Repurposing International Investment Agreements to Advance Sustainable Development in Nigeria

By:

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In January 2021, the Dutch Court of Appeal held Shell Nigeria liable to pay compensation for oil spills in the Niger Delta region of Nigeria. It took 13 years for four Nigerian farmers to pursue this civil case, which has wider implications for holding multinational companies operating in Nigeria accountable. While this is a victory for the affected communities and opens new pathways for civil suits against foreign investors in their home states, it also raises important questions about the prevention of harm and the obligations of government in prioritising an agenda of sustainable development through foreign investments. This blog reflects on recent efforts for international investment agreements (IIAs) to extend human rights and sustainable development obligations to foreign investors. Prior to the recent adoption of the Nigeria-Morocco BIT in 2016, human rights language and foreign investor obligations were notably

absent in Nigeria's IIAs. This discrepancy - between attempts to attract foreign investment through IIAs and the failure to link these investments to socio-economic priorities in Nigeria – has led to palpable tensions within Nigeria's dominant economic sector, oil production, but recent international law developments suggest a slow shift is happening.

Nigeria's economy is primarily dependent on oil and over the past few decades, it has struggled to diversify its economy despite the increase in environmental destruction that oil extraction is causing. As the world confronts arguably the biggest crisis in our generation, climate change, the sustainability and impact of resource extraction has been directly linked to this crisis. Oil extraction has always set Nigeria on a collision course with the global community. In 1995, Nigeria was suspended from the Commonwealth after the military government executed nine environmental activists from Ogoniland who were fighting to save their land and water from oil pollution. More recently, the Nigerian military destroyed the community of Odi and murdered residents in an oil producing area of Nigeria after it was alleged that residents advocating for a greater share of oil wealth were responsible for the deaths of policemen who were securing an American pipeline company. More than 25 years after Ogoniland executions, a major shift on Nigeria's foreign policy on sustainable development has been limited but important. How this shift has taken place in line with new global commitments for states is explored below.

A New Vision for Development

In adopting the Sustainable Development Goals (SDGs) in 2015, Nigeria was one of 193 member states of the United Nations to affirm a collective vision of global progress over fifteen years, based on economic development and strong protection of fundamental human rights. While non-binding, the SDGs represents a diverse set of aspirational benchmarks to be achieved by the global community, many of which are couched in the language of human rights protection. International Investment Agreements (IIAs) offer a unique and undertheorized point-of-entry for advocates pushing for sustainable development through foreign investment. IIAs, with their neoliberal foundation and stringent investor protections, may seem an unlikely place to start. Such agreements have gained notoriety by adopting opaque dispute resolution processes, which privilege the interests of corporate investors while dodging

critical human rights issues and limiting state regulation in the public interest. If human rights are indeed a fundamental part of the progressive global order envisaged in the SDGs, then IIAs have historically proven unable and unfit to reinforce these rights.

However, IIAs have tremendous potential to hinder or help states such as Nigeria in their pursuit of the SDGs. It can particularly help states if they are bolder in extending specific obligations tied to their economic objectives in IIAs. The potential for IIAs to play a role in sustainable development should not be quickly dismissed due to their widespread use, sheer volume, and impact on critical sectors, such as energy and sanitation. While various controversies and the position of some capital exporting states have cast doubt on the future of IIAs, it seems unlikely that major capital-exporting countries will rapidly abandon a system that has proven beneficial to them. Furthermore, the number of currently active treaties means that IIAs will continue to affect global investments throughout the tenure of the SDGs.

If IIAs are to become a tool to help realize the SDGs, rather than hinder their progress, states must find ways to integrate stronger protections for human rights and sustainable development policies into the language of IIAs themselves including the extension of obligations to investors. In 2016, Nigeria signed a bilateral investment treaty with Morocco where the preamble recognizes 'the important contribution investment can make to the sustainable development of the state parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development.' The agreement further seeks 'to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the state parties.' To achieve this, the agreement incorporates noteworthy provisions such as requirements for environmental and social impact assessments prior to the establishment of an investment. Furthermore, the agreement imposes post-establishment obligations on environmental management for investors, particularly, for those in resource exploitation and high-risk industries. In addition, unlike investment agreements, which only extends liability to states, the Morocco-Nigeria BIT allows investors to be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant

damages in the host state.[1]

The Morocco-Nigeria agreement is a step in the right direction. The SDGs and IIAs can work together to help reinforce human rights, and improve economic development. While the SDGs do not constitute an internationally binding treaty, Nigeria has voluntarily undertaken this collective responsibility and it is incumbent upon it, to ensure that ancillary international agreements do not frustrate progress towards these goals. The SDGs are inextricably linked to a progressive idea of fundamental human rights. The goals aim to realize the human rights of all and recognises the role of socio-economic rights in human development. The Office of the High Commissioner for Human rights stated that one of the key differences between the SDGs and the Millennium Development Goals (MDGs) was a deeper connection to human rights in the SDGs.

The Role of Human Rights

Nigeria's IIAs have mostly followed the historical approach of prioritising investor protections without adequate consideration for the implications for competing state obligations within IIAs and other international treaties such as human rights treaties. These competing state obligations can appear to directly contradict each other but better integration of the objectives of these various treaties is possible.

Nigeria has ratified a number of human rights treaties, which recognize various social and economic rights including the right to development with corresponding state obligations for their realization. For example, the African Charter on Human and People's Rights (ACHPR) notably says that 'state parties shall undertake to eliminate all forms of foreign exploitation particularly practiced by international monopolies so as to enable their peoples to fully benefit from the advantage derived from their natural resources.' The charter also recognizes the right to social and economic development and the state duty to ensure the exercise of the right to development. It also protects the right to a general satisfactory environment to development.

These provisions are legally binding on Nigeria and enforceable through the African court on human rights. In 2001, following the investigation into the state execution of the nine activists from Ogoniland, the African Commission, which was set up by the ACHPR to monitor the realization of the treaty rights,

stated that there are ‘no rights in the African Charter that cannot be made effective.’ The Commission found that Nigeria had violated several rights, including the rights to health, housing and life, given its failure to take measures to protect the Ogoni people from the adverse effects of oil exploration in the Niger Delta. The Commission also found that the right of the Ogoni people to dispose of their wealth and natural resources was violated.

Despite all of this, reference to critical human rights is notably absent from most IIAs that Nigeria had signed prior to the recent one with Morocco. This stark disparity - between global goals aimed at fulfilling basic rights and investment agreements that seek to divorce the flow of capital from its potential impact on human rights - is concerning. The SDGs can serve as a bridge to bring human rights considerations into the IIA space, recognizing the fundamental interdependency of economic development and human rights. For example, some of the SDGs may be aligned to the purported goals and benefits of IIAs themselves, such as improving economic growth via increased investment flows. In this case, IIAs can be a tool for the positive realization of individual SDGs, rather than impeding the realization of these goals, through performance requirements, fair and equitable treatment protections, and limits on government regulation. The Nigeria-Morocco BIT achieves this by creating a strong public interest exemption such as recognizing the host state’s right ‘to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.’

Unfortunately, the conceptualization of most IIAs is as exclusively investor protection instruments. However, the SDGs can help negotiating states reframe the ultimate goal of investment treaties as one of serving both state constituencies and the broader international goals. The pan-African investment code mirrors the approach taken in the Nigeria-Morocco BIT. Its objective is to promote investments that fosters sustainable development and takes into account the SDGs in its development. While it is unclear whether the Nigeria-Morocco approach has influenced the language in the draft code, what is apparent is that Nigeria alongside other African states are increasingly recognizing that when states go to the treaty negotiating table, they are now doing so equipped with holistic and creative methods of protecting and advancing sustainable development in every single provision.

A Sustainable Future Ahead

Implementation of the SDGs through IIAs represent an opportunity for states to think innovatively about how they can contribute to progress over the next decade, while a recent shift in attitudes towards IIAs has opened up space for reform. The Nigeria-Morocco BIT provides some tangible changes and suggestions that may be the first step in bringing greater coherence to the relationship between development goals and IIAs.

It is important to emphasize that the notable contributions to the development of international investment law in the Nigeria-Morocco BIT can only truly be effective if concomitant reforms are made to current investment dispute mechanism systems. Comprehensive engagement with the deficiencies of the system and its reform is beyond the scope of this post, but crucial to the success of any treaty. ISDS mechanisms need to be reformed to ensure that arbitrators are more accountable, that proceedings are more transparent, and that third parties can provide input. If a state cannot sue an investor for violating the SDG-oriented treaty provisions or defend itself on their basis, the reforms to the IIA itself become merely inert, affirmational language.

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*This post builds on an earlier research project the author worked on with students from the Harvard Human Rights Clinic as a Clinical Advocacy Fellow in 2016.

[1] For more in-depth research on the innovations of the Nigeria-Morocco BIT, see Olabisi D Akinkugbe, “Reverse Contributors? African State Parties, ICSID, and the Development of International Investment Law” (2019) 34:2 ICSID Rev 434.

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