and counter-hegemonic globalisation, which has meant that it either sides with investment or the community; and (4) the difficulties endured by the resistance in each case in achieving sustainable victories. The first goal of this thesis is to describe the neoliberal project taken up by the state and the opposition it creates within the community. The second goal is to show that within the logic of the international investment regime, counter-hegemonic victories are hard to come by. The third goal of this thesis is to demonstrate the extreme tension the state finds itself within the context of the investment rules regime, where it must side either with international capitalist interests or the interests of civil society, both of which can have dire consequences - political and economic, respectively - for the state.

Before detailing the layout of the case studies that form the basis of this thesis, the present chapter aims to contextualise the two questions posed: have counter-hegemonic mobilisations been successful in achieving their goals and what is the role of the state within

Theory: Putting the Capitalist State in its Place (Cambridge: Polity Press, 1990) [Jessop 1990], which will be discussed later in this chapter.
an era of global economic integration. I turn, first, to a brief discussion of the restructuring of the state during the past two decades as a result of economic globalisation. The trends that we see are the denationalisation of the state, the destatisation of the political system, and the internationalisation of policy regimes, which have led not to the demise of the state, but to its reorganisation. I then introduce the international investment law regime, which is the backdrop to the broader questions posed, and which is evidence of the spread of a dominant – or hegemonic – globalisation. I describe the bilateral investment treaties that structure the regime; the *ad hoc* arbitral tribunals, which are dispute resolution fora established to hear disputes brought by investors against host states; and some of the democratic legitimacy concerns that surround the investment rules regime.

In the third part, I introduce the work of Boaventura de Sousa Santos, who describes a bottom-up approach to socio-legal research on globalisation. The process of economic globalisation, driven by a neoliberal ideology, has collided with a counter-hegemonic mobilisation, which has challenged the “fatalistic ideology that ‘there is no alternative’ to neoliberal institutions.” Finally, in the last part, I describe in more detail the topics to be studied in the five case studies. I situate the international investment law regime within Santos’ approach, by first describing the resistance against the regime as a site of counter-hegemonic globalisation, and second, by examining the role of the state within the regime.

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8 Santos & Rodríguez-Garavito at 2.
2. Economic Globalisation

Globalisation, or what is generally referred to as globalisation, is a vast social field of “hegemonic or dominant social groups, states, interests and ideologies”\(^9\) that has had a planetary effect. Indeed, as Boaventura Santos claims, the term “globalisation” refers to the successful globalisation of a particular localisation. Thus, there are no genuinely “global” conditions; they in fact always have local roots.\(^10\) How localisms successfully globalise is due to a complex result of many different processes on many different scales.\(^11\) There are a number of competing versions of globalisations, as economic, political, and socio-cultural projects, including for example, international relations, social policies, cultural integration, transnational dissemination of ideas and the spread of technology. What interests me in particular is economic globalisation: the integration of national economies into the international economy or world market, and the challenge this poses to the state.

As Bob Jessop claims, within an era of economic globalisation, states have found it increasingly difficult to contain economic, political, and social processes within and across their borders due to the porosity of borders to various kinds of flows, the increasing mobility of capital over a range of transnational scales, and the compressed time at which this capital travels.\(^12\) The changes that have arisen are therefore related to a growing fragmentation and reorganisation of the state.\(^13\) Jessop describes three trends in the structural effects of the state in the emergence of a globalising economy.

\(^9\) Supra note 4 at 393.
\(^10\) Ibid. at 396.
\(^12\) Jessop 2002 at 194.
\(^13\) Ibid.
The first trend is the “denationalisation of the state:”

This is reflected empirically in the ‘hollowing out’ of the national state apparatus with old and new state capacities being reorganised territorially and functionally on supranational, national, subnational and translocal levels as attempts are made by state managers on different territorial scales to enhance their respective operational autonomies and strategic capacities.\textsuperscript{14}

Thus, state powers are delegated “upward” to supranational and international entities, “downward” to regional or local levels within the state, and “outwards,” linking regions in several societies with complementary interests.\textsuperscript{15} The second trend is the “destatisation of the political system,” which has been summarised as the shift from government to governance.\textsuperscript{16}

… [D]estatisation involves redrawing the public-private divide, reallocating tasks, and rearticulating the relationship between organisations and tasks across this divide on whatever territorial scale(s) the state in question acts.\textsuperscript{17}

States either transfer responsibilities for managing economic and social relations to nongovernmental, private or commercial actors, or exercise such functions in “partnership” with these actors.\textsuperscript{18} Destatisation can thus lead to a blurring of the division between the public and private, and an increased role for private actors in society. The third trend is the “internationalisation of policy regimes”:

The international context of domestic state action (whether national, regional or local) has expanded to include a widening range of extraterritorial or transnational factors and processes; and it has also become more significant strategically for domestic policy. The key players… have also expanded to

\textsuperscript{14} Ibid. at 195.
\textsuperscript{15} Ibid. at 195-198.
\textsuperscript{16} Ibid. at 199.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
include foreign agents and institutions as sources of policy ideas, policy design and implementation.\textsuperscript{19}

This trend has resulted in the state becoming more concerned with international competitiveness, which may be reflected in its internal economic and social policies. It also affects the development of international regimes,\textsuperscript{20} like the international investment law regime, which defines and guarantees – through a network of bilateral investment treaties with constitutional effect\textsuperscript{21} – the global and domestic rights of transnational capital.\textsuperscript{22} I return to this regime, which is the background to this thesis, in detail below.

These trends beg the question: is there still a role for the state in this era of economic globalisation? The rearticulation of the nation-state within the new global order has been conceived of as a threat to national sovereignty, a weakening of the state’s economic decision-making authority,\textsuperscript{23} and a failure of the state as the guardian of public interest.\textsuperscript{24} Some critics have gone so far as to say that economic globalisation has led to the “death of the nation-state.”\textsuperscript{25} However, despite the trends described above, the state still retains a key role. The idea that the state is becoming a “transmission belt” where its priority has shifted from welfare to one of adapting domestic economies to the exigencies of the world economy\textsuperscript{26} does not seem likely. Rather, while the role of the state remains one of internalising (from the global to the local), it also “mediat[es] adherence to the untrammeled

\textsuperscript{19} Ibid. at 200.
\textsuperscript{20} Ibid. at 201.
\textsuperscript{21} Schneiderman 2008.
\textsuperscript{22} Panitch at 85.
\textsuperscript{23} Supra note 1 at 7.
\textsuperscript{25} Kenichi Ohmae, \textit{The End of the Nation} (New York: Free Press, 1995).
logic of international capitalist competition within its own domain, even if only to ensure that it can effectively meet its commitments to act globally by policing the new world order on the local terrain.”

This new role – adherence to the pre-commitments made to the rights of global capital locally – means that the state often finds itself under pressure by citizens at the local level who are opposed to the very same commitments accorded to transnational capital. It is this tension that will be examined within the international investment law regime, which I turn to next, in this thesis.

3. Background to the International Investment Law Regime

The international investment law regime is tangible proof of global economic integration, and can provide a useful backdrop to test questions about the role of the state in the present era of globalisation. This neoliberal regime emphasises the notion that the decentralised, liberal flow of transnational capital will promote global benefit and bring about the much-needed economic development in host states, which are often non-Western states (or “developing” states in the South). The use of international law in furthering these institutions was a project largely carried out by Western states, especially in the post-colonial era, in order to protect foreign investments, which flowed mainly from Western, capital-exporting states into decolonised or Southern, capital-importing states. The

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27 Panitch at 93.
29 M. Sornarajah, “The Clash Of Globalisations And The International Law On Foreign Investment” (September 12, 2002) The Simon Reisman Lecture in International Trade Policy, Centre for Trade Policy and Law, Ottawa, at 3. Available online: <http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf> (visited Sept. 4, 2009) [Sornarajah 2002]. The basis of such a belief has been questioned by various scholars and reports, which indicate that there is no evidence that such neoliberal institutions increase economic development. See M. Sornarajah, The International Law on Foreign Investment (Cambridge: Cambridge University Press, 2004) at 54 [Sornarajah 2004].
30 Sornarajah 2002 at 2.
31 Ibid.
32 Sornarajah 2004 at 37.
foundational agreements that structure this regime – including, inter alia, bilateral and regional investment agreements and free trade agreements with chapters on investment – are in wide circulation, with over 2600 bilateral investment treaties (BITs) signed between states worldwide, and over 175 states having signed onto one or more BITs.  

3.1 Bilateral Investment Treaties

As with every treaty, the acceptance of a BIT by a state represents an exercise of its sovereign power. Bilateral investment treaties provide a mechanism through which a potential host state can attract foreign investment by establishing a partnership with the investor that is binding under international law. These treaties contain a series of rights for inward capital – protection against nationalisation, expropriation, and measures ‘tantamount to expropriation;’ guarantees of non-discrimination (national treatment), ‘fair and equitable treatment,’ ‘most-favoured nation treatment,’ ‘full protection and security;’ and binding (or interest) arbitration for investors – whilst lacking any counter-balancing investor obligations. The investor gains access to emerging markets, and benefits from reduced labour costs, more relaxed regulatory regimes, and a unilateral recourse to arbitration in the event of a dispute with the host state, aimed at reducing the risk of investing abroad. It has been argued that BITs provide the investor with protections that are far superior, in all

forms of investor-state conflicts, to those of customary international law.\textsuperscript{37} For instance, customary international law provides little protection for the investor against actions by the host state that fall short of an outright ‘taking.’ BITs, on the other hand, allow potential investors to negotiate for a much larger scope of protections and safeguards that they feel are necessary for their investments.\textsuperscript{38}

\section*{3.2 ICSID Arbitration Tribunal}

As a corollary of the number of BITs signed, arbitrations arising from disputes between investors and host states have also expanded exponentially.\textsuperscript{39} Under traditional international law, the investor may only put forward a claim against the host state after the exhaustion of local remedies of the host state's domestic courts. However, where consent has been given to investor-state arbitration, there is generally no need to exhaust local remedies.\textsuperscript{40} The investor often invokes the use of international arbitration (for e.g. an ICSID tribunal),\textsuperscript{41} as opposed to domestic courts, through the forum provision in the BIT between the host state and the investor's home state,\textsuperscript{42} so that the exhaustion of the local legal system does not often take place. The World Bank took control among international economic organisations to address the emerging international legal framework of investment treaties\textsuperscript{43} when it created the Convention on the Settlement of Investment Disputes between States.

\begin{footnotes}
\item[38] \textit{Ibid.} at 644.
\item[39] Choudhury at 4.
\item[40] Dolzer & Schreuer at 215.
\item[41] International Centre for Settlement of Investment Disputes (“ICSID”) is an autonomous international institution created in 1966 by the ICSID Convention to provide a framework for the resolution of investment disputes between investors and host States. It is part of the World Bank group.
\item[42] Dolzer & Schreuer at 218.
\item[43] \textit{Ibid.} at 19.
\end{footnotes}
and Nationals of Other States ("ICSID Convention") \(^{44}\) in 1965. \(^{45}\) As such, ICSID tribunals are the facility of choice for investment dispute resolution. \(^{46}\)

From the point of view of member states, an international arbitration system was a self-contained forum where investment disputes would become depoliticised in the sense that the dispute would be distanced from the home state, avoiding confrontation between the two states parties to the treaty. \(^{47}\) Some important features of the ICSID include: (a) foreign corporations and individuals can directly bring a claim against the host state; (b) state immunity is severely restricted; (c) international law can be applied to the relationship between the host state and the investor (i.e. a non-state actor); (d) the local remedies rule is excluded in principle; and (e) ICSID awards are directly enforceable within the territories of all states parties to the ICSID Convention. \(^{48}\) By the 1990s, ICSID had become the main forum for the settlement of investment disputes, and was included in most, if not all, bilateral and multilateral investment treaties. \(^{49}\) In spite of the initial suspicions on the part of non-Western states (mostly due to the shift in decision-making power but also due to its undemocratic elements, which I turn to next), most states have now signed onto the ICSID Convention. \(^{50}\) The effect of the ICSID Convention and its dispute resolution mechanism has been the transfer of decision-making power from the national to the transnational level.

\(^{44}\) ICSID Convention, Mar. 18, 1965, 17 U.S.T. 1270 [ICSID Convention].

\(^{45}\) Dolzer & Schreuer at 20.

\(^{46}\) Other international arbitration institutions like the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce are also available as dispute resolution forums for the resolution of investment disputes: supra note 37 at 657.

\(^{47}\) Dolzer & Schreuer at 20.

\(^{48}\) Ibid.

\(^{49}\) Ibid.

3.3 Democratic legitimacy concerns of BITs and Arbitration Tribunals

The upward shift of state capacities and delegated powers - associated with the idea of ‘hollowing out’ the state - to supranational bodies has expanded during the past two decades. The effects of this trend, and the internationalisation of the state in general, on democratic legitimacy are indisputable. An extreme tension is created between the efficacy of decisions or policies made at the international level, and democratic legitimacy, which remains at the domestic political level.\textsuperscript{51} The tension is further aggravated by the impact of international policy- or decision-making on domestic societies. Because of the binding nature and legal constraints associated with international agreements, rules, and decisions, democratic politics at the domestic level are increasingly curtailed. “While ‘democracy beyond the nation-state’ remains weak, ‘democracy within the nation-state’ is thus weakened as well.”\textsuperscript{52}

To take the international investment law regime as an example, it has been alleged that once a state enters into a BIT, its sovereign power over domestic economic activities diminishes.\textsuperscript{53} In an economically globalised world, this may be inevitable. However, that the international investment regime can encroach upon the regulatory space of states, requiring that they relinquish authority over the establishment, direction, and exit of foreign investments,\textsuperscript{54} is a new development in this era. One aspect of BITs (and the arbitration tribunals interpreting these BITs) that best evinces this claim, is that they have the potential to limit legislative and regulatory measures adopted by host states – for example, measures protecting the health,
culture or environment of the public\(^{55}\) – if the measures directly or indirectly affect the activities of foreign investors by breaching international investment rules. In the first instance, this may be due to the expansive interpretation of state obligations and investor rights as determined by arbitration tribunals established under the supranational organ, ICSID. Secondly, the investment regime, and arbitrators working within the system, presupposes the primacy of hegemonic legal and economic systems – those espousing neoliberal principles, including most notably, property rights – which they adopt in the interpretation and development of investment rules, but that do not necessarily reflect the international community’s position.\(^{56}\)

### 3.3.1 Expansive Interpretation

First, on the issue of the expansive interpretation of treaty provisions, one such example is the interpretation given to the prohibition against expropriation (of the foreign investment). If an investment is directly or indirectly expropriated, or subjected to measures ‘tantamount to expropriation,’ investors are entitled to seek damages from host states. A related issue is the identification of a ‘regulatory’ taking. The law has always recognised that a ‘regulatory taking’ is non-compensable if it is done on a non-discriminatory basis for a legitimate public

\(^{55}\) For instance, the U.S. company Ethyl Corp. sued Canada for imposing a ban on the import and export of the toxic gasoline additive MMT, the exposure of which can cause memory impairment and nervous system disorder in humans (Schneiderman 2008 at 133). In the case of Glamis Gold Ltd. (Glamis Gold Ltd. v. the United States of America, UNCITRAL (NAFTA), Award, (June 8, 2009)), Glamis Gold, a Canadian gold mining company, objected to measures introduced by the state of California (among other issues) that effectively blocked the company’s mining project. The measure addressed environmental and cultural concerns associated with mining activities generally, and specifically due to the location of the project in an area sacred to the Quenchan Indian Nation. The company claimed that the measures were arbitrary and discriminatory, violating various provisions in the investment chapter of the NAFTA. See Elizabeth Whitsitt and Damon Vis-Dunbar, “Glamis Gold Ltd. v. United States of America: Tribunal sets a high bar for establishing breach of “Fair and Equitable Treatment” under NAFTA” (July 15, 2009) Investment Treaty News. Available online: <http://www.investmenttreatynews.org/cms/news/archive/2009/07/14/glamis-gold-ltd-v-united-states-of-america-tribunal-sets-a-high-bar-for-establishing-breach-of-fair-and-equitable-treatment-under-nafta.aspx> (visited: Sept. 4, 2009).

\(^{56}\) Sornarajah 2004 at 353.
purpose (i.e. “police powers,” which may include measures to protect the environment or human health). However, as illustrated in a well-known ICSID decision, Metalclad, measures ‘tantamount to expropriation’ may include regulatory takings, and may even extend to the loss of anticipated future economic benefits. Thus, the two concepts of expropriation and regulatory taking are essentially elided into one.

The three-panel tribunal in Metalclad interpreted ‘expropriation’ to include:

[N]ot only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

The tribunal thus concluded that the municipal government’s implementation of an ecological decree in a rural Mexican province - declaring the site a protected area - amounted to an expropriation of Metalclad’s investment, contrary to article 1110 of NAFTA. Since the decree made the future operations of a planned hazardous waste facility impossible, the state was obligated to compensate the company approximately US $16.7 million. With this interpretation of expropriation, the well-established international law principle of “polluter pays,” first enunciated by the Organisation for Economic Cooperation and Development in

57 Ibid. at 355-357.
58 Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, 5 ICSID Reports 209, Award, (August 30, 2000) [Metalclad]. This case involved the purchase of a hazardous waste landfill site in Mexico by an American investor. Mexican government officials initially encouraged the investment. However, Metalclad’s plans were eventually frustrated by local officials who denied it a local construction permit once it became apparent that the company was illegally disposing the untreated waste onsite, causing environmental and health-related damage. The State Governor issued a last-minute ecological decree protecting the landfill site, effectively precluding Metalclad from pursuing its project. The investor brought an action under NAFTA alleging that Mexico had violated, among other things, its obligations under article 1110. Article 1110 prohibits the nationalisation or expropriation of investments of NAFTA investors.
59 Metalclad at para. 103.
60 Ibid. at para. 111-112.
1972, has been transformed by investment arbitration into “pay the polluter.”\textsuperscript{61} It appears that states no longer automatically have a means of enforcing public interest concerns, public policies, or municipal regulations without first considering the repercussions they may face within the regime. It also means that foreign investors may be immunised from the host state’s authority to regulate on matters of public interest, granting them supra-constitutional protection for anticipated economic benefits, and absolving them of legitimate public burdens.\textsuperscript{62}

While tribunals have not found many compensable ‘takings,’ they have interpreted the rule broadly, catching all sorts of legitimate, regulatory initiatives.\textsuperscript{63} Instead, as David Schneiderman notes, claimants invoking the “fair and equitable treatment,” which is often raised alongside claims of expropriation as an alternative basis for compensation,\textsuperscript{64} have had more success. Given the broad interpretation afforded to this seemingly abstract standard, Professor Schneiderman suggests that it is becoming increasingly clear that “the demand of ‘fair and equitable treatment’ is serving some of the functions of a regulatory takings rule, if not swallowing up the rule entirely.”\textsuperscript{65}

\subsection*{3.3.2 Primacy of Hegemonic Systems}

Second, the philosophical underpinnings of property have become significant in the analysis of a ‘taking.’\textsuperscript{66} The hegemonic power within the system, largely the United States, has

\begin{itemize}
  \item \textsuperscript{61}Marc Andrew Munro, “Expropriating Expropriation Law: The Implications of the Metalclad Decision on Canadian Expropriation Law and Environmental Land-Use Regulation” (2005) 5 \textit{Asper Rev. Int'l Bus. \\& Trade L.} 75 at 96.
  \item \textsuperscript{62}Ibid.
  \item \textsuperscript{63}Schneiderman 2008 at 71.
  \item \textsuperscript{64}Ibid. at 96.
  \item \textsuperscript{65}Ibid. at 97.
  \item \textsuperscript{66}Sornarajah 2004 at 352.
\end{itemize}
sought to project its vision of property onto the world. Professor Sornarajah argues that the analysis of a ‘taking,’ particularly of the U.S. arbitrators who sat on the Iran-U.S. Claims Tribunal, followed the legal techniques developed in American law. The concept is reflected in the U.S. Constitution, which states that there must be just compensation paid when the state takes the property of the citizen. However, the taking of property for purposes of the state was uncompensated on the theory that the permissible exercise of a state’s ‘police powers’ was an essential feature of the government. As the United States progressed into a global economic power, the contours of the takings rules changed, to the point that just compensation was to be paid whenever a state interfered with the enjoyment of the property rights of the individual. Even so, the question of whether ‘regulatory takings’ are compensable is still debatable within the U.S. legal system. Yet, it appears that the international investment law regime is fostering in its practice a strict vision of property protection for foreign investments.

3.3.3 Private Arbitration Model

The international investment regime thus legitimises the hegemonic neoliberal project by imposing its “currently prevailing perception of its own immediate interests” onto countries worldwide. What is even more remarkable in a liberal mindset is that the dispute

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67 Ibid. at 354.
68 Ibid.
69 Sornarajah 2004 at 352-359. Commentators have, however, long admitted that there is still a police powers exception operating under international law. See for example, Schneiderman 2008 at 58-59, where Professor Schneiderman notes that in the history of international law of expropriation, “there is no unanimity regarding what amounts to a compensable taking,” and that “the common law and continental legal systems both permit interferences with property that do not rise to the level of a taking.” The dicta in Santa Elena, admittedly, might suggest otherwise (see section 3.3.3.3 of Chapter 2 of this thesis). It must be noted also that the U.S. (and Canada) have modified their treaty practice in order to better control the scope of the takings rule. In this regard, the U.S. model treaty of 2004 incorporates a 14th amendment police powers exception: See Schneiderman 2008 at 33-34.
70 Jessop 2002 at 196.
settlement mechanism within the regime lacks fundamental elements of transparency, public participation, and a review mechanism that traditionally characterise democratic legal systems. Most of the dispute settlement processes are private, making it difficult to ascertain if proceedings have been initiated (although some decisions now appear on the ICSID website), what the issues, arguments and rulings are, and whether non-disputing party information has been submitted to the adjudicating body. Standing is restricted to the state and to investors, two overly self-interested parties. While the state is typically anxious for inward investment (and its promise of economic growth), investors focus on the protection of their returns; local residents are wholly excluded from the equation.

Much socio-legal research has demonstrated how local regions are negatively impacted by footloose foreign investments, whether it is a result of the privatisation of water sources and the inevitable price hike (as in the case of Bolivia or Argentina), or the establishment of hazardous waste facility sites only a few kilometers from local towns and cities (as in the case of Metalclad or Tecmed in Mexico). That the public’s voice is silenced so effortlessly

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72 The 2004 U.S. – and Canadian-model BITs allow for the submission of amicus briefs in disputes concerning matters of public interest, provided that each amicus has a significant interest in the arbitration, brings a different perspective to the dispute, and addresses a matter within the scope of the dispute (Choudhury at 42). Also, pursuant to a new rule of ICSID arbitration rules, effective April 10, 2006, amicus curiae submissions are accepted in certain conditions by the ICSID tribunal. See Rule 37 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), ICSID Convention, Regulations and Rules. Available online: <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (visited on: Sept 4, 2009).

73 Agua del Tunari S.A. v. The Republic of Bolivia, ICSID Case No. ARB/03/02, 20 ICSID Review: Foreign Investment L.J. 450 (2005) [Cochabamba]; Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19; and Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (July 24, 2008).

74 Metalclad; and Tenias Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/02, 43 I.L.M. 133 (May 29, 2003) [Tecmed].
speaks volumes about the democratic deficit of the regime. As I discuss below, this disregard for the public has not gone uncontested.

4. **Counter-Hegemonic Globalisation**

To counter-balance this top-down understanding of contemporary international lawmaking in the field of investment law, I turn to the work of Boaventura Santos and César Rodríguez-Garavito.\(^{75}\) Professor Santos claims that we live as much in a world of localisation as we do in a world of globalisation and that globalisation is merely the successful manifestation of one particular localisation.\(^{76}\) Within the dominant hegemonic globalisation framework, the particular localisation that has been transplanted to the global sphere is the Western concept of neoliberalism. Therefore, it may be possible to develop a counter-hegemonic, people-centered analysis of the international investment regime to challenge the hegemonic legal and political structures and practices by alternative principles and struggles. Two basic processes of counter-hegemonic globalisation are identifiable as (a) global collective action, whereby struggles at various levels are linked through transnational networking; and (b) local or national struggles, whereby success in one locale prompts reproduction in other areas, or the networking of parallel struggles in different locations.\(^{77}\) Through such struggles, a different form of globalisation – a counter-hegemonic globalisation – is made possible.

Counter-hegemonic forces can comprise both state and non-state actions. The latter includes progressive NGOs, civil society groups, and social movements that provide locales out of which can emerge a micro-struggle against social and economic exclusion as well as

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\(^{75}\) Santos & Rodríguez-Garavito.


macro-resistance in the name of an alternate globalisation. This counter-hegemonic
globalisation – generated by the excluded, the exploited, and their allies – is comprised of a
vast set of networks, initiatives, organisations, and movements aligned in their struggle
against the dislocations produced by the authoritarianism of neoliberal globalisation.78
Santos calls these counter-hegemonic struggles ‘subaltern cosmopolitan politics and legality’
and asserts that they, not unlike the unequal exchanges and power relations of the current
global order, also consist of law, politics and the politics of legality.79 The former type of
social movement, the “state,” is what Santos calls the site for the “newest social movement”
because of its still important, but shifted, modern role as a mega-regulator.80

4.1 Subaltern Cosmopolitan Legality Approach

Subaltern cosmopolitan legality is a bottom-up approach to the study of law and
globalisation, focusing on case studies of counter-hegemonic forms, with the goal of
furthering the potential of an alternate globalisation.81 The approach calls for the legal field
to reconnect and re-imagine law and politics, and their associated institutions, from below.
This involves several elements that stand in contrast to those prevalent in the existing and
more traditional approaches to the study of law and globalisation, which generally depict the
new global order as the top-down diffusion of economic and legal models from the global
North to the global South.82 First, it calls for an inquiry into the legal, illegal and extra-legal

78 Supra note 76 at 459.
79 Boaventura de Sousa Santos, “Beyond Neoliberal Governance: the World Social Forum as Subaltern
Cosmopolitan Politics and Legality” in Boaventura de Sousa Santos & César A. Rodríguez-Garavito, eds. Law
80 Supra note 76 at 490. While I focus largely on the non-state counter-hegemonic forces, I do examine the new
role of the state and its actions, but do so without going as far as labeling the state as a “social movement.”
81 Santos & Rodríguez-Garavito at 15.
82 Santos and Rodríguez-Garavito provide a list of a wide array of studies that focus on the “globalization of
legal fields involving the most visible, hegemonic actors … such as transnational corporations and Northern
states.” See: Santos & Rodríguez-Garavito at 2.
strategies through which transnational and local movements advance their causes. These counter-hegemonic movements can be in the form of rallies, strikes, boycotts, civil disobedience, and other forms of (often illegal) direct action, which may be pursued simultaneously with institutional forms of action, including litigation and lobbying. An example of the relation between legal, illegal and extra-legal strategies is the Cochabamba case in Bolivia, in which the citizens of Cochabamba took to the streets in protest, shutting down the city for four straight days.\textsuperscript{83} When the investor initiated the proceedings within the investment arbitration system, a U.S.-based environmental NGO, Earth Justice, filed a petition to intervene in the arbitration on behalf of social justice organisations and activists in Cochabamba.\textsuperscript{84} In this way, civil society was involved in both extra-legal (and illegal), and legal forms of action. While the legal mechanism of participatory democracy (i.e. arbitration intervention) was denied in this case, it was likely the mobilisation of – and pressure from – local social movement actors, the Bolivian state and Western NGOs that eventually precipitated the withdrawal of the dispute from the tribunal.\textsuperscript{85} In this sense, the extra-legal and illegal actions were successful in achieving their goals.

Second, the approach seeks to expand the range of rights and go beyond individual rights and individual autonomy. It focuses as well on the importance of political mobilisation for the success of rights-centered strategies, and the incorporation of collective understandings of entitlements grounded on alternative forms of legal knowledge.\textsuperscript{86} This is evident, for example, in the struggles for the collective (and individual) right to water in many Latin

\textsuperscript{83} \textit{Supra} note 28 at 9.
\textsuperscript{84} \textit{Ibid.}
\textsuperscript{85} \textit{Ibid.} at 13. Professor Schneiderman provides an analysis of the effect that local, national, international and transnational social actors and mobilisations had on the withdrawal of the company’s lawsuit from the ICSID.
\textsuperscript{86} Santos & Rodriguez-Garavito at 16.
American and African countries as a consequence of the water privatisation policies adopted by these states. Regardless of the type of rights, however, the approach focuses on the centrality of sustained political mobilisation for the struggle – and eventual triumph – of grassroots legal strategies.\textsuperscript{87} Given the deep power disparities between hegemonic and counter-hegemonic actors, it may be only through collective acts that the latter can gather enough power to bring about sustained legal change. For this reason, subaltern cosmopolitanism views law and rights as elements of struggles that need to be politicised before they are legalised.\textsuperscript{88} This is especially interesting in the case of foreign investment disputes as arbitral tribunals have mostly rejected real-life civil society mobilisation as being “extra-legal” in their deliberations, and therefore outside the purview of the apolitical investment system set up to resolve such disputes. However, one can see clearly the relation between politics and law in the Tecmed dispute, and a hint of it in the tribunal’s analysis. In Tecmed, the state denied the renewal of the investor’s landfill operating permit due to various infractions that related to the mismanagement of the site, but more importantly, due to the local opposition that had intensified since the start of the operation.\textsuperscript{89} The tribunal in the Tecmed case engaged the political nature of the protests and realised the need to balance the public’s interest with the investor’s commercial interests, even though at the end, it concluded that the social pressure was insufficient to amount to a genuine social crisis.\textsuperscript{90} That the tribunal recognised the political environment of the local community, despite undermining it and then dismissing it, demonstrates that it has come a long way from the

\begin{itemize}
\item \textsuperscript{87} Ibid.
\item \textsuperscript{88} Ibid.
\item \textsuperscript{89} In Tecmed, when the relevant Mexican authority denied Tecmed’s application for renewal of its landfill’s operating permit, the Spanish company initiated arbitral proceedings, claiming that Mexico had violated several clauses of the BIT, including the “fair and equitable treatment” standard and an expropriation of its investments. The State alleged that local opposition to the landfill due to environmental and health concerns, coupled with other issues regarding the operation of the landfill, had caused the local authority to deny the renewal of the permit. Chapter two of this thesis focuses on this particular case.
\item \textsuperscript{90} Tecmed at para. 144.
\end{itemize}
Metalclad decision, where it did not even engage with the political mobilisation of the community.\textsuperscript{91}

Finally, subaltern cosmopolitan legality resorts to political and legal mechanisms at various scales, and seizes the opportunity offered by a pluralist legal landscape by utilising state and non-state legal orders. For instance, in a Guatemalan dispute between a multinational mining corporation and an indigenous community, the latter resorted to local, national and international laws and legal strategies, seeking to protect its right to a clean and safe environment by exploiting the tensions between the various laws, but especially the contradictory Guatemalan laws on the one hand, and indigenous and international laws on the other hand.\textsuperscript{92}

5. Organization of Thesis

Following Santos’ methodology – applied in his examination of the World Social Forum as an expression of counter-hegemonic globalisation – this thesis focuses on five international investment law cases in two national states. I divide the discussion of these cases into two chapters: Mexico and Argentina. In each chapter, I first outline the context – including the political, economic or environmental background of the case – in which the foreign investor enters the scene. It is often the failure of the state to carry out a specific project\textsuperscript{93} or merely wanting to free itself from managing a particular resource or service, coupled with the

\textsuperscript{91} The tribunal in the Metalclad case noted that the reasons for denying a permit, which formed the basis of the dispute, included the local population’s opposition to the operation of the landfill at issue. In its decision, the tribunal made only a passing reference to the intense opposition and did not accord it any significant treatment. See: supra note 50 at 10.


\textsuperscript{93} It should be noted however, that what is presented by the state as the failure of a project need not be so. The state may present it as a “failure” merely to avert any opposition to the implementation of a new project, like the privatisation of a publicly owned enterprise.
pressures of economic globalisation and the spread of neoliberalism on the state – whereby the attraction of foreign capital into an ailing sector warrants unduly protective provisions for the investor against risks it may encounter in foreign lands – that facilitate the entry of such investments in these countries. In the case of Argentina I examine the project to privatise the operation of the water and sewerage services; in Mexico, I examine the privatisation of the management of a hazardous waste facility. I call these projects “state projects.” These state projects embrace the vision of the more dominant, “neoliberal” hegemonic project.

Following the specific hegemonic context of the state, I explore the counter-hegemonic globalisations that have arisen in response to the investment projects from local communities, and the role of the state within the investment law regime. I describe these two goals separately below.

5.1 Counter-Hegemonic Globalisation against the International Investment Law Regime

Processes, like the international investment law regime, that generate and sustain economic globalisation, are experienced unevenly among countries worldwide, and within any one country, as between various state components and institutions. Such processes can thus put pressure on “particular forms of state with particular state capacities and liabilities,”

resulting in the erosion of one form of state, and its replacement with another state form – a neoliberal state in this case. The emergence of the “neoliberal state” is the newest “hegemonic project” that has been forged onto - or taken up by - most states, including non-Western states. Following Bob Jessop, “hegemonic projects” are programs of state action

which bring together different class fractions – as between particular interests and general interests, cemented by concessions of a material and symbolic kind – but which “explicitly or implicitly advance the long-term interests of the hegemonic class (fraction) and which privileges particular ‘economic-corporate’ interests compatible with this programme.”95 In this way, these kinds of projects are presented as national-popular ideas or policies, although they effectively secure the interests of the political, intellectual and moral leadership of the dominant class(es).96 Neoliberalism is what Santos would call a “globalised localism,” – the process by which a given local phenomenon is successfully globalised.97 The neoliberal ideology – advocating market forces and commercial activity as the most efficient method for producing and supplying goods and services, and thereby discouraging state intervention into economic, financial and social affairs – was first developed in the UK and U.S. in the 1980s, and has been successfully globalised within a decade as such policies were endorsed by governments worldwide, especially in the transitional economies of Latin America.

While neoliberalism, as a new hegemonic project, has been successfully adopted by many non-Western states in the past two decades, it has not gone uncontested. The international investment law regime and arbitral tribunals, tasked with solving investor-state disputes, provide a tangible site to analyse counter-hegemonic globalisation against neoliberalism. The regime tries to establish thresholds of tolerable market-friendly behaviour that is supposedly freed from the control of politics.98 The impact of social movements and progressive NGOs in this field is an emerging field of research, and thus breaks away from the seemingly apolitical nature of the investment arbitration system. Such movements represent an

95 Jessop 1990 at 208.
96 Jessop 2007 at 12.
97 Supra note 76 at 178.
98 Supra note 28 at 6.
emergent subaltern cosmopolitan consciousness in civil society against the negative impacts所带来的或由新自由主义全球化带来的负面影响。

For each of the five case studies, I review the strategies and actions taken up by social movements in an attempt to force private transnational entities out of their territory. These actions are both aimed at the foreign investor and the state. For this, I draw on the contentious politics literature. While the stories of resistance in the cases largely remain local, there is an important transnational aspect to the struggles. Just as the state is denationalised, so too is civil society. The latter has forged coalitions outside the national space and has become part of a larger, global movement. Describing these counter-hegemonic globalisations in each of the five studies is thus the first goal of my thesis.

As the cases suggest, direct action, mass protests, blockades, sit-ins, payment boycotts, and international pressure often yield victories, but these victories are neither easy to achieve nor are they sustainable. The second goal of my thesis is thus to demonstrate that victories within the investment regime are hard to come by and unsustainable when they are achieved. I attribute this to the logic of the international investment rules regime. First, the regime imposes legal constraints at various levels: it wholly excludes the voice of civil society, promises compensation to the investor for a broad set of rights that may be breached by the state, and does not impose parallel obligations on the foreign investor. Second, because the

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99 While civil society and non-governmental organisations are generally considered non-parties to investor-state arbitration, the 2006 amendments to ICSID include provisions allowing for the participation of non-disputing parties as amici curiae (provided they meet several stringent conditions). In a handful of recent investment law cases, NGOs have been able to voice their concerns, though many have been coolly received by the tribunal, and in particular the investor. Despite the occasional dismissal, their submissions have at times found their way into the tribunal’s deliberations. Whether such NGO submissions are a true and adequate representation of the impacts of foreign investments on peoples qua peoples or whether such submissions disregard dissenting voices is debatable.
state is constrained by the regime and its pre-commitments to transnational capital (which I explain in the next section), it is often cornered: by civil society demanding social emancipation and by foreign investors demanding a return on their investment. Thus, for counter-hegemonic struggles, securing victories is limited by the state’s commitments to transnational capital, which often dictates that the state is first accountable to the investor and then to its citizens, limiting public interest state projects.

5.2 The Role of the State within the International Investment Law Regime

What we witness within the neoliberal hegemonic project is a shift in the state’s role. While previously the state was promoting a relatively self-contained national economy and the delivery of social services, it is now withdrawing from these social services, and promoting its space by adopting conditions favourable to international commercial capital in an attempt to fix mobile capital in its own space. In this way, the state, and more specifically, the “developing” state, has become marketised – infused with the values and priorities of the free market – to work effectively as a competition state, and at the same time, has withdrawn from its previous responsibilities. In addition, the increasing reliance of developing states on foreign corporations to aid them in realising state objectives – whether it is due to the excessive demands placed upon them, a scarcity of resources to meet their demands, a deficit in state capacities to pursue its objectives, a loss of political cohesion, or simply due to the state’s new role as a competition state – has shifted the responsibility for managing resources and providing services away from the historically powerful central state, to the private sector.

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101 Jessop, 2007 at 193; supra note 79 at 34.

102 Supra note 1 at 9.
In Santos’ view, this kind of “destatisation of social regulation, resulting as stressed above from the erosion of the social contract, show that under the same name – the state – a new, larger form of political organisation is emerging.”\textsuperscript{103} In this new political order, we see more clearly that the state is fragmented. It can be described as a complex set of social or political relations,\textsuperscript{104} competing among various forces to carry out “alternative conceptions of the public goods to be delivered.”\textsuperscript{105} Bob Jessop describes it as a “complex social relation which reflects the changing balance of forces” depending on the “outcome of struggles to realise more or less specific ‘state projects.”\textsuperscript{106} In this way, and contrary to the declarations of unity in modern state constitutions, Jessop suggests that the state is far from being unified. Rather, what one finds within the state is a continuing struggle between several rival “states” that compete for a “temporary and local hegemony within a given national territory.”\textsuperscript{107} For Jessop, therefore, the unity and organisational coherence of the state must be viewed as emergent, contested and unstable outcomes of social struggles.

It follows, as Santos argues, that under these new terms, rather than a “homogeneous set of institutions, the state is an unregulated political battlefield,”\textsuperscript{108} in which case it is not uncommon for it to act in contradictory manners. The third goal of my thesis is to show this fractured concept of the state. In the case of foreign investors in Mexico and Argentina – as the five case studies demonstrate – we see exactly that. Within the international investment rules regime, where a hegemonic globalisation collides with a counter-hegemonic

\textsuperscript{103} Supra note 76 at 489.
\textsuperscript{105} Supra note 76 at 489.
\textsuperscript{106} Jessop 1990 at 9.
\textsuperscript{107} Ibid.
\textsuperscript{108} Supra note 76 at 489.
resistance, the state has become a political battlefield among various policies, which shift over time, providing openings for some and closure for others. I call these state policies “state projects,” as per Bob Jessop. While certain state projects, like the privatisation of the public-utilities sector, embrace a hegemonic vision, others, like the renationalisation of the water system, reject such a vision. Each case highlights the inconsistent policies the state adopts. On the one hand, it is eager to welcome foreign investment to help boost its economy – despite the highly dubious evidence on which this claim rests – and pursue the developmental path associated with neoliberal policies, but on the other hand, it is faced with civil society revolt against such neoliberal projects, both of which necessitate that it adopt a more active role in either policing investment or policing society.

I now turn to the five case studies: first, the management of a hazardous waste facility in Hermosillo, Mexico and second, the privatisation of water in Tucumán, Buenos Aires, Santa Fe, and Córdoba, Argentina.
CHAPTER TWO

Nos han hecho el baño del mundo
(You have made us the toilet of the world)

1. Introduction

The 2000-mile-long border between Mexico and the United States is home to millions of people who share water, air, land and a semi-arid ecosystem under very different institutional structures and in diverse social conditions. One common issue that links the communities within this region, whether they are north or south of the border, is the effect of the hegemonic political landscape of economic globalisation and spread of neoliberalism. Responding to pressure by the International Monetary Fund and the World Bank for the liberalisation of its economy, Mexico began opening its borders in the 1980s with the accession to the General Agreement on Tariffs and Trade (GATT) in 1984. \(^1\) Under the Presidency of Carlos Salinas (1988-1994), Mexico took numerous internal and external steps to spread neoliberal policies, including the facilitation of foreign investments into its market by liberalising its economy and reducing state regulatory intervention, and the establishment of rule-based principles for business activity. \(^2\) The reforms reached their peak with the adoption of the North American Free Trade Agreement (NAFTA), which came into force on January 1, 1994. NAFTA consolidated long-term trends in industrialisation,

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\(^2\) Ibid at 365-7. Sergio Puig discusses a number of measures adopted by Mexico prior to NAFTA, including reforms to alter the foreign direct investment regime by enacting a new set of regulations which allowed 100% foreign ownership in a number of sectors, and the implementation of a new Maquiladora Decree enacted to promote the establishment of in-bond plants for exporting industries in 1989; an initiative by President Salinas sent to the Congress to reform the Mexican Constitution to allow for privatization of banks in 1990; a reform of Article 27 of the Mexican Constitution to permit a foreign corporation to own rural and agricultural lands and to eliminate some restrictions on transfer of ejidos, or “communal land” property in 1992; and an amendment to its expropriation law to increase protection and security of property in 1993. See also Cyrus Reed, Oliver Bernstein, and Texas Center for Policy Studies, “Hazardous Waste Incineration and Combustion: A Tabasco Case Study” (August 2002) in Lessons From a Free Trade Era in Mexico: Environmental and Social Impacts in Sonora, Aguascalientes, Tabasco and Oaxaca (Austin: Border Trade and Environment Project, 2002) 1 at 13 [Texas Center 2002].
accompanied by policies to increase the country’s international competitiveness, including privatisation, decentralisation, and deregulation, with the hope to promote trade and investment from abroad.\(^3\) Thus, there was a clear shift toward neoliberalism - as a hegemonic project - in the late 1980s - early 1990s.

The Mexico-U.S. border region\(^4\) is illustrative of the rapid expansion of industrialisation in Mexico, largely due to the maquiladora industry - factories owned by foreign corporations – which produce goods in Mexico for export to other countries, primarily the United States. The NAFTA agreement, coupled with the neoliberal policies that the Mexican government adopted to attract foreign investments in general, provided easier access to the Mexican market not only by U.S.-owned businesses, but also other foreign-owned companies typically from the North. This was further facilitated by the coming into force of a number of bilateral investment treaties (BITs) signed between Mexico and Northern countries, after the adoption of NAFTA.\(^5\) While the Mexican state worked to lure foreign investment into the border region, desperate for short-term economic gains, the border-states have been burdened with the environmental consequences of corporate-led industrialisation, and the ensuing toxic waste trade.\(^6\) According to Stephen Mumme, “[a] mere 11% of the toxic


\(^{4}\) The U.S.-Mexico border region, as defined by the 1983 La Paz Agreement, is the area within 100 kilometers on either side of the international border and extends 3,141 km from the Gulf of Mexico to the Pacific Ocean. The border region is comprised of 10 states (4 U.S. and 6 Mexican). See: La Paz Agreement, 1983: “Agreement between the US and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area,” 14 August 1983. La Paz Baja California Sur, Mexico, TIAS No. 10827. Available online: <www.epa.gov/border2012/docs/LaPazAgreement.pdf> (visited: Sept. 4, 2009).

\(^{5}\) Supra note 1 at 368.

wastes generated by [the maquiladora] plants is properly treated.” That Mexico is saddled with environmental burdens, as argued by some, is because it represents a path of least resistance, in terms of its lax environmental standards, weak enforcement mechanisms, and its peripheral position in the global political economic order. These factors have attracted profit-maximising multinational corporations from the North, which can take advantage of the Mexican market without bearing the costs of strict regulatory standards they may otherwise face in their home states. In addition, since Mexico has extremely limited capacity for the proper processing of this waste, most of it is illegally dumped. Indeed, the environmental situation has worsened significantly since NAFTA went into effect. It is not surprising then, that the growing environmental problems associated with the maquiladora sector has prompted environmental justice movements in response to the exploitation of Mexican labour, the environment and human resources by foreign investors.

The municipality of Hermosillo is a case in point. Hermosillo, the capital of the border state of Sonora, and the largest urban area in the state, is located about 270 kilometers south of the Mexico-U.S. border and is home to over 700,000 people. The transfer of a hazardous waste facility in Hermosillo to a privately-owned Spanish company in 1996 sparked massive community opposition. After two years of continued struggle, including legal and illegal actions by citizens and community organisations, Mexico’s National Institute of Ecology

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finally relented and denied the renewal of the company’s operating permit, shutting down the facility for good. The story, however, does not end there. The Spanish-owned company brought an international investment claim against Mexico pursuant to the Mexico-Spain BIT for alleged violations by Mexico regarding expropriation, ‘fair and equitable treatment’ and full protection and security, and was ultimately awarded nearly US $7.5 million. As with all international investment dispute forums, the citizenry found themselves outside the discursive arena of this process. Not only was the company awarded a compensation package from the state of Mexico, the hazardous waste facility was entirely abandoned. The Hermosillo case is a typical example of the difficulties of engaging counter-hegemonic globalisation in the context of the investment rules regime.

The first part of this chapter provides a synopsis of the environmental context of the northern border states of Mexico as a result of economic globalisation and the adoption of neoliberal projects by the Mexican government in the late 1980s to the mid-1990s. First, I discuss the environmental consequences that have arisen as a result of the rapid expansion of the maquiladora industry, concluding that while the industry grew exponentially, ineffective regulation of the industry has caused environmental and health damage. This, in turn, has generated a counter-hegemonic globalisation from below, which is better known as the environmental justice movement. Second, I briefly discuss the 1988 General Law of Ecological Balance and Environmental Protection, which has up to now been the foundation of Mexican environmental policy, including the management of hazardous waste produced by the maquiladora industry. Third, I show how the enactment of the North

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13 This included the market value of the landfill at the time of purchase, the amount invested and the value of two years of operation, plus interest: *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/02, 43 I.L.M. 133, Award, (May 29, 2003) [Tecmed Decision].
American Free Trade Agreement effectively amended the Mexican Constitution, providing unprecedented protection to foreign property. Lastly, I discuss the lack of effective environmental laws, despite the existence of such policies at a formal level.

In the second, and longer part, of this chapter, I describe a story of a counter-hegemonic resistance, focusing on the role of subaltern communities and individuals, and highlighting the complexities of the environmental justice movement in an era of neoliberal economic policies. I discuss the emergence of a social movement in both the institutional and extra-institutional space in Hermosillo, its relationship to national and international law, and its way of questioning the violence of the neoliberal model that wholly excludes the voice of the subaltern. Within this analysis, I argue that while the social movement was victorious in one respect – the expulsion of the multinational corporation from Hermosillo – the large compensation package awarded to the corporation by an arbitration tribunal makes such victories unsustainable. In addition, the social movements have not achieved all their objectives, including the proper remediation of the hazardous waste facility and the right for community members to participate in local decision-making processes. In this way, I show that victories are hard to come by within the context of the international investment rules regime.

In the third part of this chapter, I discuss the ambivalence of the Mexican state – both at the local and national levels – in relation to foreign investment and local opposition. While the state typically fits within the capitalist class of actors and institutions, actively encouraging neoliberal state projects – after all, it plays a central role in the creation of BITs and laws that facilitate foreign investment into the national economy, and forms partnerships with
investors from abroad without the consultation of affected local communities – the case of Hermosillo demonstrates that the state has not suddenly become a “transmission belt” for transnational capitalism. Rather, it is a site of continual struggles regarding the nature of state intervention, political representation, and ideological hegemony within a society.\(^\text{14}\) On the one hand, the state acts in concert with private corporations against the will of affected communities, but on the other hand, it works together with civil society, against the interests of the company.

2. **Environmental Context**

2.1 **Environmental Consequences of the Maquiladora Industry**

The globalisation of the economy has fueled strong industrial growth in the Mexico-U.S. border region, which was largely uninhabited at the start of the 20\(^{th}\) century.\(^\text{15}\) The growth on the Mexican side is due largely to the 1965 Border Industrialisation Program, aimed to boost the Mexican economy by liberalising and intensifying trade, while supplying cheap Mexican labour to U.S.-based corporations.\(^\text{16}\) Under this program, foreign-owned manufacturing and assembly plants - known as “maquiladoras” - set up shop in the northern border region of Mexico. They were permitted to import raw materials into Mexico, employ Mexican workers at a fraction of the wage paid to employees north of the border, and export the finished products, duty-free, back to the U.S.. This marked the start of the expansion of

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the foreign-owned _maquiladora_ industry in Mexico, and specifically in the northern border-states, where the majority of the factories are located. The _maquiladora_ programme transformed most border cities into large manufacturing centres highly integrated into the North American market. In 2001, almost 80% of the _maquiladora_ production inputs came from the U.S. and 98% of the industry exports returned to the U.S. market.

This rapid industrialisation was met with further development of the border region as part of a number of economic and political reforms that were linked to the Mexican oil crisis (early 1980s), International Monetary Fund-led structural adjustment programs, the devaluations of the _peso_ in 1982 and 1994, the signing of NAFTA in 1994, followed by a series of BITs between Mexico and other Northern countries. The net effect of this neoliberal shift, especially the environmental consequences of the _maquiladora_ industry, has been the subject of considerable debate. On the one hand, the border served as a beacon of possibility for residents in the interior of Mexico, who migrated and settled in the northern region for an improved livelihood. Between 1980 and 2000, for instance, the number of industrial facilities increased from approximately 620 to 3300, while employment in the _maquiladora_ industry grew from approximately 120,000 to over 1.2 million in Mexico alone. On the other hand, because accelerated growth of the industrialisation has not been met with the

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18 Texas Center 2000 at 29.
20 Ibid.
21 Supra note 16 at 374.
22 See supra note 19 for example.
23 Supra note 19 at 199.
institutional and physical capacity required to manage the environmental implications associated with these plants – like industrial pollution, the generation of hazardous waste material, and the releases of toxic substances – a situation has been created causing fears that the contamination is severely compromising public health and the environment in the region. In addition, of the disposal and confinement facilities that have been constructed in the area, evidence from the environmental justice literature shows that a disproportionate number of them are located in predominately minority and low-income communities.

The expansion of the maquiladora industry, coupled with the limited infrastructure for the treatment of hazardous waste generated and the weak regulation of the industry, offers a significant potential to study both hegemonic globalisation, as evinced by the expansion of foreign-based projects in the Mexican border region market, and a counter-hegemonic resistance in response to the environmental and health consequences of these same projects. Fortunately, for the environmental justice movement, the pressures of economic globalisation seem to have planted the seed for the restructuring of the environmental laws, regulations, standards and institutions in Mexico. Despite these steps, however, the picture remains bleak, as the environmental institutional framework has been criticised for inadequate funding, corruption, and the lack of political will and resources for the management, implementation and enforcement of the laws. The border region, therefore, provides an enormous challenge for the development of effective public policy, including

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25 Supra note 6 at 249.

26 Vilas-Ghiso at 141.

27 Ibid.; supra note 16 at 374.
institutional reforms, and the resolution of conflicts between various players, including not only the state and industry, but also the citizenry – which often represent opposing forces of globalisation, one from the top, and the other, from below.

2.2 The General Law of Ecological Balance and Environmental Protection

Although the maquiladora program officially began in 1964, it did not expand much until 1974, and only 14 years later did Mexico enact a law, which contained basic policies and regulations on hazardous wastes.\textsuperscript{28} In 1988, Mexico passed the Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA or Ley General). The passage of LGEEPA brought a reorganisation of the environmental ministries, defined hazardous wastes, set out general policies toward the export and import of such material, and established obligations and requirements of the federal government with respect to hazardous waste. The law included a ban on the import of hazardous wastes for storage or final disposal, and a requirement that such wastes generated from raw material, temporarily imported into the country through the maquiladora or other similar export-promotion programs, be exported back to the country of origin.\textsuperscript{29} Hazardous wastes could, however, be imported for treatment, reuse or recycling.\textsuperscript{30} While this prohibition was first included in the 1983 La Paz

\begin{footnotesize}
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\item \textsuperscript{28} Texas Center 2000 at 9.
\item \textsuperscript{29} La Ley General de Equilibrio Ecológico y Protección al Ambiente, 1988, amended in 1996 (Mexico), Capítulo VI, artículo 153; and Capítulo I, artículo 55. Under Article 153, section II of the LGEEPA “the import or export of hazardous materials or wastes are subject to restrictions which the Federal Executive establishes, conforming with the Law of Exterior Commerce. In all cases the following criteria must be met...” section III, which states “[n]o hazardous waste or materials may be authorized for import whose only purpose is for final disposal or simple deposit, storage or landfilling in national territory or wherever the nation exercises jurisdiction and sovereignty or when its use or manufacture is not permitted in the country where it was made.” Article 55 of the LGEEPA stipulates that “the hazardous wastes generated in production, transformation and assembly processes under the maquiladora regime shall be returned to the country of origin, if they involve raw materials introduced into the country under the category of temporary imports.”
\end{itemize}
\end{footnotesize}
Agreement on the Cooperation for the Protection and Improvement of the Environment in the Border Area between the U.S. and Mexico,\(^{31}\) it became a requirement under the LGEEPA.\(^{32}\) Despite these bans, however, Mexico continued to allow the entry of dangerous substances from outside the state for final disposal in Mexico, as the Tecmed case demonstrates in the late 1990s.\(^{33}\)

The *Ley General* endowed the Ministry of Urban Development and Ecology (SEDUE) with broad responsibilities for environmental protection but did not add to its institutional capabilities.\(^{34}\) In 1992, Mexico’s environmental functions were transferred to a new, higher-profile agency, the Ministry of Social Development (SEDESOL), whose primary objective was the infusion of federal development assistance into local communities. The normative and enforcement functions for the protection of the environment were divided into two quasi-autonomous agencies: the National Ecology Institute (INE), responsible for the development of environmental regulations, the implementation of environmental policies, the issuance of permits, and the evaluation of studies for high-risk activities such as hazardous waste disposal; and the Office of the Attorney General for Environmental Protection (PROFEPA), responsible for monitoring compliance with, investigating violations of, and enforcing environmental regulations, including the imposition of fines when violations are discovered.\(^{35}\) The institutional structure was once again changed, and in 1994, a new federal environmental ministry was announced, the Ministry of the...
Environment, Natural Resources and Fisheries (SEMARNAP, which later became SEMARNAT) - encompassing the INE, PROFEPA and the National Water Commission.\textsuperscript{36}

Despite the enactment and vision of the 1988 \textit{Ley General} and a series of Official Mexican Standards (“NOMs”) - which are environmental and safety regulations and standards applicable to industrial facilities - Mexico remained an attractive site for its low labour and environmental costs. These were in part due to the limited enforcement mechanisms available and the less-than-adequate environmental infrastructure of the country. Without adequate enforcement, compliance with the proper disposal of waste was lacking. In addition to this, enforcement of \textit{maquiladora} - and hazardous waste - regulations remained within the federal jurisdiction, so that even if state and local environmental officials could monitor the operations in their respective jurisdictions, they had limited power to enforce violations of the law.\textsuperscript{37}

\subsection*{2.3 Changes to the Mexican Constitution}

The North American Free Trade Agreement also deals with the management of hazardous wastes, among other areas of trade and investment.\textsuperscript{38} The Mexican government undertook numerous legislative and constitutional reforms so as to conform to the NAFTA.

\textsuperscript{36} Kevin Gallagher, \textit{Free trade and the environment: Mexico, NAFTA, and beyond} (Palo Alto: Stanford University Press, 2004) at 64. The National Water Commission was formed by the environmental arm of SEDESOL.

\textsuperscript{37} Texas Center 2000 at 9-10.

\textsuperscript{38} Article 309 in Chapter 3 of NAFTA sets out requirements for the “national treatment” of goods, i.e. that “no Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party, except in accordance with Art. XI of the GATT.” A “good” includes “waste and scrap derived from … production in the territory of one of more of the Parties” (article 415). Thus, as far as NAFTA is concerned, hazardous wastes can be considered “goods,” where the right of any Party to prohibit or restrict its importation is limited. According to article XI of the GATT, countries are permitted to impose restrictions on imports of goods where such measures are “necessary to protect human, animal or plant life or health,” i.e. where there is no available alternative measure consistent with the GATT to achieve the desired end and it is the least trade-restrictive measure available. See World Trade Organization, General Agreement on Tariffs and Trade 1994, Analytical Index. Available online: <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20> (visited: Sept. 4, 2009). Also, see Jacott at 169.
requirements in general. These reforms were mainly linked to article 27 of the 1917 Constitution, which deals with the ownership of land and resources, and once hailed as a significant outcome of the Mexican revolution. 39 Article 27, dubbed the “Calvo clause,” 40 essentially created a framework for a strong interventionist state, where the state would have exclusive control over its own economy. For example, the clause established that it was within the domestic sovereignty of Mexico to impose upon private property, “as the public interest dictates,” without compensation. 41 This strong interventionist clause was effectively removed to make room for the investment chapter of NAFTA – a classic liberal disregard for state intervention in the market - which runs counter to the essence of the Calvo clause. 42

This type of Constitutional restructuring is a form of globalisation that Santos calls “localised globalism,” which consists of the specific impact of transnational practices on local conditions that are destructured and then restructured in order to respond to transnational imperatives. 43 Among other features, the Investment Chapter calls for the settlement of disputes before an international tribunal, the protection of foreign property against host-state interference, including expropriations, nationalisation, and more recently regulatory takings

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40 Carlos Calvo (1824 – 1906) was an Argentine diplomat who wrote a treatise on international law. The Calvo doctrine, drawn from his work, asserts that “foreigners are to be treated on a plane of absolute equality with the nationals of a given country. Foreigners should not lay any claim to diplomatic protection or intervention by their home countries since this would only provide a pretext for frequent violations of the territorial sovereignty and judicial independence of the less powerful nations.” See Patrick Del Duca, “The Rule of Law: Mexico’s approach to expropriation disputes in the face of investment globalizations” (2003) 51 UCLA Law Review 35 at footnote 64 [Del Duca].
41 Del Duca at 57; Sornarajah 2004 at 146.
42 Supra note 39 at 766. It is important to note here that the intervention of international financial institutions in 1985 and 1988 marked the beginning of the major structural adjustment programs in Mexico. The plans called for the Mexican state to open local markets to imported products by reducing tariffs for foreign products, to prepare favourable conditions for foreign investment by changing the legislation that regulated it, to initiate a privatisation program of nationalised key economic sectors, and to reduce its public expenditure. These changes effectively diminished the interventionist spirit of the Calvo Clause: María Teresa Vásquez Castillo, Land Privatization in Mexico – Urbanization, Formation of Regions, and Globalization in Ejidos (New York: Routledge, 2004) at 80.
of investments, and a ‘fair and equitable standard’ of treatment in addition to the international minimum standard and full protection and security. This is replicated in the BITs between Mexico and other countries, including Spain. The Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States came into force in December 1996.

2.4 Environmental Policies Post-NAFTA

Trade and foreign direct investment (FDI) have both increased substantially in Mexico after the coming into force of NAFTA. The total trade between Mexico and the U.S., for instance, grew by 90% between 1996 and 2000, while FDI flowing annually to Mexico almost doubled during that same period as compared to the preceding five years. The number of facilities with the authorisation to store, transport, treat, burn, recycle, reuse and dispose of hazardous wastes, in Mexico, increased from approximately 140 to 520 between

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44 The dicta in the Metalclad award illustrate the expansive scope given to expropriation, as described in the Introduction Chapter of this thesis (Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, 5 ICSID Reports 209, Award, [August 30, 2000] [Metalclad]). The Ethyl case (Ethyl Corp. v. Canada, UNCITRAL (NAFTA), 38 ILM 708, Award, (1999)) was a NAFTA expropriation case brought by a U.S. company against the Canadian government for banning the use of an additive to petroleum, which was suspected of being pollutive and harmful to humans. The company claimed that the ban was “tantamount to a taking” under NAFTA, despite it being in the interests of the health of the people. While the case was settled out of court – the Canadian government paid Ethyl U.S. $13 million – it is indicative of the expansive scope of the takings rule, which now seem to include regulatory takings. See Sornarajah 2004 at 293; and David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise (Cambridge: Cambridge University Press, 2008) at 113 [Schneiderman 2008].

45 Sornarajah 2004 at 332-343 and 344-401.


49 This includes hazardous waste landfills (final disposal plant), recycling or reuse facilities, fuel blending plants, private hazardous waste incinerators, medical waste incinerators, on-site treatment plants, facilities that collect or transport hazardous waste from other companies, and plants that store hazardous waste temporarily: Texas Center 2000 at Annex II.
1994 and 2000.\textsuperscript{50} Despite this increase, the construction or expansion of storage facilities and landfills has not kept pace with the production of hazardous waste.\textsuperscript{51}

Environmental problems therefore still plague the region. This is the reality despite the formal reforms adopted by Mexico post-NAFTA. For instance, the Commission for Environmental Cooperation (CEC)\textsuperscript{52} – the NAFTA environmental side agreement – was expected to provide greater international scrutiny of environmental performance. While the CEC has developed a viable model for the study of environmental effects of trade and

\begin{footnotesize}
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\item Texas Center 2002 at 2.
\item The failure to construct new facilities or expand existing ones is due in large part to the unified local opposition which regulatory agencies face at every step of the approval process. The decreased space in existing approved disposal facilities has contributed to the skyrocketing cost of environmentally safe disposal of hazardous waste. See: Earl M. Sheppard, “Stemming the Tide: Statutory Attempts to Stop the Flood of Hazardous Waste Shipped to Mexico” New England Int’l & Comp. L. Annual, Basel Action Network. Available online: <http://www.ban.org/Library/sheppard.html> (visited: Sept. 4, 2009).
\item The CEC was created under the North American Agreement on Environmental Cooperation (NAAEC), which is a trilateral arrangement committing the three countries “to promote sustainable development, encourage pollution prevention policies and practices, …[enhance] compliance with environmental laws and regulations … [and promote] transparency and public participation in the development and improvement of environmental laws and practices.” (NAAEC Overview of the Agreement. Available online: <http://www.naaec.gc.ca/eng/agreement/agreement_e.htm> (visited: Sept. 4, 2009)). Specifically, articles 14 and 15 of the agreement establish the “Citizen Submissions on Enforcement Matters,” or “SEM” process, a tool enabling citizens to initiate investigations of alleged failures by their respective governments to enforce domestic environmental laws. This mechanism is intended to remedy the deficit in public participation and transparency in trade and economic integration of the signatory states (Inger Weibust, “Is NAFTA’s Citizen Submission on Enforcement Matters a Forum for Transnational Activism and Politics?” (2008) Paper presented at the annual meeting of the International Studies Association at 3. Available online: <http://www.cpsa-csp.ca/papers-2008/Weibust.pdf> (visited April 27, 2009) [Weibust]). Once a case has been submitted, the CEC decides if the case merits further investigation. If it decides in the affirmative, the Secretariat may conduct an investigation and draft a Factual Record, which is made public only if the Council – composed of the highest environment official of each country – votes in favour of it. The Factual Record, although important for the potential publicity it may generate, only summarises the facts of the case, without making any specific recommendations or any allegations of whether the Party has failed to enforce its environmental law effectively (Weibust; Ross E. Mitchell, “Environmental Actions of Citizens: Evaluating the Submission Process of the Commission for Environmental Cooperation of NAFTA” (2006) 15 J. of Env’t Dev. 297 at 299 [Mitchell]). Despite the initial endorsement of this mechanism by environmental groups, the CEC’s role and importance has been challenged by a number of commentators (Mitchell; David J. Blair, “The CEC’s Citizen Submission Process: Still a Model for Reconciling Trade and the Environment?” (2003) 12 J. of Env’t Dev. 295; Stephen P. Mumme and P. Duncan, “The Commission on Environmental Cooperation and the U.S.-Mexico border environment” (1996) 5 J. of Env’t Dev. 197) for various reasons, including the limited public involvement once the submission has occurred, the narrowing of the scope of the process over the past several years, the non-binding nature of the process, and the time it takes between the submission of a claim and final record, if investigated.
\end{enumerate}
\end{footnotesize}
investment, its efforts to monitor those effects have been resisted by all three governments.\textsuperscript{53} In addition, there is no specific financial mechanism built into the NAFTA for structural adjustment aimed at protecting the environment.\textsuperscript{54} At the domestic level, new environmental rules and regulations have been implemented. However, as Stephen Mumme claims, “whether the issue is financial capacity or decentralisation and subnational empowerment for environmental protection, the environment remains a residual priority, not a central one.”\textsuperscript{55} While decentralisation in the area of environmental protection is progressive in building capacity for environmental issues, Mexico has made less progress in developing implementing legislation and municipal ordinances mandating and defining environmental policy at the local level.\textsuperscript{56} The municipality’s lack of statutory authority thus effectively transfers both accountability and administrative responsiveness to higher levels of government. This distances the government authority in Hermosillo from its citizenry, weakening both its legitimacy and efficacy to represent the interests of the residents.\textsuperscript{57}

### 3. The Hermosillo Struggle

In 1997, the residents of Hermosillo discovered, by chance, the operation of a hazardous waste landfill by a foreign company. The facility belonged to the Municipality as far as they knew and had been used intermittently over several years, confining local waste.\textsuperscript{58}

\textsuperscript{53} Supra note 34 at 105.
\textsuperscript{54} Ibid.
\textsuperscript{55} Supra note 34 at 104. He suggests that the evidence for this is seen in “the inadequacy and stagnation of central funding for environmental protection, the limited progress in linking market instruments to regulatory funding, the stalled process of developing regulatory laws and implementation processes, and the limited movement toward policy devolution in the environmental sphere.”
\textsuperscript{56} Ibid. at 100.
\textsuperscript{58} Tecnias Medioambientales Tecmed S.A. \textit{v. The United Mexican States}, ICSID Case No. ARB (AF)/00/02, “Escrito de Contestación a la Demanda” (11 de febrero de 2002), ICSID at para 69 [Counter-Memorial], stating that the Confinement did not operate in 1990, 1992 and 1993.
Community concern emerged after a truck driver, who was hired to transport waste material from Baja California across the border to the Landfill, developed a burn on his leg after coming in contact with soil contaminated with a toxic substance.\(^{59}\) To their surprise, the ownership and operation of the hazardous waste facility had already been transferred – one year prior to their discovery – to a Spanish-owned company, Tecmed, in a “public” auction. The residents investigated the dumpsite and found, among other toxic substances, lead, cadmium, cyanide, and other wastes that were believed to have come from foreign-owned maquiladoras.\(^{60}\)

The hazardous waste facility dates back to 1988, when Ford Motor Co., together with the State of Sonora, constructed an industrial waste landfill for the “final or temporary disposition of dangerous (regional) industrial residues” from the manufacturing of its automobiles. The facility is located in Las Viboras, within the jurisdiction of the Municipality of Hermosillo, just 8 kilometers from the municipality’s periphery, and six kilometers from several colonias populares (working class residential areas).\(^{61}\) It received its first authorisation – granted to “Parques Industriales Sonora” – from the INE on December 7, 1988, for a period of five years and for regionally-produced waste only, although for the most part, the site was abandoned during the early 1990s.\(^{62}\) After a series of transfers in ownership between the State of Sonora and the Municipality of Hermosillo, in early 1996, the municipality auctioned the landfill to Tecmed, a Spanish-owned corporation. Tecmed

\(^{59}\) Anna Ochoa O’Leary, “Women and Environmental Protest in a Northern Mexican City” (Spring 2002) 6(1) The Arizona Report 1 at 1.


\(^{61}\) Ibid.

\(^{62}\) Counter Memorial at para 573.
immediately transferred its ownership and operation to its Mexican subsidiary, Cytrar.\footnote{Cytrar is an acronym, which translates to Confinement and Treatment of Residues. Cytrar is also the name of the facility, which was changed from its previous name, Confinamiento Controlado Parque Industrial de Hermosillo O.P.D., when the ownership was under the decentralised agency of the Municipality of Hermosillo.}

Prior to the transfer of the facility to Cytrar, the Landfill was granted a land-use permit for regionally-produced waste only.\footnote{Sonora Case, Consultative Opinion, (1999) International Court of Environmental Arbitration and Conciliation (Chamber of Consults) at 2. Available online: <http://iceac.sarenet.es/Ingles/cases/caso_sonora.html> (visited: April 25, 2009).} At the start, Cytrar continued the operation under a temporary extension of Hermosillo’s permit,\footnote{Counter Memorial at para 129.} and when it applied for its own permit in November 1996, the INE issued a one-year renewable permit, which was renewed once in 1997.\footnote{Ibid. at para 140.} In 1998, at the end of the second year of its operations, the INE denied Cytrar’s application for renewal of the permit.\footnote{Ibid. at para 315.}

As a result of this and the failed attempt to relocate the facility, the foreign-owned company filed a complaint against Mexico before the International Centre for Settlement of Investment Disputes (ICSID), for damages sustained as a direct result of the expropriatory act, and the denial of “fair and equitable treatment” of its investment, among other alleged violations of the Mexico-Spain BIT.

A social movement arose in opposition to the operation of the hazardous waste facility.

Among other concerns, three main objectives were at the core of their oppositional stance: the immediate closure of the facility, followed by a proper remediation program of the facility, and the inclusion of the community in the decision-making process of similar state projects. The first of these goals was achieved: the denial of the permit renewal closed down the waste facility indefinitely. The second goal, however, was not resolved, and has continued to burden members of the community. The third goal, which includes the right to know about the prevalence, use and disposal of toxic wastes in your community, can be
divided into two components: (a) the right to information and (b) the right to participate in the decision-making process. While this third objective is broad, I am interested specifically in the state’s adoption of projects – similar to that of the Cytrar facility – and whether details of the project are readily available to the community and/or whether the community has a participatory role in the project. The secretive nature of similar projects, even after the exit of Tecmed, continues to be a reality in the border region, which has meant that the third goal of the movement has not yet been achieved. As I describe below, the denial of a voice to civil society existed throughout the development of the mobilisation in Hermosillo, although it seems that with the closure of the facility, counter-hegemonic globalisations are having some effect on hegemonic policies.

I divide this part into three main sections. In the first section, I discuss the various strategies employed by the counter-hegemonic resistance in Hermosillo, each of which may have contributed more or less to the success (or failure) of the movement. These include (a) institutional strategies; (b) extra-institutional strategies (or disruptive action); (c) political opportunity structures; and (d) transnational linkages. In the second section, I describe the state’s response to the resistance, and the investor’s response to the denial of its permit. In the third section, I discuss the victories achieved by the counter-hegemonic resistance and the difficulty of securing these victories in the face of constraints imposed by the international investment rules regime.

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68 Political opportunity structures, which I discuss in more detail in section 3.1.3, are features of the political landscape that provide opportunities (and threats) for social movements to further their claims. Examples include the availability of influential allies or supporters for challengers or the instability of current political alignments. See: Charles Tilly and Sidney Tarrow, *Contentious Politics* (Boulder: Paradigm Publishers, 2007) at 57 [Tilly & Tarrow].
3.1 Counter-Hegemonic Globalisation

3.1.1 Institutional Strategies

The counter-hegemonic resistance against the operation of the Cytrar hazardous waste facility largely focused on conventional legal mechanisms available to them, especially at the start of the struggle. By engaging with the language of law, activists hoped that they would effect a more sustainable change within the system, as opposed to direct and disruptive action taken against the established institutions. I turn to these institutional strategies now.

3.1.1.1 Alco Pacifico Dumpsite Link

The Alco Pacifico connection to Cytrar was the first of a number of circumstances that fueled the community’s opposition to the foreign investor. An impressive group of non-governmental organisations and individuals formed in the municipality once they became aware that Cytrar was receiving shipments of toxic waste from the infamous Alco Pacifico plant, an abandoned lead smelter located in El Florida, Baja California. In 1991, Alco Pacifico was ordered to close its lead-recycling operations by SEDUE due to its having imported illegally into Mexico car batteries and lead-filled soil from Alco Pacifico Inc. U.S. for the false purpose of recycling the waste materials. According to Mexican law the waste should have been returned to the country of origin (U.S.). The plant was abandoned that same year, where an estimated 30,000 tons of toxic waste containing high levels of lead, arsenic, and other carcinogenic substances were left exposed to the air.

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70 Supra note 64 at 2.
Unfortunately for the citizens of Hermosillo, an agreement had been reached between U.S. authorities, the Mexican government, and Tecmed to allow the estimated 30,000 tons of Alco Pacifico toxic waste to be transferred to the Cytrar facility. After the community was alerted of such shipments, a request was made in March 1997 by Manuel Llano Ortega - an engineer and resident of Hermosillo who became one of the chief activists in the mobilisation against Cytrar - for the State Governor to provide a response to the community’s concerns about the transport of Alco Pacifico’s waste to the Cytrar Landfill.72 After receiving no response, the Academia Sonorense de Derechos Humanos, a human rights NGO led by a lawyer named Domingo Gutiérrez Mendívil, filed a complaint in May 1997 before the State Commission of Human Rights. He argued that provincial and federal authorities had violated the sovereignty of the State when they authorised the transport of toxic wastes from Alco Pacifico. Two weeks later, the same NGO presented a similar complaint before the National Commission on Human Rights.73 On August 26, 1997, the National Commission rejected the complaint, suggesting that the NGO get in touch with PROFEPA to obtain more information.74

72 Counter Memorial at para 169.
73 Ibid. at para 170.
74 Ibid. at para 179.
3.1.1.2 Permit Violations

Not only was the waste from Alco Pacifico linked to health problems in children and pregnant women\(^{75}\) in nearby homes of Tijuana,\(^{76}\) it was also being transferred to the Cytrar facility in a careless and dangerous manner. Various NGOs and individual residents investigated the site, and provided photographs to local authorities, illustrating that toxic wastes were uncontained and exposed during their transport to Hermosillo. They also examined the trucks and noticed that waste material leaked out as they traveled on public highways and residential streets.\(^{77}\) In view of the numerous complaints relating to the inadequate managing and unloading of toxic wastes received from the community, PROFEPA conducted inspections of the trucks and the facility in October 1997. It found 25 railroad trucks loaded with hazardous wastes from Alco Pacifico in open sacks, at the railroad tracks, with no supervisory personnel or security on-site, nor the proper machinery to unload the wastes.\(^{78}\) Cytrar was fined for all four violations, and ordered to correct them immediately.\(^{79}\)

Community members expanded their campaign - to close off the facility - to agencies at the provincial and federal levels as the renewal date for Cytrar’s permit was approaching. On November 8 and 10, 1997, Alianza Civica, an NGO that traditionally focused on promoting democratic reform in Mexico,\(^{80}\) submitted two denuncia populares before the SEMARNAP, claiming that the violations committed by Cytrar – including damages to the environment

\(^{75}\) One study by a graduate student in San Diego State University measured lead concentrations in the exposed waste to be over 20 times the level considered dangerous to human health. Lead exposure can retard a child’s development and can lead to comas, convulsions, miscarriages, and birth defects (Supra note 69 at 11).

\(^{76}\) Texas Center 2000 at 43.

\(^{77}\) Supra note 60 at 2-3.

\(^{78}\) Counter Memorial at para 180.

\(^{79}\) Ibid. at para 181.

\(^{80}\) Supra note 69.
and health of the local residents, as well as the inadequate managing and negligent 
transporting of illegal hazardous wastes from Alco Pacifico – warranted the denial of its 
permit.\footnote{Counter Memorial at para 191-2.} The state delegation of PROFEPA allegedly visited the Landfill in response to 
these complaints, and not surprisingly, confirmed the allegations made against the 
company.\footnote{Ibid. at para 193-5.} Despite these findings, INE authorised the renewal of Cytar’s permit on 
November 19, 1997.\footnote{Ibid. at para 196.}

\subsection{3.1.1.3 Demonstration}

What is evident, from the complaints and \textit{denuncias}, is that the environmental NGOs and 
activists were quite conversant with the applicable laws, understood the legal and 
administrative orders, as well as the political weaknesses of the municipality in dealing with 
environmental issues.\footnote{Supra note 59 at 4.} The community was outraged when they learned that Cytar’s permit 
was renewed despite the numerous inspections carried out by PROFEPA, and the repeated 
violations found. Around 200 people organised a demonstration and took to the streets, 
marching to the Landfill and closing it down symbolically days after the renewal of its 
permit.\footnote{Counter Memorial at para 201.} The following day, a meeting was held with Federal, State, and Municipal public 
officials, including the President of INE, the Deputy Director of Environmental Audit 
Bureau of PROFEPA, and the Minister of SEMARNAP, as well as members of the 
scientific and academic community and representatives of civil society organisations.\footnote{Ibid.} At 
best, this generated a forum where a select number of citizens were able to participate, voice

\footnotesize{\textsuperscript{81} Counter Memorial at para 191-2.} \textsuperscript{82} \textit{Ibid.} at para 193-5. \textsuperscript{83} \textit{Ibid.} at para 196. \textsuperscript{84} Supra note 59 at 4. \textsuperscript{85} Counter Memorial at para 201. \textsuperscript{86} \textit{Ibid.}}
their concerns, and take note of the guarantees made by the government to remedy the
problem.

3.1.1.4 International Mobilisation

Among other issues, opponents argued that federal law NOM-055-ECOL-93, which requires
that hazardous waste landfills be sited no closer than twenty-five kilometers from any
settlement anticipated to have a population of 10,000 residents by the year 2010 (NOM-055-
ECOL-93, provision 5.1.5.1), had been violated by the Cytrar facility. In fact, this was a
claim made in the first of three submissions by the Academia Sonorense before the Secretariat
of the CEC. In July 1998, the social movement thus reached out to international
institutions to voice their concerns about the dumpsite. Despite the obvious violation of the
federal law, however, Mexico defended the operation of the landfill by claiming that the
construction of the facility was authorised according to the laws applicable at the time, which
was prior to the enactment of the 1993 standard. It stated that the regulation refers to the
selection of landfill sites, not to their operation, which leaves one questioning the purpose of the
law. The underlying object of the 1993 standard, as stated in the Preamble, is the
protection of the community and the environment. It makes sense that the operation of
such a landfill, and not the mere presence of the building, would be the evil that the state
intended to protect. In any case, Mexico’s final defence before the CEC was that the

87 Instituto Nacional de Ecología, Normas Oficiales Mexicanas para la Protección Ambiental: Para Control de
88 Cytrar I, CEC Submission by Academia Sonorense, “Petición” (14 de julio de 1998).
minimum distance of 25 kilometers was not an absolute requirement, denying any violation of federal laws with respect to the facility.\textsuperscript{90}

Hermosillo residents, and in particular, \textit{Academia Sonorense}, rejected the Mexican position, as evinced in their August 1998 submission to yet another international body, the International Court of Environmental Arbitration and Conciliation (“ICEAC”), which provides non-binding consultative opinions.\textsuperscript{91} Two additional legislations were used by \textit{Academia Sonorense} to support the community’s claims. First, the location of the landfill failed to comply with

\textsuperscript{90} Ibid. The \textit{Academia Sonorense} filed a second submission with the NAAEC on February 14, 2001 (Cytrar II, CEC Submission by \textit{Academia Sonorense}, “Petición Sometida A La Comisión De Cooperación Ambiental Conforme A Los Artículos 13, 14 Y 15 Del Acuerdo De Cooperación Ambiental De América Del Norte” (11 de febrero de 2001 [Cytrar II]) asserting that Cytrar carried on activities in violation of multiple legal provisions, including (a) having operated without an environmental impact authorisation contrary to art. 28, 29 and 32 of the \textit{Ley General}; (b) failing to comply with the applicable legal provisions concerning the design and construction of its facilities, contrary to the Mexican Official Standard NOM-057-ECOL-1993; (c) depositing hazardous waste originating from Alco Pacifico, contrary to art. 153 of the \textit{Ley General} and art. 7 of the Regulations on Hazardous Waste of the \textit{Ley General}; (d) the failure to effectively enforce art. 415 of the Federal Criminal Code despite environmental crimes committed by Cytrar; and (e) allegations concerning access to environmental information, contrary to art. 153 bis-3 of the \textit{Ley General}. Despite the Secretariat having recommended a Factual Record for the case, the case was dismissed in December 2002 when the CEC Council invoked a pending international arbitration in voting against the preparation of a Factual Record. The \textit{Academia Sonorense} filed a third submission with the NAAEC on August 15, 2003 asserting the same allegations. The Secretariat determined not to recommend the preparation of a Factual Record for this case due to Mexico’s claim that it effectively enforced its environmental law in that it refused to renew Cytrar’s operating permit (Cytrar III, CEC Submission by \textit{Academia Sonorense}, “Petición” (12 de agosto de 2003)). Interestingly, in their response, the Mexican government notes that it will only initiate the remediation of Cytrar once the payment is made to the company (Cytrar III, CEC Response by Mexican Government, “Respuesta” (19 de noviembre de 2003)).

\textsuperscript{91} The International Court of Environmental Arbitration and Conciliation - located in San Sebastian, Spain – is an international body that was established in Mexico D.F. on November 1994, by 28 lawyers from 22 different countries, as a form of institutionalised arbitration. The Court facilitates - through Conciliation and Arbitration - the settlement of environmental disputes submitted by States, natural or legal persons. Both the public or private entity initiating the procedure and the defending party must accept the conciliation or arbitration procedure associated with the court. The ICEAC also provides Consultative Opinions in relation to any legal matter on request of any kind of entity, whether public or private, national or international. In the case of Consultative Opinions, the defending party does not appear, nor have to consent, to the procedures of the court. Consultative Opinions may be requested of the following types: (a) preventive - in order to ascertain whether a proposed project is compatible with environmental law; (b) confirmatory - in order to confirm that an action has been carried out in compliance with environmental law; and (c) denunciatory - in order to enquire whether an action by another person complies with environmental law and if not to make that information available to the international community. As it is only an opinion of the court, the consultative opinion is non-binding. See International Court of Environmental Arbitration and Conciliation website: \textless http://iceac.sar enet.cs/Ingles/fore.html\textgreater (visited: Sept. 4, 2009).
the geohydrological conditions as set forth in the 1988 Official Mexican Regulations.\(^{92}\)

Second, the landfill failed to comply with the legal conditions regarding surface hydrology.\(^{93}\)

In the consultative opinion presented in 1999, the ICEAC suggested that the Mexican government was liable for allowing a dumping ground to be built in Las Víboras in violation of 1988 regulations, and for allowing the site to be operated despite the 1993 standards. The court, therefore, recommended that the authorities of Hermosillo request that the Mexican government do away with the Cytrar deposit, and for the U.S. to finance the removal and proper treatment of the waste dumped in the facility.\(^{94}\)

### 3.1.2 Extra-Institutional Strategies

The community mobilised in a more radical way after the renewal of Cytrar’s permit in November 1997, recognising that the use of conventional legal mechanisms had been unsuccessful in achieving their goals. In order to more effectively oppose the Cytrar landfill, a coalition of five NGOs - including *Alianza Civica*, *Academia Sonorense de Derechos Humanos*, *Conciencia y Voluntad*, *Ciudadanos por el Cambio Democratico*, and *Union de Usuarios*\(^{95}\) - was formed.\(^{96}\)

The coalition and members of the community engaged in various episodes of largely disruptive forms of contention. They were determined - by sitting, blocking, moving together, and speaking loudly in public forums - to reinforce their solidarity and identity, as

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\(^{92}\) This Regulation requires that the deposit be located in an area that has no connection with aquifers, unless the underlying aquifer is at a depth of at least 200 meters. According to official data, there existed two aquifers, one at a depth of between 16 and 79 meters, and another one between 62 and 142 meters, which were in danger of being contaminated (Supra note 64 at 3).

\(^{93}\) This law calls for the location of such deposits to be at a distance of at least 500 meters from the centre of any surface waterway bed. However, a number of streams flow right through Cytrar (Supra note 64 at 3).

\(^{94}\) Supra note 64 at 2.

\(^{95}\) *Alianza Civica* = Alliance for Civic Affairs; *Academia Sonorense de Derechos Humanos* = Sonora Human Rights Academy; *Conciencia y Voluntad* = Conscience and Will; *Ciudadanos por el Cambio Democratico* = Citizens for Democratic Change; and *Union de Usuarios* = Users Union (Supra note 69).

\(^{96}\) Norma A. Abril, “Cara a cara” (22 February 2007) *El Imparcial*. Available online: <http://www.elimparcial.com/Columnas/columnas.asp?Columna=Cara%20a%20Cara&Fecha=2/22/2007> (visited: Sept. 4, 2009). Before the formation of the coalition in 1997, the individual NGOs were active in various local, but separate, issues. What united them was their shared opposition to the Cytrar facility.
opponents to both the foreign investor and the state, which had extended Cytrar’s stay in
town. In a remarkable show of commitment and organisation, the struggle continued
relentlessly during this phase, from the start of the blockade to the closure of the Cytrar
facility.

3.1.2.1 Blockade

The most dramatic act that the movement engaged in occurred on January 30, 1998. That
morning, the coalition of NGOs physically blocked the entrance to the Cytrar facility after a
court injunction (handed down on January 26, 1998 and brought before the court by
Academia Sonorense), that temporarily prohibited Cytrar from accepting wastes from other
states, was unenforced by governmental officials and ignored by Cytrar management. When community opponents learned that the authorities were not going to enforce the
ruling, they took it upon themselves to shut down the dumpsite. While the number of
participants present in the blockade varies depending on the source, what was tremendous
about the act was the fact that it dragged on for days, and then weeks. Richard Boren, an
environmental activist and freelance writer, who spent time in Hermosillo during the local
struggle against the Cytrar Landfill, claims that fires were built at night to ward off the cold,
and at one point during the blockade, up to 300 congregated at the gate to participate in a
mass offered by a local priest. One demonstrator claimed that her concerns were

97 Counter Memorial at para 207.
98 Ibid.; Supra note 68; Richard Boren, “Hermosillo Toxic Waste Dump Opponents Forcibly Removed From
Plaza” (17 September 1998) Borderlines Updater 1 at 2 [Boren 1998b].
99 Supra note 69.
100 The government claimed that there were a “limited group of individuals” (Counter Memorial at para 213),
while the arbitration tribunal made reference to 40 people blocking the Landfill in their decision (Tecmed
Decision at para 144), whereas environmental activists on site reported hundreds of residents taking part (Supra
note 69).
101 Supra note 69.
heightened when she became aware that 17 head of cattle had mysteriously died on a ranch adjoining the Cytrar facility.\textsuperscript{102}

During the blockade, the demonstrators successfully prevented the General Manager of Cytrar, Biol. Zapatero Vaquero, from leaving the site one afternoon for several hours, before the police were marshaled to facilitate a ‘safe’ exit.\textsuperscript{103} Despite the difficulty of sustaining the blockade, it was a symbol of solidarity among community members - men and women, old and young - against the unwelcomed foreign investor in their community.\textsuperscript{104} And it persisted, in the face of abuse by the police trying to remove them\textsuperscript{105} and disgruntled Cytrar employees, who parked their trucks outside the gate, blowing their horns and playing loud music at all hours, in an attempt to demoralise the protesters.\textsuperscript{106} Boren reports that “at one point a truck tried to force its way into the dump and one woman was slightly injured.”\textsuperscript{107} Nevertheless, the blockade persisted for 37 days.

### 3.1.2.2 Permanent Sit-in

Immediately after the blockade of Cytrar ended on March 6, the coalition set up a permanent sit-in in Hermosillo’s Plaza Saragossa, which lies directly in front of the Municipal Palace.\textsuperscript{108} They strung up a petition signed by over 30,000 residents of Hermosillo on colourful boards that gave a festive mood to the vigil, in addition to the more somber photo exhibit of Cytrar,

\textsuperscript{102} Ibid.
\textsuperscript{103} Counter Memorial at para 216.
\textsuperscript{104} Supra note 69.
\textsuperscript{106} Supra note 69.
\textsuperscript{107} Ibid.
\textsuperscript{108} Counter Memorial at para 223. In fact on March 25, 1998, they managed to totally block access to the Municipal building. Boren reports in supra note 70 that there were 700 people in attendance at one point.
which provided the reality on the ground.\textsuperscript{109} During the sit-in, the coalition continued to mobilise the community. They organised rallies and marches against Cytrar, in which hundreds of residents participated;\textsuperscript{110} they continued presenting the federal authorities (in particular PROFEPA) with \textit{denuncia populares} regarding the environmental violations committed by Cytrar in the manner in which it transported, treated and confined hazardous waste;\textsuperscript{111} they issued various communications condemning the actions of the authorities that had put an end to the blockade of the Landfill;\textsuperscript{112} and after the police forced the coalition out of the Plaza after 192-days, they filed a complaint before the State Commission of Human Rights against state and municipal authorities for having intervened.\textsuperscript{113}

With the arrival of Mexican Independence day on September 16, 1998, Dr. German Rios Barcelo, one of the activists leading the coalition, together with 8 others, spent the night in the Plaza in preparation for the group’s activities the following day. “We were planning to do a citizen survey regarding Cytrar,” he said, “and had been preparing the space they occupied on the plaza for the festivities. Then the police moved in on us and confiscated everything including our tents, chairs, photos, petitions, and other personal belongings.”\textsuperscript{114} Another activist and leader, Francisco Pavlovich, claimed that despite not being physically abused by the police, “there was violence in the way they rounded up all our belongings, destroying part of them.”\textsuperscript{115} Regardless of this setback, the coalition did not give up.

\begin{flushleft}
\textsuperscript{109} Richard Boren, “Permanent Vigil in Plaza was Peaceful: Other Vigils have been Allowed Without Police Intervention” (17 September 1998) \textit{Borderlines Updater} 4 at 4 [Boren 1998c].
\textsuperscript{110} \textit{Ibid.}
\textsuperscript{111} Cytrar II at para 24.
\textsuperscript{112} Counter Memorial at para 232.
\textsuperscript{113} \textit{Ibid.} at para 265.
\textsuperscript{114} Boren 1998b at 2.
\textsuperscript{115} Boren 1998c.
\end{flushleft}
3.1.2.3 Public Denunciations

In a report written by Anna Ochoa O'Leary, a professor at the University of Arizona, a feminist perspective on the mobilisation of women in Hermosillo is provided. O'Leary conducted fieldwork in Hermosillo, and describes the staging of radical forms of protest by women, including the use of public forums to shame officials and politicians. At the 188th anniversary of Mexico’s Independence – which marked the end of the 192-day sit in – when tensions were high, about 30 group members attended. They began to jeer and shout at the officials soon after the ceremony began, accusing them of being “sell-outs” (“¡vendepatía!”), demanding them to “let go of our flag” (“¡suelta mi bandera!”), and “out with Cytrar” (“¡Fuera el Cytrar!”), and accusing them of “making us the toilet of the world” (“nos han hecho el escusado del mundo”). As a result of this disruption, many of them were hurled out before the State Governor appeared on scene.

These women had with them, banners, posters and life-size mannequins with paper-maché heads of recognisable officials: Julia Carabias Lillo, the head of SEMARNAP; Armando Lopez Nogales, the Governor of Sonora; and José Luis Morachis of PROFEPA. They used every opportunity to ridicule the officials, and in doing so, were captured by the local press, helping them generate even more publicity against the officials. These verbal attacks of public officials were unprecedented, especially from women, and as expected, they were met by counter-attacks in newspaper editorials, charging the protesters with being unpatriotic, disloyal citizens. There were rumours and threats that these activists would be

116 See supra note 60.
117 Ibid. at 17. The expressions are taken from September 16, 1998 article appearing in El Imparcial, a local newspaper in Hermosillo.
118 Supra note 60 at 18.
119 Ibid. at 19.
arrested or beaten, a contention that only increased the outrage among the group.\textsuperscript{120}

### 3.1.3 Political Opportunity Structures

Besides the institutional and non-institutional actions employed by the community and NGOs, the presence of political allies provided a “political opportunity structure” to the social movement. In his study on the struggle in Hermosillo, Stephen Mumme suggests that environmental groups and the NGO coalition deliberately targeted municipal authorities as a key point of contact. This was not only because the municipality had previously operated the Landfill, or that the facility was physically situated within the territorial jurisdiction of the municipality. It was also because the protestors wanted to work the system from the bottom up, to urge the municipality to address a popular environmental movement, and to take advantage of the first opposition party in the recent history of the municipality and of the potential ties between municipal authorities and NGO members.\textsuperscript{121}

Challengers are in fact encouraged to forge alliances with influential political members, take advantage of political instabilities or weaknesses,\textsuperscript{122} and engage in collective action when they have allies who can act as negotiators on their behalf or guarantors against repression.\textsuperscript{123} These kinds of “political opportunity structures” can act as a set of clues for when contentious politics can emerge.\textsuperscript{124} It may, therefore, not be a coincidence that in the fall of 1997, after the municipal elections, the Hermosillo mobilisation included more forms of radical activism. The political opportunity provided challengers incentives to take more

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{120} Supra note 59 at 5.
\item \textsuperscript{121} Supra note 57 at 118.
\item \textsuperscript{122} Tilly & Tarrow at 57.
\item \textsuperscript{123} Sidney Tarrow, \textit{Power in Movement}, 2nd ed. (New York: Cambridge University Press, 1998) at 79.
\item \textsuperscript{124} Ibid. at 20.
\end{enumerate}
\end{footnotesize}
direct action as opposed to resorting to conventional legal mechanisms. By engaging in more disruptive resistance, especially with the implicit backing of local authorities, the social movement was successful in finally forcing the federal administration to divest from the foreign-owned facility.

3.1.4 Transnational linkages

In March 1998, the Hermosillo social movement took up yet another important strategy: building transnational linkages with other similar struggles in the region. March 1998 marked the first Annual Meeting on the Border Environment, a venue to deal with problems caused by NAFTA in the border region. The meeting attracted nearly 400 participants from all over Mexico, Canada and the U.S. to Ciudad Juárez. Communities and organisations quickly understood that a top-down coalition of economic partners required a response from the bottom up. And so, in this meeting, the Border Environmentalist Coalition emerged and united Mexican residents of Hermosillo with anti-Sierra Blanca dump activists from Texas and Native American opponents of the Ward Valley project in California. All three locales were simultaneously struggling against the development of a waste disposal in their community.

Across the border, in the small town of Sierra Blanca in western Texas, home to about 500 mostly Mexican immigrants, a very similar struggle to the Hermosillo one had been brewing, but it had been doing so for over six years. In late October 1998, after years of hard work by

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an unprecedented binational coalition, the proposed Sierra Blanca nuclear waste dump (and the US $50 million invested in the project)\textsuperscript{127} was finally defeated. This was a major victory for the environmental justice movement in the border region states. Interestingly, the Sierra Blanca dump issue had risen to the forefront of Mexican political discourse, transforming into an unusual unifier among the often-fractious political scene. All of Mexico’s five major political parties came out against the project.\textsuperscript{128} A few days after the Sierra Blanca defeat, the coalition of NGOs organised a march in Hermosillo, which turned out to be the largest protest to date, drawing over 1000 citizens.\textsuperscript{129} It is likely that the success of the counter-hegemonic resistance in Sierra Blanca helped strengthen efforts to frustrate the Cytrar renewal back home in Hermosillo.

Mexico likely felt pressure from external sources, such as the defeat of the nuclear dump proposal in Sierra Blanca, Texas, only a month prior to making its own decision regarding the fate of the Cytrar dumpsite. Not only do social movements take advantage of internal political opportunities, they can also take advantage of external political opportunities, especially when channels between their own government and civil society is hindered. This “boomerang pattern” of influence\textsuperscript{130} is characteristic of cross-border social networks, where domestic NGOs bypass their home state and form international alliances, not only in search

\textsuperscript{128} Kent Paterson, “Sierra Blanca Rises to Top of Mexican Political Debate” (20 October 1998) \textit{Borderlines Updater} 4 at 4.
\textsuperscript{130} Margaret E. Keck and Kathryn Sikkink, \textit{Activists Beyond Borders} (Ithaca: Cornell University Press, 1998) at 12. The boomerang model is particularly relevant to repressive states, where access to national governments is blocked. According to the model, Southern NGOs build bridges to Northern NGOs, who then lobby on their behalf. The pressure from the latter groups is predicted to impact the behaviour of the target Southern state, because of the state’s concern about its reputation internationally.
of crucial resources for movement formation and diffusion, but also to bring pressure on
their states from the outside.\textsuperscript{131} This may have been the case in Hermosillo. The U.S.
decision not to pursue the waste facility in Sierra Blanca, across the border in Texas,
especially given the Mexican government’s strong opposition to it, may have influenced the
INE decision not to renew Cytrar’s permit, in fear of appearing hypocritical or unconcerned
about shared environmental issues.

3.2 State - and Investor - Response

Here, I examine three responses to the social mobilisation against the Cytrar waste facility.
The first response was the denial of the state to renew Cytrar’s permit for the operation of
the waste facility in Hermosillo. Indeed, for the community, this was a major victory. The
second response deals with the state’s promise to relocate the Cytrar facility, which was
thwarted by community members and the NGO coalition. The third response was the
compensation package awarded to Tecmed by an international arbitration tribunal, after the
company brought a claim against Mexico for the alleged violation of several provisions of
the Mexico-Spain BIT.

3.2.1 Closure of Cytrar Landfill

On November 25, 1998, Cristina Cortinas Nava, General Director of the Hazardous
Materials, Waste and Activities Division of INE, rejected Cytrar’s application for the renewal
of its permit to continue operating the Landfill. The “INE Resolution” listed four main
reasons for the denial of the permit, all of which related to violations of state law or

\textsuperscript{131} Ibid.
conditions of the permit.\footnote{Specifically, the INE Resolution provided the following grounds: (i) the Landfill was only authorized to receive waste from agrochemicals or pesticides or containers and materials contaminated with such elements; (ii) PROFEPA’s delegates in Sonora had informed, in the official communication dated November 11, 1998, that the waste confinement far exceeded the landfill limits established for one of the Landfill’s active cells, cell No. 2; (iii) the Landfill temporarily stored hazardous waste destined for a place outside the Landfill, acting as a «transfer center», an activity for which the Landfill did not have the required authorization; Cytrar was requested on October 16, 1997 to file reports in connection with this activity, but to date the relevant authorization had not been issued; and (iv) liquid and biological-infectious waste was received at the Landfill, an activity that was prohibited and that amounted to a breach of the obligation to notify in advance any change or modification in the scope of the Permit, and to unauthorized storage at the Landfill of liquid and biological-infectious waste. Furthermore, CYTRAR … agreed with the different levels of the Federal, State and Municipal Government and communicated to the public the relocation of the landfill (Tecmed Decision at para 99).} This represented the first significant act of the federal government, signaling success for the efforts of the community. One of the main goals of the movement had been achieved. However, while the INE Resolution submitted a program for the closure of the Landfill, it did not provide an equivalent program for the remediation of the dumpsite.

According to Mexico, Cytrar had committed numerous violations of the law in the course of its operations, including the last of such violations, which was the expansion of one of its two cells without the proper authorisation of the INE.\footnote{Counter Memorial at para 263. In fact, the INE rejected Cytrar’s request for the construction of the expansion of the cell, but Cytrar started the constructions regardless.} Of the 12 inspections carried out by PROFEPA from February to November 1998, fifty violations were found, and of these violations, several were left unrequited.\footnote{Counter Memorial at para 297-9.} In addition, the state argued that since the continuing operation of the Cytrar Landfill was unviable, it made sense for the company together with state officials to concentrate, instead, on the selection of a new location for the facility.\footnote{Tecnias Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/02, “Escrito de Alegatos Finales” (31 de julio de 2002) at para 50.} However, why the state decided to deny the renewal of Cytrar’s permit without first finding a suitable location for the facility is unclear. I discuss this inconsistency in Part
IV of this chapter, the Role of the State. Indeed, Tecmed responded to the INE Resolution with this exact query, accusing the state for its failure to locate a new site prior to closing down the Cytrar facility, as had been promised.\(^\text{136}\) That the state bent to the will of the local community, which appeared to be the driving force,\(^\text{137}\) was a huge triumph for the counter-hegemonic resistance.

### 3.2.2 Relocation of Cytrar Facility

As promised, the INE carried out an identification and selection process - after the INE Resolution – of the most suitable sites within the State of Sonora to relocate the Cytrar facility. The selection process consisted in the evaluation of 15 probable sites, of which three in Carbó and Benjamín Hill were short-listed.\(^\text{138}\) Cytrar agreed that the site in Benjamín Hill was fit for the Landfill. In fact, by April 1999, the Municipality and Mayor of Benjamín Hill had approved to commence relevant studies on “El Pinito,” located in Benjamín Hill, and had prepared the preliminary contract of sale for the transfer of the site to Tecmed.\(^\text{139}\) In the meantime, community pressure to block these efforts increased.\(^\text{140}\) Several opinions and articles appeared in the local newspaper, *El Imparcial* after the INE Resolution in 1999, about the opposition to the Landfill’s relocation plan in the State of Sonora. These included a letter from Francisco Pavlovich, a coalition leader, against the site in Benjamín Hill; a number of articles against relocation efforts in the towns of Carbó and Guaymas; and an article against the Agua Blanca site located in Benjamín Hill.\(^\text{141}\) At the end, local opposition

\(^{136}\) Tecmed Decision at para 142.  
\(^{137}\) *Ibid.* at para 133 and 164.  
\(^{138}\) Counter Memorial at para 334-5.  
\(^{139}\) *Ibid.*.  
\(^{140}\) Tecmed Decision at para 142 and footnote 170.  
\(^{141}\) *Ibid.* at footnote 170.
in Benjamin Hill – with the help of coalition leaders from Hermosillo – stalled and then prevented the relocation of the Cytrar facility into “their” backyard.\textsuperscript{142}

### 3.2.3 Arbitration Award

In July 2000, a month before the announcement of the arbitration award in the \textit{Metalclad} case, Tecmed submitted a request for arbitration against Mexico pursuant to the 1996 bilateral investment treaty between Mexico and Spain. Under traditional international law, the investor may only put forward a claim against the host State after the exhaustion of local remedies of the host State’s domestic courts. However, where consent has been given to investor-state arbitration, there is generally no need to exhaust local remedies.\textsuperscript{143} Not surprisingly, Cytrar did not exhaust local remedies before applying to ICSID for an arbitration request.\textsuperscript{144} In its claim, Tecmed accused Mexico of effectively expropriating its investments, and denying it ‘fair and equitable treatment,’ causing damages, which therefore entitled it to compensation. The company sought damages of US $52 million for loss of investment, plus $6 million for damages caused to its reputation. While Tecmed alleged that the non-renewal of the permit was based on arbitrary and unjustified reasons, Mexico argued that the INE had discretion to renew or reject a permit and that the final decision was based on the repeated citations to Cytrar for violations of the permit conditions and environmental standards.

\textsuperscript{142} \textit{Ibid.} at para 142.


\textsuperscript{144} This may seem strange given Mexico’s \textit{amparo} process, which is a central part of its judicial system (Del Duca at 78). \textit{Amparo} actions are “the vehicle by which an expropriated party raises a judicial challenge.” (Del Duca at 77). However, \textit{amparo} actions are to be brought within 15 days of when the plaintiff knows or should have known of the injury protested. This condition, in addition to a foreign investor’s confidence in the ICSID process, which tends to be pro-investor, as opposed to the host state’s judicial system, may have influenced Tecmed’s decision to bypass the local remedies in Mexico.
Among other things, the tribunal found an expropriation to have occurred. It considered the following facts: (a) there was no evidence that Cytrar’s operations had ever threatened public health or the environment, and that the violations cited by INE were all of a minor and technical nature, easily remedied by imposing a fine; (b) the social opposition to the operation of the Landfill never amounted to a social unrest; and (c) Tecmed had agreed to relocate the Landfill and was waiting for the Mexican government to select the new location. The tribunal therefore concluded that by rejecting the renewal of the permit, the Mexican government expropriated the claimant’s investment and the lack of an adequate compensation package violated the BIT.

The tribunal then examined the question of an alleged violation of the “fair and equitable treatment” standard. “Fair and equitable treatment” necessitates that the host state “does not affect the basic expectations that were taken into account by the foreign investor to make the investment,” and that it “act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor.” The tribunal’s conclusion was that the standard was breached due to the “lack of transparency” and “ambiguity and uncertainty” on the part of the state with respect to the legitimate expectations of Cytrar—especially regarding the relocation plan promised to the company.

145 Tecmed Decision at para 151.
146 Ibid. at para 124.
147 Ibid. at para 14.
148 Ibid. at para 151.
149 The language used by the Tecmed tribunal in its discussion of the standard of “fair and equitable treatment” is often cited as the “most extensive explanation of the foundations and substance of the standard.” See Rudolf Dolzer, “Fair and Equitable Treatment: A Key Standard in Investment Treaties” (2005) 39 Int’l L. 87 at 95; also Schneiderman 2008 at 98.
150 Tecmed Decision at para 154.
151 Ibid. at para 164 and 172.
3.3 Difficulties in achieving victories

The resistance in Hermosillo was strong and continuous, and did not surrender to hegemonic disregard or counter attacks that came in the form of corporate threats, police aggression and state ambivalence. These latter episodes only strengthened the mobilisation. I turn now to some of the victories that were achieved by the counter-hegemonic struggle, drawing attention to the fact that, within the logic of the international investment rules regime, victories are at once unsustainable, given the heavy price attached to them if the investor is successful at the arbitration stage, and difficult to attain.

3.3.1 INE denial to renew Cytrar’s permit

The state’s decision to pull out of its partnership with Tecmed was the first and most significant victory for the activists in Hermosillo. Whether the decision was a result of the social mobilisation, however, is unclear. As described above in section 3.2.1, Mexico provided two main reasons for the denial to renew the company’s permit. First and foremost were the violations of the law committed by the Cytrar-operated facility, including not only provisions of the permit itself, but also a number of environmental laws (the LGEEPA in particular) and the associated regulations. These violations were cited as the only reason for the rejection of the permit in the INE Resolution. However, there appears to be another reason, provided by the federal state in the arbitration memorials and oral hearings, and that was the relocation plan.\footnote{Tecmed Decision at para 131.} By denying the renewal of the permit, the state would be forced, together with the company and local authorities, to take more seriously the relocation of the Cytrar facility.\footnote{Ibid.} Therefore, it is likely that the state pulled out of the partnership due to the specific location of the Cytrar facility, and not necessarily the
operation of the facility. Indeed, as indicated in its oral allegations in the ICSID hearing, the Mexican counsel stated that, “the problem was not a problem with a company or with an investor, but with a specific site.” 154 Similarly, Dr. Cristina Cortinas Nava, who was the INE authority responsible for the revocation of Cytrar’s permit, insisted in her oral testimony that:

… for us, the position was: let’s come to a close with this site; it is the reason for the conflict. People keep coming to the place to see how it’s being operated; they won’t even let it operate with all that community pressure. Let’s start from scratch in some other place, in the right manner and with all the mechanisms that we think might ensure that this operation could be acceptable for society. 155

According to these claims, the refusal to renew the permit was used to permanently shut-down a waste facility whose operation had become a nuisance to the public, regardless of the company in charge of operating the facility. It is probable then that the social unrest was the impetus behind the revocation of Cytrar’s permit. In its counter-memorial to the ICSID, Mexico listed the strong social opposition to the Cytrar facility as one of the reasons the INE decided to deny the company’s permit. 156 By relocating the facility to a more distant area, it was hoped that the community would no longer revolt against the existence and operation of the hazardous waste facility. In this sense, the counter-hegemonic force succeeded in effecting the termination of the investment.

The struggle in Hermosillo, however, did not fade away with the exit of the foreign company. Over ten years have passed since the closure of the Cytrar facility, yet nearly 300,000 tons of exposed toxic industrial waste remain within the site, without having

154 Ibid. at para 126.
155 Ibid.
156 Counter Memorial at para 315.
It therefore continues to be a health and environmental concern, for which no one is taking responsibility. Unfortunately, since the international investment rules regime does not impose parallel obligations on investors – as it does on states – the struggle for the proper remediation of the site lingers on.

3.3.2 Secrecy of Waste Facility (investment) projects continue

The relocation plan for the Cytrar facility is related to one of the three main objectives of the social movement in Hermosillo: the right to know about the prevalence, use and disposal of toxic wastes in your community. The manner in which the relocation plan was set out signaled the state’s continued reluctance to include community members in the decision-making process. It is also symbolic of similar investment projects that have been implemented by the Mexican state, which have again, excluded community involvement.

The secret manner in which the relocation project was being carried out inspired community activists and the coalition of NGOs to frustrate the plan entirely. The publicity created against the company after the closing down of the Cytrar landfill in Hermosillo prompted

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157 Talli Nauman, “The Green Line: Hermosillo’s smog story reads like melodrama” (23 de abril de 2007) El Universal. Available online: <http://www.eluniversal.com.mx/miami/24345.html> (visited: Sept. 4, 2009). A study by a Canadian consulting firm, Proeco Corporation – hired by the Mexican state to analyse the environmental effects of the Cytrar facility in 2004 – confirmed all suspicions of the hazardous waste facility, and concluded that a “full remediation” was urgent and necessary, to which PROFEPA announced that it would treat 2,300 tons of the toxic wastes on the surface (less than 10% of the total) and seal the remaining cells. For concerned community members, this was a cosmetic solution for one of the largest environmental liabilities in the country. See Greenpeace, “Cementerio tóxico afecta a sonorenses” (July 7 2005). Available online: <http://www.greenpeace.org/mexico/news/cementerio-txico-afecta-a-son> (visited: Sept. 4, 2009).

158 After several inspections and levying of fines of the Cytrar facility, Cytrar announced that it had ratified, among other changes, its agreement with the Municipality to relocate its operation (Counter Memorial at para 228.) Despite this new proposal, environmental advocacy groups saw the decision as “politics as usual.” Ironically, while the municipal authorities, and the Mayor in particular, considered this new plan a progressive response to the social pressure against the Landfill, the community saw itself as stakeholders who were once again excluded in the decision-making process (supra note 57 at 119). This was one of the allegations made by the Academia Sonorense in their complaint against the state of Mexico, before the Secretariat of the CEC, in 1998. The submitters alleged that the intention to install a new landfill for hazardous waste within the territory of Sonora without first consulting the public violated the right to information and citizen participation provided in article 153 – bis 3 of the Ley General, and entrenched in section 10 of the Rio Declaration on Environment and Development, 1992.
reproduction of collective action in surrounding locales struggling to keep Cytrar out of their municipality. In fact, Tecmed representatives alleged that NGOs would appear on the scene, demonstrating against the installation of a new Confinement as soon as a new location was made public or an article appeared in the newspaper with respect to a potential new site.\footnote{Tecnias Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/02, “Memorial de Demanda” (31 de agosto de 2001) at footnote 103 [Memorial].}

In this way, counter-hegemonic activists from Hermosillo and the surrounding communities thwarted all efforts aimed at the relocation plan for the Cytrar waste facility.


Until these requirements are met, environmental organisations, the media, and individuals will continue to prevent the development of waste facility projects. This was indeed the case with a proposed toxic waste site on a 100-hectare private property, between Hermosillo and the
border town of Sonoyta,\textsuperscript{162} conveniently dubbed “Cytrar II.” The proposed site was located 8 miles from a sacred site of the Tohono O’odham Nation. Again, Mexico’s federal environmental agency authorised the toxic waste confinement on October 13, 2005 without a public hearing.\textsuperscript{163} The community mobilised almost immediately after discovering the new agreement. A coalition of organisations, in solidarity with the Tohono O’odham Nation, organised protests against the project at Mexican consulates across the U.S. Southwest on Indigenous Peoples’ Day, October 12. On November 26, 2005 activists staged a symbolic closure of the strategic border crossing between Sonoyta and Lukeville, Arizona, to draw international attention by catching Thanksgiving vacationers on their way back to the U.S. from beach resorts in Sonora. There was a 120-vehicle protest caravan into Sonoyta city hall in the months that followed, which eventually influenced the governing council’s vote against the project.

The Mexican state appears to be too eager in the facilitation of foreign investment projects to concern itself with legitimate community concerns. Since the closure of the Cytrar facility, for example, it has quietly approved six hazardous waste burial site proposals without the consultation or participation of the affected communities.\textsuperscript{164} It seems to be prioritising transnational capital over the interests of its citizens. While the community has responded with various direct tactics to frustrate these projects, it is not a sustainable solution for the people or the state. In this sense, counter-hegemonic struggles have had difficulty in

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\textsuperscript{163} Supra note 161.

\textsuperscript{164} Ibid.
achieving their goal of meaningful participation in investment projects that are lured in by the state.

3.3.3 ICSID Decision

The ICSID tribunal that heard the case against Mexico awarded Tecmed a US $7.45 million dollar “free trade” package as a result of the state’s denial to renew the company’s permit to operate the Cytrar dumpsite. Within the investment rules regime, victories achieved by counter-hegemonic struggles - as the one in Hermosillo - often have a price tag attached. Unfortunately, it is the citizens and their state that are held fiscally responsible, irrespective of fiscal capacity.165 Victories are therefore unsustainable. In a similar sense, the investment regime undermines state projects responding to legitimate societal concerns if they conflict with investor interests. Victories are therefore also difficult to come by given the pre-commitments made by the state to transnational capital.

There are still other difficulties posed by the regime that are evident at the international level: the denial of NGO members to participate as witnesses in the oral hearings before the ICSID tribunal, and the disparaging remarks made by the tribunal with respect to the social resistance against the facility, an attempt to keep politics out of commercial disputes.

3.3.3.1 State vs. Civil Society

The coalition of NGOs in Hermosillo solicited the Mexican government to permit its members to present evidence at the arbitration proceeding.166 As with most of their

166 Domingo Gutierrez Mendivil, email communication, April 7, 2009.
requests, the NGOs unfortunately did not receive a response. Whether the locals actually wanted to engage in the arbitration – a forum that simply excludes the voice of the subaltern – has to do with different strategies that can be employed by social movements. It seems that some of the activists that were well versed with the law – including lawyer Domingo Gutiérrez Mendívil – considered civil society presence at the international forum an important aspect to the success of the counter-hegemonic mobilisation. At the end, the arbitration proceeded behind closed doors, without the participation of the public.

However, despite the denial of the state to include NGO participation in the arbitration case against it, it did acknowledge the extent of the opposition in its counter-memorial. The state cited a large number of the claims and denuncias that were brought against it and the company by the various social actors involved in the movement, resolving that “it is opposite to the basic principle of a democracy to ignore the validity and legitimacy of popular protests.” It also argued that the concerns of civil society were “important” and “legitimate,” so much so that the government could not ignore the social unrest and civil demands. The opposition was therefore “one of the factors considered by the INE” at the renewal stage. Finally, the state made reference to civil society involvement in detecting violations of environmental standards, and placed them on an equal footing to state officials: “not only did PROFEPa detect violations in Cytrar’s operation,” but “civil society groups also observed the operation of the company and documented its improper operation…” In this way, while the community and NGOs were excluded from the

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167 For example, in paragraphs 201-224, 231-233, 236-237, 244-246, 248, 253, 258-259, 265, 285, 290, 302, 313, 315, 383, 392-400, 457, 459, 461, and 496 of the Counter-Memorial, Mexico cites all the strategies used by the opposition groups, from the demonstrations and blockades, to the penal claims and international claims brought by non-governmental organisations against the foreign investor and the state.  
168 Counter Memorial at para 392.  
169 Ibid. at para 399 and 235.  
170 Ibid. at para 398.  
171 Ibid. at para 383.
arbitration proceedings, their concerns and the various forms of activism that they engaged did eventually appear in the counter-memorial and oral hearings of the state and therefore the arbitration proceeding.

3.3.3.2 ICSID vs. Civil Society

The tribunal in *Tecmed* paid significant attention to the general discontent of the community and the social mobilisation against the operation of the Cytrar hazardous waste facility, admitting that the “community’s opposition to the Landfill, in its public manifestations, was widespread and aggressive, as evidenced by several events at different times.”172 Why the tribunal would have cared in the first place about the local opposition, especially given that it was not a case of necessity or emergency, is unclear. Despite this, the recognition of the counter-hegemonic mobilisation itself is significant, especially given the tribunal’s near avoidance of the local population’s opposition in the *Metalclad* case.173 However, while this acknowledgement exists, the tribunal actually sets out to disparage the movement by first deeming it as insufficient to amount to a “genuine social crisis,”174 and then by suggesting that it was composed of “some individuals or the members of some groups that were opposed to the Landfill” and that “could gather on two occasions a crowd of only two hundred people… and four hundred people, the second time.” That this was the tribunal’s

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172 *Tecmed* Decision at para 108.
173 *Metalclad*. The circumstances giving rise to the *Metalclad* dispute is not very different from those in *Tecmed*. The case involved the purchase of a hazardous waste landfill site in Mexico by an American investor. Mexican government officials initially encouraged the investment. However, Metalclad’s plans were eventually frustrated by local officials who denied it a local construction permit once it became apparent that the company was illegally disposing the untreated waste onsite, causing environmental and health-related damage. The State Governor issued a last-minute ecological decree protecting the landfill site, effectively precluding Metalclad from pursuing its project. The investor brought an action under NAFTA alleging that Mexico had violated, among other things, its obligations under article 1110. Article 1110 prohibits the nationalisation or expropriation of investments of NAFTA investors. The tribunal in the *Metalclad* case noted that the reasons for denying a permit, which formed the basis of the dispute, included the local population’s opposition to the operation of the landfill at issue. In its decision, the tribunal made only a passing reference to the intense opposition and did not accord it any significant treatment, unlike the *Tecmed* tribunal.
174 *Tecmed* Decision at para 137.
conclusion despite the numerous references made by the state to the complaints filed by various individuals and NGO groups at the local, provincial, national and international levels; the blockade and the permanent vigil that were sustained for 37 and 192 days respectively; and the demonstrations that took place throughout, makes it appear that the *sole effects* doctrine\[^{175}\] was the principal consideration.

Second, the use of the proportionality approach\[^{176}\] at the arbitration level was laudable. This approach – which weighs the means used in light of the ends sought\[^{177}\] – sets out to balance the *police-powers* doctrine\[^{178}\] with the *sole effects* doctrine, where the only important consideration is the effect of the measure on the investment. In order to determine whether the acts undertaken by Mexico were to be characterized as expropriatory, the Tribunal considered “whether such actions or measures are proportional to the public interests presumably protected … and the protection legally granted to investments, taking into account the significance of such impact, which plays a key role in deciding the proportionality.”\[^{179}\] It added that, “there must be a reasonable relationship of proportionality between the charge or weight imposed onto the foreign investor and the aim sought to be realized by an expropriatory measure.”\[^{180}\] Its decision, however, seems to disproportionately apply the principle against state objectives. For instance, the tribunal resolves that measures,  

\[^{175}\] The *sole-effects* doctrine, as described by Rudolf Dolzer, is where determinations as to the violation of investment disciplines are made solely with reference to the effects of a measure on investors. See Rudolf Dolzer, “Indirect Expropriations: New Developments?” (2002) 11 *NYU Envt’l L. J.* 64 at 79.

\[^{176}\] The proportionality approach, which essentially requires that rights infringement be proportional to government ends, is the most dominant doctrine in constitutional adjudication in Canada and the United States, as well as in an increasing number of countries in Europe.

\[^{177}\] Schneiderman 2008 at 72.

\[^{178}\] It is an accepted principle of customary international law that where economic injury results from a *bona fide* non-discriminatory regulation within the “police powers” of the State, compensation is not required. A state measure will be discriminatory if it results “in an actual injury to the alien […] with the intention to harm the aggrieved alien” to favour national companies. See Rudolf Dolzer and Margarete Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995) at 98.

\[^{179}\] *Tecmed Decision* at para 122.

“no matter how laudable and beneficial to society as a whole,” are still expropriatory measures, and as such “the state’s obligation to pay compensation remains.” The passage, taken from an earlier case, seems to suggest a blanket statement that the state must compensate the investor for any environmental measure that is taken (and that affects the investor’s property). As Professor Schneiderman rightly argues, the “Tecmed formulation… suggests a strict standard of necessity of the sort that might only absolve state action in extreme circumstances.”

The investment rules regime is designed to exclude members of the public in its logic. While the extent of the Hermosillo struggle was included in the state’s testimonials, it is not equivalent to obtaining testimonials from affected members directly. And while the tribunal acknowledged the existence of social unrest, it continued to uphold the apolitical nature of the investment rules regime, however illusionary it may be. It was therefore impossible for affected individuals to participate in any meaningful way in the arbitration between the state and the investor.

4. Role of the State
The net effect of adopting state projects that embrace a hegemonic vision is a process of transferring responsibility for the management of resources away from the historically powerful state and to the hands of the private sector, oftentimes to private foreign investors. This relative decentering of the state has had a decisive (and negative) impact on social and

181 Ibid. at para 121, quoting Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID case No. ARB/96/1, 15 ICSID Review-Foreign Investment Law Journal, 72 (2000) at 192. It should be noted that the Santa Elena case has a different set of facts. In that case, the state party conceded that an expropriation had taken place. There is no mention of this difference in the Tecmed decision.
182 Schneiderman 2008 at 106.
183 This has changed slightly since the Tecmed decision as amicus curiae submissions are permitted into the arbitration dispute when certain conditions are met. See Chapter 3 for more details.
economic welfare policies, especially in fragile states that never had a welfare state proper before adopting neoliberal state policies.\textsuperscript{184} What interests me is the role of the state, where it is not only regulating the private sector, but it is also regulating civil society. In this sense, the state is assuming the role of, what Santos calls, a meta-regulator, where it is in the business of coordinating contradictory interests between private investors, eager to make a profit, and civil society, struggling for social emancipation. This new role is different from its pre-neoliberal role as the manager and regulator of the state, when it assumed its own version of interests.\textsuperscript{185} This role of the new state necessitates it to adopt either a more active role in policing investment or policing society. I turn to this topic next.

4.1 Secrecy of the Tecmed Project

For foreign investment-based projects to prosper in host countries, local politics must be conducive to foreign capital. State projects that promote such policies are strategically selected and pursued at the time of entry of foreign investment. One of the main state policies in its partnership with Tecmed – both at the national and local levels – was the secret nature of the investment project. In this way, it both suppressed information from the local community and evaded community participation at all stages. These two components – the right to information and the right to participate in local decision-making processes – formed one of the underlying campaigns throughout the Hermosillo struggle by community members and the coalition of NGOs.


\textsuperscript{185} \textit{Ibid.} at 490.
Interestingly, at about the same time that the state was suppressing this information, amendments were made to the existing laws with respect to these same rights. In the *Ley General*, a provision on the Right to Environmental Information (article 159 bis-3) was added, whereby any person has the right to solicit and receive environmental information from any level of government.\(^{186}\) In the Hazardous Waste Rules of the *Ley General*, section XIII called for the “promotion of social participation in the control of hazardous wastes.”\(^{187}\) While the right to information appears absolute, the law only provided for the *promotion of* the right to participate. In contrast to these more progressive – and formal – amendments, the law regulating environmental impact statements (EIS) at the time appears to be contradictory in spirit. For example, the equivalent American law requires for citizen review and comment on drafts of EISs for proposed hazardous waste disposal sites before the final EIS is issued. In Mexico, the procedure is more lax. Environmental impact studies are often incomplete or not widely distributed, and public participation does not begin until the final EIS has been circulated, which is often too late to withdraw from the agreement.\(^{188}\) In this way, community pressure on the U.S. side of the border has made it difficult to establish new hazardous waste facilities. Mexican communities, on the other hand, can only mobilise after the establishment of a hazardous waste facility, unless news of an agreement is leaked to the public.

\(^{186}\) However, the broad exceptions provided – which include the denial of information if it is considered legally confidential or if it is related to an administrative or judicial procedure in which a decision is still pending – seem to allow authorities great latitude to deny the release of such information. If denied access to the information, the authority must indicate the reasons for the denial, and the claimant has the right to appeal the decision (article 159, LGEEPA; Jacott at 185-6; and Texas Center 2000 at 17). However, in the experience of claimants, the ability to both obtain the desired information and succeed an administrative appeal is very difficult (Texas Center 2000 at 17).

\(^{187}\) Texas Center 2000 at 18-19.

\(^{188}\) *Supra* note 60 at 23-24.
4.1.1 Right to Information

The suppression of information about the operation of the dumpsite can be understood as an attempt by the state – especially a transitional state trying to integrate into the global economic order – to facilitate entry of controversial investment projects, aimed to embrace the hegemonic vision, into its territory. In effect, this appears to be a consequence of neoliberalism. Once a country has taken up neoliberalism as a hegemonic project, and opened its borders to trade and investment, it must function in such a way as to ensure the entry, hassle-free, of transnational capital, and promote itself as a worthy economic partner. If the publicity of an investment project is likely to spark resistance among community members, then concealing information from the public may be the only way to attract and establish transnational capital locally. In this sense, it is not unrealistic for government officials to suppress pertinent information from the public. However, it is one thing to conceal information that the state never intended to reveal to the public. It is another thing to continually promise the disclosure of information and then to conceal it at every stage.

The right to information campaign started with the demand for public disclosure of the terms of the negotiations between the municipality, Tecmed, and other government authorities. *Alianza Civica* requested this information (as well as the authorisation to visit the facility) from the State delegation of SEMARNAP in November 1997, following the renewal of Cytrar’s permit.\(^{189}\) The information was not produced, nor was the authorisation to visit the facility extended to the NGO. However, at around the same time, the first open meeting was held with Federal, State, and Municipal public officials, including the Minister of SEMARNAP, as well as members of the scientific and academic community and

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\(^{189}\) Counter Memorial at para 202.
representatives of civil organizations,\textsuperscript{190} generating for the first time, a forum for concerned citizens to participate, voice their concerns, and receive information that the government had concealed only a few days earlier.

On January 14, 1998, the President of the INE publicly expressed his commitment to share information with the community with respect to the operation of the Cytrar facility.\textsuperscript{191} It was the first time that a public official had acknowledged the state’s commitment to disclose information to the public. But when Mario Roberto Velarde Morales, a lawyer and resident of Hermosillo, requested to see the agreement between U.S. and Mexican authorities with respect to the shipment of toxic waste from Alco Pacifico in March 1998,\textsuperscript{192} he was denied such information. In fact, PROFEPA claimed that the contract was no longer available in the archives.\textsuperscript{193} Domingo Gutierrez Mendivil of Academia Sonorense, requested the disclosure of names and addresses of the companies that were generating the hazardous waste deposited in the Cytrar Landfill, but again, was denied (almost a full year later) access to this information. This time, the officials claimed that the requested information did not qualify as “environmental information.”\textsuperscript{194}

4.1.2 Right to Participate

The right to participate in the decision-making process also grew stronger in the community. In his declaration to the public, the INE President claimed that the worries of civil society – and especially the citizens of Sonora - were legitimate, and emphasised the commitment of

\textsuperscript{190} Ibid.
\textsuperscript{191} Ibid. at para 206.
\textsuperscript{192} Cytrar III, CEC Response by Mexican Government, “Repuesta de Parte” (19 de noviembre de 2003) at 16.
\textsuperscript{193} Cytrar II at para 26.
\textsuperscript{194} Ibid. at para 27.
the state to “promote the participation of society in the functioning of the facility” and to create “an integrated committee” in order to “rely on the participation of the community.”\textsuperscript{195} A mere few weeks later – during the blockade – a group of academics from the University of Sonora, anxious to take up the January offer – requested to visit the facilities. In their February 16 report, they indicated various problems with the Landfill including, among others, the inappropriately sealed confinement cells, the exposed containers filled with hazardous wastes, the entry of animals through the fence, and the open doors without warning signs.\textsuperscript{196} On April 30, after a failed blockade in April, the coalition of NGOs finally reached an agreement with state authorities to conduct a joint inspection of the Cytrar facility - for which they had been fighting for several months – to determine if the operation complied with all Mexican environmental laws.\textsuperscript{197} Dr. Rios Barcelo, one of the coalition leaders, at the time, stated that, “finally there seems to be a change in attitude among state officials. They seem to want to resolve this issue without the intervention of federal authorities. We welcome that change.”\textsuperscript{198} For the first time, it seemed that state officials were addressing community concerns and willing to include citizens in an investigative procedure of the facility.

The effort to include the community, however, fell short when state officials, several weeks later, declared that the joint inspection was cancelled. As a result, all negotiations between the NGOs and the government broke down.\textsuperscript{199} No such participatory role was extended to

\textsuperscript{195} Counter Memorial at para 206 and 230.
\textsuperscript{196} Ibid. at para 217.
\textsuperscript{197} Supra note 105.
\textsuperscript{198} Ibid.
community members, regardless of all the promises to include them in future decision-making processes.

4.2 Blockade

The blockade that lasted 37 days provides another illustration of the ambivalent role of the state. On the one hand, the municipality did not enforce the suspension of the court injunction against Cytrar, which was granted to the company mere hours after the start of the blockade on January 30, 1998.\textsuperscript{200} Cytrar launched numerous complaints and denunciations to state officials – both at the national and local levels – and requested their assistance in ending the blockade.\textsuperscript{201} Despite this, the state – according to Cytrar – tacitly allowed the continuation of the blockade.\textsuperscript{202} Stephen Mumme states in his study of the Hermosillo struggle that the Mayor of Hermosillo, Jorge Valencia, approached the Cytrar owners around this time and, on his own initiative, persuaded them to move the facility within a year to a more environmentally-sound location. This would resolve the public health concerns of the community, and circumvent unnecessary federal and state bureaucracy.\textsuperscript{203} In this way, it appeared that the state was siding with the community.

On the other hand, federal police officers showed up on the scene on February 3 to “discretely observe” the blockade, and while doing so, obtained the names of a select number of demonstrators,\textsuperscript{204} four of whom were later apprehended. In the midst of the blockade, the District Attorney initiated a formal penal action against these four

\textsuperscript{200} Counter Memorial at para 208-209.
\textsuperscript{201} Ibid. at para 212-214.
\textsuperscript{202} Memorial at para 60-61.
\textsuperscript{203} Supra note 57 at 119; Tecmed Decision at para 110.
\textsuperscript{204} Counter Memorial at para 214.
demonstrators, which was eventually dropped (by the Court) on March 3, 1998. During early one March morning, about 150 police and military personnel descended on the demonstrators, forcibly evicting the protestors, clearing the way for 19 truckloads of toxic waste to enter through the Cytrar gate, ending the 37-day blockade. This was a major show of force orchestrated by government officials from both the state of Sonora and municipal levels, which actually caused the NGOs to refuse to negotiate with government officials for some time.

4.3 Denial to Relocate Facility

The state’s denial to renew the permit to operate the Cytrar facility before finding a new, suitable location for it, as it had promised the foreign investor, poses another contradiction of state policy. On the one hand, there are a number of events that are indicative of the state’s promise to relocate the facility. As mentioned above, the Mayor of Hermosillo approached Tecmed personnel as early as late 1997, and convinced the company to move the facility to a more suitable location. According to Tecmed, the company did not object to the relocation plan, but accepted it with the condition that a new site be identified before closing the operation at the Las Víboras site. This initiative was made public in March 1998. The official declaration was issued on July 3, 1998 after a meeting between federal, provincial and municipal authorities and representatives of Tecmed, where all parties

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205 Ibid. at para 219.
206 Ibid. at para 220.
207 Supra note 60 at 15.
208 Supra note 69. A fence was, thereafter, erected between the road and Cytrar’s gate, with a permanent (24-hour) security guard (Counter Memorial at para 221).
209 Supra note 57 at 120.
210 Ibid. at para 110.
211 Ibid.
212 Counter Memorial at para 230; Tecmed Decision at para 110.
213 Memorial at 63.
agreed to work together to open a new facility to manage hazardous waste material in the province of Sonora. The new facility would comply with the domestic laws and norms required for the selection of the site, design, operation and other technicalities of a waste facility.\textsuperscript{214} The declaration stated that, “[a]s a consequence, the present landfill operated by CYTRAR shall cease to operate as soon as the new premises are ready to start operations…”\textsuperscript{215} Later that same month, the state presented a more detailed proposal, defining the methodology for the selection of the new site, which included the participation of all three levels of government, the academic community, Tecmed and other interested private companies.\textsuperscript{216} By October 1998, before the renewal date of the Cytrar permit, the state had shortlisted three possible locations for the new facility.\textsuperscript{217} Even after the November 1998 INE Resolution, there were ongoing meetings between the state and the foreign investor, including one in December 1998\textsuperscript{218} and another in January 2000,\textsuperscript{219} and an ongoing effort by the state to locate a suitable site.\textsuperscript{220} The evidence shows that state authorities had identified a number of sites, including one in the Municipality of Benjamín Hill, which was the most suitable for the relocation of the Cytrar facility.\textsuperscript{221}

On the other hand, despite the state’s continued commitment to relocate the Cytrar facility, including all the time and effort poured into the plan, the relocation program did not materialise. Why the plan was dropped completely is unclear, even from the documents presented by the state in the arbitration case against it. What is clear is that the state, rather

\textsuperscript{214} Counter Memorial at para 238.
\textsuperscript{215} Tecmed Decision at para 110.
\textsuperscript{216} Counter Memorial at para 239.
\textsuperscript{217} \textit{Ibid.} at para 270; Tecmed Decision at para 111.
\textsuperscript{218} Memorial at footnote 103.
\textsuperscript{219} Counter Memorial at para 337.
\textsuperscript{220} \textit{Ibid.} at para 331 – 337.
\textsuperscript{221} Tecmed Decision at para 142.
than consisting of a body with some pre-given unity, is better described as a site of struggle between conflicting interests – or rival “state projects” – issuing out of a single state system. Particular strategies may succeed, even if for a while, based on an accurate reading of the existing terrain at that particular time, but there is no guarantee that such strategies will survive indefinitely. The state continues to be a site of resistance, both internally within and between governments and externally within society.

5. Conclusion

In this chapter I describe the expansion of the *maquiladora* industry – a product of neoliberal policies adopted by the Mexican state in the 1980s and 1990s – and the ensuing environmental consequences in the border region between Mexico and the U.S., which has prompted a series of environmental justice movements. While the state has attempted to circumvent the demands and concerns of these environmental groups by creating legislation, regulations and amending existing laws to accommodate such worries, the current infrastructure and regulation of the industry still remains limited and weak. Added to this environmental challenge is the growing presence of foreign investors in the region – a symbol of a successful hegemonic globalisation – managing resources that were previously under state responsibility. This blurring of the division between the public and the private, again a product of neoliberalism - which I have described as the newest hegemonic project - has provoked a counter-hegemonic resistance against state policies that promote and sustain this global economic project.

The operation of a hazardous waste facility near Hermosillo in Sonora, Mexico precipitated one such counter-hegemonic resistance. The struggle against the haphazard operation of the
local dumpsite, which had been transferred without the community’s knowledge, to a Spanish-owned company, Tecmed, began in 1997 and continued for two years. I describe the various strategies taken up by the opposition, including institutional and extra-institutional initiatives, political opportunity structures, and transnational links with other similar movements in the border region. The counter-hegemonic resistance succeeded in one respect – i.e. pressuring the state to revoke the company’s permit to operate the facility, shutting it down indefinitely. This victory, however, came with a price tag: the ICSID award to Tecmed meant that the state and its citizens were held responsible for the pre-commitments accorded to the rights of transnational capital, which seem to trump larger societal interests. The social mobilisation was unsuccessful at achieving some of their other goals: the 300,000 tons of hazardous residues temporarily stored at Hermosillo remain a health and environmental menace for which no one currently has responsibility, and the state – secretly – continues to enter into partnerships with private companies for the management of hazardous waste sites in the region. These continuing struggles demonstrate the difficulty of achieving victories within the investment regime. First, the regime imposes only rights and no obligations to transnational corporations. Second, states are all too interested in facilitating foreign investment to concern themselves with other societal demands. My first conclusion, therefore, is that achieving victories is difficult within the investment rules regime, which I attribute to the regime’s built-in constraints: the unsustainable compensatory promise to foreign investments; the undermining of state legislative and regulatory measures designed to promote societal interests where they conflict with the interests of transnational capital; the lack of obligations demanded of foreign investors in host states; the expectation – both nationally and internationally – that states are to be accountable first to investors and
then to their citizens; and finally the denial of a voice to the subaltern at the ICSID forum if and when a dispute arises.

The clash between hegemonic and counter-hegemonic globalisation – as evinced by the struggle in Hermosillo – creates a tension within the state. At times, this tension pulls it to side with foreign investors, at the expense of intensifying social unrest, and at other times, it pulls it to side with civil society, at the expense of a multi-million dollar international investment claim. This tension is best captured in the inconsistent manner in which the state acts within the logic of the investment regime. I describe events that show a sudden change in state policy, which is my second main conclusion. Such change is reminiscent of the fractured state form described by Bob Jessop. For Jessop, the state consists of a plurality of apparatuses – he refers to it as an “institutional ensemble”222 – rather than a body with some pre-given coherence. In this way, it is a site of constant struggle between contradictory interests. This teeter-totter effect is seen clearly in the changing policies of the Mexican state in its dealings with the foreign investor on the one hand, and civil society on the other hand.

CHAPTER THREE

Because water is a right – not a commodity

1. Introduction

In August 1997, in Argentina’s smallest and poorest province, Tucumán, with a population of over a million people,¹ a very peculiar thing happened. “The French Want Out” read the headline in the province’s major newspaper. “The Compagnie Generale des Eaux, which currently operates Tucumán’s water and sewerage services through [its subsidiary] Agua del Aconquija, announced that it will initiate a national and international process to leave the province.”² What could have happened to cause a strong multinational corporation, that had won the privatisation bid four years earlier, to want to withdraw from its Argentine project? This occurred not only in Tucumán, but also in other provinces of the country, despite Argentina being branded a privatisation “success story” by the World Bank and International Monetary Fund.³

This chapter inquires into four cases of water privatisation conflicts that ensued in the late 1990s and early 2000s in four provinces of Argentina (Buenos Aires, Tucumán, Santa Fe, and Córdoba). I begin, in the first part of this chapter, by contextualising the economic and political state of affairs in Argentina in the 1990s, which starts with the implementation of neoliberal policies, and ends off with a massive economic crisis in 2001, crippling the state both economically and socially. In the second and longer part, I detail the specific case

studies of water privatisation in Argentina, what went wrong, the reaction of the citizens, and the strategies undertaken by social movements in frustrating privatisation policies in their respective provinces. I divide the second section into two parts: Vivendi and Suez, which were the two multinational water corporations operating in Argentina at the time of the disputes. Like the Tecmed case, the story in each of these locales is a story of resistance to the hegemony of neoliberal policies and foreign investments. While the privatisation of water was touted as a necessary transition in combating the Argentine water crisis and ensuring access to it, poor and rural communities in Argentina were in a worse position after the adoption of such policies because they could no longer afford the sharply increased rates. Thus, privatisation policies created a political opportunity for affected communities to mobilise against the transferring of what ought to have been a public good into a market commodity. However, the struggles in each case illustrate the difficulty of achieving victories within the logic of the investment rules regimes. While triumphant in one respect – the ousting of the multinational corporation from their community – the regime’s compensatory promise to investors makes these victories unsustainable.

In the third and last part, I explore the role of the state – either the federal state in the case of Buenos Aires, or the provincial states in the case of Tucumán, Santa Fe, and Córdoba – in the four case studies. The international investment law regime is exemplary of the ambivalent role of the state in an era of globalisation. On the one hand, the state actively participates in the structuration of neoliberal instruments and institutions, including the

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international investment law regime, intended to bind itself far into the future.\textsuperscript{5} It commits itself not to act in a way that would otherwise hinder market processes across national borders.\textsuperscript{6} Domestically, in keeping up with its international pre-commitments to the rights of transnational capital, the state implements “state projects,” or policies that embrace a hegemonic, neoliberal vision. The privatisation of water is one such state project. Through the adoption of these projects, the state is better able to lure in foreign investors. On the other hand, the state often assists in the protection of its society. While the resistance is initiated by a disgruntled community against both the foreign investor and the state, the state steps in to aid the resisting community, provoked either by the unjust outcome of such projects, or to police what could eventually lead to a massive revolt. In fact, in all but one of the four water privatisation studies, the state eventually withdraws from the concession contract - swayed by the opposition - despite the potential fiscal consequences that it will potentially endure. The state, therefore, plays an active role in both protecting investment and protecting society, which are often in conflict with one another.

2. **Argentina: Political and Economic Background**

After winning the 1989 elections, the Argentine President, Carlos Menem, began a swift reversal of his party’s election platform, which was traditionally associated with populism and state intervention.\textsuperscript{7} Citing fiscal deficits, a severe currency exchange crisis, and crippling hyperinflation as having devastating effects on the economy, Menem exploited the weaknesses of the Argentine democracy to create a system that essentially bent to the will of


\textsuperscript{6} Ibid.

\textsuperscript{7} Alexander J. Loftus and David A. McDonald, “Of Liquid Dreams: a political ecology of water privatization in Buenos Aires” (October 2001) 13(2) *Envi’t & Urbanization* 179 at 179 [Loftus & McDonald]; and Leopoldo Rodríguez-Boetsch, “Public Service Privatisation and Crisis in Argentina” (2005) 15(3/4) *Dev. in Practice* 302 at 305 [Rodríguez-Boetsch].
international financial institutions and foreign investors. Through the use of decree powers, he marginalised Congress, suppressing its constitutional powers to exert accountability over such actions, and compromised the impartiality of the judiciary by successfully filling the Supreme Court with his allies. As a comparison, in the previous 156 years up to July 1989, constitutionally legitimate Argentine presidents issued a total of 25 emergency decrees; Menem, on the other hand, issued 336 such decrees during his first administration alone. The underlying message throughout these sweeping reforms was a neoliberal “hegemonic project” with the normative goal that another world was not possible.

The two major pillars of Menem’s neoliberal economic program that are relevant to this paper include the 1991 Convertibility Law, which pegged the Argentine peso to the U.S. dollar on a one-to-one basis, helping to control inflation; and the 1989 Economic Emergency Act, which permitted the large-scale privatisation of state-owned enterprises, promoted as policies aimed at stabilisation and structural reform. These enterprises included public utility companies, like water and sewerage services, that were privatised through long-term concessions and licences. In order to attract the best operators to the “new” Argentina, the government undertook an ambitious program of bilateral investment

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8 Loftus & McDonald at 181.
11 In fact, several interviewees in a study by Loftus and McDonald (2001) even suggested that in the years preceding the reforms, “the water and sanitation situation was intentionally worsened to highlight the “inadequacy” of publicly owned services.” See Loftus & McDonald at 185.
12 Supra note 10 at 70.
14 Rodríguez-Boetsch at 305.
15 Supra note 13 at 44. Most provinces adopted similar measures to assist with the national liberalisation efforts. See: Compañía de Aguas del Aconquija S.A and Vivendi Universal S.A (formerly Compagnie Générale des Eaux) v. The Argentine Republic, ICSID Case No. ARB/97/3, Award, (August 20, 2007) at 4.2.1 [Vivendi Decision].
treaty negotiations, concluding 57 treaties by the year 2000.\textsuperscript{16} The regulatory framework was fully reformed with provisions designed to provide maximum protection to foreign investors,\textsuperscript{17} including mechanisms to shield investors against potential variations in tariff rates, inflation and currency exchange rates; and to enable concessionaires to calculate their utility rates (i.e. tariffs) in U.S. dollars. State regulatory entities were established to monitor the private enterprise, and to adjust tariff rates to ensure that tariffs provided a reasonable rate of return to the foreign investors,\textsuperscript{18} and at the same time protected community interests.\textsuperscript{19} The tariff schedules were within the control of the state through the regulatory bodies, which meant that concessionaires could not officially set the rates charged, unless permitted by the agency.\textsuperscript{20} In this way, it was hoped that an independent monitoring entity could police the rates charged to the consumers, ensuring “fair and reasonable” rates, and protect the guarantees of the regulatory reforms and concession contracts of the investors.

At around the same time, and not coincidentally, the World Bank was using its powerful economic and political fists to pressure governments to auction off the natural resources and productive industries of their countries into private hands.\textsuperscript{21} The privatisation of state-owned enterprises went from an iconoclastic policy idea in Margaret Thatcher’s 1979 British election platform to a major element of global economic policy, including structural

\textsuperscript{16} Supra note 13 at 45; Suez Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, (May 16, 2006) at para 21 [03/17 Jurisdiction Decision].

\textsuperscript{17} Supra note 13 at 45.

\textsuperscript{18} Ibid.


\textsuperscript{20} Supra note 13 at 46.

adjustment programs of the World Bank, over the course of two decades. Together with other neoliberal fundamentals – trade and investment liberalisation and deregulation – privatisation of publicly-owned enterprises became the “slogan of the era.” Foreign multinational corporations, eager to make a profit even in a struggling enterprise in developing countries, willingly seized the opportunity. Theoretically, the main attraction to privatisation was the promise of greater economic efficiency upon the transfer of an enterprise - which was often suffering from eroding infrastructure and insufficient funding from the state - from bureaucratic administrators to private control. So, starting in the 1990s, as a condition to providing financial assistance, the international financial institutions required countries to open their markets to foreign firms specialising in state-owned enterprises, including water. Argentina endorsed this neoliberal policy and welcomed it with the installation of a series of “state projects” embracing the neoliberal vision.

At the time of Menem’s victory, water and sewerage services in Buenos Aires, its surrounding municipalities, as well as other provinces, including Tucumán, Santa Fe, and Córdoba were the responsibility of state-owned enterprises. Since 1982, the water sector

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23 M. Sornarajah, “A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment” (2006) 6 Int’l Env’tal Agreements 329 at 335.
24 Supra note 21.
25 Rodríguez-Boetsch at 303.
26 In 1982, there was a debt crisis as a result of the financing of the artificial rate of exchange, and public financing became even more limited. The national water system was transferred to the provinces, and 161 service areas were transferred. State owned utilities lacked funds, due to inefficient operation and declining real low water rates, leading to the deterioration of the system and causing water shortages. Investment did not keep pace with population growth, and was not even enough to maintain existing assets. See Miguel Solanes, “Privatization, Foreign Investment, Arbitration and Water: A Time to Revisit” (2007) at 6-7. Available online: <http://www.aguavisionsocial.org/documentos/02subs%20comercio%20y%20agua/Miguel_Solanes.Privatisation_Foreign_Investment_Arbitration_and_Water.pdf> (visited: Sept, 4, 2009).
was decentralised and controlled autonomously by each of Argentina’s 23 provinces. In Buenos Aires, the *Obras Sanitarias de la Nación* (OSN) served as the public water enterprise before privatisation took place. By decree, a regulatory framework was set out in 1992, which privatised the Buenos Aires water and sewerage services, followed by provincial decrees in Tucumán (1993), Santa Fe (1995), Córdoba (1997), and several other provinces.

At the provincial level, the enactment of privatisation reforms was more a result of pressure from the federal government than relevant provincial politics, which allegedly haunted the regulatory dynamics from the start. A consortium of European and Argentine companies was awarded the concessions in all four provinces. In Buenos Aires, these companies subsequently formed an Argentine company, Aguas Argentinas, to hold and operate the concession. While Suez was the majority shareholder in Buenos Aires, Santa Fe and Córdoba, Vivendi was the main shareholder in Tucumán’s concession. Each of the consortia signed a 30-year concession to control and manage the water and sewage systems in their respective provinces. As with most host state-investor deals, the people affected were wholly excluded from the process. In fact, it would be seven years before the first

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28 Loftus & McDonald at 183.

29 Supra note 27 at 6.


31 For instance, Aguas Argentinas S.A. was formed by Lyonnaise des Eaux (now Suez) and Compagnie Générale des Eaux (later Vivendi, now Veolia Water), both of France; Sociedad General de Aguas de Barcelona S.A. of Spain; Anglian Water plc (now AWG plc) of the UK; and Banco de Galicia y Buenos Aires S.A., Sociedad Comercial del Plata S.A., and Meller S.A., all of Argentina. See: *supra* note 19 at 102.

32 Various reasons are given for the failure of the hegemonic project of privatizing the water utilities sector in Argentina. Among other shortcomings was a lack of competition at the time of the bidding process. One important argument used for any form of privatisation is the hypothetical benefit of competition. See: David Hall, “Water in Private Hands” (February 24, 2002) *Global Policy Forum*. Available online: <http://www.globalpolicy.org/component/content/article/221/46870.html> (visited: Sept. 4, 2009). However, when the global water industry is monopolised by just two multinationals – Vivendi and Suez – that together control over 70 percent of the private water market worldwide, entry into the enterprise occurs without any competitive tendering. See Emanuele Lobina, “Problems with Private Water Concessions: A Review of Experiences and Analysis of Dynamics” (2005) 21(1) *Int’l J. of Water Resources Dev.* 55 at 57-58 [Lobina 2005].
public hearing was held in Buenos Aires regarding the privatisation of water.\textsuperscript{33}

The Buenos Aires concession went to the bidder that promised the greatest reduction in water rates, with a condition not to increase tariffs for ten years and to make commitments for greater investments in public works. Following the 1993 water supply and sanitation privatisation by the winning bidder, water prices were reduced almost immediately by nearly 27%. Suez had lived up to its contractual commitments! However, on a closer analysis, the reduction was an official sham by the government. Just before the privatisation policy, considerable price hikes were introduced by the Menem administration\textsuperscript{34} as an incentive to make the concession more appealing to international operators and investors, and facilitate the public perception that privatisation is a success.\textsuperscript{35} Once the water enterprise was targeted for privatisation, the State drove up the rates by 25% in February 1991, 29% two months later, and 8% the following year and finally added an 18% sales tax.\textsuperscript{36} The new private company thus rolled back the huge rate increases artificially imposed onto the populace by a slight margin and was praised for its drastic rate reduction.\textsuperscript{37}

A mere eight months after starting operations, the Suez-led company, requested an “extraordinary review” of tariffs due to unexpected operational losses\textsuperscript{38} and because the government was making new “extra-contractual demands,” including a requirement that very

\begin{footnotes}
\item[33] Supra note 19 at 103.
\item[35] Lobina 2005 at 73.
\item[36] Supra note 34 at 30.
\item[37] Ibid. at 30.
\item[38] Lobina 2005 at 62.
\end{footnotes}
poor neighbourhoods receive services immediately.\textsuperscript{39} Despite the approval of such rate increases in June 1994, 45\% of projected investments were not implemented in the first three years of the concession, as set out in the original contract.\textsuperscript{40} As a result, the contract was renegotiated in 1997 and substantially altered so that it was essentially a new agreement. New charges were introduced, tariffs were adjusted, and the completion of investments agreed upon were delayed and in some areas, cancelled altogether.\textsuperscript{41} Water rates, in the meantime, hiked up by 88\% after privatisation in the first decade.\textsuperscript{42}

\section*{2.1 Economic Crisis}

Argentina is probably the country most familiar with the challenge of defending investment treaty arbitration claims. To date, there have been more than forty ICSID cases brought against Argentina for its measures taken in response to its financial crisis.\textsuperscript{43} Some have speculated that the total value of potential claims against Argentina could reach US $80 billion dollars.\textsuperscript{44} In the last weeks of 2001, Argentina experienced a financial collapse – one that has been likened to the Great Depression of the 1930s – of catastrophic proportions.\textsuperscript{45}

\begin{footnotesize}
\begin{enumerate}
\item[39] Supra note 34 at 29.
\item[41] Ibid. For example, Suez reneged on its contractual obligations to build a new sewage treatment plant. As a result over 95\% of the city’s sewerage was dumped directly into the Rio del Plata River. See: “Water Privatization Fiascos: Broken Promises and Social Turmoil” (March 2003) \textit{Public Citizen} at 2 [Water Fiascos]. Available online: <http://www.citizen.org/documents/privatizationfiascos.pdf> (visited: Sept. 4, 2009). From May 1993 to December 1998, Suez failed to realise 57.9\% of the originally agreed-upon investments for a total of US $746.4 million. See supra note 40 at 35.
\item[42] Supra note 40 at 35.
\end{enumerate}
\end{footnotesize}
In one day, Argentina dropped from being one of the wealthiest countries in the region, to one of the poorest. The state was bankrupt with debt, the banks closed down and factories laid off workers by the thousands.⁴⁶ According to The Economist, during the collapse, “income per person … shrunk from around [US] $7000 to just $3500” and “unemployment [rose] to … 25%.”⁴⁷ A “tragicomic spectacle of a succession of five presidents taking office over a mere ten days” ensued.⁴⁸ Government figures showed that in 2002, about 100,000 people dropped out of the middle class each week to become the new poor,⁴⁹ and by late 2002, over half of Argentina’s 37 million people were living below the poverty line.⁵⁰ The crisis was soon extended to the political sphere, and in one day of riots alone, 30 civilians were killed.⁵¹

In the context of essential public services, a sudden three-fold spike in the water rates to nearly 8 million inhabitants would have had devastating consequences, potentially transforming an economic and social crisis into a “full-fledged humanitarian disaster by abruptly depriving millions of citizens of their access to life-giving water.”⁵² Facing an imminent public order crisis, in addition to its financial problems, including a default on its

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⁴⁹ Supra note 3.

⁵⁰ Supra note 45 at 309.

⁵¹ Ibid.

⁵² Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Amicus Curiae Submission, (April 4, 2007) at 3 [Amicus Submission]. The Argentine government was not only morally responsible for the wellbeing of its nation under such a crisis, but it was also legally bound by a number of international instruments. Without detailing the various treaties and conventions that directly or indirectly protect the right to water, and to which Argentina is a signatory, or the fact that the Argentine Constitution gives full constitutional status to these major international human rights instruments, it is not a stretch of the imagination to assume that water, of acceptable quality, must be available and accessible to all, on a non-discriminatory basis. See sources in Amicus Submission at 4 and 10. This obligation does not subside during emergency times.
massive foreign debt, Argentina rushed to pass emergency legislation – to stabilise the economy and restore political confidence – that would later be cited the culprit in many investment claims against it. The legislation ended the parity between the U.S. dollar and the Argentine peso. This converted all dollar deposits and loans into pesos, which was catastrophic given that in one day alone, the Argentine peso lost 40% of its value. The legislation also removed the right of essential service companies to raise tariffs or charge consumers in U.S. dollars, and it effectively froze all bank accounts - citizens and corporations alike.

Had the Argentine government not frozen the tariffs, millions of residents would have been unable to afford water. Everyone was harmed in some way by the social and economic crisis, including the measures taken by the state to overcome the crisis. Foreign investors, however, had recourse to an international arbitration forum where they could dispute that the emergency measures amounted to the indirect expropriation or the denial of “fair and equitable treatment” of their investment interests, entitling them to collect damage packages, including future lost profits. In 2002 and 2003, after disputes had arisen between private water companies and the state, the latter initiated a renegotiation process with all concessionaires in the essential services sectors. Two underlying principles drove the renegotiation process: the value of the currency had been completely modified, and a fundamental human right was seriously affected by the crisis, both of which changed critical

54 Supra note 45 at 309.
55 Supra note 53 at 263.
56 Supra note 45 at 310.
57 Amicus Submission at 13.
58 Supra note 45 at 310.
dimensions of the contract, i.e. the currency value and the tariff schedule.\textsuperscript{60} Suez had to write off US $500 million in losses due to its Buenos Aires concession alone in 2002.\textsuperscript{61} The water company initiated arbitration proceedings against Argentina demanding compensation for losses relating to water concessions in Buenos Aires, Santa Fe, and Córdoba in 2003, despite the government’s continued efforts to renegotiate the contract in each of these three provinces.\textsuperscript{62}

The following cases describe the problems associated with the water concessions in four of Argentina’s provinces and the strategies taken up by civil society to fight against the privatisation policies imposed on them by the state and the company. In the first case, the withdrawal of Vivendi from Tucumán occurred prior to the economic crisis in 2001, unlike the withdrawal of Suez from Buenos Aires, Santa Fe, and Córdoba, which occurred after the economic crisis. In the Buenos Aires and Santa Fe investment arbitration cases – which are being heard and decided by the same tribunal\textsuperscript{63} – it is possible that Argentina has sought to shelter its actions by reason of a state of necessity or emergency. However, as the proceedings are ongoing and kept confidential, it is impossible to say so with certainty. The case against Argentina in the Córdoba concession has been withdrawn (at least temporarily), as Suez retains a 10% equity stake in the current private water company. In the Tucumán case, according to Argentina, the dispute exclusively involved contractual matters arising under the concession agreement. This case has been concluded. While I stay away from the details of these arbitration proceedings (largely because they are unavailable to the public),

\begin{itemize}
\item \textsuperscript{60} Amicus Submission at 3-4.
\item \textsuperscript{61} Water Fiascos at 2.
\item \textsuperscript{62} Ibid.
\item \textsuperscript{63} Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction, (August 3, 2006) at para 7 [03/19 Jurisdiction Decision].
\end{itemize}
the stories that I do paint, nevertheless, take place within the international investment law regime, so that the threat of an international arbitration dispute arising is always there in the background, affecting both community victories and the role that the state plays during its partnership with the foreign investor.

3. Counter-Hegemonic Social Mobilisations

3.1 Vivendi

3.1.1 Tucumán

After Suez landed its lucrative 30-year concession in Buenos Aires, Vivendi awaited its turn to jump in. It did so successfully and aggressively when it bid for a similar contract in Argentina’s smallest and poorest province, after several other bidders had dropped out. In 1994, Vivendi, a French water and sanitation operation company, together with Dycasa, a Spanish dredging and construction firm, formed a consortium called Agua del Aconquija, which was granted a 30-year concession to supply the province of Tucumán. The public agency responsible for the provincial water system prior to privatisation became the new regulating agency after privatisation, and in the process downsized from 1,800 employees to just 900. The new regulator, Ente Regulador de Servicios de Agua y Cloacas de Tucumán (ERSACT), played a significant role during the conflict between the public, province and the private company.

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66 Supra note 30 at 27.

67 Giarracca & Del Pozo at 96.
From the moment Vivendi took over the water concession, it faced a sustained and continuous protest by consumers throughout the province. At first, municipalities began to worry about the future of their investments, as the rural townships and local residents had financed most of the existing water and sewerage infrastructure themselves. The idea that a common good was now commercialised pushed water users to demand that the new company pay back their investments. In this respect, municipal officials in Monteros - the southern part of the province - were the first to mount pressure on the provincial government when they wrote a letter in 1995, signed by local residents, requesting a reimbursement of their infrastructure expenditures.

The company raised the price of services and substantially altered the conditions of service delivery right after it took over operations in July 1995. Vivendi’s first invoices, for example, reflected on average, an approximate 110% increase over the rates previously charged by the public water company. Given the centrality of water to the daily lives of this largely agricultural province, many residents considered this to be a gross violation of their rights, and a burden to their already-low standard of living. Unfortunately, this increase came at a time when the province’s salaries, pensions and retirement benefits were

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69 Giarracca & Del Pozo at 96. There is no indication of what, if any, the state’s response was to the 1995 letter from Monteros.

70 Giarracca & Del Pozo at 96; and Giarracca. Although water rates doubled following the award, the company allegedly “made good on few promised investments during its tenure.” See: PSIRU database; P. Hudson, “Muddy waters—Overview of troubles with Argentina’s water infrastructure” (March 1999) Latin Trade Business & Industry 5, cited in Lobina 2005 at 65.

71 Vivendi Decision at para 4.10.3.

72 Giarracca.
frozen and when its main agro-industrial activity was in crisis. The reaction of the residents of Monteros, in particular, was immediate. A series of public actions - largely organised by women, laid-off workers from the old provincial water company, and anti-privatisation provincial legislators – took place throughout the province. These protests were first locally-based, but became regional when seven neighbouring cities and towns in the interior organised into a larger bloc – the Coordinating Committee for Consumers from the Interior – to better coordinate their actions. Other disputes between the company and Tucumán residents arose, including the method for measuring water consumption, the remedy for non-payment of tariffs, Vivendi’s right to pass-through to customers certain taxes, and the quality of the water delivered.

In October 1995, the new provincial government assumed office. The following month, the provincial residents formed the Asociacion en Defensa de los Usuarios y Consumidores de Tucumán (ADEUCOT), with representation from most towns and cities throughout the province. Two important events followed. First, the new provincial legislature, led by Governor Antonio Domingo Bussi, created a commission to oversee and investigate the tariff schedule and the overall privatisation process of the province. Second, through ADEUCOT, water users initiated a dramatic strategy: the “Stop Payment” campaign. To gain support from those who had not yet joined the campaign by December 1995, the association organised a consciousness-raising event in the capital. Women involved in the campaign went door-to-door encouraging other women not to pay and convincing them that, if they carried out their

73 Giarracca & Del Pozo at 96.
74 Ibid. at 96-97.
75 Supra note 30 at 28.
76 Giarracca & Del Pozo at 97; and Vivendi Decision at para 4.14.7.
77 Ibid. at 97.
action in solidarity and followed the required legal provisions, the boycott would not be illegal.78 “Our main demand [to Vivendi] was, simply, ‘Go home!’” claimed Jorge Abdala, a Tucumán resident.79

If the protests were not persuasive enough to gain the support of all the residents, the water supply turning brown did. In January 1996, when water from faucets changed from clear to a brown colour and continued do so for a month, the regulatory agency finally stepped in and called for penalties against the company,80 demanding it also to deduct the month’s charges from its billings.81 The company contended that the discolouration was due to an inexplicable increase of manganese at the source, and did not pose any risk to human health.82 Despite this, the provincial government, for the first time, publicly announced its intention to rescind the concession agreement with Vivendi “unless there [was] a miracle.”83 The reasons were clear: high water tariffs and poor quality service.84 Vivendi countered this threat by notifying the Argentine government of the Governor’s public statement, warning the state that “in the event that a satisfactory result is not achieved” in the negotiations with Tucumán, the company would “proceed to present the eventual controversy” under the Argentina-France bilateral investment treaty (BIT).85

By the summer of that year, despite continued efforts to renegotiate the terms and conditions of the concession agreement between the provincial and national governments

78 Giarracca & Del Pozo at 103.
80 Vivendi Decision at para 4.13.5.
82 Vivendi Decision at para 4.12.2.
84 Giarracca & Del Pozo at 97-98.
85 Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v. The Argentine Republic, ICSID Case No. ARB/97/3, Award, (November 21, 2000) at para 34 [Annulled Award].
and Vivendi, the latter’s collection rate plummeted to 10%.\textsuperscript{86} In December 1996, after the failure of another round of attempted renegotiations, Vivendi initiated ICSID arbitration proceedings.\textsuperscript{87} Naturally, the federal officials increased their involvement at this point,\textsuperscript{88} sending the Argentine President to France,\textsuperscript{89} where the French government pressured the Argentine President to end the “disobedience” of the Tucumán population.\textsuperscript{90} The grassroots campaign to boycott the world’s largest water corporation by refusing to pay water bills, in this small province in Argentina, had reached the executive level of both governments. The ICSID proceedings were, as a result, put on hold for a year.

Meanwhile, in order to suppress the movement’s spread of civil disobedience among water users and to reduce the ensuing financial burden on the company, Vivendi tried to collect: it made legal threats against the utility customers directed at cutting off service. Protest organisers, on the other hand, would send demonstrators to stand on manhole covers and block access to the water mains to thwart the company’s efforts.\textsuperscript{91} At the same time, the consumers’ organisations took steps to attain a legal framework for the payment boycott. Forms were generated, completed by consumers and presented to the company with copies to the regulatory agency.\textsuperscript{92} And so, as explained by one resident-turned-activist, Tucumán “lived in a permanent state of mobilisation.”\textsuperscript{93}

\textsuperscript{86} Tagliabue 2002. Vivendi’s first collection rate was close to 74%. See Vivendi Decision at para 4.10.5.
\textsuperscript{87} Vivendi Decision at para 4.16.16.
\textsuperscript{88} Ibid. at para 4.17.2.
\textsuperscript{89} Supra note 30 at 28.
\textsuperscript{90} Giarracca.
\textsuperscript{91} Tagliabue 2002.
\textsuperscript{92} Giarracca.
\textsuperscript{93} Tagliabue 2002.
3.1.2 Difficulties in achieving victories

Vivendi could no longer endure the situation generated by the payment boycott, and as a result, withdrew from the province in 1997. That the residents of Tucumán were able to cripple a giant multinational water company and effectively force them out of their territory was an enormous victory for them. As Norma Giarracca and Norma Del Pozo explain, when “‘the French left’ (as the locals described the situation), people began to return to their towns, unaware of the immensity of what they had achieved.”94 The dispute between the company and the residents of Tucumán, however, reached ICSID at the end of that year. Vivendi filed a claim against Argentina, demanding US $300 million in damages from the poorest province in the country. The company took advantage of the BIT between France and Argentina, claiming that the latter violated the “fair and equitable treatment” standard and expropriated the company’s investment without compensation.95 Vivendi declared that it was losing US $2.8 million a month as a result of the payment boycott.96

In November 2000, there was yet another tremendous victory for the province. The ICSID tribunal (indirectly) ruled in favour of Tucumán! Vivendi’s claims were dismissed on the

94 Giarracca & Del Pozo at 104.
95 Vivendi Decision at para 3.2.3. Vivendi claimed that the state had failed in its obligation to provide “fair and equitable treatment” to the investor, contrary to art. 3 of the BIT, because of: (a) the arbitrary and discriminatory “attacks”* on the company and its investment; (b) the lack of transparency and due process in the treatment of the foreign investor; and (c) the province’s bad faith during contract renegotiations. Tucumán’s actions, therefore, deprived the company of its legitimate expectations with respect to the concession: Vivendi Decision at para 5.2.1 – 5.2.16. In addition, the company claimed that government officials failed to guarantee the company protection and full security, which they link to the “fair and equitable treatment” provision: Vivendi Decision at para 5.2.18. Finally, the company relied on six principal arguments in support of their case that the state expropriated their investment without compensation in breach of art. 5(2) of the BIT. Their arguments were: (a) the Treaty’s guarantee against uncompensated expropriation is broad, (b) article 5 bars the expropriation of concession and contract rights; (c) the Tucumán authorities’ deprivation of the company’s reasonably expected economic benefit constitutes expropriation; and (d) whether taken singly or cumulatively, the Province’s acts and omissions constitute expropriation; (e) the forced provision of services during the alleged “hostage period” constitutes expropriation; and (f) the effects of the Tucumán authorities’ actions are determinative: See Vivendi Decision at para 5.3.1. *The “attacks” refer to the province’s encouragement of customers not to pay their bills, as well as the province’s direct unilateral modifications of the concession contract, both of which are allegations made by Vivendi. See Vivendi Decision at para 5.2.4.
96 Supra note 1 at 9.
basis that they involved alleged breaches of the concession agreement, which contained an exclusive jurisdiction clause in favour of the province’s administrative tribunals.\textsuperscript{97} The dispute was, therefore, to be presented and solved at the local level before embarking on the transnational level.

Unfortunately, as is common with most ICSID-related disputes, victories won by counter-hegemonic activists are often pyrrhic. When a special committee was created through the seldom-used “annulment procedure” to review the tribunal decision a mere few months later, its ruling was predictably annulled. A new tribunal was thus established to hear the dispute. The Argentine government was eventually defeated in August 2007, when the ICSID tribunal ruled in favour of Vivendi. Vivendi was compensated with a US $105 million dollar award. That Vivendi succeeded in its multi-million dollar claim makes successful movements like the one in Tucumán economically unsustainable, since it is the community and the state – which are often unable to afford such enormous amounts – that are ultimately liable to pay the company.\textsuperscript{98}

What ensued after the official exit of Vivendi pays tribute to the continued struggle of Tucumán residents and the continued difficulties they faced as a result of the architecture of the investment rules regime especially the repercussions of forcing out a foreign investor.

\textsuperscript{97} La Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. The Argentine Republic, ICSID Case No. ARB/97/3, Vivendi Introductory Note, (no date). Article 16.4 of the Concession Contract provides as follows: For purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán. See: Annulled Award at para 27.

\textsuperscript{98} What ensued after the official exit of Vivendi pays tribute to the continued struggle of Tucumán residents and the continued difficulties they faced as a result of the architecture of the investment rules regime especially the repercussions of forcing out a foreign investor.
First, Vivendi initiated lawsuits against customers who had refused to pay their bills. After the cancellation of the agreement, Vivendi continued to operate the water services – without being able to collect payment from the users – while the government found a new operator, as stipulated in the concession contract. In spite of this contractual provision, however, the French company felt that it was “captive, because [it was] not allowed to leave Tucumán.” During and after this alleged “hostage period,” which formally ended on October 7, 1998, Vivendi continued its efforts to collect payment from the boycotters. Between July and October 2000, it dispatched 146,559 formal legal notices to its “delinquent customers.” When it was clear that its threatened collection efforts would not work, it initiated summary proceedings (executory judicial proceedings known as juicios ejecutivos) against 2000 of its top debtors, in the hopes that judgments obtained against these 2000 would cause other debtors to elect to pay rather than face a legal battle against the company.

Second, there was strong pressure at the provincial level - from political parties, popular action on the streets and mounting small claims lawsuits - to push a new law that the

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99 Giarracca & Del Pozo at 101.
100 Ibid. at 100. Text is quoted from an article that appeared in the local newspaper, La Gaceta, 1998. The original concession contract stipulated that if either party unilaterally cancelled, Agua del Aconquija would have to continue operating the water services during an eighteen-month transition period while a new operator was found: Giarracca & Del Pozo at 98.
101 Vivendi Decision at para 5.3.23.
102 Ibid. at para 4.21.1.
103 Ibid. at para 4.21.2.
104 Ibid. at para 4.21.4. At this stage, the Ombudsman and Legislature intervened. The Ombudsman brought a summary proceeding seeking the suspension of proceedings in all of Vivendi’s collection lawsuits filed against non-paying customers, as well as a bar against the company from filing any new suits. One month later, after these proceedings were rejected, primarily on procedural grounds, the Legislature enacted a law prohibiting Vivendi from pursuing any collection lawsuits for a period of 180 days. This law was held unconstitutional by a local civil court one year later. At that point the Legislature took a different approach: it enacted another law that barred Vivendi from enforcing, for a period of 180 days, judgments already rendered or to be rendered in proceedings against debtors. A new version of the same law was re-enacted every 180 days, with the last version being in effect at the time Vivendi pleaded its case at the ICSID. Vivendi Decision at para 4.21.4 – 4.21.7.
105 Vivendi Decision at para 4.21.4.
legislature was contemplating that would have mandated ‘social tariffs’ in an attempt to alleviate the effects of increased utility rates under the concession. However, given the political climate at the time – both at the international and national levels – these efforts were frustrated. Nationally, the Minister of Economy threatened a federal-provincial lawsuit for the damage caused to Argentina’s image in the eyes of foreign investors, and internationally, the new law clashed with the pending dispute at the ICSID. Thus, the international investment law regime practically constrained substantive possibilities at the local level aimed at counteracting social exclusion.

Third, in response to the company’s numerous lawsuits, the Office of the Ombudsman took two unprecedented steps in solidarity with the boycotters. First, it attempted to bring a class action lawsuit on behalf of the boycotters sued by the company, seeking the suspension of their individual proceedings. Unfortunately, despite its continued efforts, the suit was rejected in multiple fora by a number of different judges. Second, the Office of the Ombudsman offered its legal services to consumers, largely because the local bar association had refused to do so. At the time there were claims that the World Bank inserted a condition on a large health and education loan that mandated the resolution or elimination of pending conflicts with public service concessions. The bar association (including the judiciary) was, therefore, reluctant to involve itself with the disputes against boycotters. In

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106 Supra note 30 at 29.
107 The term “social exclusion” describes the inequalities, and the barriers to full participation, of certain groups in otherwise affluent societies due to, for instance, social isolation as in the case of the elderly or disabled, or through discrimination based on nationality, language, race, class or religion.
108 Vivendi Decision at para 4.21.5.
109 Supra note 30 at 29.
110 Ibid.
111 Ibid. at 30. However, while the courts heard and issued sentences to many of these individual claims, the legislature intervened and passed a law suspending the enforcement of these sentences for a six-month period.
this way, the World Bank, the legal community and the judiciary constrained the procedural possibilities at the local level, which may have otherwise led to victories for the local resistance.

Fourth, a lawsuit was launched against Vivendi by the Provincial Attorney-General for breach of contract. This, too, was later withdrawn when a change of government occurred in 1999. Non-paying Tucumán residents were thus left without legal protection to justify their boycott campaign. In response, an international campaign was launched to request the provincial government to reinstate the case to protect the rights of the water consumers.\textsuperscript{112} Despite the promise to do so, the three subsequent Attorney-Generals have thus far refused to re-submit the claim.\textsuperscript{113}

It is not my intention to paint a somber picture of the struggle in Tucumán, since at the end of the day, this highly dispersed, low-income population in the smallest province of Argentina, stood its ground and said “No” to both a large multinational company and to privatisation policies. Tucumán was, in fact, the first place in the entire country that opposed the privatisation of a public utility service,\textsuperscript{114} even though at the end they paid a hefty US $105 million dollars. Throughout the struggle, the residents became effective social actors, reclaiming their authorship of basic services. The Tucumán water system was renationalised and reverted back to a public sector operation, despite plans to award a new

\footnote{\textsuperscript{113} Giarracca.} 
\footnote{\textsuperscript{112} Supra note 30 at 30; Giarracca & Del Pozo at 101.} 
\footnote{\textsuperscript{114} Giarracca & Del Pozo at 106.}
private concession after Vivendi’s exit, which the Argentine government scrapped. The new public company is majority owned by the province of Tucumán, and minority owned by the workers union of Obras Sanitarias de Tucumán. It has plans to manage and operate the water system for the next 30 years.

The presence of a foreign multinational corporation catalysed a fierce social mobilisation among the residents of Tucumán. This activism persisted beyond the exit of the company. Civil society continued to demand various legislative proposals relating to tariff structures, disconnection and the recovery of unpaid bills. They also promoted the right to public hearings, the establishment of work cooperatives within the public company, and the creation and appointment of a consumer representative on the Board of Directors within the regulatory agency. While these latter opportunities never came to fruition, substantive gains were made. These included the legislative prohibition of water cut-offs to those residents using less than a minimum amount, and a law suspending the enforcement of the sentences issued against boycotters, which successfully thwarted the legal actions brought by Vivendi for non-payment.

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118 Giarracca & Del Pozo at 99.

119 Supra note 30 at 31.

120 Ibid. at 30-31.
3.2 Suez

The case of Suez in three provinces of Argentina is similar to that of Vivendi’s in terms of the difficulties endured by the counter-hegemonic movements in achieving victories. However, the local resistance in Tucumán started immediately after the entry of the multinational in the province, had the support of a number of provincial officials, and persisted over time, successfully embodying solidarity across the province. In the remaining three provinces, mass mobilisations generally started a number of years after the implementation of water privatisation policies, did not have the same support from their respective provinces or states, were more erratic and only occasionally built on solidarities throughout the province, especially across different classes.

3.2.1 Buenos Aires

“When it rains it often floods and the sewage gets into everything… You can’t use the toilet because it backs up. It’s disgusting.” In La Matanza, which is among the poorest districts in the Buenos Aires metropolitan area, there are no sewers, so when it rains, it floods the houses and septic tanks, which then overflow into wells. Boiling is the only way to treat water, but not everyone can afford the gas to boil a pot of water. Nitrate levels, caused by sewage contamination, are at a critical high, and waterborne diseases are all-too-common in the poorer neighbourhoods. An intestinal virus has caused the death of 20% of the infants. In another community, Lomas de Zamora, when Carina Grossi turned on the tap in her kitchen sink and raised a glass of water to the light, her eyes narrowed in disgust. “Look how cloudy the water is, how dirty.” Like many of her neighbours in this working-class suburb of Buenos Aires, the Grossis were convinced that their water was contaminated.

121 Supra note 3.
They used bottled water instead to make soup and tea. This was the reality at least in these two communities in 2003 – ten years after the entry of Suez – which was allegedly the magic bullet that would finally help deliver clean water to Argentina’s poor. Despite the failure to deliver on its investment commitments, the average water bills in the province increased by 88.2% in the first ten years.

In Buenos Aires, if you lived within the concession area, you had the right to water and sewerage services. While the private water company was responsible for the operation and maintenance of facilities to collect and purify water for sewerage treatment, and for water distribution, the main connection between the water and sanitation networks and individual homes was the responsibility of the user (often a new, poor user). The users were also responsible for the construction and maintenance of sanitary facilities within their home, which included digging ditches, transporting materials and making the pipeline connections. It was the women in these communities that were primarily responsible for these connections. And irrespective of the users’ economic status, it was their obligation to correct any problems associated with the connection to the network that may have caused a leak or a network malfunction. Unfortunately, the concession contract prohibited the use of an alternative water supply or waste services. Somewhat unsurprisingly, there were numerous complaints filed by residents in these neighbourhoods over a lack of water.

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123 supra note 3.

124 During the same period, inflation increased by 7.3%. See supra note 40 at 35.

125 supra note 19 at 107.

126 Ibid. at 111.

127 Ibid. at 107.
pressure, poor sewage drainage, and broken pipes, caused by improperly installed connections.\textsuperscript{128}

Tariffs posed a particular problem to marginalised communities as Buenos Aires is surrounded by shantytowns.\textsuperscript{129} In 1996, three years after the start of the privatisation project, a protest movement began in the suburban town of Lomas de Zamora and spread throughout the Buenos Aires area. Thousands of new water users blocked roads into the capital to protest the new US $800 connection fee charged by Suez. Although the connection fee was reduced to $200 after months of resistance and daily demonstrations, Suez was still the winner. It had succeeded in introducing a fee that was not part of the original contract.\textsuperscript{130} Meanwhile, the residents were slapped in the face with a series of rate increases, (again) contrary to the original agreement. The cost of service therefore went far beyond the reach of the poorest users.\textsuperscript{131} The inability to pay the increased water bills resulted in discontinued service. This completely defeated the main goal of privatising water management, leaving the poor neighbourhoods in an even worse condition than before. In 2005 alone, 17,372 non-paying users had their services cut because they were unable to make

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\textsuperscript{128} Ibid. at 111.
\textsuperscript{129} A mere eight months after starting operations, the Suez-led company, requested an “extraordinary review” of tariffs due to unexpected operational losses (Lobina 2005 at 62) and because the government was making new “extra-contractual demands,” including a requirement that very poor neighbourhoods receive services immediately (supra note 35 at 29). Despite the approval of such rate increases in June 1994, 45% of projected investments were not implemented in the first three years of the concession, as negotiated in the original contract (supra note 40 at 35). As a result, the contract was renegotiated in 1997 and substantially altered so that it was essentially a new agreement. Not only were new charges introduced and tariffs adjusted, but the completion of investments agreed upon were also delayed and in some areas, cancelled altogether (supra note 40 at 35). For example, Suez reneged on its contractual obligations to build a new sewage treatment plant. As a result over 95% of the city’s sewerage was dumped directly into the Rio del Plata river (Water Fiascos at 2). From May 1993 to December 1998, Suez failed to realise 57.9% of the originally agreed-upon investments for a total of US $746.4 million (supra note 40 at 35, citing a study by research centre FLACSO).
\textsuperscript{130} Supra note 3.
\textsuperscript{131} Even though a special tariff for low-income users was introduced in 2001 through an agreement between the company and the regulator, in reality, qualification for the program was nearly impossible to meet. See supra note 19 at 112.
their payments. If that was not punitive enough, the water company then sued those who had not paid their bills.132 In one neighbourhood, a group was created – Sociedad de Fomento del Bario de Sere – that would immediately congregate at the site of the next water shut-off by a Suez work crew, having been tipped-off by local residents in the area, in order to block service cut-offs.133

In 2006, the case of Lomas de Zamora raised numerous reactions from government entities and users’ organisations when Suez inserted a warning notice in the bills sent to residents that read: “In the face of an increase in water consumption due to high temperatures, well water reserves could start to be used, which can lead to findings of nitrate levels slightly higher than those allowed… As a precaution, it is recommended that pregnant women and babies less than six months of age avoid consumption. They will be provided with alternative water in sufficient quantities…” There were two problems with this, other than the presence of nitrate levels as high as 222% above the acceptable 45 milligrams per liter.134 One, the emergency supplies never showed up, and two, the company charged the same fees despite the warnings and despite the lack of an alternative source.135 In reaction to these notices, community groups from Lomas de Zamora disrupted one of Suez’s meetings by storming into a private conference room and pouring contaminated water from flooded areas onto the tables of the company’s executives.136 This action alone gained considerable media attention in Buenos Aires, forcing the water company to respond to some consumer

132 Supra note 19 at 112.
133 Ibid.
135 Supra note 19 at 116.
On March 21, 2006, the Argentine government rescinded the 30-year contract of Aguas Argentina, citing broken promises to treat wastewater, the dumping of nearly 90 percent of the city’s sewage into the river, repeatedly raising tariffs, and the deteriorating water quality, which was unfit for human consumption in seven districts due to high nitrate levels. Suez immediately responded that it would put up a fight and continue with the claim it had already filed with ICSID in 2003, pursuant to the Argentina-France and Argentina-Spain BITs, to recoup US $1.7 billion in “investments,” and up to US $33 million dollars in unpaid water bills. After the unfruitful search for private partners for a

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137 Loftus & McDonald at 197. For example, Aguas Argentina accepted longer payment options for those in serious arrears and made changes in the applicability of some of the surcharges. However, these measures do not appear to be fair concessions as contaminated water, whether it is from high nitrate or arsenic levels, should not exist in the first place, especially when the private company is profiting at the expense of the health hazards created in these communities.

138 The case of polluted waterways in Berazategui received much attention, but no victory was achieved. A legal action was brought against the company by the municipality of Berazategui in 2000 to stop water pollution in the Rio de la Plata. Despite the court’s order to enforce the contract, i.e. build a sewage treatment plant in Berazategui as stipulate in the agreement, Suez refused to do so. Instead, throughout its tenure, the company treated only 12% of the total waste produced, and discharged the remaining 88% directly into the Rio de la Plata at the point of Berazategui (supra note 19 at 115). The dumping of sewage directly into rivers and cesspools created serious health hazards and increased the levels of nitrates in the waters, which in turn, reduced blood oxygen in infants (and can be fatal). However, the refusal to build such a plant made sense, economically. Suez was saving itself about $100,000 a day in costs – or $35 million a year in profits – according to a 1996 World Bank report (supra note 3). Before the economic crisis in 2002, the company made record profits in Buenos Aires: up to twice the international average and up to three times what water companies make in the UK on average (supra note 136 at 5).

139 Supra note 19 at 107; Loftus & McDonald at 198.


141 Maude Barlow, “Water Warriors” (April 14, 2008) The Nation. Available online: <http://wespac.org/index.php/environmental/95-water-warriors> (visited: Sept. 4, 2009). Note that in the original claim, which was initiated after a period of negotiations in 2003, Suez alleged that the Argentine state was legally responsible for its wrongful actions, i.e. the emergency measures adopted by the state in late 2001 and early 2002. These actions resulted in the expropriation of the investor’s investments and denied to treat the company’s investments fairly and equitably, in breach of the relevant BITs. See: 03/19 Jurisdiction Decision at para 25; also Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Introductory Note (no date) ICSID Review – Foreign Investment Law J. 339 [Suez Introductory Note]. It is unclear whether Suez has added to its existing 2003 ICSID claim, as the documents for the case are not available to the public.
new concession in Argentina, former President Kirchner announced the creation of a state-owned company, *Aguas y Saneamiento Argentinos*, to replace Suez.\textsuperscript{142}

3.2.2 Santa Fe

In 1995, Aguas Provinciales de Santa Fe, a subsidiary of Suez signed a predatory contract that it never planned to fulfill with the Governor of Santa Fe, granting the water supply service of the province to the same private enterprise in charge of water in Buenos Aires.\textsuperscript{143} Instead of complying with the four main goals presented as the basis of the privatisation project – universal access to water and sanitation, implementation of water meters, and treatment of primary and secondary sewage – the company raised rates and negotiated to obtain foreign credits to undertake work projects for the province.\textsuperscript{144} After ten years of contractual non-compliance, perpetual re-negotiation, unjustified tariff increases, poor quality service and products, bad administration, and excessive debt, the governor of Santa Fe and Suez finally recognised the failure of the privatisation project, and cancelled the concession agreement in 2006.\textsuperscript{145}

Like Buenos Aires, a number of claims were reported from the start of the private company’s services, including overbilling, and high toxic levels found in the water supply. The latter resulted in various legal actions, and in one particular case in the city of Firmat, the local courts concluded that the water was unsuitable for human consumption due to

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142 *Supra* note 140.
143 03/19 Jurisdiction Decision at para 23.
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arsenic contamination.\textsuperscript{146} Alberto Muñoz, an activist with the Users and Consumers of Rosario – a consumer rights organisation – suggested that it was the cut-offs in service that most irritated the population. Cut-offs rose to 50,000 a year between 2002 and 2003 – almost 10\% of the 630,000 accounts that the company had in the province.\textsuperscript{147} While numerous neighbourhoods went without water and sanitation services, there was the added health crisis due to poor water quality, which meant more government spending on antibiotics, medicine, diseases and beds in local hospitals. Muñoz explains that if one were to superimpose a map of the distribution of water-borne diseases onto the neighbourhoods that lack water and sanitation services in the municipality of Rosario, there is a direct relationship between the two.\textsuperscript{148}

It was not until 2000, after four years of frustration, that citizens from various cities in the province organised themselves, in the hopes that their numbers would strengthen their voice against the company’s dismal performance. In reaction to the irresponsible operation of the water supply concession, and to local authorities who were ignoring the situation, residents convened a Provincial Assembly for the Right to Water (APDA), which set the stage for a political opposition to the company.\textsuperscript{149} Its main objectives were to defend the right to water as a vital resource for life and to publicise its claims throughout the province. The Assembly consisted of diverse sectors of society: from the marginalised rural neighbourhoods that lacked water pressure to the small businesses that were overcharged, from ecologists and academics concerned about the environmental effects caused by the water company, to trade

\textsuperscript{147} \textit{Supra} note 144.
\textsuperscript{148} \textit{Ibid.}
\textsuperscript{149} \textit{Supra} note 146 at 26; \textit{Supra} note 141.
unions and consumer associations troubled by the violation of the basic right to water. Two principles of social importance surfaced: the right to water cannot be delegated and the importance of solidarity amidst diversity in the face of common objectives.\(^{150}\)

The Assembly would meet frequently in clubs, as public audiences in municipal councils, and were permanently in contact with the media.\(^{151}\) Despite their diverging interests, intentions and socioeconomic levels, the group formed around a campaign to compel the province to rescind the concession contract with the water company due to economic and environmental concerns.\(^{152}\) Their meetings and the social network that they formed led to the most significant popular movement ever recorded in Santa Fe: a consulta popular (i.e. a plebiscite), which was held from September 26 to October 1, 2002 on the right to water.\(^{153}\)

The consulta, with 1000 polling stations situated throughout the province, was the result of the mobilisation of over 7000 activists.\(^{154}\) It was wholly organised by community members, without the support of the state, province or any official authority. With this campaign, they were able to counteract their exclusion from decision-making processes at the provincial level, and open up a space for direct democratic participation. The Assembly was able to garner 256,000 votes in 15 cities affected by the private water concession, which represents about 22% of the total electorate and 42% of the consumers billed by Suez.\(^{155}\) The vote was overwhelmingly in favour of forcing Suez out – only 400 votes were cast against the call to

\(^{150}\) Supra note 146 at 26.

\(^{151}\) Ibid. at 22.

\(^{152}\) Ibid. at 22.

\(^{153}\) Ibid. at 23.


\(^{155}\) Ibid.; Supra note 141.
revoke the contract.\textsuperscript{156} Despite the Governor of Santa Fe officially ignoring the result of the non-binding consulta, his office did receive over 100 letters from various local, national and international institutions in support of the APDA initiative,\textsuperscript{157} signaling an unprecedented display of resistance that had caught the attention of internationally-recognised specialists in the area, openly expressing their support for the social movement.

The Governor finally terminated the contract with Suez in January 2006,\textsuperscript{158} despite its continued efforts, since the 2001 economic crisis, to renegotiate the concession. Today, 50 percent of the Aguas de Santa Fe water company is owned by the provincial government, 40 percent by municipal governments, and 10 percent by trade unions.\textsuperscript{159} Not surprisingly, Suez is holding the Argentine government legally responsible for its failed Santa Fe water privatisation project.\textsuperscript{160} As in the case of Buenos Aires, the company had already submitted its dispute to the ICSID in April 2003 for damages amounting to US $180 million dollars, pursuant to the Argentina-France and the Argentina-Spain BITs. It is seeking compensation for its alleged loss due to the expropriation of its investment and the failure of the state to treat the investment “fairly and equitably.”\textsuperscript{161}

\begin{itemize}
  \item \textsuperscript{156} Supra note 146 at 22
  \item \textsuperscript{157} Ibid. at 26.
  \item \textsuperscript{160} Supra note 141.
  \item \textsuperscript{161} 03/17 Jurisdiction Decision at para. 25. Again, it is unclear whether Suez has added any other claims to its original claim against Argentina in the wake of the economic crisis. The arbitration documents are kept confidential in this case.
\end{itemize}
3.2.3 Córdoba

The water concession in Córdoba was transferred to the hands of Aguas Cordobesas, a subsidiary of Suez, in 1997. Following the Argentine economic crisis, the devaluation of the local currency and the state policy to freeze all water tariffs, Suez filed a US $108 million dollar ICSID arbitration claim in July 2003 against the Argentine government for the loss it had allegedly suffered in its concession in Córdoba. Despite the filing of the claim, the company demanded a renegotiation of its contract. In late December 2005, the Córdoba Congress approved the renegotiation of the Suez concession agreement, despite the company’s failures to deliver on its contractual promises. The contract was extended for 27 years and the company was granted a rate increase of 100 to 500 percent, dividing the city into seven zones according to a criterion that made the operation most profitable for the company. In addition, the province granted Suez a pardon for its non-payment of taxes from 2002 to 2006 (a total of US $19 million), and an extension of that pardon for two years beyond the date of the renegotiation, all as an incentive for the company to make long

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162 There are no documents on file for this case, but one can speculate that the investor’s claims were similar to the other Suez claims, i.e. the expropriation of the investment and the state’s failure to treat the investment fairly and equitably in breach of the relevant provisions in the Argentina-France and Argentina-Spain BITs. See 03/19 Jurisdiction Decision at para 7.

163 In the original contract, the total investment required to increase water supply coverage from 83% to 97% in 30 years had been estimated at around US $500 million. Although the contract required Aguas Cordobesas to invest US $150 million in the first two years, the concessionaire invested only US $84 million from 1997 to 1999. Accordingly, Aguas Cordobesas failed to realise US $66 million or 44% of the originally agreed investments in the first two years. In addition, it remained unclear whether the projected 97% coverage ratio included low-income areas, for which the operator seemed to have no legal requirement to connect these residents to the network. Also, the 1997 contract only provided for the operator’s responsibility to build and extend the primary network and not residential connections, which remained the responsibility of the municipality or individual households. This was contested by many residents in low-income neighbourhoods. See: Emanuele Lobina and David Hall, “Water privatisation and restructuring in Latin America, 2007” (September 2007) PSIRU at 19 [Lobina & Hall 2007]. Available online: <www.psiru.org/reports/2007-09-W-Latam.doc> (visited: Sept. 4, 2009).


overdue investments in infrastructure.\textsuperscript{166} As a result, Suez continued to own and operate the water concession in the province, calling off the arbitration claim before the ICSID.\textsuperscript{167}

When it appeared that the December 2005 law (resulting in the 500\% rate increase) would be forced into effect in early 2006, the Popular Commission for the Recuperation of Water – a province-wide organisation made up of trade unions, neighbourhood centres, social organisations and political parties – organised a succession of mobilisations, neighbourhood assemblies and street barricades to oppose such unjust policies. It called for the government to annul the Suez contract, renationalise the water system, and to adopt a public cooperative to manage water services with the participation of consumers and trade unions.\textsuperscript{168} “We are going to continue protesting until the increase is overturned,” vowed Oscar Mengarelli of Argentinean workers union CTA.\textsuperscript{169}

Faced with a continuous vociferous public backlash, which for the first time included middle and upper-middle class sectors - who lent their support despite their traditional resistance to state ownership - the province suspended the price hikes, instead approving an increase of 15 to 18\%. In addition, it agreed to substitute the tariff hike with a subsidy of 9,600,000 pesos annually for two years.\textsuperscript{170} This caused Suez to withdraw from the concession. While it appears that the actions of the Córdoba social movement against privatisation had successfully pressed Suez to withdraw, it failed to convince the provincial government to assume control over water and sewerage services like it did in Santa Fe and Buenos Aires.

\textsuperscript{166} Supra note 164.
\textsuperscript{167} Lobina & Hall 2007 at 19.
\textsuperscript{168} Supra note 165.
\textsuperscript{169} Lobina & Hall 2007 at 19.
\textsuperscript{170} Supra note 164.
Instead, the province offered to transfer the shares to a private firm from Argentina, to which the People’s Commission responded with a legal challenge.\(^{171}\) In July 2006, the Argentine conglomerate Grupo Roggio acquired the shares held by Suez in Aguas Cordobesas, agreed with the province to revise the contractual agreement, and started its operations later in the year.\(^{172}\) Citizens surrounded the legislature in the months preceding the renegotiations with the Grupo Roggio, shouting, “No to the re-negotiation!” which would grant another two decades of a repressive water privatisation model to yet another profit-making company.\(^{173}\) On one such occasion, police retaliated with force, detaining seven protestors and leaving 30 wounded.\(^{174}\)

In a somewhat surprising turn of events, in September 2007, after the continuous stream of massive street protests - in large part due to the increased tariff rates and the lack of reinvestment of profits into the improvement of services in the province - an official consulta popular was registered to occur simultaneously with the provincial elections in Córdoba.\(^{175}\) It was the first one of its kind after the return of democracy in Argentina. Citizens were to cast their vote on whether they wanted the contract with the private company Suez-Roggio

\(^{171}\) Supra note 159. There is no indication of what occurred with this legal challenge.

\(^{172}\) Lobina & Hall 2007 at 19.

\(^{173}\) The renegotiated agreement with the Roggio group provided for numerous measures aimed at guaranteeing the profitability of the new operations. Among other measures, a 12% tariff hike was to begin in January 2008, the payment of a US $3.3 million annual concession fee to the provincial government was annulled, a loan was obtained for US $1.7 million from a local bank, and most importantly, the implementation of the projected investment programme was postponed. Suez retained a 10% equity stake in the concessionaire for three years. Córdoba mayor Luiz Juez denounced in his personal capacity the renegotiated contract as illegitimate and flawed due to the alleged violation of laws, decrees, and administrative regulations: Lobina & Hall 2007 at 20.


to continue in their province.\textsuperscript{176} After years of community resistance, the citizens of Córdoba won the consulta. An overwhelming 77.81\% of those who participated asked for the cancellation of the controversial private water contract with Suez-Roggio.\textsuperscript{177} Although the referendum was non-binding, it gave the people moral support to continue their fight to compel privatised companies to leave the province for good. The People’s Commission has worked over the past year to ensure that the vote is translated into a binding instrument. It has also promoted discussions on how to establish an alternative public supply scheme based on a principle of community inclusion where water is operated and managed by the people, for the people.\textsuperscript{178}

3.2.4 Difficulties in achieving victories

These three stories provide a description of the victories that were won by local resistance in each case, whether it was the withdrawal of the company in Buenos Aires and Santa Fe or the official consulta held in Córdoba. I now turn to some general victories that link the local struggles to each other, and how they, once again, represent the difficulties faced by counter-hegemonic mobilisations working within the logic of the international investment law regime.

\textsuperscript{177} \textit{Ibid.}
3.2.4.1 Acceptance of Amicus Curiae submissions

That BIT dispute resolution bodies make decisions with tremendous effects on citizens’ rights without the participation of citizens illustrates the democratic deficit embedded in the logic of the international investment law regime. A victory of considerable significance emerged at the transnational level in the struggle against Suez in both Buenos Aires and Santa Fe.\(^{179}\) The petition for submission of amicus briefs in the two arbitration cases against Argentina, and its acceptance by the panel, was unparalleled at the time.\(^{180}\) The locus of interaction, which was limited to the two disputing parties, thus expanded to include a non-disputing party as amicus curiae, or “Friends of the Court.” Asserting that the case involved matters of basic public interest and fundamental rights of the people living in the area affected by the investment, the Petitioners sought access to the case record, hearings and a request to file a brief in both disputes.\(^{181}\) In both the Santa Fe ruling (March 2005) and Buenos Aires ruling (May 2005), the tribunal acknowledged that the case “potentially involved matters of public interest” and “human rights,”\(^{182}\) and that amicus submissions not only had the potential to inform the legal proceedings, but would also "have the additional desirable consequence of increasing the transparency of investor-state arbitration."\(^{183}\) It also observed that since the subject matter of the dispute – water – was a basic public service, any decision rendered would have the potential to affect the overall operation of the water

\(^{179}\) Recall that both ICSID disputes brought by Suez against Argentina are being heard and decided by the same tribunal. As such, the petition for submission of amicus briefs and other related arbitration documents are substantively similar in each of the two cases, although procedurally, they are kept separate.

\(^{180}\) This occurred before the official amendments were made to the ICSID Convention in 2006 (Rule 37(2) [ICSID] Rules of Procedure for Arbitration Proceedings, ICSID/15 April 2006), which codified the rule on admission of amicus curiae briefs under certain conditions.

\(^{181}\) Suez Introductory Note.

\(^{182}\) Agus Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, (March 17, 2006) at para 18 [03/17 Order for Amicus Participation]; and Suez, Sociedad General de Aguas de Barcelona S.A., and Vivienda Universal, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, (May 19 2005) at para 19 [03/19 Order for Amicus Participation].

\(^{183}\) 03/17 Order for Amicus Participation at para 21; 03/19 Order for Amicus Participation at para 22.
distribution system and thus the citizens it services.\textsuperscript{184} While only the request to file a brief was granted, it was the first case in which a tribunal acknowledged its powers under the ICSID Convention to allow submissions from non-disputing parties.\textsuperscript{185} Unfortunately, the decision for non-disputing parties to access the case record or the hearings lies with the parties to the dispute. Absent their consent, the Tribunal has no choice but to deny the request.\textsuperscript{186}

The willingness of the tribunal to consider amicus curiae submissions in two controversial water services disputes in Argentina was a substantial step towards the inclusion of public input into an otherwise private arbitration process. It was also significant when compared to the 2002 case against Bolivia in which three hundred civil society representatives from Bolivia and beyond sent petitions to the tribunal urging it to allow amicus interveners. The tribunal in that case refused such a request citing its lack of authority to decide on such matters. Since the acceptance of the amicus submissions in the Argentine case, ICSID has amended its rules of procedure for arbitration proceedings, largely due to transparency and accessibility problems illustrated in the Bolivian and Argentine cases.\textsuperscript{187} Pursuant to the new rules passed in 2006, amicus submissions are accepted in certain conditions by the tribunal. Despite the right of the disputing parties to consultation regarding the amicus briefs, they do not have a veto right. Instead, the tribunal, alone, is empowered to allow such submissions.\textsuperscript{188}

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\textsuperscript{184} 03/17 Order for Amicus Participation at para 18; 03/19 Order for Amicus Participation para 19.
\textsuperscript{185} Suez Introductory Note.
\textsuperscript{187} Ibid.
\end{footnotes}
\end{footnotesize}
Notwithstanding this progress, the right to submit an amicus brief is insufficient to allow for full public participation and dialogue within the framework of investor-state disputes. This is especially true when the dispute revolves around the implementation of a regulation by a state or province in order to promote or protect social welfare. At present, there are two disputing parties: the investor and the state. By accepting input by public interest groups, the arbitral tribunal is no longer focused solely on the two disputing parties’ interests, which do not represent the full spectrum of interests implicated in investor-state disputes. On the one hand is the private investor, which initiates the dispute resolution mechanism. It has two main interests: either to force the repeal of the regulation so that it can continue its profit-making business in the host-country or to obtain substantial compensation in lieu of the loss of its profits due to the regulation. As profit is its main motive, the investor is less likely perturbed by the social or economic consequences that may otherwise affect the populace. For this reason, the investor’s incentive is to move the dispute from the local to the international sphere and take advantage of the rights accorded to transnational capital, which the bilateral investment treaty facilitates.\textsuperscript{189} In this way, the delicacies of the regulation (i.e. the purpose, goal, and implications) are further distanced from the actual context. On the other hand, unlike the investor, the defendant state often has more than one goal in mind. While it is the author of state projects that promote transnational capital locally, the state must also consider societal values (beyond the disputed regulation), including the general welfare of the public and the future impact of such foreign investments (i.e. social, health, environmental damage, etc.). In addition, the state party is also (often) removed from the regulatory issues in dispute, acting only as the agent between the investor and the local

While the amici in the two Suez cases may influence the tribunal to some degree, they cannot provide the full picture, because first, the petitioners are non-local NGOs – one is an international organisation – and therefore removed from local interests. They can therefore be as exclusionary as the global economic actors they oppose. Second, they are not provided with the opportunity to engage in dialogue at the hearings, or to call witnesses and present evidence, all of which are available to the investor and the state. In essence, amicus briefs are not a substitute for public participation. Taken in conjunction with the price tag attached to the investor’s reward, like the US $105 million award to Vivendi in the Tucumán case, the opportunity to lodge a brief in the ICSID forum is at risk of being a marginal amendment that does not alter the distributive politics at the root of the conflict.


191 The amici in both cases were limited to a 30-page submission.

192 The five NGOs that intervened as amici in the Buenos Aires case are: the “Association for Equality and Justice” (a non-profit national organisation whose mission is to contribute the strengthening of democratic institutions in Argentina and to defend the basic rights of disadvantaged groups); the “Center for Legal and Social Studies” (a national NGO that has worked since 1979 for the promotion and protection of human rights in Argentina); the “Cooperative for the provision of community action services” (a national organisation devoted to the defense and protection of Argentine users and consumers’ rights); “Users and Consumers’ Union” (a national organisation devoted to the defense and protection of Argentine users and consumers); and the “Center for International Environmental Law” (a non-profit international organisation working to provide legal support to persons and civil society agencies around the world). See: Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Petition for Transparency and Participation as Amicus Curiae, (January 27, 2005). The NGO that intervened as amicus in the Santa Fe case is the “Foundation for Sustainable Development” (03/17 Order for Amicus Participation). In the Santa Fe case, there appears to be three individual claimants (Professor Ricardo Ignacio Beltramino, Dr. Ana María Herren, and Dr. Omar Darío Heffes). The Petition, however, is not publicly available, which makes it difficult to discern the petitioners’ relationship with Santa Fe.


194 Supra note 30 at 31.
3.2.4.2  Taking the Local to the Global

While most of the community mobilisation activity against Suez remained local, on May 2005 - the occasion of the annual shareholder meeting of Suez in Paris - social movements from around the world came together in France to protest the harmful and exploitative projects of the company. This was one of the first coordinated transnational actions against Suez by Argentines, taking the local to the global, and building coalitions with similarly-situated communities from other parts of the world. It is what Charles Tilly and Sidney Tarrow call an upward scale shift, or “moving contention beyond its local origins,”\(^{195}\) which may include a shift of venue to new sites, touching on the interests and values of new actors.\(^{196}\) While Suez shareholders may have been satisfied with the company’s financial performance – US $2.42 billion net profit in 2004 – social activists painted a different picture, denouncing the company’s exploitative policies, from which those profits had been gained: unjustified and unaffordable water rates, denial of access to water services for people unable to make the payments, broken contractual promises such as the extension of infrastructure, failure to perform maintenance work resulting in public health hazards and environmental damage.\(^{197}\)

Some Suez shareholders, in solidarity with affected communities around the world, directly challenged the corporation’s top executives to end the irresponsible and dangerous actions of the company in a number of countries around the world. A common declaration of grievances from civil society groups in Argentina, Bolivia, Chile, the Philippines and Uruguay

\(^{195}\) Charles Tilly and Sidney Tarrow, *Contentious Politics* (Colorado: Paradigm Publishers, 2007) at 95.

\(^{196}\) Ibid.

was formulated and read to shareholders during the annual meeting by Boston Common Asset Management, itself a Suez shareholder. Boston Common Asset Management is a U.S. investment firm that lent its proxy to enable the statement to be read at the meeting. The letter asked Suez to end immediately spurious legal proceedings brought against Argentina over water disputes before the ICSID.198 The same declaration was presented at a press conference held at the French Parliament. Meanwhile, demonstrations took place both in front of Suez headquarters in Paris and the numerous satellite offices around the world simultaneously on May 13, 2005.199

On the same day as the Shareholders Meeting, a letter was sent to United Water, a U.S. subsidiary of Suez, by over fifty organisations, challenging the corporation’s top executives to end their irresponsible and dangerous actions, providing examples of such actions from various countries.200 In a lengthy response, the CEO (Jean-Louis Chaussade) of Suez denied the accusations made, claiming that it is “regrettable because through false and misleading accusations [the letter] seriously distorts the excellent work being undertaken daily by over 30,000 Suez men and women working in local water companies throughout the world.”201 After a second letter was sent in response to the CEO of Suez, detailing contradictory remarks made by the company, the growing pattern in Latin America of social upheaval and community protest in response to the policies and practices of the company, and the contamination of water operated by Suez in the Philippines resulting in a typhoid

198 Supra note 164.
outbreak, communication between the organisations and Suez ceased, as the latter did not respond to the former’s second letter.

Despite the campaign launched in numerous countries around the world, and the shifting of their activities from the local to the transnational, unfortunately, the pressure on Suez to withdraw its claims against Argentina has not been successful. This is quite different from the effect that such pressure had on Bechtel, resulting in the victory in the case of Cochabamba in Bolivia. There may be two obvious reasons for the different outcomes: First, Vivendi was successful at the transnational level in a similar water dispute against Argentina in 2007 for its Tucumán concession, although that case was brought before the ICSID prior to the economic crisis in 2001. Second, Argentina has not been able to successfully take advantage of the defence of necessity (under customary international law or the relevant BITs) in other investment disputes, except in a limited number of cases, for the measures it undertook in the wake of the economic crisis in 2001. It is therefore unlikely – but not impossible – that it will succeed in these two Suez cases.

203 Supra note 5 at 15.
204 See David Schneiderman, “Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes” (Draft 2009) at 1 and 5. Professor Schneiderman points to two ICSID decisions against Argentina (CMS and Enron), ruling that Argentina “could not take advantage of the defence of necessity as an excuse for failing to live up to the international obligations” owed to the investors (CMS Gas Transmission Company v. República Argentina, Case No ARB/01/08 (2005); and Enron Corporation and Ponderosa Assets v. Argentina, Award, ICSID Case No ARB/01/3, IIC 292, (2007)). A third case, however, LG&E, held otherwise. The Tribunal accepted the defence of necessity, relieving the state of any obligations to pay damages during the relevant period of the economic crisis (LG&E Energy Corp. v. Argentine Republic, ICSID Case No ARB/02/01 (October 3, 2006)).
3.2.4.3 Renationalisation of Water

In spite of the failed efforts of community organisations and larger NGOs to propose new community-based models of water governance that would include greater participation by communities, the mobilisation in both Santa Fe and Buenos Aires were able to first achieve the expulsion of Suez, and second, defeat the ideology that ‘there is no alternative’ to neoliberal institutions. Activities who dedicated their lives to the struggle over the past decade call the present model a “transition.” “It’s not exactly what we want. But we were at least able to defeat the privatised company, which was totally inefficient,” claims Alberto Muñoz, of the Users and Consumers association of Rosario. In both Buenos Aires and Santa Fe, the idea of replacing one private water company with another was a reality for a short period of time after the state revoked Suez’s concession. Whether it was the persistent mobilisation by community members or a change in state policy, the sale of one private company to another did not however materialise. This was a victory for the counter-hegemonic resistance in both locales. The big challenge for social movements now is the construction of an alternative form of administration over water and sewerage services that would be both public and participative. “We will not stop until we achieve a model of public management with social participation and democracy,” meaning “greater

205 Supra note 193 at 1.
206 Supra note 159.
207 For example, the sanitary workers union in Santa Fe called a 48-hour work stoppage to protest the sale, by Suez, of its shares to an Argentine private company, Emgasud. Governor Jorge Obeid claimed that there were other private companies beside Emgasud interested in buying-out Suez. Meanwhile, consumer groups, trade unions, community members and others continued their demands to return the water services to public hands. See “Latest news: Suez will leave, but government plans re-privatisation – Workers call 48 hour strike” (no date) Public Citizen. Available online: <http://www.citizen.org/cmep/Water/cmep_Water/reports/argentina/articles.cfm?ID=13875> (visited: Sept. 4, 2009).
208 Supra note 159. In Buenos Aires, the new state-owned company, Agua y Saneamiento, still cuts off service for lack of payment, which is why the renationalisation of water is not wholly favourable to most activists who view this kind of penalty for non-paying users a violation of a basic human right: Supra note 159.
209 Supra note 144.
participation by universities and social organisations in decision-making in the company.”

However, the fact that the main water sector unions have continued to abandon any serious criticism of the water concessions both during and after privatisation, due to their 10% stake in both models, does not help matters. Without the solidarity and resources of this important group, community challenge to promote a new model is made more difficult.

### 3.2.4.4 Semi-Direct Democracy?

That the popular movement was able to defeat the tariff hike resolution authored by the province and Suez and then to push Suez out of Córdoba were two big achievements for the residents of the province. The call for the popular consultation, however, was perhaps their biggest achievement. What motivated this move is unclear. It is possible that the unofficial Santa Fe plebiscite was successfully transplanted to its neighbouring province by the force of the social movement. This mimicry in strategy is what Charles Tilly and Sidney Tarrow describe as “repertoires of contention” – claim-making routines innovated in one place and at one time, which are then adopted by social movement activists in another place and at another time. It is also possible that the province was genuinely concerned about the public’s interests and therefore held an official referendum, giving a voice to the people in the most democratic way possible. But it seems far more likely that the provincial government of Córdoba, threatened by a similar collective action against the privatisation model, used the plebiscite as a safety-valve strategy. In this sense, the province, and not the

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210 *Supra* note 159.
211 The privatisation deal was able to “purchase” both the union’s consent to the 50% staff reduction policy that Suez carried out, and the union’s resistance to the privatisation deal in general, through a lucrative share-option plan, which granted employees up to a 10 percent stake in the company (*Water Fiascos* at 2). The union, once the site of resistance to such neoliberal projects, offered no critical opposition, and even sent representatives to other countries to promote the Buenos Aires water model (*Supra* note 136 at 3). The union continued to be part of the ownership structure of the new publicly-owned enterprise.
212 *Supra* note 195 at 16-7.
people, could take charge and better control the situation. That the results were subsequently ignored makes this latter explanation more realistic.

As soon as the vote (and plebiscite) was publicised by the province, the Popular Commission for the Recuperation of Water launched the “Other No” campaign. A network of organisations called on the citizens of Córdoba to make their “NO” vote against the contract with Suez-Roggio the “Other No” against intentions to replace the current arrangement with one that would again rely on private companies as service providers. The People’s Commission saw the consulta popular as deceptive, leaving open the question of the validity of other forms of privatisation. In addition, the campaign called for the rejection to endorse any of the running candidates in an attempt to “transcend institutional representation’s disempowering game… [by using] people’s right to water as a way of gaining electoral advantage.” Instead, the Commission’s objective was to topple the privatisation model “that was born through the corruption of the ‘contract nation’ in which the state puts up the investment and business owners walk away with the profits… treat[ing] the right to water and life as if it were a product that could be regulated by the capitalist cycles and crises that the business owners themselves generate.” Despite the persistent efforts of the People’s Commission to re-appropriate water as a communal right, the people of Córdoba are still billed for the water they use by a private company.

Achieving victories by counter-hegemonic globalisations are made difficult within the constraints imposed by the investment rules regime. This section highlights such difficulties:

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213 Supra note 176.
214 Supra note 175.
215 Ibid.
the acceptance of amicus submissions does not equate to full community participation; the
movement shifted to the transnational level, but was not able to attain the same kind of
victory that the people of Cochabamba attained in their fight against a private water
company; despite the renationalisation of water, social activists hope to promote an
alternative model, one that includes direct democratic principles; and finally, despite an
overwhelming opposition to water privatisation policies, as indicated in the province-wide
plebiscite, the water system in Córdoba is still privatised.

4. Role of the State

Before describing the details of what appears to be the ambivalent role of the state, the very
essence of a contract made by the state with a private company to operate the water supply
of a community is problematic on a number of levels. First, there is a problem with charging
a private corporation with the delivery of a basic necessity since its principal goal is
maximising its profits. If the operator is faced with a trade-off between short-term gains or
long-term needs to protect infrastructure and societal interests, the company will likely
choose the former. Second, there is a lack of democratic accountability associated with
privatisation policies. Citizens cannot vote out the private water company as they do with
state officials. Third, the privatisation project in Argentina appears to have not only profited
the shareholders of the companies, but also certain state officials. It has been argued that
the maximisation of the fiscal return, i.e. the payment made by the operator for the
concession, rather than the efficiency of water delivery, was of primary concern to the
government of Argentina at the bidding stage.216 The new system “enriched a group of
union leaders, crony capitalists and officials in the government of former President Carlos

The payments made by the private utilities operators to the government were, together, equivalent to about 4% of the 1994 GDP.

In order to manage the operation of a profit-making business without the kind of accountability inherent in publicly-owned enterprises, a regulatory agency was established by the state (federal or provincial depending on the case), to ensure the implementation and compliance of contractual commitments made by the private company. It was also tasked to deal with issues regarding welfare redistribution, i.e. the extent to which the design of the service delivery met the sense of distributional fairness promised by the state. It is this regulatory agency that I examine more closely in the following section, followed by the secrecy of the concession contract and finally the concession contract itself, pointing out the ambivalent, and often contradictory, role of the state.

4.1 Regulatory Agency

Once the water sector was privatised, the state became more preoccupied with regulating the service and less with providing the service. In order to protect the right to water and to do so equitably, the state, in its self-protecting role, had an obligation to (a) establish an effective regulatory regime in order to constrain the monopolistic power of the privatised enterprise;\(^{219}\) and (b) provide access to clean, affordable water without discrimination to the populace.\(^{220}\) In Buenos Aires, a regulatory body, the *Ente Tripartito de Obras y Servicios Sanitarios* or ETOSS, was created.\(^{221}\) However, its independence was compromised by the

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\(^{217}\) *Supra* note 3.
\(^{218}\) *Supra* note 216.
\(^{219}\) *Supra* note 19 at 109; Rodríguez-Boetsch at 306.
\(^{220}\) *Supra* note 216 at 8.
\(^{221}\) *Supra* note 19 at 106-7.
fact that it was financed through a 2.67% charge on the service fees collected by the water company. This meant that when the regulator considered requests made by the company for fee increases, it would face a conflict of interest because a fee increase would also mean more money for the regulator. 222 In addition, the division of responsibilities between the regulators and their sector ministries were increasingly blurred, reducing the independence of the regulators and in the process their accountability as regulators. 223

In theory, an effective regulation agency could have policed both the company, such that water would be supplied in an efficient way, investments made in a timely manner, and tariff schedules restricted so as not to discriminate against the poor; and the community, by enforcing payments due to the operator. The efficacy of the regulator, however, was severely compromised. First, the concession stipulated that independent external auditors were to make recommendations on how management of the service could be improved. A government resolution, shortly after the start of the concession, prohibited the external auditors from using the information they gathered to make such recommendations. The regulator was therefore not receiving the independent information it needed to regulate effectively. 224 Second, the modifications made to the penalty regime by the state over time led to (a) a decrease in the amount of penalties imposed on the company for non-compliance; (b) weakened the regulator’s control; and (c) effectively altered the original contract, which provided discounts to users when the operator did not comply with contractual provisions that affected consumers. Some of these changes made it cheaper for the company to pay the penalty rather than comply with contractual obligations, like water

222 Ibid. at 109.
223 Supra note 216 at 6.
224 Supra note 19 at 109.
quality standards. The penalties imposed by the regulator in Buenos Aires up to 2004 amounted to approximately US $16 million, most of which related to low water quality. The company paid off 40% of the fines, while the government pardoned the remaining US $10 million as part of a new contract. This meant that water users were not only receiving water of low quality, which is non-negotiable in itself, but they were also not receiving a break in their bills, as originally stipulated in the contract. Third, the government did not consult with civil society groups about the state privatisation project, nor set up the users’ commission, as stipulated in the concession contract, until 1999, six years after implementing the model. Civil society groups worked hard to participate in contract renegotiations between the corporation and the state, but met insurmountable obstacles. At one point, however, the state did set up a special commission to renegotiate the contract, which included representatives of various sectors, including users and consumers. That the membership of the commission included civil society members was a great success for community organisations. Unfortunately, the commission did not exist for a long time.

After President Nestor Kirchner took office in 2003, he replaced the commission with a new body, restricting the participation of the public. The sudden back-and-forth changes in state policy can be attributed to the changing political parties and their platforms, but, ironically, it was Nestor Kirchner’s government that three years later, cancelled the contract with Suez.

\footnote{Ibid.}

\footnote{Supra note 3. This was not unique to the Buenos Aires concession. In a renegotiation of their contract in 2005, the province of Córdoba, working closely with the Suez, granted the latter a pardon for its non-payment of taxes from 2002 to 2006, and an extension for two years beyond the date of renegotiation (from 2006 – 2008): Supra note 164.}

\footnote{The users’ commission was the formal venue for civil society participation, in which the public could make non-binding recommendations to the regulator on issues concerning users’ rights. The commission, however, had no direct contact with the water corporation. See supra note 19 at 110.}

\footnote{Supra note 19 at 110.}
While most of the government interventions in the operation of the regulatory agency, as described above, favoured the investor’s interests at the expense of the public, the opposite was also true. Because of overwhelming pressure by the public due to the sudden increase in the water rates, coupled with deteriorating water quality, Vice Governor Topa of Tucumán intervened in the regulatory agency by replacing its board of directors and appointing an “Intervenor” to head the regulator. This was because, according to provincial officials, the agency was not effectively responding to community interests. On the same day it intervened, the regulatory agency issued a resolution “declaring [the company] to be at fault for the manganese incident and imposing, as a penalty, 35 days free service for affected customers. Only in this instant did the intervention by the government partially address the needs of the poor, which was one of the main mandates of the regulatory agency.

Despite being set up by the state (or province) to monitor the activities of the private company and to protect the public interest, the regulator and the decisions made by it were frequently bypassed and overruled by the government, oftentimes favouring the interests of the investor over the public. While corruption or politics may have played a part, more important is the restructuring of different forms of state policies, reflecting the changing

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229 For example, during the first eight years of the contract, weak regulatory practices and contract renegotiations that eliminated corporate risk enabled the Suez subsidiary in Buenos Aires to earn a 20% profit rate on its average net worth (Water Fiascos at 2; Supra note 19 at 112). When one compares this to the average profit of 3.5% made by the 200 largest firms in the country, or the average profit of 0.5% made by companies that were not involved in privatisation in the same period, it is not difficult to conclude that the foreign investor prevailed in the new privatisation model (Supra note 19 at 112).

230 Vivendi Decision at para 4.13.15 – 4.13.17. Under Argentine law, the intervention into an agency is permissible only in an emergency. When an Intervenor is installed, his/her job is not to take over the agency permanently, but to reorganise it and resolve the emergency: See Vivendi Decision at para 4.13.16.

231 Vivendi Decision at para 4.13.19.
balance of social forces\textsuperscript{232} within the state. This is expressed either by different factions competing at the same time, or by the same faction at different times.

4.2 Secrecy of the Concession Contract

Privatisation policies are frequently introduced on the basis of consultant reports which are intended to remain secret.\textsuperscript{233} This practice obviously hinders democratic debate. As a result, flawed assumptions remain unchallenged, inadequate evidence is not critically evaluated, incompetent work is not exposed, and alternative policy options are submerged.\textsuperscript{234} The implementation of Argentina’s privatisation policies largely followed this path. In fact, it was not until seven years after the start of the Suez concession contract in Buenos Aires, that a public hearing was held to discuss the changes to the plan for extending and improving the water and sewerage networks.\textsuperscript{235} The situation was not different in Tucumán. In a 2001 report to the World Bank, Dr. Jorge Rais, the then Undersecretary of Water Resources of the Federal Ministry of the Economy, explained the political dynamic of the times: “In order to avoid confrontation with the anti-privatisation propaganda of the political opposition, the Tucumán Government chose not to explain the objectives and procedures involved in the transformation of DiPOS [the public water company pre-privatisation], foregoing any kind of public relations strategy.” He continued “[t]he decision to privatize DiPOS was generally rejected by the local political forces (one of which took over the government shortly thereafter)…”\textsuperscript{236}

\textsuperscript{234} \textit{Ibid.}
\textsuperscript{235} \textit{Supra} note 19 at 116.
\textsuperscript{236} Vivendi Decision at para 4.8.4.
It would seem that secrecy was therefore standard practice in issues that related to the water privatisation policies in Argentina. However, in line with the often-contradictory role played by the state within the international investment law regime, the Argentine state made a drastic move away from its secretive past during the ICSID arbitration proceedings against Suez. As described above, ICSID proceedings are private, and therefore secret, although an incomplete list of ICSID disputes – past and present – do appear on the ICSID website. Access to memorials, counter-memorials, and transcripts from oral hearings, are often not available to the public (other than the disputing parties involved).237 While civil society organisations were permitted to submit an *amicus curiae* brief in the Suez cases against Buenos Aires and Santa Fe, their request to access documents, including the memorial and counter-memorial, among others, were rejected, especially by the foreign investor.238 In response to this rejection, the Attorney General of Argentina, acting for the state in the case, published all the information he had available on the Attorney General’s state website, providing access to all documents to interested non-party entities.239 It is therefore evident that the state is composed of several rival “state projects” – which may be fueled by differing administrations – that act in contradictory manners.

4.3 The Concession Contract

Finally, if we accept that the state, as explained by Bob Jessop, has no essential unity, then “there is never a point when [it] is finally within a given territory and thereafter operates…

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237 However, in a number of cases, these documents do appear on the ICSID website or other similar sites, after the completion of the arbitration case.
238 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, (February 12, 2007).
239 *Supra* note 186.
on automatic pilot according to its own definite, fixed and inevitable laws.” The most
paradoxical case of a state (or province) acting in a contradictory manner in its dealing with a
foreign investor is the Tucumán government during its renegotiation process with Vivendi.

On the one hand, the provincial government built alliances with the public and together
worked against the company, or so it may have appeared to the foreign investor. On the
other hand, the government implemented the privatisation model, welcomed Vivendi, and
continued to renegotiate the concession contract in order to convince the company to
remain in Tucumán. In this way, the province built alliances with the private company. As
described above, the start of the concession contract coincided with the victory of Governor
Bussi in the provincial elections in Tucumán. Governor Bussi, of the Republic Force, was
the first non-Justicialist Party candidate to have won office in Tucumán since 1983, and this
was largely due to his tough stance against the privatisation of water. In Tucumán, the
population saw the privatisation of its water supply and sewage system as a threat to the
citizen’s human right to water. Unlike other provinces however, the entry of a new political
party with anti-privatisation sentiments provided a new opportunity for civil society to
engage in contentious politics. As both threats and opportunities shift with fragmentation
or concentration of power, and the availability of allies, protesters immediately took
advantage of the “political opportunity structure,” and engaged in disruptive resistance by
promoting the “Stop Payment” campaign.

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240 Supra note 232 at 9.
242 Supra note 195 at 58.
243 Ibid.
The alleged alliance between the state and society first appeared during the “Stop Payment” campaign. It is possible that government authorities not only sat back and passively observed the campaign, which successfully continued for two years, but also actively encouraged the public to boycott the company. An example of the early concern of one legislator is Gumersindo Parajon’s proclamation in September 1995, that “[t]he people must join the civil resistance and refuse to pay the bloated invoices they will receive for potable water and sewage services.” However, despite the government’s (passive or active) support of the “Stop Payment” campaign, which was launched immediately after the first water bills, there was (a) a 67.9% tariff increase; (b) separate charges for municipal, provincial and federal taxes; and (c) a 6% contribution to the regulatory agency, which together totaled an increase of 110% in rates. These increases were all mandated under the concession contract authored by the company and the provincial government.

Second, in response to Vivendi’s announcement that it would cut-off those who were in arrears, Legislator Próspero Barrionuevo published a form letter, “advising members of the public of their rights, setting out procedures to be followed if they felt that [they] had a grievance against [Vivendi] regarding its invoices for the quality of that service.” He included a model letter for the public to use for making such claims. He also explained that the company was not entitled to cut them off from the water if they had a valid claim against the company. This was due to the issuance of a formal resolution which effectively prevented the water company from cutting the service to customers who refused to pay their

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244 Vivendi Decision at para 4.11.2. Text is quoted from an article, “Parajón insta a resistir y no pagar el agua,” that appeared in the local newspaper (September 6, 1995) *La Gaceta.*
245 Vivendi Decision at para 4.10.4.
bills. However, to enforce payment by customers for the services provided, the province itself had granted Vivendi the right to cut off service to non-paying customers, subject to certain conditions specified in the agreement.

Finally, after the occurrence of manganese turbidity in the water supply, the regulatory agency confirmed that laboratory analyses of the water showed that it posed no risk to human health. Despite this (and if we assume that the agency was correct), the government undermined the findings, declaring instead that, “the water in San Miguel could cause cholera, typhoid and hepatitis,” causing further outrage among water users. The province directed the water company to grant a 35-day billing holiday to customers affected by the manganese turbidity. However, it was the same provincial authorities that proposed to renegotiate a solution following such criticism against the company. Even after the failure of the first round of renegotiations, at which point the province had the opportunity to rescind the contract, a second round of renegotiations commenced in mid-1996 with the assistance of the federal government and the World Bank. A third and final attempt to renegotiate the concession contract began in 1997. According to the Argentine state, Vivendi was successful in imposing new contractual conditions on the Province, which granted the company three of their main strategic objectives, including a reduction in the concessionaire’s investment requirements. However, the company then “unilaterally abandoned… the concession agreement, [since] it realised it had lost the trust and goodwill

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248 Ibid. at para 5.3.13.
249 Ibid. at para 4.5.6.
250 Ibid. at para 4.13.11-4.13.12.
251 Ibid. at para 4.13.13.
252 Ibid. at para 4.13.19.
253 Ibid. at para 4.15.3.
254 Ibid. at para 4.16.1. It is quite possible that the contradictory behaviour of the state can be explained by its wanting to have some leverage over the investor in these contract renegotiation rounds.
of the people of Tucumán.”

Even after Vivendi’s exit from Tucumán, the provincial government, under Governor Bussi, decided to award a new concession to another private company, despite his original welfare-oriented campaign. In December 2001 and after Governor Bussi’s term in office, the Argentine state decided to scrap plans to award a new privatised concession for Tucumán’s water system.

These instances illustrate that there was no unity among provincial policies, most notably because of the change in government. On the one hand, a dimension of the political environment encouraged the public to use both direct and institutional collective action against the foreign investor. On the other hand, the same province – but with different state officials in some cases – had authored the concession contract with Vivendi, continued to work with Vivendi through three renegotiations, and even accepted to award a water concession to another private company after the termination of Vivendi, despite the discontent of the public with the policies of the foreign operator and the privatised model more generally.

5. Conclusion

The privatisation project in Argentina was presented in such a way as to make any other alternative impossible. As it turns out, however, within the context of neoliberal state

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255 Ibid. at para 3.3.4.

256 In her work on Latin American democracies, and in particular, the Argentine political system, Susan Stokes explains that sometimes politicians run for office promising one set of policies, and if they win, switch to very different ones. In Latin America, state officials in recent years have frequently run with the promise to avoid pro-market reforms and harsh economic adjustment, since the majority of voters prefer welfare policies, but when they win, they transform immediately into enthusiastic market reformers and efficiency-oriented policies. See Susan C. Stokes, “What do Policy Switches Tell us about Democracy?” in Adam Przeworski, Susan Carol Stokes, and Bernard Manin, eds., Democracy, Accountability, and Representation (Cambridge: Cambridge University Press, 1999) 98.

projects, those excluded from the benefits of such policies account for the majority of the population, and this population does not always remain silent. In reaction, it revolts against the unjust outcomes of such projects. The initiatives taken up by the counter-hegemonic movements throughout the various provinces of Argentina have shown not only that “another world is possible,”258 but have spurred bottom-up policy reforms at both the local and transnational levels and have effectively forced the largest water multinationals, Suez and Vivendi, to withdraw their investments in developing countries altogether.259

Despite the success of counter-hegemonic resistance forcing the water companies out, victories within the international investment law regime remain both fiscally unsustainable and difficult to achieve. First, embedded within the regime is the compensatory promise to transnational capital whenever state action interferes – directly or indirectly – with its investment interests. Second, the pre-commitments made by host states in protecting foreign investments and the fear that an investment claim will be brought against it, make it difficult for the state to undertake projects to protect the social welfare of its citizens where such measures may potentially conflict with the investment model. Third, legal constraints associated with the investment regime go hand-in-hand with the constraints imposed on states by a network of supranational economic organisations – like the World Bank and the International Monetary Fund – that can withhold funding to the state until measures are taken to protect the investor.260 Fourth, full and effective participation of the affected

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258 supra note 193 at 2.
260 Or until measures taken by the state against the investor are relinquished. I am referring here to the case in Tucumán where the World Bank inserted a condition on a large health and education loan that mandated the resolution or elimination of pending conflicts with public service concessions.
communities at the dispute resolution level are still lacking. Finally, foreign investors are granted broad rights, but the regime does not impose a parallel set of obligations on them.

The neoliberal projects implemented by the state and the counter-hegemonic resistance that arises as a reaction to the projects, places the state in a tight position. Does the state choose to side with civil society and force the foreign investor out of its territory, despite the fiscal consequences – i.e. large ICSID awards – that may arise? Or does the state choose to side with foreign investment interests, despite the political consequences – i.e. civil society unrest – that may ensue? The state is thus left with a dilemma. It is this dilemma which more clearly brings out the idea that the state is an institutional ensemble of rival state projects, struggling for local – though temporary – hegemony. Various state projects are therefore present at any one point, which may result in the state acting in contradictory ways: at times colluding with the foreign investor, contrary to the public’s interests, and at other times, colluding with the public, contrary to the investor’s interests.
CHAPTER FOUR

Conclusion

One of the most dominant and widespread hegemonic projects in the economic globalisation era has been the neoliberal one, with the normative goal of suppressing alternatives.¹ It has been successful in its spread throughout the globe – states have either adopted this project voluntarily or in response to external pressures of international financial institutions and powerful nation-states. Neoliberalism proposes that national economies open themselves to the world market; private property rights be effectively and internationally protected; and the liberal mobility of transnational investments and profits be promoted and protected.² The neoliberal state prioritises a free market over the regulation of its economy and the social sector. In doing so, it withdraws from its responsibility of wealth redistribution. In the pursuit of global economic integration, institutional changes are occurring both within and without national systems, to advance the needs of this new economic world order. In the area of trade and investment, for instance, legal structures and functions are set up to facilitate the entry of mobile capital, secure foreign investments, and guarantee the proper functioning of global markets within the host territory.³ The network of bilateral investment treaties that I describe in this thesis represents one such structure. In addition, to marketise its resources and services, the state adopts and restructures projects that endorse a neoliberal vision, i.e. policies based on privatisation, liberalisation, and deregulation. In this way, it lures in foreign corporations, like Tecmed, Vivendi, and Suez that actively support such state projects.

³ David Harvey, A Brief History of Neoliberalism (Oxford: Oxford University Press, 2005) at 2.
The *Tilt* in the International Investment Rules Regime

In this thesis, I have described one aspect of the global economic order: the international investment rules regime, and its embedded legal constraints that guarantee returns on investments for mobile capital.\(^4\) The regime empowers investors with rights that can be enforced at the international level whenever “state regulation goes too far in diminishing expected returns on investment.”\(^5\) In both the *Tecmed* and *Vivendi* cases, the investor was awarded a compensation package in lieu of changes in state policies that were found - by arbitration tribunals - to have indirectly expropriated or denied a “fair and equitable treatment” to their investments. Perhaps the best example of the structural tilt of the regime – in favour of the investor – is the number of ICSID decisions that have held Argentina liable for the emergency measures it invoked in the wake of the economic collapse in 2001. The measures, which were for the self-protection of society, and the subsequent renegotiation of all contracts into pesos, which “ ensured that all participants in the economy would share the necessary burden collectively,”\(^6\) were not welcomed by Suez in the Argentine arbitration claims. For although investors insist on “national treatment,” they only tolerate it so long as it does not fall below a minimum standard, “at which point [they] cannot be expected to share in the burden of a failed”\(^7\) state project. While Suez, the French water corporation in charge of the water and sewage system in a number of Argentine provinces, initially welcomed the privatisation project, it exited the scene once its expected returns were not guaranteed. Unlike nationals, including national corporations, the promise of recouping losses suffered during a crisis like the one in Argentina exists for foreign

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\(^4\) *Supra* note 1 at 395.

\(^5\) *Ibid*.

\(^6\) *Ibid* at 397, citing *CMS* decision at para 20 (*CMS Gas Transmission Company v. República Argentina*, Case No ARB/01/08 (2005)).

\(^7\) *Supra* note 1 at 399.
corporations. Although the dispute has yet to be resolved by an ICSID tribunal, it is likely that a decision favouring the foreign investor will be forthcoming. Thus, like a number of cases that came before it, it will further strengthen investor protections - without parallel obligations - beyond the intent of the states parties to the BITs under which these cases have been brought.

**Limits on State Regulatory Power**

Cases like the *Suez* dispute against Argentina – where the state of Argentina implemented measures to self-protect society – illustrate how the investment rules regime limits the capacity of states to solve redistributive problems, even in response to a massive economic crisis. If in the past, states were checking and placing limits on economic powers in the marketplace with the intended goal of protecting the interests of society at large, today, it appears that the global economic powers are checking and placing limits on states in their exercise of political and social authority with the intended goal of guaranteed returns. The *Tecmed* case illustrates the practical effects of the regime’s reach into the regulatory sphere of a state. The next time the same set of facts appear, Mexico will face a dilemma. Does it shut down a hazardous waste facility, the operation of which has spurred widespread opposition and discontent in the community, and face the consequences of international arbitration? Or does it renew the facility’s permit in order to avoid the threat of having to pay a multi-

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8 Professor Schneiderman points to two ICSID decisions against Argentina (*CMS and Enron*), ruling that Argentina “could not take advantage of the defence of necessity as an excuse for failing to live up to the international obligations” owed to the investors (*CMS Gas Transmission Company v. República Argentina*, Case No ARB/01/08, Award (2005); and *Enron Corporation and Ponderosa Assets v. Argentina*, ICSID Case No ARB/01/3, IIC 292, Award (2007)). See: David Schneiderman, “Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes” (Draft 2009) at 1 and 5. In another decision (*Sempra v. Argentina*), the tribunal ruled that Argentina’s economic crisis would have had to compromise the “very existence of the State and its independence” to attract the treaty exception (*Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award (September 28, 2007) at para 348).

9 *Supra* note 1 at 399.
million dollar damage award to the investor, despite the social unrest or the ensuing environmental and health effects that may arise in the future due to the mismanagement of the facility? In both scenarios, the investment rules regime guarantees rates of return to the investor so long as one of their (broad) treaty rights have been breached. In the first scenario, the state (and inevitably the citizenry) is held fiscally responsible for its pre-commitments, which essentially means that state policies relating (directly or indirectly) to the investment are frozen at the time of the investor’s entry. In the second scenario, the state is faced with a disgruntled community, which can lead to massive social and political unrest, or a democratic crisis. Thus, within the logic of the investment rules regime, the state is always cornered: by the transnational capitalist class demanding it to continue according high priority to the rights of foreign investment without any obligations on the part of the latter, and by civil society threatening to form a human barricade or a 192-day sit-in in front of the Municipal Palace unless there is a response in its favour, and against the interests of the foreign investor.

First Objective

Undoubtedly, the current economic model provides a new, contested, space - between hegemonic globalisation from above (i.e. the interests of foreign investment) and counter-hegemonic globalisation from below (i.e. the interests of the public at large), which seem contradictory at present – to engage in contentious politics. Describing these counter-hegemonic globalisations in five different cases in Mexico and Argentina was the first goal of my thesis. Each one of the cases ends in the same manner: the exit of an unwanted foreign investor. I have shown the various strategies that are employed by social movements, each questioning the hegemonic neoliberal model. On the one hand, there are movements that
regard the engagement of popular struggles with state institutions, or international agencies, as ineffectual (and contrary to the very essence of social movements), largely because the political and legal orders of the state and the institution of capitalism are unreceptive to measures that will improve the living conditions of the popular classes.\footnote{Boaventura de Sousa Santos, “Beyond Neoliberal Governance: the World Social Forum as Subaltern Cosmopolitan Politics and Legality” in Boaventura de Sousa Santos & César A. Rodríguez-Garavito, eds. Law and Globalization from Below (Cambridge: Cambridge University Press, 2005) 29 at 54.} They tend to instead maintain the status quo, which, for a popular movement, must be either contested or ignored.\footnote{Balakrishnan Rajagopal, “Limits of Law in Counter-Hegemonic Globalization: the Indian Supreme Court and the Narmada Valley Struggle” in Boaventura de Sousa Santos and César A. Rodríguez-Garavito, eds. Law and Globalization from Below (Cambridge: Cambridge University Press, 2005) 183.} In Tucumán, it was the “Stop Payment” campaign that eventually crippled the foreign investor. In Hermosillo, it was the escalating direct action - the blockade, sit-in, and public denunciations – that finally led to the closure of the facility. Just as these strategies mimicked ‘repertoires of contention’ from other social movements - for example, the U.S. civil rights movement\footnote{Charles Tilly and Sidney Tarrow, Contentious Politics (Boulder: Paradigm Publishers, 2007) at 18 – 21.} in the case of direct action strategies taken up by Hermosillo activists – other locales have used these same strategies based on their successful outcome in Hermosillo, Tucumán, and Santa Fe.

On the other hand, social movements cannot avoid the law as it also provides them space for resistance. Supporters of institutional action promote engagement with the law, where they do not see failure as the only possible outcome.\footnote{Supra note 10 at 55.} Certain actors in the movement, like Domingo Gutiérrez Mendivil, a human rights lawyer in Hermosillo with a high level of legal expertise, largely supported institutional action in the hope that it would lead to legal measures corresponding to the movements’ objectives - for example, legislation calling for
open and transparent public engagement with investment projects on their territory. In Santa Fe, it was the plebiscite – that was eventually transmitted to Cordoba – that was employed. According to this strategy, engaging with the language of law may provide a more sustainable change within the system, as opposed to quick reactions to patch up a problem temporarily. In addition, social movements take advantage of changing political opportunity structures created in the local legal arenas – like the change in government in Tucumán and Hermosillo – to forge political alliances, as well as networking with similar organisations in other locales and with global organisations to further their goals on a transnational level.

Second Objective

The second goal of my thesis was to demonstrate that the state, rather than being described as a simple “transmission belt” from the world economy to the local economy, is better understood as a “complex social relation that reflects the changing balance of social forces in a determinate conjuncture.” In an era of economic globalisation, we see more clearly that the state is in fact composed of a plurality of forces that constantly compete for a temporary and local hegemony. In the words of Pierre Bourdieu, it is a site of constant struggle between the “left hand” of the state – agents of the “spending” ministries who promote the social welfare of society – and the “right hand” of the state – agents of the “savings” or “profiting” ministries who promote international trade and investment in addition to other

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14 Domingo Gutiérrez Mendivil was the activist who brought three claims against the Mexican government before the CEC, a claim before the International Environmental Arbitration, two criminal complaints against Cytrar in Mexico, and various denuncia populares, complaints filed before the National Commission of Human Rights and Sonora Human Rights Commission.


financial gains.\textsuperscript{17} If current struggles are (temporarily) resolved in a direction that favours the
to have an independent existence, comprising of potential sites of struggle.\textsuperscript{18} It is possible that those state projects favouring the interests of transnational capital will eventually be dislodged by other state projects that succeed them. These latter projects will be based on a better script of the existing – the current – terrain, i.e. projects that favour the social welfare of society after a massive social and political revolt. It is therefore too simplistic to view the state as always promoting the interests of transnational mobile capital. It promotes also the interests of its citizens, especially when the citizens are revolting against the very architecture of transnational capital. Therefore, it is not uncommon for the state to act in contradictory ways within the investment rules regime, since it is pulled in opposite directions by two self-interested entities: society and the foreign investor. The case studies that I examine demonstrate this conflicting pattern within the state. For instance, the state may renationalise the water system four years after it was privatised, deny the renewal of a permit without securing a new location as promised, or encourage users not to pay for their water bills despite having created the penalty scheme used by the foreign operator. The state therefore can change course entirely and appear ambivalent to both the investor and civil society: at times it pleases the foreign investor by policing civil society, at other times it pleases civil society by policing the foreign investor.

**Third Objective**

This ambivalence – itself a product of the logic of the investment rules regime – and the regime itself, which places a priority on the security of investment interests, have meant that

social movements that fight against the neoliberal institutions and structures of transnational legality have had much difficulty in achieving their goals. To show that victories are hard to come by was the third goal of my thesis. On the one hand, the recipe of neoliberalism - privatisation, marketisation and liberalisation - has eroded state-sponsored guarantees of some of the most critical resources and services to the public: water, sewerage system, a safe and clean environment, and most importantly, wealth redistribution in these areas. Instead, a new form of indirect rule has emerged in which powerful economic actors – especially multinational corporations – hold an immense amount of power over these resources, and therefore the basic livelihoods of people. Because profit maximisation is their main goal, they are less concerned with the redistribution of resources to host-state citizens. In fact they are granted with almost no obligations, only rights as against the state in which they operate. The case of privatised water in Argentina is illustrative of communities caught by “the phasing out of the safety nets once provided by the welfare state” and now unable to buy welfare in the market. Affected communities are fed up with this new economic model, which has distanced the state from the public.

On the other hand, the economic model – and specifically, the investment rules regime as tangible evidence of the model – relegates the voice of the subaltern to an inconsequential – or almost non-existent – role. First, neither their consent nor participation is required at the start of a partnership between the state and the foreign investor. In fact, such contracts are often settled discretely, outside the purview of public scrutiny since states are all too interested in facilitating foreign investment to concern themselves with the worries of the community. Second, they are excluded from participating in the partnership during the

19 Supra note 10 at 40-41.
20 Ibid. at 37.
lifetime of the investment project, again because of their often-oppositional stance, which could lead to the withdrawal of the investment. Third, they are wholly barred from the dispute settlement mechanism that governs relations between the investor and the state once a dispute arises. These disputes, as illustrated in the Tecmed and Vivendi cases, in fact exist because of civil society. Their exclusion from the arbitration forum therefore seems illogical.

Within the current logic of the international investment rules regime, therefore, the only victory that may be won by counter-hegemonic movements is the ousting of the foreign investor from the host state. This, however, is rarely a “free” victory because if and when the foreign investor succeeds in arbitration, citizens and their states are punished by the hefty price tag attached to the exit of the company. In addition, given the “cramped” role to which states are confined within the regime and the regime’s guarantee of investor rights (with no obligations), each time the state acts to protect citizens or attend to their concerns, it must do so without denying at the same time its commitment to treat the foreign investment “fairly and equitably” and above a certain minimum level. Because the state has to at once please transnational capital and the people, it often ends up pleasing either one or the other, or none at all. In this sense, victories, which are attainable by counter-hegemonic resistance, are often not achievable given the state’s pre-commitments to global capital.

In conclusion, the shift to a globalised free market economy has not only eroded state-sponsored commons and transferred an immense amount of control to powerful economic actors, but has done so without the promise of worldwide economic growth or the reduction

21 Supra note 1 at 399.
of inequalities, both within states and internationally between states.\textsuperscript{22} In fact, the investment rules regime has been structured in such a way as to undermine the state’s regulatory authority, including its role in resource redistribution, which seems contrary to one of the goals of transnational mobile investments - i.e. the promise of worldwide economic growth.\textsuperscript{23} Fortunately, the high period of neoliberalism has spawned within itself an extensive oppositional culture, which puts us at the second phase of Polanyi’s ‘double movement.’\textsuperscript{24} If the adoption of neoliberal state projects produces the kind of social unrest and political instability of the order of that in Mexico or Argentina, then as David Harvey suggests, “it could just as easily be said that neoliberalisation repels rather than encourages investment.”\textsuperscript{25} Indeed, the destablising effect of the international investment rules regime has pushed some states, like Bolivia,\textsuperscript{26} to check out from the regime altogether. The regime, thus, calls for a reformation of the global economic model: one that moves away from transnational regulatory frameworks that limit state projects aiming to protect the social welfare of society whenever they conflict with the interests of transnational capital and towards regional regimes that may better promote cross-statal cooperation whilst maintaining state authority over the social and economic welfare of citizens.

\textsuperscript{22} \textit{Supra} note 3 at 11, 154, 203.
\textsuperscript{23} One area that needs further examination is the relationship between local, provincial and national level governments, and each of their roles within this new economic model. I have attributed the role of the federal state onto all lower levels in most of my analysis, in part due to the federal state’s obligations under the bilateral agreements, and its presence, rather than lower levels of government, in the dispute resolution forum. It would be interesting to dissect further into the specific roles each level played within the lifetime of the investment project. Is one level more concerned about commitments to transnational capital and less about societal interests? I have used the phrase “the role of the state,” which may in fact be more complicated as various levels of government often have their own set of state projects to promote.

\textsuperscript{24} Polanyi’s concept of the “double movement” refers to society’s inevitable self-protection against the commodification of life. See: Vicki Birchfield, “Contesting the Hegemony of Market Ideology: Gramsci’s ‘good sense’ and Polanyi’s ‘double movement’” (1999) \textit{6(1) Rev. of Int’l Poli. Eco.} 27 at 38. In 1957, he wrote: “For a century the dynamics of modern society was governed by a double movement: the market expanded continuously but this movement was met by a counter-movement checking the expansion in definite directions” – Karl Polanyi, \textit{The Great Transformation: Political and Economic Origins of Our Time} (Boston: Beacon Press, 1957) at 130.

\textsuperscript{25} \textit{Supra} note 3 at 118.

\textsuperscript{26} David Schneiderman, “Investing in Democracy: Political Process and International Investment Law” (Draft 2009) at 3.
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