TWAIL’s Blind Spots Concerning International Investment Law

By:

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Third world approaches to international law (TWAIL) is part of the critical branch of international legal scholarship and an intellectual and political movement. It is not easy to engage with TWAIL because of its heterogeneity. TWAIL serves as a kind of umbrella category that includes different theoretical and often conflicting ideological traditions. However, at the cost of oversimplification, it may be argued that TWAIL represents an endeavour to comprehend the history, structure, and process of international law from the perspective of third world countries that includes both third world governments and third world people. TWAIL-ers look at international law as not being neutral law formed between sovereign equals but as law imposed by the first world on the third world to further the imperial project.

In this piece, I contest some of the TWAIL views on international investment law (IIL) particularly reflecting on the recent post by Claiton Fyock. Fyock combines TWAIL approaches with Marxist approaches to question what he describes as

the “the political economy of IIL”, which is “couched almost entirely in the rational, market-driven economics of contemporary capitalism”.

Fyock’s vocabulary and methodology appears to be heavily influenced by B S Chimni, a key member of the TWAIL movement. Chimni also combines TWAIL with Marxism to critique the international legal order. Chimni argues that since the end of the Cold War, international law has been shaped by the transnational capitalist class (TCC) to realize its own interests as universal interests that collide with the interests of the subaltern class.

Chimni describes BITs and international investment laws as instruments to achieve the objectives of global imperialism. Borrowing from David Harvey, Chimni argues that BITs are being used by global capitalism for “accumulation by dispossession” at the expense of the subaltern class and ignoring societal and environmental concerns. Fyock makes the same point when he argues that the purpose behind foreign investment is the “extraction of higher levels of surplus value”.

I wish to make the following points about TWAIL’s grand narratives targeting BITs and investor State dispute settlement (ISDS). First, these narratives stem from a deep suspicion about global capitalism and free markets. Since TWAIL’s principal opponents are global capitalism and western hegemony, BITs and ISDS are critiqued because they are seen as instruments to propagate global capitalism. Given the strong ideological underpinnings of TWAIL, this project will continue unabated even if all BITs were terminated.

Second, TWAIL-ers often critique BITs and ISDS in general and broad terms, thus presenting over-simplified analysis. Full attention is not paid to the actual working of BITs, ISDS, case laws, and empirical evidence. For example, M. Sornarajah, a leading TWAIL-er and a critic of the IIL regime, argues that ISDS tribunals award exorbitant sums as damages to foreign investors. However, he does not provide any empirical evidence to back this claim.

This account fits very well in the larger TWAIL narrative of how capitalist modes of production are fleecing the subalterns though the empirical evidence does not quite support this claim. Between 1987-2017, there have been only five

instances where ISDS tribunals awarded damages exceeding $1 billion. In half of the cases the damages awarded were below $16 million, which is not exorbitant.

Likewise, TWAIL-ers cheery pick ISDS claims to show that tribunals do not recognise the right of developing countries to regulate in public interest. While no one denies that there have been bad ISDS awards, a fact that TWAIL scholars do not often report is that there have been many instances where ISDS tribunals have upheld the host State's right to regulate in public interest.

An example of oversimplification is Fyock's argument on 'economic development'. He uses the notion of 'economic development', adopted by ICSID tribunals as one the four criterions to define 'investment' in IIL, to show how capitalist institutions such as ICSID create a discourse on development to justify capitalist modes of production. However, this is overgeneralisation because there are several ICSID tribunals that have not accepted 'economic development' as a criterion to define investment. Thus, this understanding is not universal, as Fyock seems to suggest. Also, there is economic literature showing positive links between FDI and economic growth, though some scholars contest this claim. So, the narrative on 'development' is not something that ICSID tribunals have invented out of thin air.

Third, TWAIL-ers often present a picture that the neoliberal economic policies were thrust by the first world on an unwilling third world in early 1990s, with signing of BITs being a part of it. While this may be true for some countries, it cannot be called universal. For example, India did not sign any BIT till 1994 because of its belief in socialistic policies since India's independence in 1947. However, post 1990, India decided to liberalise its economy not just as a consequence of conditions imposed by the International Monetary Fund (IMF) but also because of an internal conviction that India's socialistic economic policies had not worked. Thus, India willingly accepted the international law on foreign investment that it had opposed in the 1960s and 1970s.

Fourth, TWAIL critique of IIL has not evolved. It sounds the same as two decades back whereas the world has changed quite a bit. The overuse of the 'developed- developing' country or 'North-South' framework has meant that

TWAIL scholars have not been able to account for the countervailing forces acting against the IIL regime due to the changing global realities. There is a geographical economic rebalancing of the world occurring with the share of North America, Western Europe and Japan in global GDP falling due to the rise of China, India, Vietnam, Thailand, Indonesia, and other Asian countries. As, Branko Milanovic argues, in 1970, the West produced 56% of the world output and Asia (including Japan) only 19%. Today, these numbers are 37% and 43%. Due to this changing global dynamic, several developed countries are revisiting their own stand on the IIL regime. The US 2012 Model BIT, which provides a better textual balance between investment protection and state regulation, is quite different from the 1984 Model BIT.

Fifth, the tendency of TWAIL scholars to show the ISDS regime as exploitative or as an example of 'regime bias' conceals an important fact that there are several instances where ISDS tribunals have interpreted norms in a manner supportive of host State's right to regulate. This narrative also hides an important fact that third world states are quite capable of abusing their public power to the detriment of hapless foreign investors. In my book, I argue that a large number of ISDS claims brought against India is due to India abusing its public power to regulate and not because India adopted measures to protect public health, environment, or other such community interests.

In sum, the argument is not that the IIL regime has no problems. There are several problems ranging from vague and broad treaty provisions to lack of transparency in the ISDS system. The 'regime bias' critique in terms of norm interpretation and adjudication, made by TWAIL-ers like James Gathii, and other criticisms offered by TWAIL scholars, requires serious consideration. However, painting the regime in a one-sided manner employing the language of imperialism dampens the scope for a constructive engagement. It dilutes the emancipatory potential of the IIL regime for developing countries. Moreover, radical solutions like terminating BITs and pulling out of arbitral institutions, as proposed by Sornarajah, are not quite helpful. TWAIL needs to have a constructive approach towards reforming the IIL regime rather than merely using it for the critique of capitalism, neoliberalism and western hegemony. Several reform proposals have already been made to fix the system, which TWAIL scholars need to engage with.

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