Promoting Japanese Private Investments in Africa: A Clash of Interests

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August 20, 2021

1. Introduction

Africa has the potential to be the next frontier for foreign investment. The emergence of new investment sources and expanded sectors offer tremendous investment opportunities, especially in energy and infrastructure. Meanwhile, Asia has overtaken Europe as the dominant source of Africa's investment, while intra-African investment is also rising. China has embraced the lion's share of investment opportunities in Africa, gaining considerable attention and importance in the region. Nevertheless, compared to Chinese investments in Africa, Japanese investments in the continent have received less attention despite their rise, engaging a subtle competition with Chinese investments in the continent. Against this backdrop, this note examines the legal implications of the evolving political economy of Japanese investments in Africa. In doing so, it argues that the apparent clash between Japan's political interests in investing in Africa and the economic interests of its private sector has brought the investment protection to the fore prompting a revitalization of the Afro-Japanese bilateral investment treaty (BIT) programme that had remained idle for more than three decades. Although its future direction remains to be seen, the current Afro-Japanese BITs do not contribute to rectifying the investment treaty regimes' systematic imbalance, and they are not harnessed to ensure Africa's sustainable economic development.

2. From Foreign Aid to Foreign Investment

Investment has become the centrepiece of Japan's current Africa policy. It aims to transform Japan and Africa into modern economic partners, contrary to their conventional relationship as donor- recipients. The Tokyo International Conference on African Development (TICAD) has played an essential role in this transformation by providing an official multilateral platform, amongst others, to facilitate partnerships between African and Japanese businesspeople. Furthermore, since the third session of TICAD in 2003, it has aimed to promote private business partnerships between Asia and Africa, affirming the private sector as a crucial "engine of growth" and declaring Japan's strong commitment to Africa's economic development through Japanese private investments.

While marking its zenith, the latest session of TICAD in 2019 contemplated "business-based innovative solutions for inclusive and sustainable economic and social transformation in Africa". Moreover, private companies were recognized as official partners of TICAD for the first time in its history while pledging to mobilize a large volume of private investment (over 20 billion USD) in Africa over a short period. As such, investing in Africa has become crucial in Japan's contemporary Africa policy, which expects to triumph over official development assistance by adopting a "private-investment-based approach" as a part of the country's broader economic diplomacy in Africa.

3. Economic Rationales for Promoting Japanese Private Investments in Africa

Since the 1960s, Japanese companies have been doing business in Africa. The pursuit of efficiency and new markets were identified as common motivations of Japanese investors in Africa. However, the recent past has seen an increased amount of Japanese private investments in Africa mobilized due to "Tokyo's investment objectives in Africa." Investing in Africa helps Japan revitalize its economy by seeking new international markets, mainly for exporting infrastructure and securing natural resources. Among them, improving infrastructure has become crucial in Japan's effort to incentivize its companies to invest in Africa since poor infrastructure in the continent is one of the main concerns of Japanese investors.

Likewise, securing energy resources has become essential for Japan in the wake of the nuclear crisis, followed by the Fukushima disaster, which impels the country to diversify its energy sources. In addition, Japan is keen on diversifying its sources of strategic materials, particularly rare-earth minerals, which China allegedly used as a bargaining chip following the maritime disputes between the two countries in 2010. Meanwhile, securing private investment helps Japan "catch up with other Asian and Western actors" in the booming African market by extending its commercial presence in the continent, which is vital in marking the country's reemergence on the international plane through rigorous economic diplomacy.

4. Political Considerations for Promoting Japanese Private Investments in Africa

Japan's interest in increasing its influence in global affairs has been identified as an impetus to promote Japanese investments in Africa as it would garner African countries' support for Japan on the international plane. This includes Japan's attempt to reform the UN Security Council and obtain permanent membership thereof. In addition, the urgency of offsetting China's increased presence in the continent has seen Japan's political impetus for promoting Japanese private investments in Africa. Indeed, Japan's political preference in this respect goes hand in hand with its China containment policy in general, and the urgency of counterbalancing China's Belt and Road Initiative, particularly. It is also premised on several other reasons.

To mention a few, the fact that Chinese investments are undertaken mainly by Chinese state-owned enterprises or state-to-state deals has become a concern of Japan. Japan's commitment to a free-market economy is inconsistent with China's state-guided development model. Further, from Japan's vantage point, Chinese investments in Africa aim to "soak up" Africa's resources and seize employment opportunities of Africans, manifesting China's neocolonial economic dominance over the continent. Accordingly, watchwords such as "African ownership" and "who have Africa's best interest at heart" have popped up in the diplomatic sphere, unfolding a covert Sino-Japanese rivalry in Africa. Indeed, investments play a crucial role in this rivalry due to their significance as an effective foreign policy tool that garners political and diplomatic ties of these striving two Asian giants with strategic African nations.

5. Investment Protection has come on the Scene

The political economy of promoting Japanese investments in Africa demonstrates Japan's aspiration to intensify its economic diplomacy in Africa by placing private investment at the core of Japan's current Africa policy. However, fusing big business with diplomacy has been criticized for giving a political tone to the Afro-Japanese business partnership while persuading Japanese companies to invest in a locality that they do not consider a fully-fledged investment destination. Difficulties include political and regulatory instability, health risks and security threats prevailing in Africa. For context, the Ebola fever epidemic in 2015–2016 pointed up the health risks prevailing in the continent, while the killing of ten Japanese expatriates in the hostage crisis at a natural gas plant in Algeria increased concerns on the physical security of Japanese investors and their investments in Africa.

Therefore, the Japanese business community generally considers Africa a "risky and dangerous" investment destination geographically and culturally remote. This has given rise to a perceptible "disconnect" between Japan's political interests in investing in Africa and the economic interests of its private sector while bringing the protection of Japanese private investments in the continent to the fore. The resulting clash of interests has pushed Tokyo to provide "risk-averse" Japanese investors with mechanisms to deal with non-commercial risks involved in investing in Africa. To be precise, since 2016, the state-owned insurance company Nippon Export and Investment Insurance offers a political risk insurance programme covering risks related to terrorist attacks and natural disasters. In addition, the Japan Bank for International Cooperation also provides Japanese companies with guarantees to mitigate risks involve mainly in overseas infrastructure projects.

Furthermore, while legally equipping its investors, Japan has accelerated its BITs programme with Africa by signing investment treaties with Mozambique in 2013 and Morocco and Côte d'Ivoire in 2020. Indeed, they grow the list of Afro-Japanese BITs confined to a single treaty for more than three decades: the Japan-Egypt BIT of 1977. At the same time, the revival of the Afro-Japanese BIT programme goes well together with Japan's ambition to expand its current web of investment treaties despite the Japanese investors' minimal utilization of the investment treaty regime to protect their overseas investments. To be exact, hitherto, Japanese investors have brought treaty-based investment arbitrations only in five pending cases. According to the International Centre for Settlement of Investment Disputes (ICSID) database, four of these cases have been brought against Spain based on the Energy Charter Treaty, and one has been brought against China based on the China-Japan BIT of 1988.

Despite the Japanese investors' moderate engagement in the ISDS mechanism, the Japanese government has been active in investment treaty-making, adopting a two-faced approach therein. Japan tends to conclude pro-investor treaties with (developing) countries from where it receives small or no investments compared to the less protective investment treaties concluded with (developed) countries from which it receives a considerable amount of investments. Indeed, in this stance, Japan aspires to minimize the possibility of the country being exposed to the investment treaty arbitrations while enabling its investors to protect their outward investments by bringing international arbitrations against countries hosting Japanese investments.

6. Afro-Japanese BITs; between Pro-investor and Balanced Investment Treaties

From a cursory glance at all four publicly available Afro-Japanese BITs, it is clear that they have gradually departed from the orthodox pro-investor treaties and embraced the notion of "balanced investment treaties". Nevertheless, the equilibrium varies across them. Contrary to the pro-investor Japan-Egypt BIT of 1977, the rest of the three Afro-Japanese BITs contemplate safeguarding the states' regulatory space by including several traits of so-called "balanced" investment treaties. For example, they refer to the state's right to regulate and/or regards non-investment concerns such as health, safety, environmental protection, and labour standards. In addition, all of them include qualified fair and equitable treatment (FET) clauses that refer to (customary) international law and subject their protection to the security and public policy exceptions provided by the treaties per se. They further regard the host state's regulatory space to ensure the integrity and stability of its financial system by permitting the adoption of temporary safeguard measures and prudential measures where necessary.

However, a uniform approach has not been adopted relating to the protection against uncompensated expropriation. Not all treaties supplement this treatment standard with an interpretation annexure or include carveouts for general regulatory measures. Concerning the dispute settlement, the investor-state dispute settlement (ISDS) mechanism has been accorded a predominant role in all the Afro-Japanese BITs. Accordingly, they neither employ local remedies rule nor regard domestic courts as an essential forum to resolve investment disputes. Still, they require resolving such disputes amicably through consultations, within three or six months, before recourse to international arbitration or to provide the respondent host state with a written "notice of intent" at least 90 days before submitting any claim to arbitration. All in all, dispute settlement clauses in Afro-Japanese BITs align with Japan's preference to continue with the treaty-based investor-state arbitration system, particularly with developing countries. Indeed, this postulation doubts the extent to which the revitalized Afro-Japanese BIT programme fosters Africa's inspiration of shaping investment dispute resolution in a manner favourable for developing host states. More conspicuously, none of the BITs refers to the notion of sustainable development, whereas, at the policy level, Japanese private investments in Africa have been often framed as a means for making Africa's sustainable development possible. Nor are the characteristics of an investment included in the treaty definition of investment. The only treaty that does so has forsaken the contested but the most favourable characteristic from the host state's perspective; investors' contribution to the host state (economic) development. More importantly, none of the Afro-Japanese BITs includes investors' obligations or assumes duty on the part of the home states to ensure that their investors do not harm the host state or its people. These omissions cast doubt on the extent to which Afro-Japanese BITs, at least the most recent ones, align with the growing inclination to integrate those overlooked aspects into modern investment treaties. This has been a unique feature of African investment treaty-making practice as demonstrated by its continent-wide model BITs and the exemplary intra-African BITs such as The Pan-African Investment Code and the Nigeria-Morocco BIT of 2016, respectively. At the same time, the integration of standards of responsible business conduct into investment treaties is essential in "aligning investment treaties with the pursuit of sustainable development."

Conclusion

Private investment is at the centre of Japan's current Africa policy that aims to amplify its economic diplomacy in Africa, offsetting the increased Chinese presence in the continent mainly through sovereign investments. This has made the promotion of Japanese private investments in Africa a "strategic priority of Japan", whose political impetus in this respect clashes with the economic interests of "risk-averse" Japanese investors. Accordingly, the protection of private investments has come to the fore hastening the Afro-Japanese BIT programme remained idle for decades. Plausibly, this is due to the significance of investment treaties to provide Japanese private investors with international legal protection against infringing African countries, notwithstanding their less utilization by Japanese investors at large. However, from the host country perspective, the revitalized Afro-Japanese BIT programme does not reflect Japan's policy rhetoric of framing its private investment as means of achieving Africa's sustainable development. It further does not sustain Africa's goal to fix the systematic imbalance of mainstream investment treaties by integrating obligations of foreign investor and their home states. Instead, revived Afro-Japanese BIT programme draws out the lopsided relationship between Japan as the capital-exporter and Africa as the capital-importer, despite its regards to the regulatory space of the host state.

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