

GOVERNANCE

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Bilateral investment treaties, non-state authority, and Africa

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This paper examines the governance of global economic relations with Africa through the utilization of bilateral investment treaties (BITs). BITs are the preeminent means for establishing the legal framework for foreign investment in the world and are increasingly being used throughout Africa. This paper explores the empirical and theoretical dimensions of governance through BITs. It documents the use of BITs in Africa, illustrating the increasing pervasiveness of these agreements in a number of sectors and industries. They are of particular significance in the extractive sectors and serve to regulate the oil, gas, and mining industries. BITs are of considerable theoretical and analytical interest because they constitute bilateral contracts as mechanisms of global governance. The typical BIT is entered into by investor and host states to govern the investment relations of their nationals. As such, BITs form instruments of public international law that impose obligations upon and grant rights to states. However, in doing so BITs bind host states to certain conduct that limits policy and legislative autonomy, simultaneously creating private contractual rights for the investing private corporations. BITs thus form curious governance mechanisms that partake of both public and private law, as well as public and private methods for dispute settlement.

This paper argues that BITs may be fruitfully analyzed and theorized as a mechanisms of private or non-state authority that challenge conventional approaches to governance in international relations and international law. Conventional approaches regard the state as the main actor, subject, and source of law and conceive of governance in terms of state-led regimes, treaties and

the like (Cutler 2001). In contrast, this paper advances an alternate conception of BITs as legal forms that reflect considerable pluralism and heterogeneity in terms of the sources and subjects of international relations and law and methods for dispute resolution (Cutler 2003). The paper thus contributes to the growing literature on non-state or private authority (Cutler, Haufler, and Porter 1999; Haufler; Hall and Biersteker 2002). The paper also develops a theory of international law as a form praxis with profound emancipatory potential (Cutler 2005). The governance dimensions of BITs are of particular concern to peoples who live and work in close proximity to foreign corporations, particularly in zones of conflict in Africa. This raises the significance of BITs for the rule of law and the corporate security responsibility of foreign corporations and states.

This paper engages with a number of the Conference themes. As evidence of increasing normative pluralism, BITs have implications for governance through a hybrid of public and private authority. As instruments of public international law and regimes of private rights, BITs are at the cutting edge of the constitutionalization of public international law through private regimes of accumulation. Dispute settlement through private arbitration under these agreements raises issues of democratic legitimacy, the scope and nature of the rule of law in international relations, and the sovereignty and regulatory capacity of African states. This is of particular concern for weak and war-torn states in Africa where a governance gap suggests the potentially revolutionary and transformative uses of bilateral investment agreements.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 2

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