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International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement

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Abstract

Today, sustainable development is an unavoidable paradigm underpinning all human actions from the local through the global level in both the public and private sectors. The principle of integrating economic growth, environmental protection, and social progress is a key constituent of sustainable development. However, international investment law that serves the purpose of facilitating and governing transnational investment activities often fail to strike a balance between the competing priorities of economic and environmental considerations. Limiting the scope of state regulatory power by the means of applying bilateral investment treaties (BITs) in investor-state dispute settlement (ISDS) is a barrier for pursuing sustainable development within the investment sector. In his provocative book, International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement, Fola Adeleke aims to address the following central question: how can corporations be held accountable through investment treaties in the absence of a global treaty on business and human rights while protection the rights of investors? He then considers the public interest regulation theory to critically examine how ISDS tribunals hinder developing countries, in particular African countries, to achieve sustainable development and human rights protection. He assesses the regulatory framework of ISDS tribunals with the aim of assisting African

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countries to attract sustainable foreign investments and offers alternatives on more sustainable reforms of current African BITs that have been concluded with capital exporting countries.

1. Introduction

Bilateral investment treaties (BITs) have been in existence since the 1960s, though it was not until the 1990s that they were increased in number and rendered as a key substance of the global investment governance regime. The root of the proliferation of BITs can be traced back to the end of colonialism, a process that was initiated by colonizer countries to protect their interests in their former colonies. New independent states have also embraced concluding BITs to increase the flow of foreign investments into their countries.

Despite the growing prominence of BITs, the discussion remains in regard to whether they can support the investment and environment nexus. On the one hand, "BITs have gained notoriety for preferencing the interest of corporate foreign investors, limiting state regulation that can advance public interests and adopting secretive dispute resolution processes that erode the rule of law" (Adeleke 2018:1). On the other hand, BITs show enormous potential for imposing sustainable development obligations on foreign investors and holding them environmentally responsible.

With regards to the significant role of BITs in sustainable development, this book examines the global investment governance regime in the context of African experiences and the global trend shaping development in Africa. The author seeks to study how corporations could be held liable for sustainable development management in the investment sector lacking a global treaty on investment and human rights. To make BITs a useful tool for sustainable development management in African, Adeleke explores the current objectives of attracting investment, depoliticize investment disputes and promote the rule of law. Instead of suggesting that African states should avoid their investment protection obligations in favor of non-investment obligations, Adeleke recommends the evolution and development of the international investment governance regime through increasing the transparency of investment arbitration, enhancing the language of investment agreements and increasing preference for domestic dispute settlement law.

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2. Book Review

Fola Adeleke is a Visiting Senior Researcher at University of Witwatersrand and a fellow on social and economic inequalities at the London School of Economics. He is also a trained lawyer and legal researcher in the field of international economic law and human rights with an interest in the duty of corporations to protect human rights and how to hold global corporations accountable in the absence of a global treaty on business and human rights.

In light of such expertise, Adeleke engages with the scholarly literature criticizing the global investment governance regime from the sustainable development perspective. He argues that among numerous backlashes against the substantive procedures of the current international investment law regime, limiting the scope of state regulatory power and constraining the domain of applicable law in investor-state dispute settlement (ISDS) are the most detrimental to the sustainable development values of the host states. Adeleke establishes its argument on a premise that BITs are popular among African states under the false foundation that they promote foreign direct investments (FDIs) and consequently strengthen sustainable development in host states.

Adeleke suggests that "African countries continued to sign BITs that negatively affected their interests due to a lack of awareness and understanding of the financial implications in the event of breach an agreement" (2018: 2). Such misunderstanding as well as poor knowledge of BITs language that increases the liability of host states for investment protection continued to affect the interest of African states. With this in mind, the author seeks to prove his premise by rethinking the role of ISDS tribunals in protecting environmental and human rights in Africa.

As an attempt to analyze the trends emerging from ISDS tribunals' awards dealing with the sustainable development affairs of African countries, this book is comprised of seven substantive parts. Following the first chapter that demonstrates the importance of ISDS tribunals in sustainable development, the remaining parts consider how foreign investors could be held accountable through

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BITs, examine the current deficiencies of ISDS tribunals in human rights protection, identifies alternatives for ISDS, and discusses the future trend for dispute settlement in Africa.

In chapter two, Adeleke engages with the scholarly literature that explores the role of ISDS tribunals in considering the public interests for sustainable development. This chapter has been evolved around discussing how the public interest regulation theory is applied in ISDS tribunals and how the investment obligations of states might be infringed as a result of other competing obligations of the host states. The public interest regulation theory seeks to accommodate domestic sustainable development policies into ISDS tribunals for reaching a more equitable outcome for both the foreign investors and host states, and thus to address the legitimacy concern relating to the manner in which arbitrators interpret BITs obligations.

Determining the scope of state regulatory sovereignty is of paramount importance, but it highly dependants on the interpretation power of ISDS tribunals that influences host states' regulatory measures for public interest considerations. ISDS case law shows that investment tribunals are reluctant to consider the sensitivity of the environmental claims when drawing a line between a lawful exercise of the state police power and an illegal breach of the investment agreement. Consequently, pro-investment provisions of IIAs are taking precedence over national environmental regulations in governing investment disputes (Van Harten 2013). Such decisions are justified by the notion that BITs are not a proper discourse in considering environmental values (Chi 2018), and when states enter into a BIT, the investment-protection provisions therein would govern investment disputes. However, this approach is characterized by Weil as "an exercise in prejudiced assumption, and those who supported the application of international law to investment relations were accused of sacrificing the interests of the Third World countries to Western multinational corporations" (Weil 2000: 407). In the next four chapters, Adeleke expands on this approach by noting that how the sustainability and human rights of African nations are undermined by the procedural biases of ISDS tribunals negotiated in BITs.

Chapter three that is titled the rule of law and depoliticization of investment disputes re-emphasizes the view that constitutionalizing investment rules leads in superseding such rules over domestic constitutional norms and impairs the sovereign power of a state to pursue its sustainable development goals. Adeleke advances the scholarly argument initiated by Schneiderman on how

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constitutionalism treats foreign investors as a minority group and legally constrains the government of host states from taking actions that might adversely affect investment interests (Schneiderman 2008). In the context of South Africa, Adeleke refers to the South Africa's constitution that recognizes expropriation for the public interests. Its rule for compensation is also just and equitable to reflect a balance between public values and the interests of those affected. However, in ISDS tribunals, these rules are subordinate to the constitutionalized investment rules that prohibit expropriation and require prompt compensation in the event of an investment seizure. As a result of which not only sustainable regulations of host states have been wrecked, but also foreign investors have been subject to more lenient sustainable development and human rights regulations that South African investors who are subject to domestic regulations.

In this chapter, Adeleke also examines how the current structure of ISDS has failed the sustainable development capacity of African countries and constrained their public policies on human rights protection. In the context of African countries, recurring investment disputes are categorized into six groups: ordinary regulatory disputes, extraordinary crisis disputes, transition disputes, tax dispute, culturally sensitive disputes, financially disproportionate disputes. In all these types of disputes, regardless of the notion of the issues disputed, Adeleke notes there is an apparent deterrence of domestic regulations in the face of investor claims. This all is due to the perceived bias of some arbitrators, colonial background of investment governance regime, pro-investment provisions of investment agreements, and lack of competence of local courts are among issues challenges the legitimacy of ISDS tribunals.

The notion of perceived bias, for instance, that means arbitrators are more likely to be appointed based on their previous experiences and their relationship with the parties is one the main issues that impair the legitimacy of ISDS tribunals. The perceived bias of some investment arbitrators that criticizes ISDS tribunals from the structural perspective has been initiated by Van Harten with a reference to the impartiality of appointing authorities designated under BITs. Since this authority is exercised by the World Bank's ICSID Convention, judges leaning towards investor interest are often appointed as the presiding arbitrator of ISDS tribunals. Consequently, the circle of arbitrators is closed to those favoring foreign investors (Adeleke 2018).

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Adeleke states that the current structure of ISDS has been developed by capital exporting countries to safeguard foreign investors and their investment. To attract foreign investments, developing countries might give up their public concerns, whereas developed countries like the US take advantage of their strong bargaining position to secure their investors. Sornarajah argues that the legal norms of the international investment regime embedded in colonialism have been manipulated to protect the commercial interests of capital exporting countries in the advancement of exploiting host countries. After a colonial period, "the need for a system of protection of foreign investment came to be felt by the erstwhile imperial powers which now become the exporters of capital to the former colonies and elsewhere" (Sornarajah 2010: 21). In consequence, host countries that might be suffered from irreversible damages caused by foreign investors are unable to rely on this regime to safeguarded national values and be compensated financially.

Moreover, since ISDS is the most crucial institution to promote foreign direct investments, developing states, in expectation of investment flows, limit parts of their sovereignty to offer external protection from ISDS tribunals to foreign investors. Adeleke asserts that ISDS tribunals settle investment claims based on the pro-investment standards included in BITs. These provisions then confine host states' sovereignty by prohibiting "expropriation" of foreign investments, by prescribing "fair and equitable treatment" for investors, and by providing "no less favorable" treatment to foreign investors that offered to its domestic counterparts. Indeed, ISDS tribunals may challenge regulatory measures intended by states to protect the public welfare, if the measure directly or indirectly affects the value of the investment. This threat of ISDS is now seen by many to have an informal "chilling effect" on states adopting public welfare regulations appeared to be inconsistent with IIAs.

Finally, Adeleke criticizes the private approach of investment arbitrators to ISDS. He notes that "a commercial arbitration perspective of ISDS sees investment arbitration as a private dispute between parties, which would justify confidentiality and an isolation of the issues to only matters brought up by the parties" (Adeleke 2018: 52). However, since ICSID tribunals are established by the sovereign act of states, they should be considered to be a consensual adjudication between investors and host states as well as a mechanism of adjudicative review in public law.

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In the following chapter, the author conducts a comparative study among potential alternatives to ISDS tribunals. These alternatives are suggested as a replacement for the current ISDS to address the above-mentioned issues challenging the sustainable development and human rights protections values of host states. Domestic legal systems, state-state dispute settlement, political risk insurance, regional human rights courts have been analyzed in this chapter with the aim of understanding how these replacements could increase the investment flows, depoliticize investment disputes, promote the rule of law, and provide financial remedies. To make a comparison among potential alternatives to ISDS tribunals, Adeleke considers nine notable features: transparency, non-disputing party participation, correctness, cost, impartiality, efficiency, accessibility, deficiencies, interaction with the rule of law. He finally comes to the conclusion that "all the alternative proposals to ISDS have some level of credibility and advantages but they also have flaws" (Adeleke 2018: 109). Therefore, the approach of dispute prevention that is proposed by Roberto Echandi might be a better institutional mechanism than any replacements to ISDS tribunals.

To address the backlash of the broad scope of BITs' interpretation that exceeds investor protections and limits state regulatory sovereignty, Adeleke, in chapter five, seeks to "understand how investment agreements can be drafted and interpreted to ensure that public policy interests to promote sustainable development … are taken into account in investment rule making" (2018: 110). This chapter focuses on how investment arbitrators could apply relevant rules of international law such as human rights law and thus host states can justify the use of other international obligations as a permissible infringement on investment protection.

According to the Article 31 of Vienna Convention, arbitrators should interpret any agreements based on "good faith", "ordinary meaning", "context", "object and purpose of the treaty", "the text of the treaty including its preamble", "agreement or instrument made in connection with the treaty", "subsequent agreement or practice between parties", "relevant rules of international law", and "intention of parties". In the context of investment tribunals, a good faith reading of BITs calls for a balance to be struck between investor protection and state regulatory power. Such good faith interpretation needs investment arbitrators to consider the ordinary meaning, text, object, and purpose of the treaty. Understanding the meaning of a BIT requires a cross reference to other provisions in that treaty such as

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its preamble that provides a consistent meaning to what the parties intended to achieve throughout the investment treaty. In order to understand the ordinary meaning of a treaty and determine the true intention of the parties, investment arbitrators should consider the context in which the treaty has been negotiated. This consideration enables them to resolve the dispute in light of the primary object and purpose for concluding the applicable agreement.

The rise of investment treaties and investment disputes faces ISDS tribunals with a number of challenges. Among them, shrinking the domain of state regulatory power, inconsistent jurisprudence, and the inability of non-disputing parties to influence the ISDS proceedings are the significant ones that question the legitimacy of investment tribunals. A consideration of the relevant rules of international law "can be a useful way to determine the meaning of broad standards of protection in investment treaties" (Adeleke 2018: 116). Investment arbitrators are reluctant to interpret BITs in light of other relevant rules of international law, which results in an interpretation approach minimizing the conflict between the competing obligations of states. Therefore, using such interpretation statements allows a direct application of sustainable development and human rights regulations and then balance various elements and interests.

In chapter six, Adeleke considers the investment regulatory framework of three African power blocs, South Africa, Nigeria, and Kenya, and the extent to which such regulations contribute to sustainable development. Three regulatory frameworks, including the SADC, ECOWAS, COMESA are mainly discussed in this chapter and their roles in promoting investment flows, the rule of law in the governance of investments, as well as the depoliticization of investment disputes have been examined.

In Nigeria, for instance, the ECOWAS Supplementary Act contains investment rules were passed to recognize investment protections of national treatment, most favored nation treatment, and minimum regional standards. The ECOWAS rules are one of the well-articulated agreements that adopt a rights-based approach to development. These rules allow free transfer of assets to promote domestic development, but in the context of sustainable development, they require foreign investors to provide environmental and social impact assessment reports. Furthermore, investor-state disputes should be resolved at a national court, or tribunal, or the ECOWAS Court of justice.

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Regardless of these investment rules, the majority of African countries give up their economic dominance to their advantage when concluding BITs with developed countries. Adeleke notes that "the BIT regimes of most African states are distorted because they often reflect the agenda of developed countries" (Adeleke 2018: 156). One explanation is the lack of experience and expertise in developing states to negotiate BITs that could make a balance between the economic interests of both parties. Moreover, the lack of recognition by developing countries that BITs play a significant role not only in facilitating the flows of foreign investments but also in shaping the nature of investments. Consequently, African countries who are the primary recipient of foreign investments carry the burden of succumbing to the will of their developed partners such as investment protection by limiting state regulatory power.

In the final section of *International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement*, Adeleke reaffirms the need for African states to safeguard their public interests while creating a competitive environment to attract FDI. Although the flow of FDI to Africa continues to increase due to the population growth and economic diversity, African states must be careful about the negotiation of BITs and development of investment regulations that ensure the attraction of sustainable foreign investment. So, they need to adopt regulations that sustainable development and to impose environmental obligations on investors. moreover, states should avoid arbitrary measures that erode the investment protection rights of foreign investors.

3. Conclusion

To make a balance between the competing priorities of economic growth and environmental protection, Adeleke has written an excellent scholarly work to suggest three ways of making ISDS tribunals more compatible with the sustainable development values of developing countries. First, BITs are the main supplier for governing investment disputes. Thus, more "balancing provisions" and "good governance provisions" could enhance the supply of sustainable development norms in ISDS tribunals. The adoption of such provisions prevents investment arbitrators to view investment treaties purely as investor protections rights and needs them to impose sustainable development obligations on investors. Second, increasing the transparency of ISDS tribunals through the better access of non-disputing parties to information could not only enable investors to obtain relevant evident affecting their investments, but also involve various stakeholders on the level of negotiating new BITs. In this context, investor

arbitrators should recognize the importance of adopting interpretation tools that favor both foreign investors and third parties affected by FDIs by considering public interests in their decision making. Third, since a major backlash against ISDS is stemmed from the lack of public participation and procedural integrity, proposed alternatives to ISDS tribunals that often have these relevant features of democratic ideals could fill the gap of human rights considerations in investor-state disputes.

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