A TWAIL Perspective on the Challenges Associated with Upgrading International Arbitration in Developing Countries like Pakistan

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Introduction

Arbitration is instrumental to domestic and international transactions in the modern world and has dramatically changed how dispute resolution can function. One of the main aims behind improving legislation on arbitration in developing nations, such as Pakistan, and harmonising it with the best international practices, is the need to attract foreign direct investment ("FDI"). This is because foreign companies bringing investment to developing countries rely heavily on the arbitration mechanism to ensure effective dispute resolution. Thus, it is essential to ensure that legislation regarding arbitration is conducive to the successful functioning of local and foreign companies. However, cementing sustainable and efficient arbitration policies comes forth as an issue of complexity for multiple reasons. While keeping both commercial and investor-state arbitration in mind, this article attempts to shed light on the challenges faced by developing nations. This article first highlights the Third World Approaches to International Law ("TWAIL") and arbitration, alongside the inherent biases against developing nations in the international arena. Second, it underlines the inability of developing nations to balance the needs of the investor and the third-party (often the public) due to the government's socio-political restraints and affiliations. Third, this work examines the legal framework regarding arbitration in Pakistan and concludes with the observation that while the country has developed substantial legislation regarding international arbitration, there is still a long way to go until its laws are aligned with international standards.

TWAIL and International Arbitration

Developing countries need FDI based on transnational agreements and contracts to promote economic development. These are often governed by international laws biased towards the Global North or developed countries. However, FDI is crucial

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to the economic development of developing nations. These inward investments for the exploitation of developing countries rich in minerals and raw materials take the form of loans, subsidiaries, power projects, mergers and acquisitions, and joint ventures.[1] To resolve disputes arising from such trans-national agreements, developed countries prefer international arbitration over the local legal systems of developing countries. This is because, compared to the local legal systems, international arbitration is assumed to be a more neutral and updated dispute resolution instrument.[2] Consequently, developing countries rely heavily on international arbitration to attract FDI and boost their economy. However, international arbitration is subject to scrutiny by TWAIL scholars. They contend that TWAIL is a reaction to decolonisation and the end of direct British colonial rule over the colonies.[3] It is both proactive and reactive in nature.[4] TWAIL is proactive as it aims for the "internal transformation" of circumstances in developing countries, but it is reactive as well because it views international law as an imperial project.[5]

TWAIL scholars also argue that international arbitration is not neutral rather, it exhibits a "regime bias" towards developed countries. Laws, such as commercial and anti-trust laws, in the First World have evolved over time and are updated to meet the market's novel demands. These laws form the basis of international arbitration and provide developed countries with a way to mould national laws in a manner conducive to the realm of international litigation. This phenomenon is referred to as "regime bias." Regime bias involves the organisation of various regimes of international law that are imperialistic and solipsist in nature.[6] Such that each regime has its own biases, depending on the area of international law it aims to regulate. Each regime has a distinct set of vocabularies and rules depending upon its structural prejudice towards underlying values like

[1] Antonius Rickson Hippolyte, 'Third World Perspectives on International Economic Governance: A Theoretical Elucidation of the 'Regime Bias' Model in Investor-State Arbitration and its Negative Impact on the Economies of Third World States' (2012) SSRN Electronic Journal 1 <https://ssrn.com/abstract=2080958> accessed 11 May 2022.
[2] Ibid.
[3] Makau Mutua and Antony Anghie, 'What is TWAIL?' (2000) 94 American Society of International Law 31 <http://www.jstor.org/stable/25659346> accessed 2 May 2022.
[4] Ibid.
[5] Ibid.
[6] Alexander Somek, A Bureaucratic Turn?' (2011) 22(2) The European Journal of International Law 345 <https://doi.org/10.1093/ejil/chr028 > accessed 17 Apr 2022.

"international trade, investments, human rights or bringing the wrongdoers to justice."[7] This results in some regimes taking precedence over others, thus creating an international legal hierarchy, which also influences the arbitration proceedings and legal decisions, putting the economically weaker or less influential countries at a disadvantage. Therefore, TWAIL scholarship argues that international arbitration serves as a key to promoting the interests of First World countries. It mirrors "continental legal thought shaped during the imperial period of European expansion,"[8] and legitimises the concentration of power, preservation, and expansion of private property rights in favour of the Global North. So, the ambitions of developed countries are imposed on developing countries in the form of international laws. The hegemony created through the recognised system of arbitration reproduces imperial control.[9] This is because investor-state arbitration reflects a colonial and post-colonial outlook of the developed countries, with the abuse of natural resources of developing countries at its focal point.[10] By analysing the techniques and tools utilised by global powers, TWAIL scholars have observed the parallel between colonial and contemporary conventional international legal practices.

Additionally, TWAIL scholars have recorded that the laws and legal structure created by international relations sustain global inequality.[11] Moreover, laws governing global trade, commerce, and investments are formulated and arbitrated in such a way that a "regime bias" is fostered, promoting the benefit of international capital and giving developed countries a greater advantage.[12] Thus, the international commerce regime marginalises the weaker members of the international trading community through its regime bias.

It is further argued that international law turns a blind eye to the issues that concern developing nations but are not in the interests of the First World. For example, research has unveiled international law's implicit biases in civil and

[7] Ibid 349.
[8] Mohsen Al Attar and Rosalie Miller, 'Towards an Emancipatory International Law: The Bolivarian Reconstruction' (Third World Quarterly 2010) <http://www.jstor.org/stable/27867929> accessed 11 May 2022.
[9] Somek (n 6).
[10] Hippolyte (n 1).
[11] Ibid.
[12] Ibid.

criminal court proceedings and discrimination in employment and immigration proceedings in the US.[13] Regime affiliation is not only detrimental to the economies of developing nations but also creates hostility in these nations towards the First World. According to TWAIL scholars, international law implicitly disseminates prejudice against developing countries and contradicts its purpose. For instance, while international law aims at fostering values of self-determination and state sovereignty, it gives little heed when the actions of international arbitration, i.e., "regime bias," constantly violate international legal principles. Hence, TWAIL scholars attempt to confront the tensions between "universality and pluralism, rejection and reform, and the use of law to advance elite interests and its use to respond to social problems such as poverty, racism, and corruption."[14]

In addition, regime bias indicates how the rules of international trade and commerce can be produced, applied, and adjudged to damage the economies of underdeveloped countries. It examines the internal procedures utilised to interpret laws applied in arbitration.[15] In this context, Van Harten examines regime bias and argues, "international law is not a neutral and objective set of rules, but an instrument employed in a context of power relations among Western and Third World States."[16] He further builds on the idea by arguing that international arbitration reflects an underlying bias against the previously colonised countries by "otherising" them in the international society. TWAIL scholars, therefore, express their doubts regarding the effectiveness of international law and call for restructuring the internally biased international arbitration through "legal paganism." Legal paganism refers to the idea that the restructuring of the current biased regime and legal order can be done by actively engaging developing countries through the revision of international economic relations.[17] Moreover, international laws, especially relating to commercial transactions, being developed and inspired by the West, have an institutionalised affiliation with developed states.

[13] Machiko Kanetake, 'Blind Spots in International Law' (2018) 31(2) Leiden Journal of International Law 209 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3111823>.
[14] Van Hatten Gus 'TWAIL and the Dabhol Arbitration' (Comparative Research in Law & Political Economy 2011) <https://core.ac.uk/download/pdf/232618132.pdf> accessed 17 Apr 2022.
[15] James Thuo Gathii, 'Third World Approaches to International Economic Governance' (London: Routledge 2008) <https://doi.org/10.4324/9780203926512> accessed 17 Apr 2022.
[16] Gus (n 14) [137].
[17] James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184 < http://www.ejil.org/pdfs/9/1/1476.pdf> accessed 17 Apr 2022.

Through regime bias, this affiliation determines the application and interpretation of rules in global arbitration and where and how they are applied.[18]

Besides the institutionalised regime bias, developing countries, like Pakistan, are further put at a geographical and jurisdictional disadvantage because the major arbitration centres in the world are concentrated in the Global North. The First World countries bringing in foreign investment find it convenient to settle their disputes in well-known dispute resolution centres, such as the International Criminal Court ("ICC"), the London Court of International Arbitration ("LCIA"), the American Arbitration Association ("AAA"), the Singapore International Arbitration Centre ("SIAC"), and the Swiss Chamber's Arbitration Institution ("SCAI").

These arbitration centres are preferred for their fast proceedings and decision-making, whereas commercial arbitration centres in developing countries struggle with interpreting and applying laws. Furthermore, Paul D. Friedland states that six conditions are analysed while selecting an international arbitration institution:[19] first, the relative pros or cons of any differences among the set of institutional rules;[20] second, the relative skills and preferences of the organisations in relation to the appointments of arbitrators;[21] third, the relative reputation of the centre in the enforcement of arbitral awards;[22] fourth, the "relative experience and ability of the institutions' administrators" to value case administration;[23] fifth, the administrative and arbitrator cost;[24] and sixth, the geographical location of the centres.[25] The major dispute resolution centres in the Global North check all the conditions and are preferred by major investors for dispute settlement. This naturally puts the centres in developing countries at a comparative disadvantage.

[18] Hippolyte (n 1).
[19] Paul D. Friedland, *Arbitration Clauses for International Contracts* (Juris Publishing 2007) <https://arbitrationlaw.com/library/choosing-arbitral-institution-chapter-4-arbitration-clauses-international-contracts-2nd > accessed 17 Apr 2022.
[20] Ibid 43.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.

Claiton Fyock conducted a Marxist analysis of the TWAIL approach to shed more light on the issue and highlighted the political economy of international investment law. He argues that "international investment law is couched almost entirely in the rational, market-driven economics of contemporary capitalism."[26] Moreover, scholars argue that the idea of "economic development" employed as the goal of international arbitration is restrictive.[27] For example, the International Centre for Settlement of Investment Disputes ("ICSID"), the leading dispute resolution body for investor-state arbitration, does not have any reliable definition of "investment," which is a determining factor for most arbitration agreements and jurisdictions. To overcome this gap, the regime undertakes controversial tests like the "Salini test," which determines economic development and investment based on the "contribution of assets, risks, duration, and a contribution to the host state economy."[28] Moreover, there are no clear criteria for what "contribution to the host state economy" means. This supports the Marxist approach to international law, which states that foreign investors do not invest in the Third World host state out of its "goodwill" or to aid in economic development.[29] Rather, the goal behind foreign investment is the withdrawal of increased levels of surplus value.[30] Thus, First World states employ the tool of international law to pursue this goal.

The Dilemma of Balancing Interests

Often, developing countries give more importance to economic gains while overlooking the interests of third parties during investor-state arbitration. However, if arbitration is to be sustainable in a country, it must satisfy the interests of all parties.[31] There have been many instances whereby large-scale investments in

[26]Claiton Fyock, 'International Investment Law and Constraining Narratives of 'Development: 'Economic Development' in the Definition of Investment.' (Afronomics Law 2020) <https://www.afronomicslaw.org/2020/02/23/international-investment-law-and-constraining-narratives-of-development-economic-development-in-the-definition-of-investment/ > accessed 11 May 2022.

[27] Alex Grabowski 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15(1) Chicago Journal of International Law 287 <https://chicagounbound.uchicago.edu/cjil/vol15/iss1/13 > accessed 11 May 2022.

[28] Ibid.

[29]Fyock (n 26).

[30] Ibid.

[31] Lorenzo Cotula, and Mika Schröder, 'Community Perspectives in Investor-State Arbitration' (International Institute for Environment and Development 2022) <https://pubs.iied.org/sites/default/files/pdfs/migrate/12603IIED.pdf> accessed 17 Apr 2022.

industries such as mining, petroleum, and agriculture have yielded widespread implications on the interests and rights of local communities, such as environmental degradation or the destruction of important cultural sites. Thus, the major question that arises through such instances is whether investor-state arbitration is conducive to the "proper consideration of the rights, interests, and perspectives of others who are affected by, but not party to, the dispute."[32]

It must be recognised that it is the state's responsibility to ensure that the nation's best interests are aligned with investments. This can be done, for example, by setting strict environmental requirements which need to be fulfilled or by enforcing appropriate taxes. The case of *Pac Rim Cayman LLC v. Republic of El Salvador* identifies certain issues that arise when arbitration tribunals have considered community perspectives in the past in other jurisdictions.[33] It stipulates that "community perspectives" in arbitration deals tend to receive less attention when awards are given.[34] This is because procedures for third parties to make submissions to the tribunals are not efficient in ensuring that the local community participates effectively. It also reflects a rift between the legislative approach of the tribunal and the socio-political and economic reality. Thus, such a situation can create conflicts between balancing the demands of the community and satisfying the investors.[35] Therefore, it brings to light the need for more adequate institutional arrangements to manoeuvre and operate today's often "complex and multi-faceted investment disputes."[36]

Another major concern is the contradiction between the priorities of the government and the interests of the local communities. Often, the government's viewpoint may differ from that of the community. State action violating the rights of the people may be the main cause of the dispute, for example, in cases where authorities approve investment without consultation from the communities that reside in that area.[37] Politics can also be complexly woven into how such deals are made. Coupled with this, capacity constraints lead governments to prioritise their economic gains at the expense of third parties. To further understand the nature of

[32] Ibid 1.
[33] Pac Rim Cayman LCCLLC v. Republic of El Salvador (ICSID Case ARB/09/12).
[34] Cotula (n 31).
[35] Ibid.
[36] Ibid.
[37] Ibid.

issues that affect the harmonious implementation of arbitration that aligns with community values, a reference may be drawn to *William Ralph Clayton v. Government of Canada*.[38] In this case, the government denied approving a project, and an arbitration claim seeking damages was filed by the investor. The tribunal reflected that "domestic legislation did not explicitly provide for the core community values standard, this standard was unclear and open to different interpretations, and the investor had not been given advance notice that this standard would be applied."[39] Given the context in which Pakistan exists, it is evident that it suffers from the same inadequacies. The government is reluctant to restrict investors as it adversely affects foreign investments.

Consequently, the above leads to leniency on labour and environmental laws, increasing exploitation. For example, the Bhopal disaster in India and the Rana Plaza incident in Pakistan occurred because the government had allowed multinational companies to operate with low security and maintenance, leading to incidents of mass destruction where hundreds of people lost their lives.[40] These instances reflect a lack of government attention and contradictory priorities in arbitral proceedings. Thus, as investor-state arbitration increases, countries like Pakistan must balance the rights of those living in the concerned areas.

Current Legal Framework in Pakistan

In the subcontinent, it can be argued that arbitration in different forms has a rich and ancient heritage, stemming from the system of *panchayat*, which flourished even with the advent of British colonial rule.[41] However, in its modern version, arbitration draws its roots in the Indian Arbitration Act of 1899. The current legal framework in Pakistan revolves around two main pieces of legislation: The Arbitration Act 1940 ("Arbitration Act") and the Recognition and Enforcement

[38] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada (PCA Case 2009–04).
[39] Cotula (n 31) 26.
[40] Annie Banerji, 'Factbox: Grief and Neglect - 10 Factory Disasters in South Asia' (Reuters 2019) <https://www.reuters.com/article/us-india-fire-workers-factbox-idUSKBN1YE1PT > accessed 12 May 2022.
[41] Shazia Bilal, 'Legal Framework of International Commercial Arbitration in Pakistan' (Master's Thesis University of Oslo) <https://www.duo.uio.no/bitstream/handle/10852/39962/Final-thesis-Bilal--Shazia.pdf?sequence=1&isAllowed> accessed 12 May 2022.

(Arbitration Agreements and Foreign Arbitral Awards) Act 2011 ("Foreign Awards Act").[42] Although it may be argued that the Arbitration Act lacks consistency with other developed jurisdictions, it is still a well-established legislation on commercial matters. It provides for arbitration with and without the intervention of the court. It defines an arbitration agreement as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."[43] It grants significant freedom to the parties as they can choose the arbitrator(s), procedural rules to be followed, interim awards, and any other flexibilities stipulated by the two domestic or international parties. However, as per Section 30 of the Arbitration Act, if the umpire or arbitrator either misconducts the proceedings or presents an award after the court has issued an order, the same can be set aside.[44] Moreover, it can also be set aside if the time for the issuance of the award has expired because of the pendency of legal proceedings or improper procurement of the award. For example, the award can be challenged where the arbitrators lack jurisdiction or where the irregularity in evidence leads to substantial injustice.

Moreover, being a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("Convention"), it was important for Pakistan to harmonise its laws with international best practices.[45] Thus, the Convention has become part of the Pakistani legal system through the Foreign Awards Act and has been enforceable since July 15, 2011. A party against whom legal proceedings have been initiated in a foreign agreement may apply to the court under the Foreign Awards Act to refer the matter to arbitration. This would be done unless the court finds that the agreement was "null and void, inoperative or incapable of being performed in accordance with the Convention."[46] This was a monumental step towards entrenching the principles of arbitration in the Pakistani legal system. Before this, when legal proceedings were initiated against a party to a foreign arbitration, the court had complete discretion to refuse or allow the arbitration proceedings. The courts were barred from judicial

[42] RIAA, 'A Study of the Arbitration Law Regime in Pakistan' (*RIAA*, 2015) <https://www.riaabarkergillette.com/usa/wp-content/uploads/Insight-Article-A-Study-of-the-Arbitration-Law-in-Pakistan.pdf> accessed 17 Apr 2022.
[43] Section 2(a) of the Arbitration Act, 1940.
[44] RIAA (n 42).
[45] Bilal (n 41).
[46] RIAA (n 42).

intervention and refusing the "recognition and enforcement of arbitration awards" under Sections 6 and 7 of the Foreign Awards Act. However, this was conditional on the award or agreement not contradicting the premises set in Article V of the Convention, which states that an award may be refused "at the request of the party against whom it is invoked." Additionally, in *Abdullah v. CNAN Group SPA*, the High Court of Sindh held that a foreign award could not be nullified through a civil suit for the reasons stipulated in Article V of the Convention as that can only be taken as a defence by an award debtor to any legal proceedings initiated by the award creditor for enforcement and recognition of the foreign awards, such that it is a shield and not a sword.[47]

Moreover, recent legal advancements have set significant pro-arbitration precedents in Pakistan. For example, in *Lakhra Power Generation Company Limited v. Karadeniz Powership Kaya Bey*,[48] while the Supreme Court declared the main contract void, the Sindh High Court successfully enforced the arbitration agreement. The High Court applied the "doctrine of separability" while referring to the landmark judgment of *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd.*,[49] where the court concluded that "the doctrine of separability can save the arbitration agreement even where the main contract was void ab initio and not merely voidable."[50] Similarly, in *Louis Dreyfus Commodities Suisse S.A. v. Acro Textile Mills Ltd.*,[51] the Court recognised and enforced the impugned award and agreement by the combined interpretation of Sections 6 and 7 of the Foreign Awards Act. Under such interpretation, an award cannot be declared invalid unless it is against Article V of the Convention.[52] Since the agreement met the requirements set in Article V(1)(a) of the Convention, the Court declared it valid and imposed the foreign arbitration award.

Moreover, a promising principle has been propagated in *Louis Dreyfus Commodities Suisse S.A. v. Acro Textile Mills Ltd* by Justice Ajmal Mian, suggesting that the court should take an approach that is "dynamic" in nature, and unless there are compelling reasons, the arbitration clauses should always be

[47] PLD 2014 Sindh 349.
[48] 2014 CLD 337.
[49] [1993] 3 All ER 89.
[50] Ibid.
[51] PLD 2018 Lahore 597.
[52] Ibid.

respected.[53] He stipulated that arbitration clauses have become far more common with the growth and development of international commerce and trade, which has increased with the modernisation of transport and communication systems. Thus, a speedy and effective mechanism must be made to facilitate them.[54] Therefore, there have been positive developments. However, the laws still need amendments in the codified Arbitration Act, but binding precedents from superior courts are gradually addressing the issues that arise.

Moreover, projects like the China-Pakistan Economic Corridor ("CPEC"), having a well-developed and trusted dispute settlement mechanism, are essential. In practice, foreign arbitration is still lacking in Pakistan. Among several reasons, one of the commonly used grounds is *forum non conveniens*, which refers to the discretionary ability of the courts to dismiss a case when a better, more suited forum is available.[55] Thus, it enables domestic courts to deny the continuation of legal proceedings regarding foreign arbitration agreements and, consequently, has been used to delay proceedings.[56] Such issues act as hindrances to the successful completion of projects like CPEC. In fact, one of the biggest concerns regarding the project is how conflicts will be resolved in the future.[57] There can be various methods for resolving disputes. Firstly, they may use international commercial courts.[58] For example, China introduced three international commercial courts for its Belt and Road Initiative, which had several advantages. They proved far more flexible and cost-efficient than normal court proceedings. Moreover, the contracting parties had more autonomy, allowing them to save the business relationship as it was a less adversarial approach compared to litigation. Third, the two countries may establish Joint Arbitration Centres, similar to how, in 2015, the "China Africa Joint Arbitration Centres" were established to settle investment and trade disputes between South Africa and China.[59] The basic logic behind

[53] Ibid.
[54] RIAA (n 42).
[55] Cornell, 'Forum Non Conveniens' (Cornell Law School's (Legal Information Institute) <www.law.cornell.edu/wex/forum_non_conveniens> accessed 12 May 2022.
[56] Ibid.
[57] Bushra Aziz and Mehwish Batool, 'China-Pakistan Economic Corridor: The Quest for A Dispute Resolution Mechanism' (2019) LUMS Chinese Centre for Legal Studies 1 <https://ccls.lums.edu.pk/sites/default/files/2023-01/01_-_china-pakistan_economic_corridor_-_the_quest_for_a_dispute_resolution_mechanism.pdf> accessed 8 May 2022.
[58] Ibid.
[59] Ibid.

developing these centres was to avoid the involvement of domestic courts and national and international arbitration institutions. Thus, a joint institution was established to ensure neutrality and efficiency. Fourth, another option could be the creation of mediation centres for dispute resolution.[60] Although this can prove to be a speedy and cheap option, such centres' decisions are not legally binding and might not be enforced. So, Pakistan must analyse and work towards developing a feasible mechanism for dispute resolution; otherwise, it will be susceptible to suffering a great loss during such processes, as highlighted by the recent case of *Reko Diq,* where the ICSID gave it a fine of nearly $6 billion.[61]

Conclusion

Conclusively, local and international arbitration is complex, particularly in developing countries like Pakistan. While inherent biases exist in the international arena whereby the Global North is at a significant advantage, improvements can be made by strengthening local laws and balancing the interests of all parties. Governments should not forget the role arbitration plays in facilitating foreign direct investment to boost the economy significantly. Thus, if developing nations like Pakistan are to establish themselves, they must keep in line with international best practices and create an atmosphere conducive to arbitration despite existing in a highly polarised world. For example, they should implement clear, modern arbitration laws establishing a strong foundation for arbitration proceedings.

Additionally, it is important to establish reputable arbitration institutions, as they enhance the credibility and efficiency of the arbitration process. These institutions often possess well-defined rules, procedures, and experienced arbitrators, ensuring a fair and effective resolution of disputes. Developing nations like Pakistan should also prioritize aligning their judicial systems with arbitration by enforcing arbitration agreements and respecting arbitral awards. Limiting judicial intervention in arbitration can safeguard the integrity and autonomy of the arbitral process.

[60] Ibid.
[61]Wajid Ali Syed, 'Pakistan Fined Rs950 Bn in Reko Diq Case' *The News* (Washington, 14 July 2019) <https://www.thenews.com.pk/print/497999-pakistan-fined-rs950-bn-in-reko-diq-case> accessed 12 May 2022.