A STUDY OF INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION: PERSPECTIVES FROM DEVELOPING COUNTRIES

by

Karan Kataria[1]

ABSTRACT

This paper aims to bring together literature on biased nature of the International Alternative Dispute Resolution Mechanism and Institutions in general and International Arbitration in specific. The underlying international relations and power dynamics between countries affect the legal structures and implementation of international law on each country. While developing countries have accepted the contemporary Arbitration mechanisms studies show that they are still not treated at par with their developed counterparts.

The paper will bring to forefront literature that shows the underlying biases, politics, and disproportionate treatment of developing countries in the international arbitration eco-system. The system is still saturated with euro-centric tendencies and voices and interests of developing countries are marginalised in both law making and implementation of laws. The paper aims to given a bird's eye view to the existing power dynamics and biases in the international arbitration ecosystem. This paper will analyse whether these institutions genuinely serve their intended purpose of providing equitable and just dispute resolution on a global scale or whether they perpetuate existing power imbalances. The paper delves into TWAIL arguments against the existing arbitration eco-system as well.

Through a case study analysis of India, the paper aims to show that will changing times though developing countries have accepted arbitration as a norm. However, there still exists creation of trust and reliability in the sentiments of developing nations towards push for arbitration by developed nations.

The paper does not aim to delve into a critical analysis of the literature, it rather culminates it for purposes of showing the existence of differential treatment of nations. The paper is divided into three sections. Firstly, it traces development of alternative dispute resolution mechanism including their public and private nature, it also touches upon the relation between legitimacy

[1] PhD Scholar Rajiv Gandhi National University of Law, Punjab

Indian Journal of Law and Jurisprudence | Licensed under Creative Commons — https://creativecommons.org/licenses/by/4.0/ | DOI: 10.5281/zenodo.24549641 | Title: A Study of International Alternative Dispute Resolution: Perspectives from Developing Countries

and effectiveness of Alternative Dispute Resolution Mechanisms. Secondly, provides a literature around the problem statement. Finally, it provides a sui generis case of India, where arbitration has developed into a robust system of conflict resolution, yet is a developing countries.

Introduction

There exists politics, biases, and effectiveness of international dispute resolution institutions from the perspective of developing countries.[2] There is a need to investigate how these institutions, often characterized by Eurocentric mechanisms, marginalize the voices and interests of emerging nations in policy and law-making processes. Developing countries face immense challenges in navigating these systems, where larger, more powerful states and blocs dominate the agenda, influencing which laws are enacted and how they are enforced.[3]

In this globalized world even the non-state actors, particularly multinational corporations (MNCs), are shaping the decision-making processes of these institutions. By exerting significant influence, these actors often skew outcomes in favour of their interests, further sidelining the needs and priorities of the Global South.[4] The question that arises from the presence of these non-state actors is whether these institutions genuinely serve their intended purpose of providing equitable and just dispute resolution on a global scale or whether they perpetuate existing power imbalances.[5]

The threshold of the extent to which these institutions accommodate or hinder the participation of developing countries and non-state actors in the global legal order differs from state to state.[6] Hence, there is a need to contribute to the ongoing discourse on reforming international dispute resolution systems to better serve the interests of all stakeholders, particularly those from the Global South, ensuring a more inclusive and fair global governance framework.[7]

In layman terms, Dispute Resolution mechanisms are processes or methods used to resolve conflicts or disagreements between parties.[8] They provide an alternate course of action and

[2] James C Baker and John K Ryans, 'Multinational Corporation Investment in Less Developed Countries: Reducing Risk' (1979) 18(1) Nebraska Journal of Economics and Business 61.& James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184.
[3] James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184.
[4] Adrija Das and Susanah Naushad, 'Developing Nations in International Investment Arbitrations: Bias or Power Dynamics?'
[5] Ibid
[6] Ibid
[7] Ibid
[8] Oxford Dictionary

aim to provide a fair and just outcome without resorting to litigation in courts. Some common types of dispute resolution methods are Negotiation, Mediation, Arbitration, Conciliation, Litigation, Collaborative Law, and Online Dispute Resolution.[9]

Legitimacy is the cornerstone of effective dispute resolution.[10] Legitimacy refers to the right to rule. Ruling includes promulgating rules, specifically in the context of dispute resolution promulgating rules would amount to issuing decisions and awards. Additionally, it would also require securing compliance with them by attaching costs for non-compliance and rewards or benefits for compliance. Legitimacy becomes the substructure on which support and acceptance of independent authority is formed. This view is usually called content-independent support. Summarily, Legitimacy allows parties to accept and comply with holdings and decisions of various dispute resolution regimes, regardless of the outcome.[11]

History of International Dispute Resolution Mechanisms

Historically, alternative dispute resolution methods have preceded judicial settlements. All civilisations across the world ranging from Ancient India, Islamic world, Ancient Greece, China, to Arabian tribes, medieval Europe, and in Papal Practices.[12]

The origins of the modern form of Arbitration are dated to the so-called Jay Treaty of 1794 between the United States of America and Great Britain. Though, throughout the nineteenth century, the United States and the United Kingdom had recourse to them, as did other states of Europe and Americas, this formalized and modern version of ADR was yet to be introduced in colonies and other nations. This initial phase was followed by the Alabama Claims in 1872 again between the United Kingdom and the United States. Under the Treaty of Washington 1871, the U.S.A. and U.K. further agreed to submit to Arbitration Claims by the former for alleged breaches of neutrality during the American Civil War.

The beginning of the final phase of International Arbitration in modern history was the convening of the Hague peace Conferences in 1899 by the Russian Czar Nicholas II. The Objective of the conference was ahead of its time - smaller states of Europe, some Asian states and Mexico also participated to discuss peace and disarmament. These Conferences culminated in the adoption of the Convention on the Pacific Settlement of International

[9] Ibid

[10] Stephan W Schill, 'Conceptions of Legitimacy of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 106–124, Amsterdam Law School Research Paper No 2017-17, Amsterdam Center for International Law No 2017-14

[11] Ibid

[12] Jonathon DiPietro, Past and Present Institutions for International Dispute Resolution (2022) American University, Juris Mentem Law Review.

Disputes, which became a landmark for alternative dispute resolution mechanisms with the aim to achieve pacific settlements. A few years later, in 1907, a second Hague Peace Conference, to which the States of Central and South America were also invited, revised the Convention and improved the rules governing arbitral proceedings. The Permanent Court of Arbitration was set up in the Peace Palace in 1913 has been the culmination of all efforts towards Alternative Dispute Resolution Mechanism.[13]

Public and Private Origin of International Dispute Resolution Mechanisms

David D. Caron, Professor of Law at University of California, Berkely and a pioneer in the realm of international dispute resolution and institutions categorized all dispute resolution mechanisms into public and private mechanisms.[14] Based on how much role is given to the parties and to the community interested or affected by the dispute, there is a degree of variance in mechanisms of international dispute resolution. There is a greater degree of recognition given to mechanisms that are designed to serve a community than individual parties. Based on this reasoning, a distinction between dispute resolution mechanisms that have a public-origin and a private origin has been drawn.[15] For example, Municipal Courts, Supra-national courts like ECtHR, the International Court of Justice, and the International Centre for the Settlement of Investment Disputes (ICSID) are all institutions that have public origins as they are created by communities.[16] While, on the other hand, Ad hoc Interstate or international Chamber of Commerce are institutions of private origin as they only originate or come into play from the will of the parties. This Distinction affects the legitimacy of various international dispute resolution mechanisms.[17] A community will design rules for a mechanism that it perceives to be of its interests, while the parties do not delve into protective or precautionary measures at the same threshold like the community. In simpler words, there is a distinction of public and private origin and there is a proportional and fundamental relationship between composition, mechanisms and resultant structure of these mechanisms.[18] More precisely, even privately originated mechanisms have an undertone of public mechanisms as in the individual parties know that their mechanisms have to meet the

[13] Ibid
[14] Barry E Carter and others, 'Comparative Analysis of International Dispute Resolution Institutions' (1991) 85 *Proceedings of the Annual Meeting (American Society of International Law)* 64.
[15] Ibid
[16] Ibid
[17] Ibid
[18] Ibid

minimum threshold of basic-community wide criteria.[19] The interrelation of public and private originated mechanisms lays on the question of the role of broader community. Specifically, to whom does an arbitrator or a judge feel he or she has a duty to? Are the ethics of the decision maker defined in reference to the particular parties or in reference with the community that created the mechanism? Is the decision maker an agent of the community or merely filling a role defined by the agreement of the parties? Whether the judges are given the powers or initiation and what such powers reflect? For example, ICJ may order interim measures on its initiative, while UNCITRAL Rules of Arbitral Procedure or the ICC Arbitral may only order interim measures at the request of the party. Moreover, In the international dispute mechanism arena, there is a tussle between adoption of either public or private. This tussle exists because all the international mechanisms are similar in that they are governed by the consent of the parties. Consent to the jurisdiction and to the mechanism by the parties in the dispute governs them. In short, there is an amalgam of mechanisms which creates a market for the parties to decide which mechanism suits their objectives and aims the best.[20]

The existence of the inescapable tension between community and party interests in the international dispute resolution due to reliability and importance placed on autonomy of parties in the terms of choosing the mechanism. However, this does not mean that the community interests can be escaped altogether. Ground of Public Policy is the sword used by the community to safeguard its interests.[21]

Relationship between Legitimacy and the Effectiveness of Alternative Dispute Resolution

Marguerite S. Millhauser, Principal at Conflict Consulting, Washington D.C. defines alternative dispute resolution, regardless of international or domestic level, refers to a range of options for resolving disputes between two extremes: negotiation and mediation on one hand, and litigation, arbitration or some formal decision-making process on the other.[22] The key feature of alternative dispute resolution methods is the use of neutral third parties. Mediation, Mini-trial and arbitration are some forms of Alternate Dispute Resolutions. Alternative Dispute Resolution was originally a private mechanism. However, by passing of the Administrative Disputes Resolution Act, the US Government opened the doors of Alternative

[19] Jonathon DiPietro, Past and Present Institutions for International Dispute Resolution (2022) American University, Juris Mentem Law Review.
[20] Ibid
[21] Ibid
[22] Supra 13

Dispute Resolution Mechanism into the public domain and gave it a parallel pedestal with the formal Justice Delivery System.[23]

Locknie Hsu points out that having the elements of legitimacy increases the favourableness of any alternate dispute resolution mechanism.[24] Legitimacy gives stabilizing power and support to an institution which is not contingent upon self-interest, coercion, or rational persuasion. Having legitimacy increases the effectiveness of the alternate dispute resolution mechanism regime as it increases the compliance with decisions and awards, increasing stable and consistent participation and in assisting the development and further legitimation of norms and customs of the particular regime in question. Extrapolating this into the context of Public International law and the global north-south divide becomes relevant in the works of multilateral development banks as it reduces the cost of doing business globally. It promotes economic participation, increases commercial stability and predictability.[25]

However, as per H Siblesz, Alternate Dispute Resolutions or private origin dispute resolution mechanisms suffer more from the legitimacy deficit than intergovernmental institutions and international organizations.[26] There are several reasons for this deficit of legitimacy in alternative dispute resolution regimes. Firstly, due to the highly state-centric or state-consent based nature of the international arena, representation of interests of private persons takes a back seat. To add on to this existing inequality is the existing inequality between states. States are formally equal but unequal in terms of geopolitical power. This underlying inequality implies the possibility of coerced consent given by smaller or weaker states in various circumstances. Secondly, these regimes of alternate dispute resolution are seen as lacking 'process legitimacy' as well. The absence of entrenched, well-established and accepted codes for civil or/and criminal procedure, suggests to some degree the de-legitimization of authority of these regimes. Thirdly, these regimes which are already on a weak foundation due to lesser threshold of substantive and procedural legitimacy also suffer from outcome legitimacy. The lack of outcome legitimacy ultimately compromises the effectiveness of dispute resolution systems.[27]

IJLJ ISSN: 2583-2794

[23] Ibid
[24] Locknie Hsu, 'The Role of International Organizations in Promoting Effective Dispute Resolution in the 21st Century' in Peter Quayle and Xuan Gao (eds), International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law 2019, vol 2 (Brill 2019) 90.
[25] Ibid
[26] Hugo Siblesz, 'The Role of International Organizations in Fostering Legitimacy in Dispute Resolution' in Peter Quayle and Xuan Gao (eds), International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law 2019, vol 2 (Brill 2019) 77
[27] Ibid

International organizations involved in dispute resolution play a vital role in fostering legitimacy and hence, the legitimacy of these institutions. Presence of institutions such as International Court of Arbitration, Permanent Court of Arbitration, UNCITRAL Model Law increase all three types of legitimacy. Source, Process, and Outcome Legitimacy are upheld by these institutions which in turn enhances their effectiveness and portrays them as bodies that uphold values such as procedural justice, neutrality, and independence. These elements not only foster the trust of the individual parties but also of the broader community, giving these institutions a mix of both publicly and privately originated bodies. It also gives them normative legitimacy, democratic authority, and sociological legitimacy. As a result, investor-state, state-state, individual-state, individual-individual trust is built up.[28]

International Dispute Resolution Mechanisms and Developing Countries

As per Joseph T McLaughlin , the most significant factor that changes the nature of legitimacy in the case of developing countries is the economic growth and development due to globalization.[29] There is a change in the role of these countries as they have shifted from being mere colonized nations to assuming an active role in development, marketing and exploitation of their own resources and services. Commercially sophisticated industrialized nations either through trade deals sponsored by states or non-state actors such as MNCs have shown immense deal of interest in the economic potential of these developing nations.[30] This shifting balance of economic power, though making the developing nations highly desirable has also made them vulnerable to the international system that is governed on the terms of the western countries. There exists an underlying perception in the global divide that the developing nations are economically naive and hence not stabilised markets give opportunity for the private investors from developed nations to exploit this in their favour.[31] On the other hand, the developing nations have their own set of predispositions against foreign investment and following the rules set up by the economically developed nations. Firstly, because there is a long history of colonization between these western powers and the developing nations. Secondly, the process of decolonisation has led to a heightened feeling of nationalism in these countries, making them sceptically unreceptive to controlling or strong foreign presence. [32]

[28] Supra no 9
[29] Joseph T McLaughlin, 'Arbitration and Developing Countries' (1979) 13 Int'l L 211.
[30] Ibid
[31] Ibid
[32] Ibid

Joseph T McLaughlin further mentions this background requires not only special attention to the relationship and contracts between the developing world and the developed world, but also special types of agreements which take into account the dynamic nature of the relationship and changing power structures of the world order.[33] Mostly, the agreements signed between developing countries and investors are developmental agreements not short-term contracts, which provide a mechanism for long-term projects. These developmental agreements are mostly 1. Purchase/sale of goods, 2. Investment and 3. Transfer of Technology.[34] These agreements are important channels for transfer of technology, as stimulating agents for domestic entrepreneurship and most importantly, as inputs for a consciously directed program of economic growth.[35] The special nature of these agreements gives more leeway to the nations to decide their economic development program. However, it also suggests an existing difference of perception of goals between these nations and the investors. Thus, even after detailed and special agreements, differences may erupt either during or after the project. Thus, it is essential that there is surety about completion of projects either long-term or short term. Option of access to robust alternative dispute resolution mechanisms with legitimacy and enforceability becomes a necessity in case there is a dispute contrary to the formal justice delivery system.[36]

Despite other many positive attributes of these mechanisms many countries are reluctant to restore to mechanisms and dispute resolution regimes of the international institutions. In the words of Prof. Sanders, *"The different concepts of dispute resolution, looking at dispute resolution on a world-wide basis, is another problem of international commercial dispute resolution. The concept of dispute resolution is not the same everywhere in the world. The Anglo-Saxon concept of dispute resolution differs from that of the civil law countries and those two concepts both differ from the dispute resolution concept in the socialist countries. For the unification of dispute resolution these different concepts constitute a great draw-back."*[37]

For Tom J Farer, there is a need to tailor the dispute resolution agreements.[38] They must 1. Anticipate the consequences (practical and legal) of a dispute resolution clause by taking into account the view of both sides, 2. Only the most suited rules for the agreement to be selected.

[33] Joseph T McLaughlin, 'International Arbitration' in ALI-ABA Course of Study: Construction Contracting in the Middle East (1978).
[34] Ibid
[35] Ibid
[36] Ibid
[37] Supra no 28
[38] Tom J Farer, 'Economic Development Agreements: A Functional Analysis' (1971) 10 Columbia Journal of Transnational Law 200.

3. use of specific language governing agreements. It is important that any agreement should first acquire a basic understanding of the state towards the agreements.[39] For example, most of the African and sub-Saharan countries have adopted the modern arbitration statutes and are parties to treaties of friendship, commerce and navigation, while as per Professor Setrakian, the countries of the Middle east even after recognizing arbitration as a form of dispute resolution are hesitant of enforcing awards of foreign arbitral tribunals or to accept application of foreign law for resolution of the conflict.[40] Latin Countries have viewed arbitration with misgiving and antipathy towards international dispute resolution regimes. These countries still adhere to the Calvo Doctrine which restrains creation of third party adjudicative devices for dispute resolution.[41]

As per Joseph T McLaughlin, Problems in negotiating clauses with parties and Developing Nations:[42]

Choice of Forum:

Professor Domke noted, "*developing countries no longer wish to see their disputed commercial relations determined by Western-oriented arbitral bodies outside their countries.*"[43] Simultaneously, the investor will avoid resolution of disputes in national courts. The most viable solution is to agree for arbitration in a third country under internationally recognised rules. However, if the contracting party is the government of the state itself, there is a conflict of sovereignty as it will be adverse to submission to an arbitration in a third country.[44]

Choice of Law:

There is a consensus on application of procedural rules formulated by international institutions, the countries often insist upon application of their own substantive law. This resistance towards the question of governing substantive law arises from the view of many Asian and African countries, that the traditional principles of private international law are biased in favor of Western industrialized interests. These principles were established when the needs, demands and concerns of the developing world were not even fully recognised and an

[39] Ibid
[40] Ibid
[41] Ibid
[42] Supra no 28
[43] M Domke, 'Arbitration, Nationalism and the Multinational Enterprise: Legal, Economic and Managerial Aspects' (1973) 233-243.
[44] Ibid

attitude of western chauvinism was the undertone of most dealings with the developing nations.[45]

Arbitrable Issue:

Some countries in many instances repudiate from their arbitration commitments and choose national procedures for resolution of disputes between contracting parties. This forms a view that the country's right to rescind an agreement and substitute it with national remedies is a form of concessionaire.[46]

Factors affecting Favourableness of outcome of Dispute Resolution for Developing Nations:

Anna Spain focuses on tailoring the needs and expectations of all parties, Striking a balance between state's sovereignty and consent of the parties.[47] Common reason for developing countries exiting from international dispute mechanisms is the argument about these institutions existing primarily to serve the interests of western entities (state and non-state both). Hence, there is a need to reasonably persuade developing countries towards advantages of these mechanisms and guarantee that their interests will be fairly protected and to reinstall faith in the international institutions.[48]

Current international arbitration institutions, currently striving to expand their scope, are well-positioned to ensure that the potential for greater utilization of arbitration is completely actualised. The decentralization of conventional arbitration centres, primarily situated in Western Europe, would significantly improve the perception of arbitration in developing nations. Such centres would draw a greater number of arbitrators from poorer nations, resulting in more balanced arbitration panels. Furthermore, considering the importance of selecting the arbitration forum, such regional centres would provide developing countries the chance to engage in arbitrations with procedural procedures that are more familiar to them.[49]

For C M Chinkin and Romana Sadurska , the effectiveness of arbitration in resolving disputes consensually depends heavily on the parties' ability to choose the laws that will govern the proceedings.[50] This flexibility can be compromised by poor planning and drafting. However,

[45] Ibid
[46] Ibid
[47] Anna Spain, 'International Dispute Resolution in an Era of Globalization'.
[48] Ibid
[49] Ibid
[50] CM Chinkin and R Sadurska, 'Learning About International Law Through Dispute Resolution' (1991) 40(3) International and Comparative Law Quarterly 529.

with careful planning and drafting, parties, including those from developing nations, can avoid the common pitfalls of international arbitration and ensure that arbitration remains consensual and impartial.[51]

Effects of the North - South (Developed-Developing) Divide on the International Arbitration Eco-system

Lucy Reed and Andrew Jacovides state that these international dispute resolution institutions have gained legitimacy through the value of their awards, threshold of enforceability of their decisions and the support they garner from the international community.[52] However, any study of these institutions has to throw light on their relation with the developed western world and the rest of the world. Since most of these institutions were founded by the western powers, are headquartered in the western states, are controlled administratively by citizens of the western world, show how far these institutions are from neutrality as a ground for legitimacy.[53]

International Relations, highly resembling human relations are also a result of power structures. The north-south divide defines the economic, social, and political differences between the developed western world on one hand, and the rest of the developing world on the other. This divide impacts every sphere of a state's being as a unit in the international arena. Hence, also impacting the international dispute resolution mechanisms in several ways such as impacting fairness, accessibility and perceptions of justice. These institutions, like other international processes, are also not immune to these biases.[54]

Asymmetry in Treaty Negotiations, Access to Dispute Resolution Mechanisms, Unequal Capacity of Enforcement, Perceived Bias of International Courts and Arbitrators, and, Power Imbalances in the International Arena are some of the effects of the divide on enforceability and legitimacy of International Dispute Resolution Regimes. Does International Arbitration inherently favour developed nations? V.V. Veeder stated that, *"the perceived 'international arbitration' is not international; it's simply a continuation of western legal imperialism."*[55] At the core of this suspicion lies the question of neutrality.[56] The predominant paradox being that arbitration by its very nature is an impartial avenue for resolving disputes. However, evidence

[51] Ibid
[52] Lucy Reed and Andrew Jacovides, 'Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?' (2002) 96 Proceedings of the Annual Meeting (American Society of International Law) 219
[53] Ibid
[54] Ibid
[55] Stephen M Schwebel, 'Introduction' in Samuel Wordsworth and Marie Veeder (eds), *On Arbitration: V V Veeder, Selected Writings and Contributions to the Development of Law* (Oxford 2023; online edn, Oxford Academic, 18 July 2024).
[56] Ibid

suggests otherwise, bias is predominant towards the interests, legal systems, and practioners of developed countries. Two major factors that contribute to this favoured approach towards developed nations i.e. Existing Power Dynamics and, Legal Infrastructure and Access to Opportunity. The imbalance in power dynamics begins with selection and appointment of arbitrators. The rosters of International Chamber of Commerce (ICC) and the International Centre for Settlement of Investment Disputes (ICSID) are disproportionately dominated by arbitrators from developed countries.[57] Moreover, the rules and procedures that are followed by these institutions are also heavily influenced by legal cultures of developed nations.[58] The underlying power dynamic is formed because appointed arbitrators bring their own legal culture and interpretation of law. Hence, their national and cultured biases are also brought. As for the legal infrastructure of the developed countries which is robust and hence offers a favourable ground for world-class legal experts.[59] This hub creates a pool where lawyers from these nations have better access to information, world-class legal research and, access to opportunities. While on the other side, for lawyers from less-developed nations, there is no level playing field.[60]

Arbitration Institutions designed to protect foreign investments are now being used as sword by investors from developed countries for disproportionately penalising developing countries.[61] As per World Economic Situation and Prospects 2023 Country Classification and UNDP HDI, the countries can be classified into Developing (India, Morocco, Lebanon), Developed Economies (Switzerland, France, and Australia) and High HDI Countries (Brazil, China, and Ecuador). Developing and High HDI countries are unreasonably subjected to Arbitration claims compared to FDI received by them.[62] Contrary to Susan Franck's proposition, foreign investors from developed world form more that 70% of the claimants while only around 20% respondents are governments from the developed world. Developed countries and parties belonging to them also tend to win more cases compared to other two categories.[63]

IJLJ ISSN: 2583-2794

[57] Carrie Menkel-Meadow, 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context' (2004) 54(1) Journal of Legal Education 7.
[58] Ibid
[59] Ibid
[60] Ibid
[61] Ryan Stephan, 'Is Investment Arbitration Beneficial for Developing Countries? An Empirical Analysis' (27 June 2024).
[62] In 2022, Latin American countries received 9.3% of global FDI but are subject to 27.5% of all ISDS claims. Similarly, in the same year, African countries only received 5.4% of global FDI inflows but are subject to 16,2% of all claims. In general, developing and High HDI countries face 78.6% of all arbitration claims. & Ibid
[63] Developed countries also tend to win more cases, with an average success rate of 53,6%. Compared to the success rate of 44,5% for High HDI countries and 33,3% for developing countries, we can conclude that investors are much more likely to win a case against a developing economy than against a developed one. & Ibid

TWAIL Perspective on International Arbitration

The double-edged sword of FDI, crucial for economic development of developing countries on one hand and a means for exploitation on another in the form of loans, subsidies, M&As, and joint ventures. International arbitration mechanism as they exist in today's times are scrutinised by TWAIL scholars. TWAIL being a proactive and reactive response to decolonisation aims for internal transformation. They put forth the proposition that International arbitration displays a regime bias towards developed nations.[64] TWAIL scholarship supports the notion that International Arbitration is a key to promote interests of the First World Countries.[65] It amalgamates "*continental legal thought shaped during imperial period of European Expansion and legitimises power, preservation and private property rights of Global North.*"[66] For TWAIL Scholars investor-state arbitration mirrors colonial outlook of developed countries with abuse of natural and human resources of the developing countries at core. There exists a parallel between conventional international legal structure and colonial structures which sustain inequality. Regime Bias examines ways in which rules and procedures of arbitration from lens of power dynamics.[67] Van Hatten further brings to front the underlying bias against previously colonised countries as they are "otherised" in the international scenario.[68] They argue for legal paganism to restructure international arbitration. Legal paganism is to restructure the current biased regime and legal order by revising international economic relations and actively involving developing countries.[69] Moreover, the institutionalised regime bias is further aggravated by geographical and jurisdictional disadvantage as most of the arbitration centres are concentrated in the Global North.

INDIAN SCENARIO

India, the fifth largest economy in the world is set to reach the position of third largest economy by 2030. India has become an attractive destination for foreign investors due to its

IJLJ ISSN: 2583-2794

[64] 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

[65] Mohsen Al Attar and Rosalie Miller, 'Towards an Emancipatory International Law: The Bolivarian Reconstruction' (Third World Quarterly 2010)

[66] Ibid

[67] James Thuo Gathii, 'Third World Approaches to International Economic Governance' (London: Routledge 2008)

[68] Van Hatten Gus 'TWAIL and the Dabhol Arbitration' (Comparative Research in Law & Political Economy 2011)

[69] James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184

expanding and growing population, large consumer market, and youthful labour force.[70] With this background of increase in influx of foreign investors and economic activity, there is set to be an increase in disputes on international character as well.[71] Hence, the Indian Trajectory in international commercial arbitration is a tale of cautious optimism. This part of the paper deals with the India's current position in the international commercial arbitration scenario.

Arbitrations involving Indian parties have increased in number, value, and profile.[72] India has been the one of the top foreign user of SIAC for five years in row and number to parties reached 300 in the past two years.[73] India is also among the top ten users of ICC arbitration as well. The Indian law has been one of the most commonly applied governing law at SIAC. The number in appointment of Indian arbitrators also saw an increase in 2023.[74] For various factors such as geographical proximity and cultural affinity, reputation for neutrality and fairness, credibility of enforcement of awards, efficiency and expertise, supportive legal frameworks, cost effective options Singapore remains to be a preferred seat for India-related Arbitration cases. London, Paris, Geneva and Dubai are also popular choices.[75]

The change in Indian legal landscape is due to two folded change in perspective. Firstly, the corporations have started accept arbitration as a cooperative process and secondly, arbitration is started to be perceived as a tool for India's economic growth.[76] The other side of the same coin being that Indian Judicial system still makes it a lengthy and unpredictable process as seen in the case of Antrix v. Devas. Evolution of Arbitration ecosystem in India can also be seen through cases such as Vodafone's Arbitration case,[77] Delhi Metro Rail Corporation Case,[78] Adani Group v. Gujarat Maritime Board,[79] Reliance Infrastructure v. Damodar Valley Corporation.[80]

Recent Developments in India-related International Arbitration:

The judicial approach in India has gradually shifted towards being pro-arbitration. Though historically Indian Courts have notoriously been known for judgments and interferences that often resulted in unpredictable results incompatible with international norms. They have also

[70] Rohit Bhat, Vasuda Sinha, and Stuti Gadodia, 'India: A New Era for International Arbitration?'
[71] Ibid
[72] Amazon's challenge of the sale of Indian retail business to Reliance.
[73] Supra 69
[74] Ibid
[75] Ibid
[76] Ibid
[77] PCA Case No. 2016-35
[78] 2022 1 SCC 131
[79] 2021 SCC Online APTEL 67
[80] AP 40 of 202

been known to interfere with arbitral awards which also added on to the unpredictably for parties.[81] The shift is not only in the judicial approach, the legislative outlook towards arbitration has also taken the same path. Following are the all-encompassing changes (Judicial Approach, Legislative Approach, and Treaty Landscape) in the Indian Outlook that are paving the path for India to be an arbitration hub in the region:

Judicial Approach:

Indian Supreme Court and some High Courts have advocated for minimal interference in arbitral awards, need for swift enforcement and execution of foreign arbitral awards, confirmation of emergency arbitral awards in India-seated arbitrations are locally enforceable, confirmation on role and legitimacy of third-party funding in arbitration.[82]

Legislative Approach:

The latest amendments to the Indian Arbitration and Conciliation Act 1996 in 2021 have made significant changes which aim at strengthening the arbitration landscape in the country. Key changes include unconditional stay on awards in certain cases, changes in qualifications for arbitrators among others. India has also appointed a committee of experts (T.K. Vishwanathan Committee on Arbitration and Conciliation Act) to review the gaps in the existing regulations related to arbitration. The Committee has submitted its report in 1st quarter of 2024.[83] The Committee Report focused on Institutionalisation of Arbitration. The recommendations of the Committee include establishment of the Arbitration Promotion Council of India, Amendments to Section 11 of the Act to allow Arbitral Institutions to be Appointing Authority, Recognition and Enforceability of the emergency awards, Creation of an Arbitration Bench, Creation of an Arbitration Bar, Accreditation of Arbitrators, Incorporation of Arbitral Institutions, among others.[84]

Key Proposed Amendments to the Act by the Committee include, Amendment of Timelines under Section 29A of the Act, Retrospective application of the Act, Amendment of Section 2(2) of the Act allowing specific provision to apply where the place of arbitration is outside India, Amendment of Section 45 related to judicial authority to refer parties to arbitration

[81] Supra no 69
[82] Ibid
[83] T.K. Vishwanathan Committee on Arbitration and Conciliation Act, 1996
[84] Ibid

where place of arbitration is outside India, enforcement of foreign arbitral awards among others.[85]

Treaty Landscape:

Amount of Investor-State disputes against India will continue to decrease following India's termination of many bilateral investments treaties (BITs) with only few known cases arising out of sunset clauses. Investor protection exists through numerous trade and economic partnership agreements which also contain provisions for Investor-State dispute resolution.[86] New BITs and FTAs are being heavily pushed by India to increase and diversify international trade and grow the economy. Moreover, there is a proposed draft investment protection agreement which includes provisions for protection of investors and has a proposed establishment of 15-member permanent tribunal for resolution of investor-state disputes.

Though India's approach towards Arbitration has been positive due to its developing nature, the hesitation in its judicial system towards the International Arbitration Mechanisms, the closed nature of even the newly amended laws suggests that there is still deficit of trust in these institutions.

Conclusion:

"To a man with a hammer, everything looks like a nail." The phrase encapsulated the nature of today's international arbitration eco-system where the developed countries still wield the hammer and developing world is similar to the nail which has to bend under the weight of already set legal reasoning of the developed world. A conscious effort to diversify the eco-system by appointment of arbitrators from all the regions, inclusion of lawyers from around the world, and capacity building in institutions such as ICC or ICSID for developing countries are some measures that can help make the system more inclusive. In conclusion, a balance is to be struck between investors rights and State's sovereignty.

IJLJ
ISSN: 2583-2794

[85] Ibid
[86] agreements with Japan, Singapore and South Korea

BIBLIOGRAPHY

1. A H Qureshi, 'The World Trade Organization and the Promotion of Effective Dispute Resolution: In Times of a Trade War' in International Organizations and the Promotion of Effective Dispute Resolution (Brill 2019).

2. A Martin, 'Points to Note in Drafting Arbitration Clauses and Choosing Arbitrators' (London, November 1976).

3. Adrija Das and Susanah Naushad, 'Developing Nations in International Investment Arbitrations: Bias or Power Dynamics?' (15 October 2012).

4. Amazon's Challenge of the Sale of Indian Retail Business to Reliance.

5. Anna Spain, 'International Dispute Resolution in an Era of Globalization'.

6. 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.

7. Ashish Dholakia, Ketan Gaur, and Kaustub Narendran, 'India's Arbitration and Conciliation (Amendment) Act, 2021: A Wolf in Sheep's Clothing?' (Trilegal, 23 May 2021).

8. Barry E Carter and others, 'Comparative Analysis of International Dispute Resolution Institutions' (1991) 85 Proceedings of the Annual Meeting (American Society of International Law) 64.

9. Carrie Menkel-Meadow, 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context' (2004) 54(1) Journal of Legal Education 7.

10. CM Chinkin and R Sadurska, 'Learning About International Law Through Dispute Resolution' (1991) 40(3) International and Comparative Law Quarterly 529.

11. David Straus, 'So Perfect in Theory—So Neglected in Practice' (March 1978).

12. H R Hahlo, J G Smith, and R W Wright, Nationalism and the Multinational Enterprise: Legal, Economic and Managerial Aspects (Sijthoff/Oceana 1972).

13. Hugo Siblesz, 'The Role of International Organizations in Fostering Legitimacy in Dispute Resolution' in Peter Quayle and Xuan Gao (eds), International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law 2019, vol 2 (Brill 2019) 77.

14. India's Bi-lateral Agreements with Japan, Singapore, and South Korea.

15. James A R Nafziger, 'Comparative Dispute Resolution: A New Look' (2002) 10(1) Willamette Journal of International Law and Dispute Resolution 11

16. James C Baker and John K Ryans, ‘Multinational Corporation Investment in Less Developed Countries: Reducing Risk’ (1979) 18(1) Nebraska Journal of Economics and Business 61.

17. James Thuo Gathii, ‘International Law and Eurocentricity’ (1998) 9 European Journal of International Law 184.

18. James Thuo Gathii, ‘Third World Approaches to International Economic Governance’ (Routledge 2008).

19. Jonathon DiPietro, Past and Present Institutions for International Dispute Resolution (2022) American University, Juris Mentem Law Review.

20. Joseph T McLaughlin, ‘International Arbitration’ in ALI-ABA Course of Study: Construction Contracting in the Middle East (1978).

21. Joseph T McLaughlin, 'Arbitration and Developing Countries' (1979) 13 Int'l L 211.

22. Locknie Hsu, 'The Role of International Organizations in Promoting Effective Dispute Resolution in the 21st Century' in Peter Quayle and Xuan Gao (eds), International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law 2019, vol 2 (Brill 2019) 90.

23. Lucy Reed and Andrew Jacovides, ‘Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?’ (2002) 96 Proceedings of the Annual Meeting (American Society of International Law) 219.

24. M Domke and O Glossner, 'The Present State of the Law Regarding International Commercial Arbitration' in M Bos (ed), The Present State of International Law and Other Essays (Springer 1973).

25. M Domke, 'Arbitration, Nationalism and the Multinational Enterprise: Legal, Economic and Managerial Aspects' (1973) 233-243.

26. Mohsen Al Attar and Rosalie Miller, ‘Towards an Emancipatory International Law: The Bolivarian Reconstruction’ (2010) Third World Quarterly.

27. Rajesh Babu Ravindran, ‘International Commercial Arbitration and the Developing Countries’ (2006) AALCO Quarterly Bulletin 386.

28. Rohit Bhat, Vasuda Sinha, and Stuti Gadodia, 'India: A New Era for International Arbitration?'

29. Ryan Stephan, ‘Is Investment Arbitration Beneficial for Developing Countries? An Empirical Analysis’ (27 June 2024).

IJLJ ISSN: 2583-2794

30. SA Tiewul and FA Tsegah, 'Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice' (1975) 24(3) International and Comparative Law Quarterly 393.

31. Setrakian, ‘Arbitration under the Legal Systems of the Middle Eastern Countries’ in ALI-ABA Course of Study: Construction Contracting in the Middle East (1978); Albert Planagan, American Arbitration Association Library Document (1977).

32. S I Strong, ‘Legitimacy and International Arbitration: An Alternate View’.

33. Stephen M Schwebel, 'Introduction' in Samuel Wordsworth and Marie Veeder (eds), On Arbitration: V V Veeder, Selected Writings and Contributions to the Development of Law (Oxford 2023; online edn, Oxford Academic, 18 July 2024).

34. Stephan W Schill, 'Conceptions of Legitimacy of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutty and Epaminontas E Triantafilou (eds), Practising Virtue: Inside International Arbitration (Oxford University Press 2015) 106–124, Amsterdam Law School Research Paper No 2017-17, Amsterdam Center for International Law No 2017-14

35. Susan Franck, ‘Empirically Evaluating Claims About Investment Treaty Arbitration’ (2007) 86 North Carolina Law Review 1.

36. Syeda Eimaan Gardezi and Faqiha Amjad, ‘A TWAIL Perspective on the Challenges Associated with Upgrading International Arbitration in Developing Countries like Pakistan’.

37. T K Vishwanathan Committee on Arbitration and Conciliation Act.

38. Tom J Farer, 'Economic Development Agreements: A Functional Analysis' (1971) 10 Columbia Journal of Transnational Law 200.

39. UNCTAD, Foreign Direct Investment, Handbook of Statistics 2023.

40. Van Hatten Gus, ‘TWAIL and the Dabhol Arbitration’ (2011) Comparative Research in Law & Political Economy.

IJLJ
ISSN: 2583-2794