TWAIL AND INTERNATIONAL INVESTMENT LAW: A SUBALTERN CRITIQUE OF THE FORMATION OF BITS AND THEIR IMPLEMENTATION THROUGH INVESTMENT ARBITRATION

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Legal systems do not function in isolation from the social, economic, political, or cultural milieus within which they are situated. Bodies of law and the legal systems through which they operate seek to uphold themselves to fair and impartial standards- however, upon closer examination, their functioning reveals multiple issues that detract from the sincerity of their commitment to the causes they ostensibly support. Third World Approaches to International Law (TWAIL) is a movement that seeks to examine the various ways in which socio-political asymmetries of power and knowledge influence the interactions between developing countries and international law.[1]

One of the earliest contributors to TWAIL, Ratna Kapur, speaks of how the term 'postcolonialism' acts as more than just a temporal marker in the transition from the colonial era to its aftermath in contemporary times.[2] TWAILS's attempt to challenge linear narratives of history is one that is motivated by an acute understanding that the postcolonial world continues to be impacted by its erstwhile relationship with the Empire- through a mechanism which enlists the help of the law to covertly sustain the power imbalances upon which it depends.[3] TWAIL endeavours to move past the perception that the third-world exists merely as a receptive sphere; in acknowledging the agency of post-colonial subjects, TWAIL recognizes the fact that these states also exist as sites of production of knowledge. By not accommodating these differential standpoints in their epistemological approaches to the development of international law, dominant voices in international legal scholarship tend to (inadvertently?) preserve the legacies of colonialism and imperialism.[4]

Salvador Allende, at the third session of the UN Conference on Trade and Development, made certain remarks which contextualized the role played by third-world countries in the international economic and trade order.[5] He reiterated the need for transformation of the world order from one that is dominated largely by capitalist, neo-liberal imperatives, to one that is more inclusive of the needs of underrepresented nations. The Bretton Woods Conference of 1944, which resulted in the formation of the World Bank and the International Monetary Fund

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[1] Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT. COMMUNITY LAW REV. 355, 357-358 (2008).

[2] RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM 22 (1st ed. Routledge-Cavendish 2005).

[3] 94 MAKAU MUTUA AND ANTONY ANGHIE, PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 31 (Cambridge University Press 2000).

[4] James Thuro Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography* 26, 3 TRADE L. & DEV., 32 (2011).

[5] Tricontinental: Institute for Social Research, *The Coup Against the Third World: Chile, 1973*, TRICONTINENTAL (Sept. 10, 2023), https://thetricontinental.org/dossier-68-the-coup-against-the-third-world-chile-1973/.

(IMF), did not promote substantial participation from third-world countries. Systems of trade were therefore designed in a manner that favoured Western countries. Developing countries sought foreign investment- not for the purposes of capital investment, but so that they could repay their debts to developed nations. Allende stated that developing countries incurred these debts as a consequence of operating within a trade and investment system that disregarded their economic needs; additionally, the exploitation of natural resources within third-world countries, and their systemic exclusion from international scientific collaborations furthered their marginalization in the global economy.[6] These statements continue to resonate strongly even in the present milieu. While imperialism previously placed more emphasis on states and the right to statehood, present forms manifest through information technology and processes of capital.[7] In a world that is becoming increasingly globalized, the significance of international flows of capital cannot be understated. The role played by each country in the international investment regime determines the extent to which it can reaffirm its sovereignty on an international scale and also, more often than not, its ability to exercise true autonomy in constructing its internal policies and regulations. By utilizing TWAIL as a frame of reference in analysing the international investment law regime, this paper attempts a critique of one of the most fundamental bases of investment law- BITs- and the manner in which they are implemented and protected through investment arbitration.

Reinscription of Asymmetries Through Bilateral Investment Treaties

Bilateral investment treaties (BITs) are agreements between two nations which govern the rights and obligations of both parties involved vis-à-vis investments made by foreign investors in the host state. BITs are designed with the primary aim of equipping investors and their investments with adequate legal protection in foreign countries; in furtherance of the same, BITs contain clauses such as the most favoured nation (MFN) clause, and also espouse standards such as fair and equitable treatment (FET). This section will attempt to illustrate how BITs are premised upon an understanding of the law which is not in consonance with pragmatic considerations relating to human rights, environmental protections, and the sovereignty of host states- an issue that is particularly exacerbated in the cases of developing countries acting as host states.

Dispute resolution clauses are another integral feature of BITs, through which foreign investors can enforce the protections available to them under these treaties. These dispute resolution clauses act as an avenue for foreign investors to raise disputes before private international tribunals without recourse to domestic courts of the host state. While in a formalistic manner states are positioned upon a level playing field, the practicalities of investment arbitration reveal procedural biases which favour developed countries. ICSID has already come under criticism for its lack of substantive equality- the following paragraphs attempt to show how investment arbitration is based upon a misguided understanding of the dynamics affected international investment.

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[6] Tricontinental, supra note 5.

[7] KAPUR, *supra* note 2, at 22.

Mutua speaks of the dangers of universalism in the context of human rights law.[8] By positing that certain norms and values are universal, bodies of law are able to universalize their implementation through the development of legal principles and systems. In doing so, the law often turns a blind eye to multicultural perspectives and instead actively encourages political and cultural homogenization. For instance, in the case of *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II),*[9] the Permanent Court of Arbitration utilized the Ecuador-US Bilateral Investment Treaty to exempt Chevron from liability when they had caused extensive environmental damage to the Ecuadorian Amazon. Chevron exploited the lack of regulatory measures and appropriate standards for business compliances in Ecuador by directly discharging toxic waste into the Amazon rainforest- an option that did not exist for Chevron's counterpart in the US, as it had more stringent mechanisms in place to regulate such activities.[10] The international investment corpus and its assumption of equal sovereignty is one that leaves little scope for developing countries to truly level the playing field; "'sovereignty', choice and 'voluntariness' mean nothing, but collapse into a singular alternative, i.e. entering and sustaining within a certain investment regime, however unjust or unfair."[11] In the case of *Chevron*, the invocation of an agreement between Ecuador and Texaco exempting the latter from liability for damages- as well as application of the BIT- ensured that the Texaco functioned on a playing field that was levelled to its favour. Additionally, the complexity of legal creations such as separate legal personality and multi-level subsidiary formations further entrench the immunity of multi-national corporations from legal consequences.[12]

Hegemony occurs not only through the assertion of force, but also through the consensual subordination of people who were formerly dominated.[13] In the context of international investment law, this would imply that some countries- although ostensibly equipped with sovereign powers just as much as their peers- would be compelled to submit to measures that they may not be ideal for them. On the other hand, the international investment law corpus also enables developed countries to continue exerting their influence by offering them avenues through which they can transpose political preference into a legal language. Underneath a veil of legal technicality, these preferences abet the manipulation of legal rules and mechanisms by developed countries.

In *White Industries v. The Republic of India,*[14] provisions from the India-Kuwait BIT were invoked using the most favoured nation (MFN) clause in the India-Australia BIT. Under the India-Kuwait BIT, Article 4(5) requires India to "provide effective means of asserting claims

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[8] MAKAU MUTUA, *The Complexity of Universalism in Human Rights* in HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 51-64 (András Sajó ed., 2004).
[9] Chevron Corporation and Texaco Petroleum Corporation v Ecuador (II), PCA Case No 2009-23.
[10] Fernanda Frizzo Bragato and Alex Sandro da Silveira Filho, *The Colonial Limits of Transnational Corporations' Accountability*, 2 TWAIL REV. 34, 37 (2021).
[11] Kanad Bagchi, *A BIT of Resistance*, VÖLKERRECHTSBLOG (26 Jan., 2019), https://voelkerrechtsblog.org/a-bit-of-resistance/.
[12] Bragato and Filho, *supra* note 9, at 42.
[13] Mansour Vesali Mahmoud and Hosna Sheikhattar, *A Call for Rethinking International Arbitration: A TWAIL Perspective on Transnationality and Epistemic Community*, LAW AND CRITIQUE 1, 9 (2023).
[14] White Industries Australia Limited v. The Republic of India, UNCITRAL.

and enforcing rights with respect to investments."[15] As a result of its incorporation by means of the MFN clause, this article resulted in India being held liable for its failure to provide justice to White Industries in a timely manner- a period of nine years for the enforcement of an international arbitral award was considered to be an unwarranted delay, and thus in contravention of India's duties to Australia under the BIT. While this reading in of such provisions is in line with the international investment law corpus, it also has the effect of subverting the sanctity of domestic judicial decisions. In a country where the judiciary is overburdened with pending cases (as was acknowledged in the *White Industries* award), the rendering of an award which circumvents the holdings of domestic courts further detracts from public confidence in domestic legal mechanisms. The importation of the impugned clause in this case entails that, despite the existence of extensive impediments in judicial processes, foreign investors are entitled to expect a speedier version of justice that the citizens of India. Such a privileging of foreign entities over citizens of the host state are reflected in the impact of other BITs- as seen in *Chevron*. Though the United Nations Guiding Principles advocate for the incorporation of human rights concerns in the functioning of business enterprises, there has been an inability to enact a more cohesive framework that incentivises foreign investors to follow these principles in an effective manner.

In the Latin American context, Sornarajah describes how Argentina's pursuit of neo-liberal policies after its rejection of the Calvo doctrine (which had been followed for many decades) had proven to be disastrous. Resulting in claims amounting to billions of dollars, the new investment treaty regime also partly perpetuated a vicious cycle which worsened Argentina's economic difficulties.[16] In *CMS Gas Transmission v. Republic of Argentina*,[17] the claimant initiated ICSID arbitration proceedings alleging that there were violations of Argentina's obligations under the US-Argentina BIT. In particular, the claimant argued that there had been a breach of Argentina's duties to abide by the FET standard- caused by an economic crisis affecting the stability and profitability of the claimant's investment in a local subsidiary. While the claimant had also alleged violations of three other clauses, the tribunal held that there had been a violation in the case of two clauses- the FET clause, and an umbrella clause relating to stabilization.

Critiques of the FET standard have placed emphasis on its ambiguity, which lends an unfair advantage to foreign investors by clouding its contours. Furthermore, the interlinkage of the FET standard with the doctrine of legitimate expectations necessitates the application of administrative law. In broadening the scope of administrative law to include international concerns within its ambit, the FET standard posits that the subject-beneficiary of administrative protections (previously citizens) could also include multi-national corporations (MNCs). The international investment corpus thus antagonizes the interests of two important classes: the citizens of the host state which seeks to protect domestic interests through economic policies,

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[15] *Id*.

[16] Muthucumaraswamy Sornarajah, *Mutations of Neo-Liberalism in International Investment Law*, 3(1) TRADE L. & DEV. 203, 216-217 (2011).

[17] White Industries Australia Limited v. The Republic of India, UNCITRAL.

and foreign investors who are often MNCs possessing significant power and capital.[18] Such an antagonization thus has a chilling effect on the host state's ability to effectuate regulatory measures for the benefit of its citizens. The ability of a host state to assess and influence the formation of a BIT is rendered largely illogical if it cannot exercise true autonomy in making these decisions.

These unbalanced dynamics and the undercurrents of coercion that they seek to protect through a legalistic veil are also reflected in the functioning of international financial institutions such as the World Bank and the IMF. The capital extended by these institutions to developing countries, in the form of loans, often come with various strings attached. The implications of accepting such loans are manifold- developing countries, in particularly, are made to relinquish part of their autonomy over economic and regulatory policymaking.[19] While it would be misguided to claim that BITs, in all cases, produce a chilling regulatory effect, there have been many instances where developing countries have refrained from maintaining a strong regulatory environment due to the apprehension of having an ISDS claim brought against them.[20] Cases like *Phillip Morris v. Oriental Republic of Uruguay*[21] illustrate that, in some instances, developing countries can be successful in protecting their interests against those of foreign investors from developed countries. However, in adopting a formalistic approach to the application of BITs, investment arbitrations turn a blind eye to the realities of the socio-economic circumstances within which they operate. Presumptions of equal sovereignty and equal bargaining power lead international investment law woefully astray from its obligations towards developing nations who have persistently voiced their concerns about the inequitable treatment meted out to them. Dolzer points out that "the willingness to conclude investment treaties is recognized today as the passport to the global competition for foreign investments."[22] The effect of such treaties which reproduce socio-political inequalities between developed and developing nations, coupled with their interpretation and expansion in international investment arbitrations, thus serves to reinscribe neo-liberalism's centrality in the investment law corpus.[23]

Conclusion

Through the usage of various principles embedded in widely used clauses such as the MFN clause, FET clause, as well as ISDS provisions themselves, the international investment law corpus has proven to be an effective conduit for the maintenance of hegemony over the third world. In order to foster the creation of a milieu which is more reflective of substantive equality (rather than just formal equality), it is imperative for such asymmetries to be acknowledged

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[18] Sornarajah, *supra* note 15, at 224.

[19] Nuria Molina-Gallart and Bhumika Muchhala, *Strings Attached: How the IMF's Economic Conditions Foil Development-Oriented Policies for Loan-Borrowing Countries*, 32 TWN GLOBAL ECONOMY SERIES 1, 1 (2012).

[20] Sam Fowles, *FPC Briefing: How Investment Treaties have a chilling effect on Human Rights*, THE FOREIGN POLICY CENTRE (May 11, 2017), https://fpc.org.uk/wp-content/uploads/2017/05/1803.pdf.

[21] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay).

[22] Rudolph Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 953, 971 (2005).

[23] Sornarajah, *supra* note 15, at 217.

during the negotiation of BITs. ISDS, and other avenues for international investment arbitration, must undergo systemic changes that allow developing countries to truly represent their economic interests at an international level. In dismantling the various presumptions of the international investment corpus, TWAIL has been an indispensable aid in the deconstruction and critique of asymmetries of power between the developed and developing word, as well as the various ways in which these imbalances influence the formation and functioning of the international investment regime. However, its importance must be qualified by the transformation of the global order- with countries such as India and China steadily progressing towards becoming developed countries, their advancements necessitate a reformulation of TWAIL's understanding of the third world. Notwithstanding the fact that colonialism has played a pivotal role in the development of third-world nations, future conceptualizations of TWAIL must also be reflective of the fact that post-colonial states such as India are now transforming into capital-exporting countries, and thus demand a version of TWAIL that is more reflective of class as a cross-cutting difference.