Book Review Symposium Introduction: The Investment Treaty Regime and Public Interest Regulation in Africa

By:

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29 May 2024

1. ***Scope***

A fundamental premise of The Investment Treaty Regime and Public Interest Regulation in Africa is that national constitutions "are supreme in the hierarchy of legal norms within the domestic context, and governmental actions in Africa, including the making of investment treaties, are governed by these fundamental legal norms." In this monograph, I addressed, then, the question of the limits that national constitutions and the right of African states to regulate in international law place on the authority of African states in their conclusion of international economic treaties such as investment treaties. I examined four different and fundamental areas of public interest: national judicial systems, the environment, human rights, and development. Based on a constitutional-general international law imperatives analysis, I developed the imperatives theory as a theoretical framework to explain the conflict of legal norms and interests through a critical analysis of the intersections of public law and policy and international investment treaties. The issue addressed by the imperatives theory is whether the fundamental human rights and corresponding obligations of African states towards citizens under African constitutions, international environmental treaties and international human rights treaties do place or should place, limitations on the competence of African states to conclude investment treaties the terms of which constrain the exercise of the states' public interest regulatory authority. I argued that African states' obligations to protect the public interest are fundamental and central under their constitutions and general international law. The powers of government must be exercised within constitutional limits and to promote the welfare of the people. These constitutional-general international law imperatives limit the investment treaty making powers of African states and raise legal and normative questions about the validity of existing treaties that seek to limit the states' exercise of their regulatory powers. I developed these arguments on the substantive and procedural constitutionality of investment treaties in chapter 1. African states have constitutional and international human rights and environmental treaty obligations to protect human rights and the environment and to initiate and implement development policies. Accordingly, they cannot limit or surrender their constitutional regulatory authority merely to protect foreign investment. African countries must prioritise the public interests of their citizens in the conclusion of international economic treaties (including free trade agreements and bilateral investment treaties). They must not surrender their regulatory authority in the name of investment protection because foreign investment does not always come with guaranteed tangible benefits.

2. *The Utility of Investment Treaties in Africa*

The imperatives explored in The Investment Treaty Regime and Public Interest Regulation in Africa provide a basis for African countries to rethink the necessity of making future investment treaties and to consider terminating or renegotiating existing investment treaties for several reasons. The case for the conclusion of (bilateral) investment treaties (BITs) is that they attract foreign investment, and that foreign investment leads to development. Both propositions are contestable. First investment treaties do not enjoy any singular advantage over various other factors that foreign investors consider in making the decision to invest abroad. In fact, the literature disputes the claim that investment treaties attract foreign investment. In Can African Countries Attract Investments without Bilateral Investment Treaties?, the author found that most FDIs in Ghana at the time of research were made by foreign investors from countries with which Ghana had no BITs, meaning in effect that investments can be attracted without BITs. According to the Australian Department of Foreign Affairs and Trade, "approximately 170 Australian resource companies are currently operating in 35 countries in Africa." Australia has a BIT with only one African country, namely Egypt and one double taxation treaty with another African country, South Africa. Australia does not have any other international economic treaty with any of the African countries in which its resource companies operate. If BITs were that significant and primary to Australian resource companies' decision to invest in Africa, then these companies would not operate in Africa.

It is also disputed that foreign investment leads to development. As I pointed out at page 6 of the monograph, the first BIT in Africa to have legal effect is the Niger-Switzerland BIT which was signed on 28 March 1962 and entered into force on 17 November 1962. The Cote d'Ivoire-Switzerland BIT also entered into force in 1962. The first BIT to be signed in Africa is the Togo-Germany BIT, signed on 16 May 1961 but it did not enter into force until 21 December 1964. The first ABIT was signed by Pakistan and Germany in 1959 and came into force in April 1962, only five months before the Niger-Switzerland BIT came into force. It follows that Africa has been part of the investment treaty regime right from its inception. Yet African countries are still developing. If the conclusion of investment treaties truly leads to investment attraction and development, then Pakistan and African countries would be *developed* countries by now. They are still *developing*.

Second, there is no or very limited *reciprocal* benefit for African countries under investment treaties. African countries do not invest at all or only make insignificant and infinitesimal investments among themselves and with other countries with which they have concluded investment treaties. Yet investment treaties are designed for the *reciprocal* promotion and protection of investments and are supposed to bring about reciprocal benefits to the contracting parties. Given African countries do not invest all or only make infinitesimal investments in developed countries with which they enter investment treaties, they do not stand to benefit from the reciprocal benefits envisaged under investment treaties. Mutual benefit does not accrue automatically merely by concluding investment treaties. To reciprocally benefit from investment treaties, African countries must grow their local businesses that have the capacity not only to invest domestically, but also to invest in other countries. No country reciprocally benefits from investment treaties simply by opening its borders for foreign investment without developing the capacity of its local firms to invest in other countries.

Third, investment treaties entitle foreign investors to bring claims against states for adopting legislative, policy, and administrative measures or even against judicial decisions alleging breach of the terms of these treaties. The various legislative and administrative measures that foreign investors have challenged using investment treaty arbitration include environmental policies, banking sector reforms, measures in response to economic crises, revocations of licences and permits, application of tax laws and water concessions. These regulatory measures are at the core of what constitutional and democratic governments are required under both domestic law and international law to take to serve or protect the interest of their citizens. Yet, the standards of investment protection in investment treaties are aimed primarily at restricting governmental regulation that adversely affects investors and their covered investments and to compensate foreign investors whether the regulation is in the public interest or not.

Investment treaties unduly constrain public policymaking and implementation. According to the *World Investment Report 2023*, 132 countries have been respondents to one or more investor-state arbitration claims. These cases against states reached 1,257 in 2022. Crippling monetary awards and legal costs flow from investment treaty claims and can have devastating impacts on national development. In *Yukos v Russia*, the arbitral tribunal ordered Russia to pay USD50 billion to cover the damages, costs of arbitration, and the investor’s costs of legal representation. Details of the investment treaty claims as they involve African countries are analysed in chapters 1 and 3 of *The Investment Treaty Regime and Public Interest Regulation in Africa* and in Won Kidane's *Africa's International Investment Law Regimes*, chapters 3-11. In effect, by signing on to investment treaties African states wittingly or unwittingly limit their legal and constitutional authority to regulate in the public interest. So African countries must not conclude investment treaties when the benefits of these agreement do not exist or are insignificant. Given that investment treaties play no spectacular role in investment attraction and no nation develops based solely on foreign investment, the restrictive effects of investment treaties on the exercise of public interest regulatory powers are unjustifiable.

Fourth, African countries must not enter into investment treaties because foreign investors and covered investments already enjoy legal protection under domestic constitutions and domestic investment laws including protection against expropriation without compensation and they have the legal right to enforce their disputes under domestic law against host states such as reflected in sections 30-33 of Ghana Investment Promotion Act 2013 (Act 865). Domestic legislation in Africa also makes provision for alternative dispute resolution such as is available under Ghana's Alternative Dispute Resolution Act 2010 (Act 798). This makes investment treaties and investor-state arbitration duplicitous and unnecessary. The presence of over 170 Australian resource companies in 135 African countries when Australia does not have BITs with those countries suggests that these companies are satisfied with the legal protection available to them under domestic law or at least that they are willing to take the risks associated with doing business in Africa without the benefit of the protection of BITs because they arguably consider the absence of BITs to be insignificant when assessed in relation to the economic benefits they stand to gain by doing business in Africa.

Fifth, as argued elsewhere and in chapter 4 of the book, it should be troubling to any government in Africa that believes in the rule of law and accountability that foreign investors should be granted the privilege and right to settle their disputes by investment treaty arbitration. This mechanism enables foreign investors to bypass the jurisdiction of municipal courts, using legal rules that do not apply in municipal law, and thereby enabling arbitral tribunals to override municipal courts, the jurisdictions of which are original, appellate and final.

3) The Making of Future Investment Treaties in Africa

Since African countries may still conclude investment treaties, I suggest how any such future investment treaties may be made in chapter 6. The duties of African states to regulate in the public interest, the difficulties of voiding treaties, and the narrow room for escaping from a treaty's binding effect under the Vienna Convention on the Law of Treaties support the need to rethink the terms of future investment treaties. Therefore, the following specific proposals would severely restrict the scope of investment treaties to make them compatible with the imperatives theory.

First, investment should be entitled to coverage and protection under an investment treaty only where the investment has made or will make a tangible contribution to the development of the host African country in one of the ways identified in African constitutions and development policies and/or as may be defined by the parties in the investment treaty.

Second, indirect expropriation must be done away with completely. There are several reasons for this. One is specific to African constitutions. The requirement for payment of compensation for indirect expropriation under the investment treaties conflicts with the constitutions of African countries including Cameroon, Egypt, Ghana, Kenya, Nigeria, and South Africa. These constitutions recognise the payment of compensation only for compulsory taking possession or acquisition, of property by law, that is direct expropriation. There is no constitutional right to compensation for general regulation that adversely impacts on property rights. This issue has been adequately explored elsewhere.

Third, I argue against the inclusion of national treatment and most-favoured nation treatment (MFN) in future investment treaties. African states exist or must exist first for their own citizens and should not place foreigners and citizens on the same level in terms of economic protection. African states must learn from developed countries which use their immigration laws and policies selectively, discriminatorily, and restrictively against foreign nationals to advance national interests without giving excuse for doing so while at the same time they promote free trade and investment agreements to allow their businesses to operate in Africa with unbridled rights. The right to national treatment under these agreements allows their nationals to not be 'discriminated' against by requiring the to be placed at the same level of protection as citizens of the host countries in Africa. African states should be able to initiate and implement measures solely in the interests of citizens whether they are engaged in the same or similar business as foreign investors without having to incur investment treaty liability. National treatment should be a choice and not an obligation giving rise to compensation. The case against the MFN rule is that it indirectly defeats the very purpose for which a state did not agree to a particular investment treaty term with a particular treaty partner. If national treatment and MFN standards are retained or continued to be included in investment treaties, then the Most-Favoured-Home-Third States Clause (MFHT Clause) must be included in investment treaties. The MFHT Clause will impose obligations on foreign investors to carry on their businesses and operations in Africa in accordance with the most favourable environmental, human rights, and other operating and performance standards and obligations applicable in their home states or in third states. The MFHT Clause is discussed in detail in the monograph.

Fourth, the fair and equitable treatment (FET) protection has become one of the most controversial in international investment law because of its imprecise and indeterminate nature. Like indirect expropriation, it has become a powerful and flexible test for foreign investors to use to challenge even public interest regulatory actions. African countries must not continue to agree to such a term in its current amorphous form. The term must be very well defined to limit its scope and effect to preserve regulatory autonomy. To be fair and equitable, this standard must operate to protect the interests of the state too. It is inequitable and unfair where the term operates lopsidedly only to protect foreign investors and covered investments.

Fifth, provisions on transfer of investment and returns would need to preserve the right of African governments to restrict transfers in the interest of financial stability and economic development. There must be absolute freedom to restrict transfers for purposes of stabilizing the economy in cases of economic and financial crises and the existence of that situation must be self-judging.

In future, African states must not conclude treaties that contain investor-state dispute settlement by arbitration. The fundamental principles of African legal systems in which the courts have original, appellate, and final jurisdictions over all legal disputes and persons, and in which the principles of probity, separation of powers, rule of law, accountability, and transparency are entrenched and paramount, dictate against African states agreeing to international arbitration, surrendering all judicial powers to this mechanism principally because foreign investors are involved. Instead, they should go for domestic courts and state-state arbitration. Foreign investors need dispute settlement mechanisms that are efficient. Efficiency is not an inherent attribute of investor-State arbitration.

4) Conclusion

Given that foreign investment is not the panacea for all development problems in Africa, African states must reject this regime. In the alternative, a restricted approach to investment protection must ensure the role of African states in development and the protection of human rights and the environment is not underestimated or undermined, and foreign investment is not given absolute protection above everything else. The significance and original contribution of The Investment Treaty Regime and Public Interest Regulation in Africa is acknowledged by the excellent reviews that follow and others.

In his review, Emeritus Professor Muthucumaraswamy Sornorajah situates the originality and contribution of the book within the history of the development of international law on foreign investment and the exploitative nature of this regime. Professor Sornarajah noted rightly that there is limited critical engagement and rejection or resistance of the investment treaty regime by African jurists. This book adds to the limited African scholarly engagement on the subject. Moreover, in Professor Sornarajah's view, the book's contribution and uniqueness lie not just in its focus on Africa but its critical focus on national constitutions and the limitations they place on the capacity of African states to conclude international economic treaties that limit their constitutional authority and powers to regulate in the public interest.

Professor Gus Van Harten in his review also identifies the book as arising from its study of investment treaties in the "tradition of condemnation; through a "careful" and "judicious" analysis. Professor Harten's analysis establishes that the book is a critical contribution to the literature through its focus on the fundamental purposes of the states and the constitutional limits to the authority of states to limit their regulatory powers needed to fulfill those purposes. Accordingly, in the view of Professor Harten, the book's contribution is that it "has taken 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." The constitutionality investment treaties' approach adopted in the book provides a basis to assess whether the regime is lawfully constituted and legitimate.

Dr Kehinde Folake Olaoye's continues with the acknowledgement of the contribution of the book as being its focus on the constitutionality of international economic treaties exemplified by its focus on the intersection of national constitutions and investment treaties. In Dr Olaoye's view, the book is the first in Africa to address constitutional issues in international economic regulation by treaty. According to Dr Olaoye, the book is an important contribution to ongoing debates about the reform of investment treaties and provides a basis for reflection on good governance and how to ensure coherence between domestic investment laws and international economic treaties.

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