# Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms – A Response

**By:**

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In this blogpost, John Nyanje engages with the subject of investor-state dispute settlement reforms in Africa. The author rightly notes that the backlash against investor-state dispute settlement (ISDS) is a global phenomenon. The ISDS regime, Nyanje notes is under attack for various reasons including consistency and predictability of decisions reached, transparency in arbitral proceedings and accessibility of awards made. In 2010, the United Nations Conference on Trade and Development (UNCTAD) summarised the backlash against ISDS in the following terms:  "[A] perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures." [UNCTAD, *IIA Issues Note: Reform of Investor-State Dispute Settlement: in*

*Search of a Roadmap* (No 2, United Nations, June 2013, p. 1)]. Nyanje also rightly states that there seems to be agreement among states, policymakers, international arbitration practitioners and investment dispute settlement institutions that ISDS needs reform. Approaches to how these reforms are to take have, however, varied from country to country, region to region, and from scholar to scholar.

Nyanje came very clear on what the blogpost sought to do, namely, to advance a "a theory of how African states must consider ISDS reform from *a neutral viewpoint*, and should avoid the *misguided radical paradigm shifts* that have become popular talk on the Continent, where everyone seems to be fighting for hegemony of the system rather than discussing a working formula." The position taken by Nyanje here cannot be "a neutral viewpoint" when he characterises one perspective as to how the reform of ISDS should be approached as "misguided," "radical" and as "fighting for hegemony of the system rather than discussing a working formula." As it is, Nyanje has not established how "misguided" and "radical" the African approaches are or how they fail to work either when assessed on their own or when compared to regimes outside of the African continent. It is not clear from the blogpost how African countries, individually and collectively, have taken a position on ISDS that is idealistic, unrealistic or unworkable. The purpose of the use of the concept of "hegemony" is also not clear from the analysis.

Nyanje is right when he argued that self-interests underlies ISDS. The history of investment treaty law and arbitration is largely a post-colonial one. During colonialism, investments were protected by imperial legal systems which were transplanted into the colonies. In parts of the world where colonialism did not take place, diplomacy and force were occasionally used to protect aliens and their property. The controversy between the United States of America and Latin America countries was about whether aliens were to be treated according to the so-called international minimum standard or according to national treatment based on domestic law. The conclusion of investment treaties with provisions for investor-state dispute settlement mechanism in the 1960s coincided with the gaining of independence by former colonies across Africa and Asia and within the backdrop of the resistance of former colonies and developing countries in general, including some North and South American countries, against the externalisation or internationalisation of standards of investment protection and the treatment of aliens in general. [Muthucumaraswamy Sornarajah*, Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015); Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4edn, CUP, 2017); and Jeswald Salacuse, *The Law of Investment Treaties* (2edn, Oxford University Press, 2015) are useful readings on these issues].

The resistance is reflected in the United Nations resolutions such as General Assembly Resolution 1803 (XVII) of 14 December 1962, *Permanent Sovereignty over Natural Resources*; General Assembly Resolution 3281 (XXIX) of 12 December 1974, *Charter of Economic Rights and Duties of States*; and General Assembly Resolution 3201 (S-VI) of 01 May 1974, and Declaration on the Establishment of a New International Economic Order. The current reforms of investment treaties and investor-state arbitration to accommodate states' right to regulate, including reforms by the very Western countries that championed and favoured ISDS over domestic courts, largely reflect the values embodied in these resolutions. Clearly, therefore, developed countries are retreating from the norms and dispute settlement mechanisms they promoted in relation to developing countries. It would seem then that African countries are not taking a position different from what they have long stood; indeed, they softened their stances partly because foreign investment was presented as *sine qua non* for development [Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* ( Cambridge University Press, 2005)]. The developing world is now returning to the values underlying the various resolutions. If the developed world, the 'capital exporting' countries are abandoning the neoliberal tenets emblematic of investment treaty law and arbitration they initiated, African countries that originally adopted these regimes because of their dealings with the developed world, and not necessarily because it was in the interest of the continent to do so, have the more reason to radically and critically revaluate the utility and rationality of both investment treaties and investment arbitration [On the retreat from neoliberalism, see Muthucumaraswamy Sornarajah, 'The Retreat of Neo-Liberalism in Investment Treaty Arbitration' in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 273].

In the opinion of Nyanje, "States have to view FDI as a double-edged sword. First as country that is receiving the capital and secondly as a country that will export capital through its investors. Unfortunately, more often than not, African states see themselves as the former and not the latter.” It is not clear how the reception and exportation of capital amounts to a double-edged sword. Nyanje wants African countries to make use of the ISDS mechanisms, which he believes are currently underutilized. Perhaps the idea of a double-edged sword is to suggest that African countries stand to benefit or lose from investment treaty law and arbitration. The history of investment treaties shows that they were concluded at a time when the Western countries were the ones making large investments in Africa and other parts of the world. Therefore, investment treaties were concluded solely in their interests, as they presented them in disguise as *bilateral* and *reciprocal*. As UNCTAD has stated, initially, investment treaties were concluded between developed and developing countries, “usually at the initiative of the developed country in order to secure additional and higher standards of legal protection and guarantees for its investments firms than those offered under national laws” [UNCTAD *Bilateral investment treaties 1959–1999* (UN doc UNCTAD/ITE/IIA/2, 2000)]. African states hardly invested in the Western world when the investment treaties were concluded with them and therefore stood to benefit less from the investment treaties to which they had agreed. Today, investment outflows out of Africa is disproportionately low in comparison to investment inflows [UNCTAD, *World Investment Report 2019: Special Economic Zones* (United Nations 2019, pp. 34-39)]. This in turn means less reciprocal benefits will flow from countries with which African countries have investment treaties.

Moreover, the role of foreign investment as sole panacea for development is disputable. Equally disputable is the role of investment treaties in investment attraction generally, and to Africa specifically. A study on bilateral investment treaties and investment attraction to Ghana shows that the country attracted most of its investments from countries with which it has no bilateral investment treaties. The study concluded that the investments attracted to Ghana from countries with which it has investment treaties cannot be convincingly connected to investment treaties. The study refuted the role of foreign direct investment attraction conventionally attributed to bilateral investment treaties and argued based on the data analysed, that bilateral investment treaties were not uniquely relevant for investment attraction to Ghana and, by extension, similarly, placed African countries [Dominic Dagbanja, ‘Can African Countries

Attract Investments without Bilateral Investment Treaties? The Ghanaian Case' (2019) 40(2) *Australasian Review of African Studies* 71]. African countries are not using ISDS to their benefit perhaps because they do not invest or invest less abroad and the need to use ISDS has accordingly not arisen. It may also well be that the system is not relevant or cost-effective for African businesses. Arguably then, for African countries investment treaty law and arbitration is a single, rather than a double edged sword; it work less in favour of the continent.

Nyanje also says "Africa must think of their investors in any ISDS arrangement, and the mentality behind whatever dispute resolution system Africa states adopt, must be that of a balance of rights between investors and states." It is less clear from the blogpost the position African countries have taken on ISDS reforms that is exclusively about their interests and not that of the investor. It may be that Nyanje meant to advise rather than to critique. In the Draft Pan-African Investment Code, a framework for the making of investment treaties, African states recognised in the preamble, both "the right to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives" and the "growing importance of trade and investments for the growth and development of Africa." Accordingly, the Draft Code guarantees foreign investors of protection by the usual standards of investment protection but also qualifies them so as to accommodate the right to regulate. The Draft Code also provides for corporate legal and social responsibilities of foreign investors so as to ensure that their activities meaningfully contribute to the development of the host states. Article 26(1) of the Draft Code provides that "State contracts should be negotiated and implemented, subject to national laws and regulations, in a mutually supportive manner *with due respect to and taking into consideration the legitimate development objectives of Member States as set out in their investment policies, while giving due consideration to the rights and interests of investors*." On ISDS, Article 42(1)(d) of the Draft Code provides that investor-state disputes may be resolved by "established African public or African private alternative dispute resolution center" and the arbitration shall be governed by the United Nations Commission on International Trade Law (UNCITRAL) rules." Thus, the case for 'balance', if that balance is justifiable and reasonable at all, both in substantive terms and ISDS is well recognised at the continental level in Africa.

The blogpost also criticises African state for getting "attracted to this idea of a total paradigm shift" and questions "why several African states are against the current ISDS system." It cites investment treaty and arbitration reforms in South Africa as an example of the "total paradigm shift." The blogpost's position on Africa seems rather unjustifiably critical and not reflective of what is going on elsewhere on ISDS reforms. For example, Indonesia terminated about 30 of its 72 investment treaties and India terminated 67 of its 86 investment treaties [UNCTDA, *Investment Policy Hub: International Investment Agreements Navigator*,<https://investmentpolicy.unctad.org/international-investment-agreements>]. These investment treaty terminations brought both the substantive and procedural protections to foreign investment to an end subject to termination clauses. The terminations by each of these two countries exceed investment treaty terminations in Africa put together. In the Western world, investment treaties and ISDS are being abandoned indirectly when the deal with themselves. For example, on 05 May 2020, 23 member States of the European Union (EU) signed an agreement to terminate intra-EU BITs with a view to implementing the ruling in the *Achmea case,* which held that investor–state arbitration clauses in intra-EU BITs were incompatible with EU law. About 125 intra-EU BITs will be terminated when the agreement enters into force [UNCTAD, *World Investment Report 2020: International Production beyond the Pandemic*, United Nations, 2020, p. 108]. Europe is also shifting from ad hoc investor-state tribunals to a permanent investment court system [Marc Bungenberg and August Reinisch, 'From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement', European Yearbook of International Law (Springer 2018)]. Moreover, some recent treaties either do not provide for ISDS at all or if provided for "it is subject to the State's right to give or withhold arbitration consent for each specific dispute" (UNCTAD, *World Investment Report 2020*, p. 113). Thus, African countries have been less "radical" in their approach to ISDS when compared to what is happening elsewhere, especially as evidenced in reforms by the very states that championed ISDS as the best mechanism for investment dispute resolution.

The blogpost ends by proposing the reforms of ISDS in terms of exhaustion of local remedies provisions in the investment treaties, a code of conduct for arbitrators, early dismissal procedures, mechanisms for joint interpretations and establishment of investment courts. These reforms largely reflect existing reform efforts in Africa, for example in the Uniform Act on Arbitration 2017 of the Organisation for the Harmonisation of Business Law in Africa and Sothern African Development Community (SADC) Model Bilateral Investment Treaty (July 2012).

In the opinion of this contribution, African States must be more radical in their approach to investment treaty and ISDS reforms. First, they must retain the role of domestic courts in the resolution of investment disputes in line with their national constitutions. Second, where the case for an international dispute settlement mechanism is made, they must consider a state-state trade and investment dispute settlement bodies at the regional and continental levels for all transnational business disputes. Appeals from domestic courts could lie before regional appellate bodies and from a regional appellate to a continental dispute settlement body. This should provide assurance to investors and other business entities that their disputes can and must be resolved within the African continent.

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