Symposium Introduction: Centering Voices from the Global South on Investor-State Dispute Settlement Reform: A Debate

By:

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The various asymmetries of the Investor-State Dispute Settlement (ISDS) regime are well known. For example, only investors can bring cases against States. States are disabled from commencing cases against investors for any violations investors commit, except through the rare and difficult counterclaim route. The overwhelming number of arbitrators who sit on ISDS panels are white and very likely male even though an overwhelming number of ISDS suits involve non-White Global South countries as respondents. The substantive legal regime upon which the ISDS system is predicated excludes the protection of values such as the environment and human rights as integral guarantees alongside investor protections such as the anti-expropriation norm. In addition, the overwhelming policy and scholarly debates about the reform of the ISDS

system are largely defined and dominated by western voices.

This symposium is intentionally designed to center voices from the Global South in the veritable tradition of Afronomicslaw.org of amplifying, centering and making visible voices from the Global South in discussions and debates, whether scholarly, policy or otherwise on international economic law. For the purpose of this symposium, we categorize these debates under two broad rubrics – contributions that defend the ISDS regime as it is, and contributions that are critical of the system and seek its reform.

In the first category of debaters that defend the ISDS regime, the contributors make the case that the ISDS regime provides certainty, predictability and neutrality and that African States should therefore continue supporting the system. This perspective is also grounded in the view that States should not derogate from the agreements and the dispute settlement mechanisms that they have voluntarily consented to. From this vantage point, the unequal nature of the relationship between the State parties and the often well financed investors that bring ISDS cases is not relevant.

The second category of contributors are critical of the international investment law regime. The contributors here emphasize the vulnerability of Global South countries, particularly African States, in the international investment law regime. These critiques view the on-going reform of the ISDS regime as cosmetic and window-dressing in its focus on the procedural challenges as opposed to a concrete and substantive overhaul of the system. The deficit of the ISDS regime are well noted in this UNCTAD report.

Yet, other ‘moderate’ critiques acknowledge the shortcomings of the ISDS and other arbitral dispute settlement regimes. They do not advocate a withdrawal from the ISDS regime. Instead, they recommend that the reforms of the system should correct the limitations that critiques have identified.

This symposium is organized as a debate of Global South voices along the foregoing lines. The contributors respond to an essay by Nyanje John who we are very thankful to for sparking this debate symposium and agreeing to have this symposium respond to him. Now that all the essays are ready, we invite Nyanje to write a response post. Nyanje’s opening essay “advances a theory of how African states must consider ISDS reform from a neutral viewpoint and

should avoid the misguided radical paradigm shifts that have become popular talk on the Continent, where everyone seems to be fighting for hegemony of the system rather than discussing a working formula." He invokes "the narrative and hypocrisy versus facts and perception" and wonders whether African States are misguided in their call for a paradigm shift. Drawing on Anthea Robert's work, he queries some of the critiques that have been raised by scholars about the "hegemony of the [ISDS] system". For Nyanje, African States "perceptions and plausible folk theories aimed at nothing but creating hegemony in ISDS must be shunned" and they need to engage with the reform "neutrally." In his view, "ISDS is here to stay, thus, we must make no mistakes, but shape ISDS to suit our future interests."

The second essay by Dominic Npoanlari Dagbanja contends that "the position taken by Nyanje cannot be "a neutral viewpoint" when he characterises some perspectives as "misguided," "radical" and as "fighting for hegemony of the system rather than discussing a working formula." Dagbanja's broader research falls at the intersection of International Investment Law and the constitutional law of host states. From this perspective Dagbanja argues that Nyanje's essay lacks clarity on "how African countries, individually and collectively, have taken a position on ISDS that is idealistic, unrealistic or unworkable." Dagbanja grounds his analysis on the model Pan-African Investment Code as well as other international investment instruments regimes. He argues that "African states must be more radical in their approach to investment treaty and ISDS reforms in the following ways. First, they must retain the role of domestic courts in the resolution of investment disputes in line with their national constitutions. Second, where the case for an international dispute settlement mechanism is made, they must consider State-to-State trade and investment dispute settlement bodies at the regional and continental levels for all transnational business disputes."

The third post by Jean Ho titled "Hegemony 101 in International Investment Law" addresses Nyanje's "intriguing proposition that African states wishing to contribute more meaningfully to ISDS reform must steer clear of 'folk theories aimed at nothing but creating hegemony in ISDS.'" Ho wonders the extent to which "Nyanje and the scholars he admires" have "considered the stark informational and knowledge asymmetry on the finer workings of ISDS and of IIL across the UNCITRAL delegations. This asymmetry is evident from the

content and tone of official interventions from the different delegates, and from unofficial discussions with other participants during session breaks, but it is not fully captured in the published reports." Ho argues that Nyanje underestimates the hegemonic aspirations that are shaping the future of the ISDS and IIL. Ho then offers a three-step (3) approach through which we could understand the "hegemon-aspirants in IIL." These are "to disguise," "to dismiss," and "to divert". While Ho argues that she does not have a crystal ball, she is "… convinced that African states and critically-minded scholars who have the courage to openly voice their fears and doubts over the best way forward for ISDS and IIL, are the best checks on those asserting dominance over any reform agenda. Ho notes that "[c]reating a diversion from the most difficult issues plaguing the legitimacy of ISDS and IIL today is probably the greatest disservice one can do to the actual betterment of foreign investment regulation, and to the search for a truly equal, inclusive, sustainable and just form of multi-stakeholder dispute settlement."

Our fourth essay by Harrison O. Mbori, contextualizes ISDS reforms in the complex histories of colonialism and neoliberalism. "Exiting the Scene" should be on the cards if the radical desires of African states for a paradigm shift are not met. In Mbori's view, what Nyanje "refers to as folk theories for the creation of ISDS hegemony are in fact counter-hegemonic claims that seek to dismantle the continued dominance and protection of private transnational and mobile capital from the Global North in Africa." Mbori takes issue with Nyanje's characterization of critical TWAIL reactions as "perceptions" For Mbori, and unlike Nyanje, "it is difficult to understand how the egregious sins of colonialism and its continuities – if we agree that this is a strong origin of ISDS – are mere perceptions". He argues that the focus on the ISDS reform should be to "treat the problems and not the symptoms". In other words, the focus should not be on the "procedural" steps that as Ho argues, "disguises" the problem at the heart of IIL and ISDS. Mbori also identifies the asymmetrical nature of the ISDS regime and concludes that although procedural reforms are desirable, substantive reform are urgently required. More pointedly, "if substantive reforms cannot take place then African states should exit the ISDS scene."

The fifth essay by Dilini Pathirana contextualizes the precarity of African states further by examining the developments in Tanzania. Her essay "… reflects on the Tanzanian approach of using natural resource sovereignty as a basis for

denouncing the international arbitration of investment disputes in a context where the international investment regime faces increased criticism due to its impact on national governance." Pathirana conceptualizes Tanzania's prohibition of international adjudication of investment disputes arising from natural resource contracts as a possible manifestation of the Third World Approaches to International Law (TWAIL) network's regime bias critique of the IIL regime. Tanzania's prohibition, she argues, "was partly triggered by the loss of faith in international arbitration bodies. As such for the "Tanzanian government, those international arbitration forums are formed to protect the interests of investors over the interests of developing countries." She wonders to what extent Tanzania's reforms can be characterized as a wholesale rejection of the entire international investment treaty regime and notes that this will perhaps only be known in the future.

The sixth and final essay by Sannoy Das titled "ISDS Reform and the Problems of Imagining Our Future" is situated in the histories of movements by the Global South, such as the NIEO, African intellectuals such as Azikiwe, Nkrumah, Nyerere. The essay also takes into account recent scholarship on decolonization of international economic order, including but not limited to his critique of the neoliberal underpinning of international investment law regimes. Against this background, Das expresses skepticism in the ISDS reform. In this regard, while he welcomes the reform of ISDS, he fears "that when we think about merely reforming the ISDS regime, we remain in the grip of the idea there is no alternative to neoliberalism … [despite the fact that] … a cosmopolitan alternative was at the heart of the renewed founding of African States in the 20 th century." Das, like other some of the contributors to this symposium share some of Nyanje's reservations on the shortcomings of the ISDS regime, particularly given the likelihood that "turn[ing] away from international rules would only likely benefit a narrow rentier class." Yet, as his essay demonstrates, the complexity of the task cannot be underestimated when situated in the broader context of other regimes as Nyanje's post does.

We thank the contributors to this symposium for engaging with John Nyanje's opening post and to John Nyanje for his excellent essay. Afronomicslaw.org is committed to continuing this discussion and we welcome additional reactions to the posts in this symposium, including on all our social media platforms, or in the context of future debate symposia.

Contributions:

Nyanje John: Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms

Dominic Npoanlari Dagbanja: Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms – A Response

Jean Ho: Hegemony 101 in International Investment Law

Harrison O. Mbori: Exit is the Only Way Out: A Polemic Response to John Nyanje's "Hegemony in Investor State Dispute Settlement: How African states need to Approach Reforms"

Dilini Pathirana: Sovereign Rights to Natural Resources as a Basis for Denouncing International Adjudication of Investment Disputes: A Reflection on the Tanzanian Approach

Sannoy Das: ISDS Reform and the Problems of Imagining Our Future

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