Book Review II: The Investment Treaty Regime and Public Interest Regulation in Africa By Dominic Npoanlari Dagbanja

By:

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In the early days of investment treaty awards, twenty or so years ago, it was obvious something was badly amiss. With virtually no legal analysis, the Metalclad tribunal found an indirect expropriation against Mexico based on the government's refusal to authorize a landfill in a historically polluted area. A few years later, foreign asset owners busily sued Argentina for the country's emergency measures, adopted in the face of a national economic crisis; the arbitrators were unsympathetic to the Argentine lawyers' argument that it was 'necessary' for the country's government to override the stipulated water rates in contracts with irresponsibly privatized utilities so households could afford drinking and bathing during the crisis and recovery. In CME, a case against the Czech Republic, the tribunal awarded hundreds of millions to a U.S. mogul after reasoning very erratically that the country had violated most of the cryptic

investor protections in the invoked treaty. The dispute arose from Czech efforts to regulate broadcasting of cheap American re-runs on a major privatize TV station that was filling the airwaves with profitable muck. A sister tribunal in Lauder, bizarrely hearing a parallel claim by the human owner of the CME company, refused to award any compensation for the same dispute.

What could one say? The awards were a shit-show. Those who read them closely had to know and each, especially in the academic community, had to choose: do I say so, or not? Do I condemn this turn for the worse in international adjudication – and expose the power that formerly-colonized states have been said to have given to an arbitration industry consisting mainly of lawyers for multinationals? One should compliment Dominic Dagbanja that his study of investment treaties is in the tradition of condemnation, albeit it in a careful, judicious, and polite manner. He offers elaborate reasons for how the treaties, now applied in so many cases, have undermined fundamental purposes of states. Not only are they ill-advised; the treaties are incompatible with the state's capacity constrain its own role based on its constitutional and international obligations. Dagbanja offers a welcome African perspective on the treaties. Originally educated in Ghana, he analyzes how that country's constitution and other laws interact with the authorization of its investment treaties. Dagbanja adds analysis of Egypt, Cameroon, Kenya, Nigeria, and South Africa to represent the continent's various sub-regions. He draws together the case studies to argue that the treaties are incompatible with domestic constitutional orders and the corresponding role of a state.

The crux of the argument is that states, at least in Africa, cannot relinquish their powers as they purportedly have done in investment treaties, demonstrated time and again in the awards. The treaties must be informed by strict boundaries on the state's capacity to self-limit. To elaborate, Dagbanja focuses on three themes. They are (1) the state's judicial structure, (2) its environmental and human rights responsibilities to the population, and (3) the post-colonial mission to 'develop' (a term used with care by Dagbanja) for the common good. In each of these areas, Dagbanja argues, the state cannot conclude a treaty which constrains its core functions, whether directly or – by the imposition of financial risks and compensation orders in huge amounts – indirectly. As such, the treaties should not be interpreted to eschew core functions of statehood or they would go beyond the state's authority pursuant

to the domestic constitutional order and to international obligations in related fields based especially on jus cogens norms and customary international law.

Dagbanja calls this perspective the ‘imperative theory’. That is, it becomes imperative for a state in its treaty-making to preserve its essential role to act on behalf of its population. In chapter 2, Dagbanja lays out the theory, rooting it in domestic constitutional orders and general international norms which must be taken to have precluded or displaced anything to the contrary in investment treaties. For each African country, Dagbanja elaborates relevant domestic and international norms in the context of:

- the national judicial order, while also addressing the potential unreliability of courts (chapter 3);

- protection of the environment and human rights, points to the many in Africa are poisoned and abused in their daily work and life (chapter 4); and

- protection of governmental capacity to enact policies that limit and guide capital toward positive developmental outcomes and, above all, the avoidance of economic disaster (chapter 5).

In each area, Dagbanja gives ample support for the position that African states must have intended to be left able to act in the public interest, regardless of any investment treaty text or the language chosen by arbitrators in awards.

I expect some defenders of the treaties might be rolling eyes at the idea of domestic law being used to limit a state’s treaty obligations. They may react with the skepticism – backed by a flood of claimant-friendly awards – to the view that multilateral conventions on the environment or human rights, or that hard-to-pin-down customary norms on post-colonial self-determination, can diminish foreign investor protection. It is also an old ploy to pretend that the risk of billion-dollar compensation orders does not amount to a constraint on sovereignty. Such defenders could make credible arguments, at least formally and textually, for these objections to what Dagbanja says in his book.

In the ongoing train wreck of investment arbitration, Dagbanja's thesis requires, at least within the framework of investment law analysis, a deliberate open-mindedness and willingness to reject nearly the whole. Yet his contribution is that he has taken the less-travelled path into the woods of a pre-1990s era of the law and has shown there is much to gain from doing so. At the most fundamental level of what we understand as statehood, emanating from hundreds of millions of people mostly living on small farms or in sprawling slums across a rich and beautiful continent, Dagbanja makes clear that it is possible to re-envision how the regime is constituted lawfully and legitimately. He explains why a country should be assumed to have agreed only to investment treaties that it can manage without ruining itself. The treaty cannot mean an abandonment of vital national needs.

There was undoubtedly room for improvement in the book. The discussion of quotes from other writers, especially figures like Aquinas, Dicey, and Locke, was sometimes under-developed. Some key insights in the discussion could have been elaborated, such as where Dagbanja reconciles domestic constitutions with the Vienna Convention on the Law of Treaties, where he draws on the treaties' purposes to supplement textual analysis, and where he addresses the vagueness of treaties and awards to make space for the state. Similarly, the evaluation of typical treaty standards (in chapter 1) and of awards mostly against African countries (throughout) could have been structured more consistently instead of shifting between criticism of one standard or award and description of another. Also, in discussing any investment treaty case, there often much to do, beyond an account of the award, to explain the context for the dispute, the activities of the investor and the state, and their effects on others.

Even so, Dagbanja explains the treaty standards well and examines the cases against various African countries with care. Ultimately, he elaborates credibly on the major threats posed by the treaties to the functional state. Putting aside formal objections more appropriate to an investor-side brief, Dagbanja has shown how the regime can be changed by avoiding or terminating treaties but also by insisting on their use within another legal framework, one that emphasizes the state's responsibility to its population. Professor Gus Van Harten York University

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