Book Review: Dominic Npoanlari Dagbanja's "The investment Treaty Regime and Public interest Regulation in Africa"

By:

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There is quite some work that has been done on investment regulation and human rights protection in the context of Africa. One of such works is Fola Adele's book, International Investment Law and Policy in Africa, Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement (2018), where he discusses sustainable development and human rights protection. Most significantly, Adeleke acknowledges that the role and importance of public interest issues, sovereignty of states and other binding obligations that interfere with investment treaty norms have not been given adequate attention. This is why I welcome Dr. Dominic Npoanlari Dagbanja's book "The Investment Treaty Regime and Public interest Regulation in Africa" with lots of admiration. This work does not only provide a wealth of resource for scholars seeking to research on such a thorny issue, but also serves as a fresh

reminder of the important yet difficult conversation about the need for African states to recast future investment treaties in the light of their constitutional mandates and responsibilities.

I term Dr Dagbanja's book 'radical' because from the outset, he highlights the constitutional duty of States towards their people. He asserts that this duty is reflected in customary international law and international treaties that protect the environment and human rights. He throws more light on how these constitutional and international treaty obligations may conflict with a state's desire to attract foreign investment by protecting the foreign investor over and above its people. He then challenges the legitimacy of African states signing BITs that fundamentally put them at odds with their constitutional powers as well as the core obligations they owe their citizens; thereby neglecting to their duty to pursue positive development for the good of all. He thus introduces the "imperatives theory".

I consider the imperatives theory to be the fulcrum of the book. It lays the foundation for, and provides the lens through which to examine investment treaties entered into by African governments, with consequences that result in fundamental constitutional violations. Dagbanja argues that African states lack the mandate to sign treaties that contradict their core constitutional mandate to act in the best interest of their people. He posits that treaty terms must be in conformity with the powers conferred under the constitution. He thus makes the point that reposing adjudicatory powers in an arbitral tribunal in respect of investments that are governed by host state laws is an anomaly, unconstitutional, and suspect. In essence he encourages national courts to exercise final judicial authority over matters that concern their domestic laws and investments in their territory.

TThe book has six chapters. Chapter One discusses the intersection of investment treaty law and arbitration, and public interest regulation in Africa. Using the imperatives theory as the conceptual framework, Chapter Two focuses on how African states can reclaim their regulatory autonomy in the investment treaty regime in Africa. In Chapter Three, Dr Dagbanja highlights the legal status and limitations on investor-state arbitration in Africa. He then delves into an increasingly topical area in Chapter Four— the Environment, Human rights and the investment treaty regime in Africa. He also discuses the

right to development and development policy making within the context of the investment treaty regime in Africa, in Chapter five. Finally in Chapter Six, he argues the indispensable need for reform in the investment treaty regime in Africa. The book is a case study centred around six African countries, namely Cameroon, Egypt, Ghana, Kenya, South Africa and Nigeria. He assesses their Constitutional provisions and international arbitration cases that were the basis of huge awards against some of them.

A core theme that runs through the book is the reminder that African states have duties under both national and international law to abide by overarching legal obligations undertaken in these laws. Consequently, subsequent agreements in the form of investment treaties should be subject to these overarching constitutional and international law obligations, especially those relating to protection of the environment and human rights. In the interest of fulfilling these duties, he argues, that African States should maintain the autonomy to regulate.

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A key highlight of the book which is of special interest, is Chapter Four on the environment, human rights and the investment treaty regime in Africa. Dr Dominic emphasises the a “constitutional-general international law imperative” on African states to respect and uphold their environmental and human rights law obligations. Dagbanja admonishes African states to conduct their internal affairs, including the execution of investment treaties, in a manner that is in consonance with the principles of public international law and national laws and interests. Environmental and Human rights obligations of African states, he argues, should be at the fore of any negotiation and conclusion of investment treaties.

In the wake of the African Continental Free Trade Agreement (AfCFTA) and the extensive provisions on the Environment and Human rights protection in its Investment protocol, Chapter Four of the book is an insightful resource to help re-assess the AfCFTA and other new generation treaty provisions to determine whether they are in consonance with domestic law obligations, and whether they would translate into domestic policies and laws towards protecting Human rights and the Environment in host states.

One considered shortfall of the book, however, is the brevity with which the author discussed some cases. For example, the discussion of the Balkan Energy cases does not provide detailed context or background to how the investment was set up. An account of how the investor approached the investment, including all the due diligence the investor sought to do prior to making the investment and the assurances given by the State in response, would have provided a holistic context for appreciating the conduct of both investor and State and the eventual decision of the Tribunal. There is the need to examine State conduct (complicity) in these investment cases, including how these conducts are likely to affect the interest of the local people and local communities. Consequently, a more detailed discussion of cases from the perspective of both investor and State would have been helpful in highlighting some of the shortfalls in the conduct of States, in concluding investment agreements.

This observation notwithstanding, The Investment Treaty Regime and Public Interest Regulation in Africa" lays a solid foundation for continuing the discourse on achieving a balance between investment promotion and human rights protection in Africa. It advocates for a balancing of the States's constitutional duty to prioritise the interest of the people against that of the desire to protect the foreign investor. Hopefully, this work will serves as a pivot for researchers and scholars on the continent to continue the conversation on this difficult subject. Kudos to Dr. Dominic Npoanlari Dagbanja, for gallantly bearing the torch and lighting the path.

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