ISDS Reform and the Problems of Imagining Our Future

By:

Sannoy Das

September 12, 2020

At the heart of African decolonization was radical political thinking about international non-domination, and the vision of an international legal, political and economic order that secured this anti-imperialism through global redistribution. This idea of the world, that involved radical reinterpretation of the principle of self-determination, united the political thinking of the tallest leaders of Africa – Azikiwe, Nkrumah, Nyerere, and others. This is the fascinating story that Adom Getachew narrates in her recent book, *Worldmaking After Empire*. And soon after the wave of African decolonization, third world alliances sought to decolonize the imperial foundations of international law by pushing the General Assembly resolution on the New International Economic Order. In many ways, it was the rise of the African continent that gave sharper bite to the process of destabilizing the hierarchical foundations of international order that began a decade earlier with Indian independence. In reading Bedjaoui's classic *Towards a New International Economic Order*, we can see how Third World leaders and intellectuals understood decolonizing international law to mean a wholesale rewriting of its

liberal foundations – even while retaining a spirit distilled from liberalism - of universal freedom and prosperity. In the half century after these exciting moments, much of the radical promise of decolonization was lost, as the rise of neoliberal ideology displaced the intellectual ferment in the Third World, in favor of deeply conservative dogma. Crucially, for freedom or prosperity, much of the world came to believe that there was no alternative to neoliberalism.

Over the last few years though, a backlash against neoliberal prescriptions has once again gripped intellectual and policy circles. For international law, this has resulted in a backlash against those institutions that symbolized the core of the neoliberal project – the World Trade Organization, and the system of investor state dispute settlement (about which, I recently wrote on this blog). We should note here, that this backlash against neoliberal globalization has been driven, in part at least, by majoritarian-nationalist parties, which makes this politically troubling, and intellectually unsatisfactory. But I should hasten to add that the crisis of post-war (neo)liberalism (albeit, 'delayed,' as Wolfgang Streeck explains), is very real, and can be powerfully channeled by progressive forces to renew the cosmopolitan thinking that marked the time of decolonization. Indeed, should they fail to do so, neoliberalism might adapt much better to the nationalist-protectionist agenda arising on the Right, as some authors in a recent book explore.

It is this background that frames my response to John Nyanje's very thoughtful, and pragmatically driven, piece on how African countries must approach ISDS reform. Nyanje recognizes, like many scholars and practitioners of international investment arbitration, that, to quote from *Hamlet,* 'something is rotten in the state of Denmark.' But to cure the malady, Nyanje hopes, African States would participate more fully in the ISDS regime rather than take such clauses out of bilateral investment treaties; they would therefore, open up their chance to write more equitable rules for the regime. Reform of course, would be very welcome; but my fear is that when we think about merely reforming the ISDS regime, we remain in the grip of the idea there is no alternative to neoliberalism. And yet, as we know, a cosmopolitan alternative was at the heart of the renewed founding of African States in the 20th century.

Nyanje, I think, makes four notable points: *first,* at least some criticism of the ISDS system remains to be empirically established. *Second,* as African nations

develop greater capital concentration, it is likely that there will be more capital exported out of Africa, and that outward movement of capital will demand protection abroad. *Third,* foreign investment is not an unequal bargain, and investment flows depend, at least in part, on commitments to adjudicatory mechanisms. *Fourth,* politicians encourage backlash against international dispute mechanisms to sometimes a deflect domestic discontent. I share this concern; many African States have of course, given up on developmental projects, to be replaced by clientelist governments. Therefore, the fear that the turn away from international rules would only likely benefit a narrow rentier class of citizens is entirely legitimate. And in such circumstances, to choose nationalist-protectionism over neoliberal globalism can hardly seem appealing. But this is where we must take pause. I fear Nyanje loses sight of the fact, and we must not, that what has driven the backlash against the ISDS system is fundamentally a democratic impulse – to assert the democratically legitimate jurisdiction of national courts over the behavior of trans-national corporations. The institutions that support democracy within States must surely be improved, but in the meanwhile, there is little to be gained by offering shields to foreign investors from the vagaries of democracy.

Now for two specific concerns. First, Nyanje hopes to persuade African governments to think of their future as capital exporting nations, when their investors would benefit from ISDS protections. Underlying this, is of course a deeply flawed vision of development, of nation-States following a singular, Western led path of history. ISDS provisions have their roots in imperialism – offering protections to capital investors from core capitalist nations in jurisdictions that were not, in their opinion, suitably governed by the rule of law. Anti-imperialism would, I think, morally require us to reject these premises for our future. But we might even ask the empirical question – what are the jurisdictions that do not suitably offer protections to foreign investment within their local dispute resolution mechanisms? More specifically, is there any evidence at all, of countries that systematically discriminate in their local courts against foreign investors? Which countries are such ‘rule of law’ outliers? Without evidence of this, ISDS provisions are entirely unnecessary.

Second, I want to pay attention to the brief, but jarring, comparison that Nyanje draws between the international human rights regime and the ISDS regime. If the human rights regime is legitimate when it allows individuals to directly sue

governments, without anyone complaining of States held hostage, why do we cry foul over corporations carrying similar rights to sue, asks Nyanje. The brief answer of course, is power. Human rights treaties inevitably require exhaustion of local remedies. International human rights litigation rarely sets States back by millions of dollars. And finally, transnational corporations can scarcely be abused and denied the rights that inhere in the human person. But I think there is a deeper point here. From the point of view of law, international human rights are premised on constraints acting on national sovereignty. And thinking about global justice certainly might require thinking in terms beyond state sovereignty. When we do so, we might have to again draw on the resources of radical anti-colonial thought – modern day human rights are, as Sam Moyn argued, are anything but radical. Thus, if we set out to think beyond nationalism and sovereignty, but with an eye to justice, we will have to revise both human rights and ISDS (among other things): except in opposite directions.

View online: ISDS Reform and the Problems of Imagining Our Future

Provided by Afronomicslaw