Exit is the Only Way Out: A Polemic Response to John Nyanje's "Hegemony in Investor State Dispute Settlement: How African states need to Approach Reforms"

By:

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Introduction

African states like many other states in the Global South should not approach Investor State Dispute Settlement (ISDS) reforms from a neutral and benign viewpoint. Instead they should offer proposals that will radically transform the system. John in his post argues for a search of a "working formula" to reform ISDS. It is difficult to fathom a working formula in a system founded on a history of subjugation, imposition, and colonial continuities. How African States can remain neutral and in search for a working formula in such a system completely baffles me. It is difficult to deny that ISDS is facing a serious legitimacy crisis

from many quarters. Yet African and other states from the Global South have been reluctant about this system since its inception and it is only now that is has also proven burdensome for the Global North that serious efforts at reforms are on the table. The explanation for this "lateness of reaction from developed States lies in the fact they are now becoming targets of mechanisms that were devised against developing states in a past era of foreign investment relations."

The era for New International Economic Order (NIEO) targeted this hegemony that has been present from the beginnings of imperialism and has mutated over centuries to continue serving the interests of transnational and mobile capital. If the system is not reformed from its roots, the new reforms that emerge will be another transition towards retrenchment. This is the reason why African States cannot and should not face ISDS reform from a neutral perspective. Part of my wholesale rejection of this neutrality is that is part of the erasure of history and epistemicide that African countries have faced for the past. Like many other areas of international law, international investment law promotes neo-colonialism and neo-liberalism. I therefore completely agree with Mathias Kumm that "The idea of investment arbitration as a field with its own separate dispute resolution infrastructure should be seen as an inherently dubious transitional phenomenon – perhaps comparable to the League of Nations Mandate System or the UN Trusteeship System – that deserves to wither away over time, rather than being reformed." This idea is well traced and supported by Antony Anghie in is seminal book on Imperialism, Sovereignty, and the Making of International Law.

Foreign Direct Investment (FDI) Law and Policy's Neo-liberal Imposition

John argues that FDI is a union of convenience and that its offers benefits on both sides. The evidence of this in Africa is lopsided with mixed and contradictory evidence on the increase of FDI as a result of investment treaties. Some studies have found little evidence that signing of BITs stimulate additional investment. The FDI referred to here was first protected by colonialism and is now protected by neo-liberal imposition for which ISDS is a prime example. The truth that African countries are capital importers is also tied to the history of extractive colonialism and continuities of colonialism

through neo-liberal imposition that John ignores. That is why he argues that "African counties view themselves as capital importers." This view does not capture how the Global North countries and institutions of the neo-liberal era have forced African States into a cul-de-sac. History, especially imperialism has conspired to make African States economic dependents of the Global North for FDI. It is not these African States desire to "view" themselves as capital importers. The truth is that through imperialism and neo-liberal imposition transnational mobile capital is generated, disseminated, and regulated in the Global North. The external force of powerful institutions like the Bretton Woods Institutions (World Bank and IMF) have made African States perpetual capital importers.

With this background, blaming the close to non-existent African foreign investors, who would activate the use of the ICSID system does not make logical sense. The institution was created to respond to unfavourable claims of transnationals companies in non-domestic avenues but founded on contracts not on treaties. The answer why African investors have not used ICSID actively can be found within the structure of the ISDS system itself historically and international law's support of a manifestly unfair economic playing field. Telling African States to learn from the USA's lessons in NAFTA is akin to advising former slaves to use the tactics of their former slave master to achieve the same level of hegemonic economic power. This is not just a "mentality" that African States are facing, it's a carefully woven system of subjugation and imposition. It has historical roots is the colonial vehicles of imperialism: The Chartered Companies like the Imperial British East African Company (IBEACo) that were used as the original special purpose vehicles to colonize African States. You cannot erase a more than two centuries-based history of the use of international law for the interest of powerful imperial states with a mere change of mentality.

Colonialism and Neo-Liberalism as African Lived Reality

At the heart of his argument, John says that African states are only against ISDS as a perception informed by Terence Halliday's Folk Theory. It is difficult to understand how the egregious sins of colonialism and its continuities – if we agree that this is a strong origin of ISDS – are mere perceptions. TWAIL oriented

scholars from earlier ones like Judge Mohammed Bedjaoui and M. Sornarajah, to more recent ones like Amr A. Shalakany and, Antony Anghie have already demonstrated how the ISDS system is founded on weak foundations and original sins. African States are therefore not merely using unverified assertions as basis for the rejection of ISDS.

Specifically, on the perception claim, John points to Chile's response to Mauritius and South Africa on the importance of facts and not perception. He rejects any perception claims as having nothing to do with the failed ISDS system. This is strange as perceptions are part of the sociological claims of illegitimacy of ISDS. Yet John view against African State perception requires them to provide hard facts. To do this for purposes of perception is not possible. Perception is indeed a sociological phenomenon that cannot be measured empirically. Yet perceptions remain important in the research on ISDS. In fact, a recent study by Andrea K. Bjoklund, Daniel Behn, Susan D. Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil, and Emilia Onyema uses the criteria developed by Nienke Grossman on sociological (perceived) legitimacy of international tribunals. Grossmman points out that to judge the sociological legitimacy of international tribunals one should use the following criteria: (1) there must be a perception that a tribunal is fair and unbiased; (2) there must be an identifiable commitment to the underlying normative regime, which will be affected by the quality of the decisions made about norms in addition to the norms themselves, (3) there must be some commitment to transparency and other democratic institutional norms.

Thus, to respond to John, the Mauritius and South African ISDS rejection claims are "perceived folk" theories that are not only supported by historical and factual evidence but by sociological theory too. In that sense they are not merely folkloric. The seven scholars in the study above, out of whom as I know, only two are Africans have verified and used a sociological perceptions based study to anchor their research. Additionally, Prof M. Sornarajah has spent a large chunk of his illustrious career making similar claims to those of South Africa and Brazil that have culminated in his support of the South African position. Additionally, the normative framework of investment arbitration itself- protection of investors- is founded on an imperial bedrock. Won Kidane has also persuasively shown how the cultural deficit of appointing mainly "white, old,

men" from the Global north further exacerbates this problem.

Proposals for Reforms: Let us Treat the Problems not the Symptoms

In my view, since John has not persuaded us on the root causes of the ISDS problem, his suggestions for reform, just like with the many suggestions in vogue at the UNCITRAL and ICSID reform processes are merely palliative (symptoms oriented) and not curative (root cause/problem oriented). Once he got the diagnosis wrong, it is close to impossible for him to prescribe any effective remedies. His remedies remain at the shallow end dealing with code of conduct for arbitrators (ICSID reform), early dismissal procedure, and opt-in multilateral treaty (UNCITRAL'S Mauritius Convention which has only attracted five State parties since it entered into force on 18 October 2017). All these do not deal with deep rooted historical, sociological, and normative causes of the rot in ISDS. For example, while a code of conduct is helpful, if all or most arbitrators are appointed from the Global North and few except two women (Gabrielle Kaufmann-Kohler and Brigitte Stern) the perceptions of bias against ISDS will continue. Gabrielle Kaufmman-Kohler has in fact herself stated that "we cannot claim arbitration is the global dispute resolution method unless actors from all regions can participate." Additionally substantive concerns such as the asymmetrical nature of the regime needs to be urgently addressed. And while a multilateral investment court might deal effectively with most procedural challenges what about the normative challenges that have been mainly ignored by current reform processes? It is thus easy to see why South Africa rejects John's view on systemic incremental changes from a multitude of fora.

Conclusion

What John refers to as folk theories for the creation of ISDS hegemony are in fact counter-hegemonic claims that seek to dismantle the continued dominance and protection of private transnational and mobile capital from the Global north in Africa. It is questionable why foreign investors have greater access to dispute settlement than local businesses. Thus, while procedural reforms are important, substantive reform should be foregrounded. If substantive reforms cannot take place then African states should exit the ISDS scene.

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