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Law at two speeds: Legal frameworks regulating foreign investment in the global South

by
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Foreign investment in developing countries' natural resources brings into contact competing interests characterized by an unequal balance of negotiating power -- from multinational enterprises and host governments to people affected by the implementation of investment projects.[1] Economic globalization has been accompanied by extensive developments in national and international norms regulating investment and its impact -- including investment law, natural resource law and human rights law. These norms affect the way the costs, risks and benefits of investments are shared among the multiple parties involved.

An analysis of developments in national and international law and in transnational contracts for natural resource investments in Africa suggests that the balance of legal claims tends to provide stronger protection to foreign investment than to affected people. For the vast majority of rural populations whose rights are protected under national legislation and international human rights law, legal protection is undermined by shortcomings in rule of law, substantive rules and legal remedies. For them, challenging adverse government action is difficult at both national and international levels. State-of-the-art social and environmental management plans developed for some investments go substantially beyond national law requirements, but fall short of creating legal entitlements enforceable by affected people. On the other hand, bilateral investment treaties (BITs), national law reforms, transnational contracts, and international arbitration have gone a long way toward strengthening the legal protection of foreign investment and imposing discipline on the arbitrary exercise of state sovereignty, reflecting significant developing country efforts to attract foreign investment. The resulting regime seems more geared toward enabling secure transnational investment flows than ensuring these flows benefit people in recipient countries.

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[1] This note is based on the author's new book *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (London and New York: Routledge, 2012).

Take the case of international law. Both investment law and human rights law protect right-holders against arbitrary interference by the state and provide access to international remedies. But the safeguards that investment law provides to foreign investors tend to be more effective than those available to all under human rights law. Expropriation clauses in BITs typically include public purpose, non-discrimination and compensation requirements, and link compensation to market value. On the other hand, the African Charter on Human and Peoples' Rights affirms the right to property but does not require states to compensate right-holders for losses suffered; it merely requires compliance with applicable law, demonstrating that international human rights law does not address gaps in compensation requirements that may exist under national law.

In addition, human rights law typically requires petitioners first to try all available remedies under national law before accessing international courts, possibly involving lengthy proceedings and several degrees of appeal. Many arbitration clauses included in BITs do not require investors to exhaust domestic remedies -- though some do and others require first trying domestic remedies.

If human rights petitioners win a case, the ruling may have limited legal or practical force. For example, the African Commission on Human and Peoples' Rights only issues non-binding decisions. The recently established African Court on Human and Peoples' Rights issues binding judgments. But only about half the African states are parties to the Court's Protocol. And only four countries issued declarations allowing individuals and NGOs to bring matters to the Court without first going through the Commission. On the other hand, where states have consented to international arbitration, arbitral awards are legally binding. In practice, investment law offers no absolute sanctuary against determined government action. Although enforcing awards can be difficult, arrangements to enforce such awards are generally more effective than those provided by human rights law. By virtue of some widely ratified multilateral treaties, where signatory governments are unwilling to pay up investors can seize assets that the host state holds abroad -- though immunity rules may restrict this option.

Where competing rights come into contest, differences in legal protection can have important implications -- for example, where an investor and affected people bring disputes about the same investment respectively to international arbitrators and human rights bodies. This has recently happened in cases involving Latin American countries.

Investors need effective safeguards against arbitrary treatment. There may be legitimate reasons to treat different rights differently. But as global interest in developing countries' natural resources increases, it is imperative that affected people also have stronger rights. In relative terms, affected people have more to lose from weak protection than large investors -- because the loss of a small plot of land can make them vulnerable to destitution and loss of social identity.

International law must be more balanced, so that the protection it offers to investment is matched by equally strong safeguards for rights that may be affected by investment flows. National law must grant local landholders stronger rights to their resources and a greater voice in decision-making. Investment contracts must be more inclusive, in terms of transparency, accountability and safeguards for local rights where national law falls short of international standards. For these legal reforms to make a difference, they must be accompanied by sustained investment in strengthening local capacity to exercise rights.

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