International Investment Law and Policy in Africa: Further Analysis on Neoliberalism

By:

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International Investment Law and Policy in Africa sets out to counter the neoliberalist tendencies of international investment law and particularly investment treaties through developing a public interest regulation theory which calls for the arbitration of investment disputes and regulation of investment treaties to treat public interest issues – and fundamentally human rights – as paramount. Accordingly, one of the key points of departure of this book is that 'the prevailing investment treaty based rules regime institutionalises neoliberalism, which argues for a lesser involvement of the state in the market' (p. 19), and that 'despite neo-liberalism's aversion to the role of the state in economic matters, the state is responsible for the public interest and is the highest authority and a reduction in its economic functions' (p. 19). It is on this basis that Adeleke theorises a harmonisation between the neoliberalist attitudes of international investment law on the one hand, and the public interest objectives of human rights law on the other. This short essay

seeks to provide some further analysis on neoliberalism and its implications for the arbitration of investment disputes within African, and other Global South, regions.

While it is important to recognise that understandings and critiques of the concept and practices of neoliberalism vary widely and are oftentimes contested (O'Connor 2010), neoliberalism may be broadly understood as a dominant and self-acclaimed universal contemporary ideology that holds the free market as the ultimate (non–) governor (Gill 1995). The free market redistributes power and money through competition and commerce, and its influence supposedly extends to the mediation of all spheres of human life. Neoliberalism is broadly considered a totalising ideology centred upon the role of the market as an undefined and unconfined corpus under which every aspect of life can be managed, controlled, and economically enriched (Harvey 2005). In his seminal work on the topic, David Harvey describes neoliberalism as an ethic, guiding human action and replacing earlier structures of ethical belief and behaviour (2005, p. 3). Through this ethics, neoliberalism normalises a species of individuals to be entrepreneurial and autonomous, and organises society and public institutions to maximise profit and commodification.

The history of neoliberalism, as a social theory, is commonly thought to date back to the work of Adam Smith and his 1776 publication *The Wealth of Nations* (Clarke 2005). Proffering the free market as a superior economic system, Smith argued that it naturally brought about societal benefit, insofar as individuals entered freely into exchange interactions in efforts of betterment. This idea was later revisited by Milton Freidman in his work on free market theory, broadly considered as seminal to neoliberalist doctrine (1962, p. 55). But neoliberalism proper was thought to have become dominant in the decade after Freidman. Clarke describes the resurgence of 19th century liberal market thinking in the last quarter of the 20th century, particularly in Britain and the United States (2005). He states how this resurgence was precipitated by the crisis of the Keynesian welfare state that was falling short of the liberal market ideal, and slowing the growth of global capital (2005). O'Conner, more pointedly, locates the emergence of neoliberal thinking and policies with the historical evolution of capitalism (2010). Through a Marxist analysis of capitalism, O'Conner lays out how neoliberalism reformed the post-war political

economy by ‘reordering the interests of workers and capitalists, the organizing and reproductive structures of capitalism, and the institutions/policies of accumulation’ (2010, p. 710).

For David Singh Grewal and Jedediah Purdy, law is the key vehicle through which neoliberalism is mediated by altering the role of the state from sovereign of the people to regulator of the free market. They speak of four critical assumptions of neoliberalism and how these assumptions draw on and reshape the purpose of law and the state as law-maker. These assumptions include:

- ‘The view that strong rights of property and private contract are the best means to increase overall welfare, the sole justification for “political intervention” being to “correct market failures”’;
- ‘The belief that strong property rights best protect the equal freedom and dignity of individuals, so that a commercial social order governed by the market is the most decent society we have any chance of achieving’;
- A denial of any possible alternative means of governing and conducting social and economic affairs (5-6).

Indeed, for Grewal and Purdy, the shift in the role of law within neoliberalism is such that ‘the disputes it addresses are embedded in such questions as the scope and nature of property rights (including intellectual property), the constitutional extent of the government’s power to regulate, the appropriate aims and techniques of administrative agencies, and the nature of the personal liberty and equality that basic constitutional protections enshrine’ (p. 8).Anti-neoliberal scholars therefore wholeheartedly reject the premise that market conduct and profit is naturally within the public interest; a premise which has substantial ramifications for the role of the public interest in the regulation of investment disputes, and particularly within African and Global South regions where questions around the legitimacy of state actions too readily arise.

Thus, within the context of investment disputes, 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. This is particularly telling within the African context

where the African Charter on Human and Peoples' Rights sets out the unprecedented (within international human rights law) canon of community rights, which sit critically opposed to the valorisation of the entrepreneurial neoliberal individual whose private property rights trump all other social goods.

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