Book Review I - The Investment Treaty Regime and Public Interest Regulation in Africa. By Dominic Npoanlari Dagbanja

By:

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African states have been making investment protection treaties from the 1960s. The treaties involve assurances that the states will protect the foreign investment from adverse interferences by the state. The protection which involves restrictions on the sovereign powers of the host state is premised on the assumption that the existence of investment treaties promotes the flows of foreign investment due to the protection given to foreign investments. The further assumption is that such flows promote economic development. If this assumption is correct, after six decades of such treaties, African states must be in high states of development. They are not.

These assumptions are promoted by institutions like the World Bank and the International Monetary Fund. Western international lawyers have written

supporting the system of investment protection developed through international law mechanisms. The assumptions relating to economic development appear in the preamble of the treaties. On the basis of these assumptions, the treaties prohibit interferences by the state with the foreign investment even if the measures are in the public interest. It does not require sophisticated economic studies to show that the assumption that investment treaties lead to economic development is not true. The fact that states have developed without treaties (e.g., Brazil), that those states which have terminated the treaties have not been affected adversely as far as flows of foreign investment are concerned (e.g., South Africa) and the exorbitant damages that states have had to pay as a result of arbitration awards resulting from the violation of these treaties show that the system that has been created is a hoax based on unprovable assumptions. The treaties have led to the economic development of a select group of arbitrators in the field and large law firms of the West but not of the developing states. Questions need to be raised and answered as to the utility of the treaties. Dagbanja's splendid book does just that.

Academic opinion has been divided on the legitimacy of the system of investment treaties and the regime of investment protection they have created. There is a large body of Western literature supporting the investment treaty system despite the fact that the arguments that can be made for them are flimsy. The system is supported by sheer numbers of Western international lawyers rather than the cogency of their arguments. Increasingly, there is a build-up of literature against the system. In the earlier period, few African jurists, among them notably, Samuel Asante of Ghana, opposed the system. But, now, there is an increasing number of younger African scholars joining in the criticism of the system. The African practice on the subject seems to be changing. Dagbanja's contribution comes at an opportune time adopting a novel approach to the subject that will make it stand out as contributing to a new way of thinking about such treaties in a part of the world which through force and now through deception has been made the object of plunder.

Dominic Npoanlari Dagbanja's brilliant book does not get its uniqueness because it is on Africa as many African academics have written on the area. What is unique is that Dagbanja concentrates his study on a combination of the constitutional issues of African states making treaties that curb their

constitutional duty to make laws to further the public interest of their people and international law principles concerning human rights, the environment and development. The precise question he asks is “Do, or should, national constitutions and the rights they preserve limit the powers of African states in investment treaty-making?”. The question immediately highlights the irreconcilable tension between the constitutional duty of the state to prioritize the furtherance of the interests of its people and the interest of the foreign investors in the protection of their investments in the host state. The answer is further supported by the fact that customary international law principles on human rights, the environment and the right to development, received into the domestic laws of African states, support the answer that the legality of making such treaties are suspect.

Africa has long been the quarry for natural resources for the developed countries. It has been looted for centuries by imperial powers and their corporations. Investment treaties ensure that Africa continues to be looted long after decolonisation. The resource curse of Africa has been manipulated by capital exporting powers to continue with the situation that existed during the colonial period through the system of investment treaties. After decolonisation, the former imperial powers have been joined by new actors, China and India, in continuing the exploitation. China’s Belt and Road Initiative ensures Chinese presence in Africa. Both the West and the new hegemons act on the deluding, altruistic assumption that they have the necessary civilizational and ideological tools to ensure the development of poorer states. The regimes they have devised continue control and looting of the resources of African states. Such looting of resources and the continued domination of African states is ensured by the conclusion of investment treaties which insulate the foreign investments from the control of local laws.

It is in the context of these developments that Dagbanja’s book assumes significance as it surveys the need to preserve the regulatory capacity of the African states to act in the public interest. He does so in the context of the experience of six African states but the conclusions he draws are of global significance. Dagbanja has chosen six states - Ghana, Cameroon, Egypt, Kenya, South Africa and Nigeria but the issues in other African states and indeed all developing countries are very similar. He points out that the treaties are based on the violation of constitutional principles that the state must have the

capacity to regulate in the public interest and the violation of treaty obligation to protect human rights and the environment. The cogency with which Dagbanja establishes these propositions will have to lead to a rethinking about investment treaties in Africa but also in other parts of the world.

Dagbanja buttresses his arguments by developing what he calls an imperative theory drawing the theory from both constitutionalism and international law. Using the interplay of the two systems to draw the principle that the investment treaties offend imperative notions of constitutional systems as well as of international law is a strength of his thesis that investment treaties are obnoxious to fundamental prior principles on which state authority rests. Dagbanja is a Ghanaian lawyer. The arbitration cases brought against Ghana show close analysis of the impermissibility of the state to make investment treaties the principal object of which is to constrain a state from acting in the public interest. A court in Ecuador recently held that the country's investment treaties are unconstitutional. The court in Columbia in the Eco-Oro v Columbia also questioned whether investment treaties should impede the state's power to protect the environment. There will be a snowballing of the arguments that Dagbanja makes in the future course of this subject. His book will give greater momentum to the argument in Africa and hopefully, outside Africa as his reasoning has universal application.

The core of constitutionalism in Ghana, Dagbanja asserts after his survey of Ghanaian law, is that the state must always act in the public interest. This principle is recognised in the other African legal systems he has surveyed. Indeed, this is true of the constitutional systems of all democracies. As Cicero asserted, salus populi, suprema lex. If that be so, what Dagbanja says of Ghana and the five other African states he studied, is true for the rest of the world. United with the view that human rights and the environment have priority over other obligations in international law, the argument that they can displace the obligation to protect private property when such an obligation conflicts with prior obligations of the state contained in ius cogens norms is a powerful one reinforced by Dagbanja with other arguments that follow in later chapters of his book.

There is no evidence that the courts in African states are incapable of meting out justice to foreign investors affected by state legislation that justifies

recourse to overseas arbitration. There is increasing evidence that arbitrators are prejudiced in favour of foreign investors. The system itself survives because it leans towards providing relief to foreign investors even in situations where there are public interest reasons why a state should interfere with the investment. The lack of legitimacy of the system has been canvassed in the literature.

Every aspect of investment treaties and the jurisprudence behind them is carefully marshalled to show that they conflict with constitutional norms as well as principles of human rights law and international environmental law. This analysis is important because through interpretation of the words of the treaty, arbitrators have created an entirely unanticipated edifice of investment protection that goes well beyond the intention of the parties. Dagbanja argues that there is no room for the inclusion of indirect expropriation in treaties as such expropriations are usually in the public interest. He argues against the inclusion of the most favoured nation clause and points out the defects in the interpretation of the fair and equitable standard. He suggests other changes to the existing system. In the context of his criticisms, it appears that the best solution would be that adopted in South Africa which is to leave issues of foreign investment entirely to domestic law and dispute settlement to domestic courts. This is an important work which will have an immense impact on the future course of developments in the subject.

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