

Critiques of twail perspective and investment law



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CONSTRUCTIVE APPROACH TOWARDS INVESTMENT LAW

1. CHALLENGING VIEWS OF THE THIRD WORLD APPROACHES

The conventional view in western states among international legal scholars is that no comprehensible or distinctive 'Third World Approach' is apparent in international law. While it remains undeniable that certain reoccurring issues trigger the same response from Third World states[1], per scholars the typical view expressed is that 'disparate strands do not weave together a sort of pattern.' [2] Although they are grouped together beneath 'Third World' rubric, it is a constitution of no more than ad hoc responses to discrete issues. The recognition of the Third World approach to any extent can only be categorised as reactive in nature. This is supported by Wolfgang Friedmann who argues that 'any difference in the approach taken by underdeveloped countries could be explained in terms of their lack of economic and political clout.' Likewise, a couple years later the same perspective is argued that instead of challenging international laws fundamental assumptions, the third world scholars are still concerned with the responsiveness of international law focusing in regards to their interest. [3]

Western scholars that are even sympathetic towards Third World approaches express similar views. For instance, Richard Falk has claimed that even explicit anti-Western' works by third world scholars have been in reliance on western approaches in a moderately non-critical manner. Thus, Falk argues that 'the emergence of distinctive modes of thought and analysis failed to accompany the process of decolonization, or even to follow upon it.' [4] Per Falk third world scholars are inclined to 'avoid any ideological imprint' upon

their work, as they want it to work ' scientific in a Western sense.'[5]An analogy is created between third world scholar's characteristics and Soviet scholars. Soviet scholars were ' pragmatically oriented towards enabling Soviet bloc participation in the prevailing debates in Western international law circles.'[6]

TWAIL scholar B. S Chimni supports Falk critique and argues that TWAIL has been stagnant as a critique instead of proposing practical alternatives to the issue. He makes this criticism clear in a passage from his work:

' While international lawyers from the Third World have challenged, often with success, Western perceptions of the history and content of international law and pointed to the inequitable nature of the body of rules bequeathed from the past, they have failed to propose and articulate an alternative approach which is inclusive and internally consistent. In fact, the matter has not received sufficient consideration. It is, therefore, not unusual to see a Third World scholar speaking of rejecting rules which are prejudicial to the interests of developing countries embracing a theory of international law and world order which seeks to justify and protect the status quo and has little to say about the developing world. This eventually leads him to assume positions which strengthen that which he had set out to fight.' [7]

A specific example where this perspective is mainly critiqued is from the failures of the NIEO. It is criticised for lacking breadth and Robert Rothstein claimed that short-sighted stance had been taken hence the reason the regime failed. Rothstein argued that instead of the regime being focused on how to create a clear strategy that will have both western and third world

states mutual interests and ' consensual knowledge and technically sound proposals, the focus was on a strategy of confrontation and a demand for the acceptance pf biased and controversial principles'[8]This shows that the TWAIL view is limited and has no practical alternatives to revolutionise the injustice upon third world states. Rather their methods are to flip the legal system and turn it into a bias third world system, which will not therefore lead to any justice and harmony within international law. This supports both Falk and Chimni claim of TWAIL lacking pragmatism and having a positive impact.

2. TWAIL LIMITATION AND MORE CONSTRUCTIVE APPROACH TO INVESTMENT REGIME IN INTERNATIONAL LAW

Even though the TWAIL critiques has been significant, nonetheless it has been flagged up to have several blind spots.[9]One of the fundamental blind spots flagged is the critique to suggest practical ways to remedy the deficiencies within international law (especially international economic governance). Although jurists do highlight theoretical arguments, it fails to suggest constructive solutions in improving the injustice upon third world states in the international system. Therefore, it is necessary to provide a constructive solution that will also take the third world states interests into account.

The desires of the TWAIL perspective should go beyond being a mere instrument of ' system criticism.'[10]It should have the ambition to form a constructive engagement; therefore, it should develop and lay out ideas that could be expressed in practical terms to improve the governance of international investment and economic law. A key issue developing <https://assignbuster.com/critiques-of-twail-perspective-and-investment-law/>

countries are faced with in international trade has been competitiveness of liberalization.[11]Refers to trade of western countries on preferential terms (PTs) with only chosen developing countries, which is incongruent with GATTs principle of only trading with your most favoured nation. Competitive liberalization is argued to have led to economic success to states such as South Korea (KORUS) and Mexico (NAFTA)[12]who benefited from regional trade agreements (RTA). But this was at the expense of neighbouring states who stayed relatively underdeveloped.[13]Evidentially competitive liberalization has a detrimental impact on other developing states ability to find markets that would give them a competitive and comparative advantage. In this sense TWAIL could be more effective and remedy this issue by ' spearheading the creation of geographically wider RTAs encompassing regional economic blocs in different parts of the developing world.'[14]An example of the possible RTA could be between Economic Community of West African States and Mercado Común del Sur which would be valuable to both regional blocs. Thus, West African states will be able to supply the cotton, which is in demand in South America, due to the growth of the textile industry, while South Americans vice versa would have a market for electronic goods which is becoming essential in West Africa. This would be an approach that could be implemented to enhance the participation of developing states in international trade.

TWAILs concern in the international investment regime is primarily related to the inequality of negotiations within arbitration treaty and International Institutional Agreements. Per TWAIL a practical approach could be implemented on IIAs, for instance with regards to BITs, developing states can

create their own models. An example of this is apparent from the SADC (Southern African Development Community) BIT model. SADC BIT model consist of the same characteristics of a traditional BIT, just with the addition of striving more towards an equitable, fair and just participation within the foreign investment regime for third world states. The model is a representation of distinct efforts to enhance ' a sustainable development dimension of future BITs.'[15]

Such engagement with the foreign investment regime would create the welcoming environment that developing countries need to enhance participation in the foreign investment regime. Moreover, another unproductive approach from TWAIL within international investment law is the resistance towards investment treaty arbitration. Again, here there is a failure to suggest a constructive approach to rectify this problem that the third world are subject to. As apparent in the case of OCCIDENTAL PETROLEUM CORPORATION v REPUBLIC OF ECUADOR, the withdrawal of Ecuador due to its disregard to the unjust manners of the ICSID did not prevent the ICSID from awarding the largest damages to the investors which was a rough total sum of \$1. 7 billion plus 6% interest.[16]Consequently a more pragmatic approach for developing states is to implement their own arbitration centres equivalent to the AALCC's regional arbitration centres establishment within the African- Asian region.[17]But this should be done with a sustained participation within the current system. The establishments of these centres within the Afro-Asian region has been advantageous as it alleviates concerns of developing states in regards to participating in international arbitration. Besides that, it will promote better engagement in

the foreign investment regime and facilitate more participation of developing states in the current system.

3. CONCLUSION

This chapter shows that there are flaws within the TWAIL theory and it is a critique perspective rather than a constructive one. Perhaps there are aspects of the investment regime that bring injustice within international law but constructive alternatives methods must be suggested to improve the system. This is where the TWAIL theory is limited and other perspectives such as first world scholars should be analysed before a conclusion can be made regarding the international law being unjust.

- CONCLUSION

This thesis has discussed the accuracy of the TWAIL theory that investment regime in international law is used as another tool to support the domination of the Western world. This commenced by dating the emergence of TWAIL back to decolonisation era and ever since the aim of the theory has been to 'redirect international law's focus to the plight of developing countries.' [18] TWAIL focuses on the significant paradigm shift from the historical relevance of the NEC and NIEO approaches to the regime bias. The 'regime bias' theory has been 'emblematic' of the entire system of international law and is even visible in International Institutions such as Arbitration. 'The regime bias critique illustrates developing countries' sceptical attitudes towards the international economic governance' which includes both international trade and foreign investment. This is because, as Shalakany argues s the regime bias in international law empowers the

investors, who come off as winners within the system at the expense of ignoring the Third Worlds interest.

TWAIL argues that the international institutions increases the ideological gap to ensure that there is unequal participation in the system. Corporations being in control of resources in host states already provides constraints on a step towards a just investment regime. This is because it maintains colonial attitude which makes the Third World states passive rather than active participant in the investment regime. Likewise, the International Functioning Institutions have also helped to maintain the dominance of Western States in International Investment by promoting globalization, and making it a mandatory requirement to for Third World States to adopt privatization programmes to create more favourable investment climates for the investors.[19]

Nonetheless a fundamental ' blind spot'[20]of TWAIL critiques is that it fails to offer avenues for a constructive engagement of developing countries in the investment regime in international law. ' TWAIL's shortcomings have highlighted the need for a pragmatic solution instead of just being a mere critique'[21]tool of the international law regime. It has been criticised for being very repetitive and staying stagnant on the idea of I law responding to Third World interests instead of challenging the fundamental issues in international law. A more pragmatic approach for developing countries in the investment regime is seeking to alleviate their concerns and enhance their participation in the system. This would pave the way for a more constructive engagement of developing countries in the investment regime of international law and will also prevent the domination of the Western States,

as the lack of participation is part of what has enabled the First World to be so powerful.

I can conclude from this thesis that the investment regime in international law is subtle in the way it suppresses the developing countries and maintains the interests of the developed countries. Therefore, it makes it challenging to argue that the whole regime is unjust. However, although the TWAIL approach is 'rhetoric'[22] in the nature of its arguments, I agree with the view that part of the key issues that supports the domination of Western States is the amount control they have in the key international institutions; for example, US being the largest shareholder in the World Bank. To constructively solve this issue, it could be argued that the starting point should be reconstructing the rules and process making of these institutions, in order for there to be a fair just and balanced participation between the less developed and developed states. There should then consist of a body who makes checks and balances to ensure that no states acts ultra vires. This would lead to an international law that would reject bias and be based on mutual interests.

[1]Karin Mickelson ' Rhetoric and Rage: Third World Voices in International Legal Discourse'16 Wis. Int'l L. J. 353 1997-1998 p. 353

[2]Karin Mickelson ' Rhetoric and Rage: Third World Voices in International Legal Discourse' 16 Wis. Int'l L. J. 353 1997-1998. p. 353

[3]Patricia Buirette-Maurau, La Participation Du Tiers-Monde , A L'Elaboration Du Droit International (1983)199-202

[4]Richard Falk, *Preface* to B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 9, (1993). p. 9

[5]Richard Falk, *Preface* to B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 9, (1993) p. 9

[6]Richard Falk, *Preface* to B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 9, (1993) p. 9

[7]Richard Falk, *Preface* to B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 9, (1993) p19

[8]Robert L. Rothstein, *Limits and Possibilities of Weak Theory: Interpreting North-South*, 44 *J. OF INT'L AFFAIRS* 159, (1990). p. 174

[9]John D. Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (Mississippi College School of Law Legal Studies Research Paper No. 7/2014, 2014) pg. 18.

[10]Antonius R Hippolyte 'Correcting TWAILS' Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance. p. 15

[11]C. Fred Bergsten Competitive 'Liberalization and Global Free Trade: A Vision for the Early 21st Century' (Peterson Institute: Institute for International Economics. Working Paper 15/1996, 1996)

[12]KORUS trade was an agreement between South Korea and US. NAFTA was a trade agreement between Mexico and North America.

[13]Antonius R Hippolyte ' Correcting TWAALS' Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance. p. 16

[14]Antonius R Hippolyte ' Correcting TWAALS' Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance. p. 16

[15]Antonius R Hippolyte ' Correcting TWAALS' Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance. p. 16

[16]2012 ICSID Case No. ARB/06/11 at paras 824-25.

[17]R Rajesh Babu, ' International Commercial Arbitration and the Developing Countries' (2006) 4 AALCO Quarterly Bulletin 386, 398.

[18]Antonius R Hippolyte ' Correcting TWAALS' Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance. p. 18

[19]Antony Anghie, ' Time Present and Time Past: Globalization, International Financial Institutions and the Third World'. p. 256

[20]Antonius R Hippolyte ' Correcting TWAALS' Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance. p. 18

[21]Antonius R Hippolyte ' Correcting TWAALS' Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance. p. 18

[22]Karin Mickelson, " Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16 Wis. Int'l L. J.