Locating Fragmentation in the 'Africanization' of International Investment Law

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I. Introduction

Contemporary scholarship on international investment law (IIL) in Africa has emphasised the 'Africanization' of IIL[1]. Mbengue and Schacherer define the Africanization of IIL as the recent trend by African states and organisations to reform IIL to suit their policy and development priorities[2]. In her article, 'Investment Law and Treaty Reform in Africa: Fragments and Fragmentation', Ndanga Kamau builds on this scholarship and canvasses recent IIL reforms in Africa at the national, bilateral, sub-regional and regional levels.

She argues that while some recurring themes can be found within and between these levels, the divergent policy approaches in these various reform processes reflect a *fragmentation* in the reform of IIL in Africa[3]. For example, it may be inferred from her description of reform processes at the national level that

African countries have expressed various policy stances in their laws on issues such as national treatment, fair and equitable treatment and even the scope of investor obligations[4]. She makes similar observations at the bilateral level when she examines the ten most recent bilateral investment treaties (BITs) ratified by African states and argues that 'while there has been a change in some of the language in the treaties as a reaction to criticism of earlier generations of treaties, the changes have not been coherent even within states'[5]. In sum, she concludes that without clearly defined policies, African states are 'simultaneously amending their domestic laws, negotiating BITs, negotiating investment provisions of RECs, negotiating the [African Continental Free Trade Area] Investment Protocol and participating in global reform efforts'[6].

Of concern is how she frames this fragmentation within the 'Africanization of IIL thesis'[7]. While Kamau makes observations on the inadequacy of individual reforms (e.g. the Pan-African Investment Code), I limit myself to her conceptualisation of the phenomenon of Africanization and the place of fragmentation within it. In contrast to the definition provided earlier in this piece, Kamau instead takes the Africanization of IIL to mean that 'African states are taking control of the reform process *and infusing it with an African approach to international investment law*'[8]. Kamau strongly implies that an 'African approach' to IIL means aligning IIL reform processes in Africa to an overarching continental policy vision[9].

Her central argument is that because of the fragmentation in various reform processes across the continent, we cannot say that these reform processes reveal 'a distinctly *African approach to reform*'[10]. To summarise, she implies that an African approach would mean that reforms cohere around a cross-cutting policy vision guided by common principles and objectives. The close nexus that Kamau's view of Africanization draws between reforms of IIL in Africa and their coherence with a harmonised policy vision raises an important problem, namely, whether the absence of such a coordinated approach limits the argument that IIL has been 'Africanised' in the various reforms that have thus far been pursued.

Reflecting on Kamau's article, I make two points in this piece. Firstly, I argue that the presence of a cross-cutting policy vision in the Africanization of IIL

should not be viewed as its conceptual sine qua non but as a significant challenge to its end goals. In other words, we should not dismiss a given reform of IIL in Africa as not being (in Kamau's words) 'uniquely African' purely because it does not adhere to a continental cross-cutting policy vision of IIL reform. Secondly, I argue that Kamau's analysis is incomplete insofar as it fails to consider why certain themes have been recurrent in the Africanization of IIL. To make my case, I first broadly establish the meaning that this writing attaches to the 'Africanization'of IIL'. I then discuss reforms that have frequently been argued to signify the Africanization of IIL and how they fit within Kamau's analysis. Following this, I reflect on some critical points that Kamau raises, which I agree with and consider how Kamau's fragmentation problem should be located within the broader phenomenon of the Africanization of IIL.

II. What does the Africanization of IIL Refer to?

Mbengue and Schacherer, who have made some of the more notable scholarly contributions on the subject, describe the Africanization of IIL as the 'prise en main of African States and organisations to design the regulation of international investment according to their policy and development priorities'[11]. Mbengue, in other writings, has located the Africanization of IIL within a broader transition of African states and organisations from mere consumers and recipients of IIL rules ('rule-takers') to active producers of IIL that suit their contexts and priorities ('rule-makers')[12]. These writers thus describe the Africanization of IIL as a phenomenon where some African states and organisations are actively centring their developmental interests through the reform of IIL.

Olabisi Akinkugbe, in a recent article, goes further and dedicates his study to solely conceptualising what he calls the 'Africanization thesis'. He frames his analysis in a TWAIL critique and argues that the Africanization of IIL refers to the 'substantive and procedural actions by African states against the hegemony of an international investment regime that historically subjugated their economic development interests in favour of the investor'[13]. This hegemony has its origins in colonialism and has owed its continuity to post-colonial neo-liberal impositions such as the investor-state dispute settlement (ISDS) regime[14]. The ISDS regime has, for instance, historically created an unequal economic playing field in favour of investors from the Global North at the

behest of African states and the Global South generally[15]. Based on this, he argues that an important end of Africanization is the subversion of IIL's unequal architecture that has subjugated African states[16]. In its totality, he writes that the Africanization of IIL 'situates the broader socioeconomic, political, cultural, and sustainable development aspirations of African states with the interests of investors who enrich themselves even at the expense of the host states and their peoples'[17].

Inferring from the above literature, this writing broadly takes the Africanization of IIL to mean the initiative by African states and organisations to centre their developmental interests, particularly in the context of a hegemony historically in favour of investors through redesigning and reforming IIL. As was elaborated in the introduction, this definition differs from Kamau's concept of Africanization which emphasises the necessity of policy coordination and a harmonised policy vision with common principles. In the next section, it is shown that Kamau's choice to conceptualise the Africanization of IIL in this fashion results in an important shortcoming in her analysis.

III. African Voices in IIL Reform Processes

There are various investment reforms at equally various levels in the continent that reflect the innovative reforms of the kind discussed by Akinkugbe, Mbengue and Schahrer. For instance, at the national level, the South African Protection of Investment Act 2015 is often discussed. Among other innovations, the South African Act aligns investment law to constitutional aspirations, emphasises South Africa's right to regulate investment in the public interest and rebalances investor obligations with state interests[18]. At the bilateral level, one may consider the 2016 Morocco-Nigeria BIT[19]. The Treaty requires all investments to contribute to the sustainable development of the host state, and investments that do not adhere to this objective are not protected under the BIT[20]. It has been stated that the treaty 'recalibrates investment protection' through the various obligation on investors[21].

Regionally, the Common Market for East and Southern Africa's revised Investment Agreement is another notable effort. Though not yet in force, some key provisions include rebalancing rights between its member states and investors and compliance with a state's domestic laws[22]. Other significant

efforts at the regional level include the Economic Community of West African State's (ECOWAS) Common Investment Code and the amended Annex I of the Southern African Development Community's (SADC) Protocol on Finance and Investment, which revolve around similar themes[23].

The African Union's Pan-African Investment Code (PAIC) is the most significant instrument thus far at the continental level[24]. Like some of the reforms described above, it introduces innovative provisions that include direct obligations for investors, the integration of sustainable development with investment law, horizontal obligations and corporate governance obligations for investors. As Kamau notes, the PAIC is expected to inform the African Continental Free Trade Area's Investment Protocol[25]. Significantly, COMESA's revisions of its Agreement discussed above were made so that the Agreement would align with the PAIC[26].

It is clear that there have been some efforts by African states and regional organisations to orient investment regulation to their developmental interests and to redefine obligations between these states and investors. Indeed, it has been argued that the above instruments have departed from the 'old European-styled IIAs[27]'. Notably, Kamau discusses some of the reforms elaborated on above. However, there are two pitfalls to her analysis.

The first pitfall concerns her general point; there is no overarching policy approach in reform processes, and therefore, on this basis, these reforms are not 'uniquely African'[28]. With this perspective, we cannot say that the Africanization of IIL has occurred if its constituent instruments are not concluded in a coordinated manner and if common principles do not guide them. This limited view has the potential to erase African voices in IIL reform processes in the continent purely because they have not spoken in unison. As Akinkugbe writes, this kind of approach is couched in a rubric of regionalism which 'inherently limits the innovative character of some of the investment reforms in Africa' at the various levels discussed prior and thus 'inadvertently erases the African voice in the reform agenda of international investment agreements and IIL'[29]. From a conceptual and epistemic standpoint, this piece submits that the presence of a harmonised policy vision should not be taken as the sine qua non of the Africanization of IIL.

The second pitfall to her analysis is her dismissal of patterns of reform in Africa that involve subjects such as sustainable development, the state's right to regulate and the rebalancing of investor-state rights as simply 'recurring themes'[30]. While her observation of their recurrence is empirically useful, a degree of nuance is missing because she avoids the question of 'why' these themes have recurred in the first place. At least to some extent, one may argue that these themes may represent some common concerns of African states and so could reflect areas of priority in the reform of IIL in Africa. For instance, most of the instruments discussed above have tried to rebalance investor-state obligations and incorporate sustainable development, environmental protection, and marginalised rights in international investment treaties[31]. While these did not become priority areas due to some overarching policy coordination in the continent, their recurrence could embody the underlying policy commonalities that Kamau's study sought to uncover. However, Kamau does not effectively confront this question, so her analysis is arguably incomplete.

IV. Fragmentation and the Africanization of IIL

It would be prudent at this point to restate the unifying factors of Africanization presented earlier. It was previously stated that the Africanization of IIL involves centering African developmental interests in IIL and countering the investor hegemony that has historically been to the disadvantage of African states. Though fragmentation within and between levels of reform may not entirely eliminate the Africanization thesis from a *conceptual and epistemic* standpoint, they do seriously limit the achievement of its ends. Notably, Kamau does discuss these critical limitations.

Firstly, since one of the functions of investment law is to provide clarity to investors on how their investments will be treated, one must point out that isolated reform processes in Africa can add numerous complexities to existing obligations and present serious issues of clarity and clarity predictability for investors[32]. Kamau makes this point when she argues that the failure to establish a common and coordinated approach to reform has resulted in African states spinning an increasingly convoluted network of rights and obligations[33]. With this in mind, the absence of a common and coordinated approach should thus be considered in the context of the already 'complex,

fragmented, and heterogeneous network of bilateral, regional, and international legal instruments'[34]. If the Africanization of IIL sees African states centring their developmental interests through IIL reform, then one might argue that these interests are negatively affected when investors cannot adequately infer their obligations and rights.

Furthermore, common African positions would more strongly facilitate Africa's participation in the global reform of international investment agreements and ISDS[35]. Certainly, Kamau observes that African states have not effectively taken common stances at the global level[36]. Inconsistencies in reform processes and regimes of IIL in Africa limit this outcome because they express divergent approaches to common issues. This is detrimental because the hegemony that Africanization seeks to overcome has historically been catalysed by 'international treaties whose text and content was heavily influenced by the Western capital-exporting economies who were keen on maintaining international rules favourable to their social and economic interests[37]'. Developing a common voice on certain issues is thus important in translating the continent's common developmental interests in the broader global reform of IIL.

Related to this point, Zagel writes that on a bilateral level, despite important steps such as the Morocco-Nigeria BIT, there are still a large number of traditional international investment agreements concluded by African states and the Global North[38]. These agreements do not include the innovative reforms undertaken in the various instruments described above and thus can unduly prejudice African states' developmental interests to benefit investors and Global North states[39]. These inconsistencies limit existing reforms by preserving the unequal architecture of IIL and calls into question the broader 'persuasiveness' of Africanization in overcoming these realities[40].

Overall, the extent of policy coordination in reform processes is a serious criterion that can be considered alongside other factors that would inform a general metric of judging the adequacy of African reforms of IIL. Akinkugbe proposes, for instance, that Africanization efforts should be assessed on whether they preserve the unequal architecture of IIL that has subjugated African states. He argues that almost all reforms undertaken thus far have been moderate to the extent that they preserve this architecture but that African

states should continue to cascade these moderate reforms because they gradually and positively affect change to the IIL regime[41]. Inversely, Harrison Mbori suggests that by barring the radical reform of ISDS in Africa, African states are better off leaving the ISDS regime entirely[42]. While it is beyond the scope of this writing to substantively express a holistic metric to assess African reforms of IIL, the importance of such a metric cannot be understated.

V. Conclusion

For the reasons explored above, Kamau's greatest contribution is her comprehensive mapping of Africa's fragmented IIL reform processes and the divergent objectives that characterise them. In light of the fragmentation existing in reform processes, her recommendation that African states should therefore identify their collective interests ahead of the African Continental Free Trade Area's Investment Protocol is timely and critical[43]. However, despite the utility of her contribution, a more nuanced conceptual placement of these divergences as they relate to the Africanization of IIL would have been desirable. At the very least, it is hoped that this piece makes some strides towards that effect.

References

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[3] Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’ 1(1) African Journal of International Economic Law, 2020, 229.

[4] Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’, 203-212.

[5] Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’, 212.

[6] Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’, 230.

[7] I borrow the term ‘Africanization of IIL thesis’ from Olabisi Akinkugbe : Akinkugbe O, ‘Africanization and the reform of international investment law’ Forthcoming in 53 Case Western Reserve Journal of International Law, 2021, 4.

[8] Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’, 201.

[9] Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’, 203 where she states that ‘even though there does not yet exist an African approach to reform of international investment law, African states should strive to identify their collective interests’. Similarly in the abstract (at page 199) she summarises her argument by stating that ‘these reforms do not cohere around one approach and as such there is no distinctly African approach exemplified in these fragmented efforts’. See also Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’, 202, 229, 230.

[10] Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’, 229-230.

[11] Mbengue M, and Schacherer S, ‘Evolution of international investment agreements in Africa: Features and challenges of investment law Africanization’, 2-3.

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[18] Section 4, 6, 8, 12, South African Protection of Investment Act 2015.

[19] See Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 2016.

[20] Article 1, Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 2016.

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[22] Article 11, 13, Revised Common Market for East and Southern Africa Common Investment Agreement, 2017.

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[24] African Union Pan-African Investment Code, 2015.

[25] Kamau N, ‘Investment Law and Treaty Reform in Africa: Fragments and Fragmentation’, 202.

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