Hegemony 101 in International Investment Law

By:

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It is a special day when open scepticism by some African states towards investor-state dispute settlement (ISDS) is likened to hegemony. This characterization suggests that critical voices, once banished to the outskirts of ongoing discourse tabling reforms to ISDS in particular and to international investment law (IIL) more generally, now occupy the center of action and claim the mantle of thought leaders. But instead of cherishing this potential turning point for international law development by African states, we are urged to deny and disregard the views from Africa.

In this reply to John Nyanje's 'Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reform', I address Mr Nyanje's intriguing proposition that African states wishing to contribute more meaningfully to ISDS reform must steer clear of 'folk theories aimed at nothing but creating hegemony in ISDS'. Apparently, espousal of 'folk theories' by some states will convince many other states to follow suit, resulting in a prevailing vision of ISDS or IIL that rests shakily on 'folk theories'. According to Mr Nyanje, when

states rely on press clippings and poorly articulated fears to discredit the current system of ISDS, they are compromising the agenda for reform with 'weakly founded justificatory rhetorics' that pejoratively typify 'folk theories'. To be fair to Mauritius and South Africa (the two African states that are the main targets of Mr Nyanje's critique), the intense politicisation of ISDS makes it improbable for most states, and especially developing African states, not to approach ISDS reform as some form of political discourse which the popular press would see fit to weigh in. And to be fair to Mr Nyanje, learning about the 'true fears' of certain anti-ISDS states, chiefly costs and duration of arbitral proceedings, from the dispassionate and abbreviated reports on the UNICTRAL Working Group III sessions must have been an underwhelming experience.

However, Mr Nyanje and the scholars he admires may not have considered the stark informational and knowledge asymmetry on the finer workings of ISDS and of IIL across the UNCITRAL delegations. This asymmetry is evident from the content and tone of official interventions from the different delegates, and from unofficial discussions with other participants during session breaks, but it is not fully captured in the published reports. The more conversant a delegate is with the mechanics of ISDS and its reflection of the current state of IIL, the more profound and persuasive his or her interventions on the pros and cons of the system on and off the floor. To this end, South Africa's detailed written submissions to UNCITRAL evidence a firm grasp of both cosmetic and foundational problems with ISDS and a strong preference for more wide-ranging reforms. South Africa's stance on ISDS reform is far from uninformed. Mr Nyanje's complaint, which recalls the ostracism of developing world views by imperial nations that TWAIL scholars have long deplored, therefore stems from the inability of other dissenting African states, a number of whom labour under an informational and knowledge asymmetry, to convert him to their cause. And yet, he believes that unpersuasive arguments are nonetheless effective vectors for spreading anti-ISDS sentiments. I believe that Mr Nyanje underestimates what it takes to realize hegemonic aspirations in shaping the future of ISDS and IIL. That said, Mr Nyanje does not need to look far for a crash course on hegemony. The hegemon-aspirants in IIL have already, and perhaps unwittingly, revealed their three-step manual.

The first step is *to disguise*. In order to cultivate a large support base, which is fundamental to intellectual dominance, some hegemon-aspirants claim

neutrality for the position they espouse. If successfully implemented, this strategy enables hegemon-aspirants to rise above the fray of warring epistemic factions to become the voice of reasonableness and objectivity, thereby drawing the moderate and undecided masses to their cause. However, explicitly maintaining neutrality may backfire because it calls attention to the disguise. The more promising hegemon-aspirants present uncritical consolidatory observations on the narrow ISDS reform agenda and process, ostensibly striving to be of assistance to the advancement of sovereign and academic discussions. By championing the softer options for superficial ISDS reform, the subscribers to neutrality aim for mass appeal. But doing so at a time when the historic and structural inequalities in IIL that are manifested in ISDS are relentlessly exposed and acknowledged, is an unapologetic preservation of a deeply flawed system. This is the antithesis of neutrality.

The second step is *to dismiss*. After amassing a loyal and hopefully sizeable following, hegemon-aspirants then proceed to downplay dissent. One way of doing so in the context of the current ISDS reform dialogue, as Mr Nyanje helpfully points out, is to select and dismiss concerns that may not have been backed by the most incisive rationales as 'folk theories'. The possible absence of presentational finesse when some African states voiced their scepticism towards ISDS at UNCITRAL does not demote their fears and concerns to mere expression of 'folk theories'. How is it a 'folk theory' or rhetoric that the current system of ISDS allows a tribunal to order Pakistan to pay an Australian investor nearly $6 billion in damages, a sum which is roughly equivalent to a three-year bailout from the International Monetary Fund and large enough to cripple the country's finances? This award is all the more startling as the investor's application for a mining license was rejected and it never even began operations in the province of Balochistan. And how is it a 'folk theory' or rhetoric that the current system of ISDS persistently fails to acknowledge the rights of indigenous communities, like the peoples inhabiting the *páramo* of Santurbán in Colombia, when they are the ones whose livelihoods are disproportionately affected by investor activities and the attempts to regulate those activities? When the best evidence, where the foregoing are but two of many examples, against the substantial retention of the current ISDS system is already in the public record, it is disingenuous to deliberately miss the wood for the trees by highlighting and taking issue with the least salient objections.

The third step is *to divert*. Having disguised their intentions and downplayed dissent, hegemon-aspirants then frame the debate over ISDS reform in a way that diverts attention from the precarious foundations of IIL. Focusing on what will make the current system work, without simultaneously asking what about the current system is wrong, harbours two objectives. The first is to generate an aura of pragmatism. Since multilateral discussions on ISDS reform are already underway, it is surely more constructive to focus on the way forward than to revisit the past. The second is to justify refusal to engage with the critics on the systemic failings of ISDS. Since the hegemon-aspirants only want to talk about how to view and preserve ISDS and IIL with peripheral modifications, while the critics want to talk about the need for more profound and extensive reconceptualization and change, the critics have wilfully exceeded the parameters of the debate by talking past the anointed framers. This entitles the hegemon-aspirants, in the spirit of reciprocity, to pointedly turn away from the systemic failings of ISDS in order to talk past the critics. Creating a diversion from the most difficult issues plaguing the legitimacy of ISDS and IIL today is probably the greatest disservice one can do to the actual betterment of foreign investment regulation, and to the search for a truly equal, inclusive, sustainable and just form of multi-stakeholder dispute settlement.

Unlike Mr Nyanje, I have no crystal ball. But I have a conviction that African states and critically-minded scholars who have the courage to openly voice their fears and doubts over the best way forward for ISDS and IIL, are the best checks on those asserting dominance over any reform agenda. Conversely, if it is Mr Nyanje's concern that the critical voices will soon eclipse the complicit ones, then we must all await the new challengers to the new hegemony in IIL.

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