Book Symposium Introduction: Exploring a Human Rights based approach to Investment Regulation in Africa

By:

Dr. Fola Adeleke

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This book symposium is about a new era of international investment norms in Africa. The discussion focuses on how to foster cooperation between African states and foreign investors in implementing sustainable development objectives and addressing global challenges. Several traditional investment treaties offer investors broad rights and protections that are backed by strong dispute settlement mechanisms. In the same vein, States have historically committed to non-reciprocal obligations in investment treaties that are seen as significantly limiting the policy space of states. However, in recent years, countries—particularly those from the global South—have been questioning the rationale behind this practice and have attempted (mostly on a regional level) to design models that strike a balance between investment protection and legitimate policy space that extends obligations to investors and protects a

State's right to regulate in the public interest. African governments have taken a leading role in this area.

The Common Market for Eastern and Southern Africa (COMESA) addressed compliance with human rights and other social obligations in its 2007 Investment Agreement. The Economic Community of West African States (ECOWAS), the East African Community (EAC) and the Southern African Development Community (SADC) —have also developed templates that contain clauses aimed at the legal protection of the interests of different stakeholders. The 2016 Pan African Investment Code (PAIC) is another recent example that includes extensive provisions on investor obligations.

Dozens of standards, guidelines, principles, norms, and best practices have also been adopted under international law to address environmental, economic and social impacts of multinational enterprises. Yet, many governments from emerging economies believe they have had their regulatory space curtailed through arbitration decisions that adopt an expansive interpretation on the standards of treatment offered to foreign investors in the investment agreements of respective countries.

How do we address state concerns about investor accountability with domestic and international human rights standards in their operations while providing regulatory certainty for investors? Can investment frameworks be used as a general framework for sustainable investment and address emerging global challenges? How do we create a better balance of rights and obligations for states and investors? I am pleased to present this book symposium to answer these questions on the recalibration of international investment agreements for sustainable investment discussed in my book, International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach.

The presentations in this symposium aim to interrogate approaches to investment dispute settlement that ensures investors adhere to sustainable development standards in their operations in the host states, respect human rights obligations and ensure that communities and people adversely affected by investors' corporate behaviour can seek and obtain redress for any harm suffered.

Towards the end of 2016, two economic giants in Africa, Morocco and Nigeria, signed a bilateral investment treaty. The agreement is an excellent attempt to give effect to various norms proposed in the model treaty frameworks reflected in various regional agreements across Africa including the Pan African Investment code. In the Morocco-Nigeria BIT, foreign investors are obliged to uphold human rights in accordance with laws of the home and host state of a foreign investor. The notion of sovereign right to regulate of states is also fast gaining traction in emerging economies with preference for enhancing systemic consistency such as settling investment disputes outside of international arbitration, balancing the strategies deployed for promoting and facilitating investment while ensuring responsible investment.

The global economy and global economic competition is a game of unequal players as argued by Ha-Joon Chang, a development economist, in his book, Bad Samaritans. As a result, it is necessary to allow a playing field that sometimes favour economically smaller countries. This would in practice mean an allowance for stricter regulations on foreign investment to meet the economic objectives of countries. Current orthodoxy on neoliberal economics suggests that multi-national corporations will avoid countries that regulate foreign direct investment (FDI) and does not provide investor-state dispute settlement (ISDS) mechanisms. If that were the case, countries such as China and Brazil would be lagging behind on FDI inflows. Various studies suggest that corporations are more interested in the market potential of a host country than liberalized regulation that gives foreign firms maximum freedom to operate. In a world where some global firms have a larger capital base than some emerging economies, we need corresponding obligations for foreign investors in treaties and mechanisms for dispute settlement that allow states to hold corporations accountable for their actions which may contravene human rights norms or are anti-inclusive development. Without this, the concept of sustainable development will not address much needed equity in the global economy.

I hope you engage with these thought provoking pieces that starts off with a discussion on neoliberalism and its implications for the arbitration of investment disputes within African, and other Global South, regions by Dr. Rachel Adams. Dr. Adams argues that ‘greater contextual emphasis must be

placed on the human rights obligations of states at both the negotiation and arbitration stages of investment treaties, as human rights act as a critical counter-weight to neoliberalist thinking insofar as they are based, at least constitutionally, on the primary role of the sovereign state being the wellbeing of its people.'

Dr. Shanelle van der Berg in her piece on accountability in sustainable development acknowledges that 'attracting foreign investment while holding transnational corporations to account for any human rights transgressions is by no means an easy feat.' She argues that 'it will require that a careful balance be struck between the interests of the host State and its people,' and that 'the sustainable development agendahas necessitated a re-imagining of corporates' role in the financing and realisation of the Sustainable Development Goals (SDGs) and, indirectly, the realisation of the rights on which the goals are based .'

In his piece, Dr. Regis Simo contends that new developments in Africa offer new opportunities for investment rule-making and dispute settlement that breaks the cycle of African countries being rule takers. Faith Tigere makes the case for why Africa should have its own continent wide investment regulatory framework to complement the AfCFTA agreement and the two protocols in Trade in Goods and Services.

I hope these insights offer new perspectives on the exciting future of investment law in Africa.

Contributors

Dr. Rachel Adams: International Investment Law and Policy in Africa: Further Analysis on Neoliberalism

Dr. Shanelle van der Berg: Accountability in sustainable development: Pipe dream or necessity for global transformation?

Dr. Regis Simo: International Investment Law and Policy in Africa in the Context of the Pan-African Investment Code

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