Book Review

The Investment Treaty Regime and Public Interest Regulation in Africa

By Dominic Npoanlari Dagbanja, Oxford University Press, 2022

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Background

International investment law (IIL) is contested.[1] Contestation is not new to this area of international law given the "colonial origins" of IIL and the challenge to the international economic system that the Third World marshalled in the 1960s-1970s and before those decades.[2] In the turn to economic development as a postcolonial and neoliberal concept and the promise that foreign investment presented, African and other Third World states appeared to embrace the IIL regime in what has emerged as an ambivalent relationship.[3] A direct connection between IIL and socio-economic wellbeing is, however, also contested.[4] Amidst ongoing contestations, African states are incorporating some limited changes in recent intra-African investment instruments.[5] Dr. Dominic Dagbanja's book, *The Investment Treaty Regime and Public Interest Regulation in Africa,* emerges in this climate of contestation and calls for change in IIL.[6] It presents a uniquely African constitutional challenge to IIL while being global in potential impact.

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1 *See generally* Muthucumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment (Cambridge University Press, 2015).

2 Antony Anghie, Imperialism, Sovereignty and the Making of International Law 3, 4, 224 (Cambridge University press, 2005); *see generally* Mohammed Bedjaoui, Towards a New International Economic Order (Holmes & Meier, 1979).

3 Ibironke Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World,* 8 San Diego Int'l L. J. 345 (2007).

4 M. Sornarajah, *International Law and Development: Foreign Investment, in* The Oxford Handbook of International Law and Development 387 (Ruth Buchanan et al. eds., 2023).

5 Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law,* 53 Case W. Res. J. Int'l L. 7 (2021).

6 Dominic N. Dagbanja, The Investment Treaty Regime and Public Interest Regulation in Africa (Oxford University Press, 2022).

Dagbanja's book is a major contribution to IIL scholarship in Africa. Although there has been a turn in the literature to Africa's perspectives on IIL and the workings of the discipline on the continent, this book is one of the few book-length manuscripts on IIL in Africa.[7] It centers constitutional governance and the public interest regulation and protection obligations of African states in its assessment. The book examines the compatibility of African states' investment treaty obligations with their constitutional obligations to regulate in the public interest as well as obligations in general international law, international environmental treaties (IETs), and international human rights treaties (IHRTs). Central to the book's core position are Dagbanja's questions regarding African states' capacity to agree to the obligations that they assume in investment treaties considering the "fundamental rights of citizens" and "legal norms that define what African states can or cannot do with public power" (p. 62). The book's assessment covers African states' constitutional and general international law obligations to regulate in the public interest on matters regarding the environment, human rights, and development. While the book draws examples from all parts of Africa, it specifically studies six countries (Cameroon, Egypt, Ghana, Kenya, Nigeria, and South Africa) spanning all the subregions in Africa.

IIL has provoked calls for reform.[8] Situated in the reform context, Dagbanja's book is an indictment of the current construction of IIL, arguing that "African states' investment treaty obligations are largely incompatible with their legal obligations to protect the public interest under national constitutions and general international law" (p. 38). Dagbanja's critical intervention provides a conceptual approach for assessing IIL, the public interest, and regulatory autonomy in Africa. He makes an original contribution to constitutional and public interest analysis of IIL especially in light of the legitimacy challenges that IIL has presented for host states. While there are other constitutional analyses of IIL,[9] and much has been written about the public interest and IIL,[10] Dagbanja combines constitutional analysis with IIL in a specifically African context relying on detailed assessments of the constitutions of African countries. He offers an elegant articulation of the constitutionality of the public interest-impacting nature of constraints on states' regulatory autonomy in investment treaties while also marshalling similar analysis in general international law. Dagbanja's book has the potential to inform similar challenges in many Third World countries with comparable historical background and challenges as most African countries.

7 For a recent book, see generally Won L. Kidane, Africa's International Investment Law Regimes (Oxford University Press, 2023).

8 *See e.g.,* James Thuo Gathii & Harrison Otieno Mbori, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue,* 24 J. World Inv. & Trade 535 (2023).

9 On constitutions and IIL, *see, e.g.,* David Schneiderman, Constitutional Review and International Investment Law: Deference or Defiance (Oxford University Press, 2024); International Investment Protection and Constitutional Law (Stephan W. Schill & Christian J. Tams eds., 2022).

10 *See, e.g.,* Alessandra Arcuri & Federica Violi, *Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives, in* Handbook of International Investment Law and Policy (Julien Chaisse et al. eds., 2020).

Imperatives Theory

Dagbanja's analyses are organized around at least three notable areas and contributions. These three areas mirror the structure of the book. The first is the theoretical framework on which Dagbanja builds his claims. This framework, which Dagbanja calls the imperatives theory and which relies on *constitutional-general international law imperatives* (the "legal rights of human beings and the corresponding core duties of states" (p.113)), is a major contribution of Dagbanja's book. The imperatives theory, which Dagbanja had been developing for some years, is at the core of his analysis of states' competence to restrict their regulatory autonomy in investment treaties.[11] It also informs the book's analysis of conflicts between states' public interest obligations under constitutional and general international law on one hand and investment treaty obligations on the other hand. By this perspective, African states' obligations to regulate in the public interest with regards to environmental protection, human rights protection, and the right to development derive from domestic constitutions and general international law; hence, the *constitutional-general international law imperative.* For Dagbanja, "these legal norms and the higher values of society contained in them concerning the public interest must determine and shape the investment treaty-making powers of African states" (p. 56).

The imperatives define the limits to obligations that may be imposed on states in investment treaties. Informed by his analysis of the imperatives theory, Dagbanja concludes that constitutions and general international law regarding states' regulation in the public interest limit African states' competence to form investment treaties. This view is based on at least two factors that Dagbanja identifies. First, the powers that African states exercise are derived from their people through the instrumentality of their constitutions and are intended to be exercised for the benefit of those people. The "public source" of states' powers and the "public purpose" for which they hold these powers essentially limit states' capacity to enter investment treaties that constrain their obligation to regulate in the public interest (p. 56). Second, investment treaties are only created, valid and enforceable based on constitutional and general international law and their creation, validity, and enforceability is determined by states' constitutions and by general international law. Primarily then, African "constitutions and the very rights, interests, and values they preserve should dictate the content of international agreements that African states enter into in the first place" (p. 74). This imperatives theory and the claims derived from the perspective are at the core of Dagbanja's intervention.

11 Dominic N. Dagbanja, *The Conflict of Legal Norms and Interests in International Investment Law: Towards the Constitutional-General International Law Imperatives Theory,* 6 Transnat'l Legal Theory 518 (2015).

The Public Interest

A second notable contribution of the book is Dagbanja's engagement, through the lens of the imperatives theory, with key public interest issues, that is, human rights protection, environmental protection, and the right to development. The "constitutional imperatives place the public interest at the centre of the exercise of the powers of governments in Africa" (59-60). Dagbanja, for example, argues that the duty to protect human rights and the environment "should be superior to investment treaty obligations" (p. 253). This is a key claim as the most controversial investment arbitration cases impact the public interest.

Investor-state arbitration, indeed, has many difficulties and has engendered significant criticism.[12] It is a major stage on which competing interests play out. However, it is a stage that effectively excludes the voices of the peoples of the host state who are often directly impacted by the disputes.[13] In his examination of investment treaties and public interest regulation, Dagbanja first assesses the jurisdiction of national courts and investor-state arbitration's displacement of these courts before he discusses human rights, the environment, and development. His analysis is a departure from current investor-state arbitration orthodoxy. He weaves difficult issues together as he examines the competence and authority of African states to settle disputes through investor-state arbitration, assesses the jurisdiction of domestic courts, and analyzes three issues have been difficult to reconcile in IIL: investor protection, citizens' rights, and state obligations.[14] Dagbanja centers domestic courts instead of investor-state arbitration[15] noting that "African states must never include investor-state arbitration in future investment treaties and other international contract and agreements if they are to reassert the authority of municipal courts" (p. 174). Where states retain investor-state arbitration as a dispute settlement mechanism, Dagbanja insists on exhaustion of local remedies and a list of non-arbitrable matters.

Dagbanja turns to human rights and the environment in chapter four. He argues that in light of the constitutionalization of environmental protection and human rights in the African constitutions that he assesses as well as provisions of IETs and IHRTs, "it is a *constitutional-general international law imperative* for African countries to respect and uphold their human rights and environmental law obligations" (p. 195). This imperative "must be treated as taking precedence over an investment treaty obligation which seeks to prevent or limit the adoption of measures required for the realization of this … right" (p. 213). As a result, the obligations that states can assume under investment treaties are limited and African states' competence to form investment treaties is also limited. Dagbanja also departs from positions that only suggest incorporating the right to regulate in investment treaties and adopts the view that affirming the right to regulate in these treaties is insufficient. This is significant

12 *See* Gus Van Harten, The Trouble with Foreign Investor Protection (Oxford University Press, 2020). On critique of ongoing reform and reform debates, *see also* Gus Van Harten & Anil Yilmaz Vastardis, *Special Issue: Critiques of Investment Arbitration Reform – An Introduction,* 24 J. World Inv. & Trade 363 (2023).

13 Ibironke T. Odumosu-Ayanu, *Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law,* 24 J. World Inv. & Trade. 792 (2023).

14 Dagbanja, *supra* note 6, at 140–41.

15 *Id.* at 172–75.

given acontextual calls to affirm states right to regulate in the public interest. Such affirmations, by themselves, are insufficient. Dagbanja argues for a position that supports imposing "positive and negative obligations on foreign investors which must be enforceable against the investors" (p. 252); a "reciprocity of benefit" and "reciprocity of obligation" (p. 260). Meanwhile, he affirms that foreign investors and foreign investment must be protected while noting that states' environmental and human rights duties "must not be subordinated to investment treaty obligations" (pp. 258-259).

Many investment treaties and even arbitral institutions proceed(ed) on the promise of economic development in host states which, at the inception of contemporary IIL, were mostly Third World states. African states embraced the IIL regime and institutions such as the International Centre for Settlement of Investment Disputes based on this promise.[16] However, not only is there no clear connection between economic development and IIL, but investment treaties also have significant impacts on African states' development policy making. In chapter five, Dagbanja focuses on development and development policy making. This is essential as the neoliberal era has been informed by the discourse and various forms of the practice of 'development'. Dagbanja problematizes the concept of development and sides with the basic needs approach articulated in the constitutions of the six African states. He challenges the narrative that foreign investment/ investment treaties promote development while also assessing the impacts of investment treaty provisions on development policies.

Like the other public interest matters, Dagbanja locates the right to development and states' development obligations in African constitutions and general international law and views them as constitutional-general international law imperatives. For Dagbanja, the articulation of this right and corresponding state duties limits the competence of African states to form investment treaties that curtail their regulatory autonomy regarding development policy making. If investment treaties are to be formed in the future, for Dagbanja, they must require that foreign investment contribute to development to qualify for protection. The *Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area,* which incorporates some shifts in investment treaties, insists that investments must contribute significantly to the sustainable development of the host state.[17] However, the extent of the Protocol's contributions is yet to be ascertained. Moreover, newer investment treaties in other contexts have not always yielded results different from those produced by older treaties.[18]

Negotiating IIL and the International System

A third notable point in Dagbanja's book is the attempt to navigate the complex exercise of negotiating space in the international system for his claims about the course of IIL in Africa while sometimes incorporating proposals that recognize that African states may continue to pursue IIL in

16 *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* 5 ILM 524, ¶ 9 (1965). *See also* Odumosu, *supra* note 3.

17 *See generally* AFCFTA, Draft Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (Addis Ababa, Feb. 2023).

18 Wolfgang Alchner, Investment Arbitration and State-Driven Reform: New treaties, Old Outcomes (Oxford University Press, 2022).

its current frame. For example, Dagbanja proposes that African states should not adopt investor-state arbitration but recognizes that states may choose this position and as a result, supports exhaustion of local remedies in the latter case.

Chapter six offers insights on the reconciliation of investment protection (which investment treaties focus on) and regulation in the public interest (which is a core constitutional principle). Dagbanja focuses on three areas in this reconciliation exercise: a framework for future investment treaties with tangible suggestions for the content of the treaties, an assessment and a basis for interpreting existing treaties. Following his careful assessment of African states' regulatory autonomy and competence to form the types of investment treaties that have prevailed, Dagbanja also challenges reliance on investment treaties as the book draws to a close. He notes that:

> ongoing reforms of investment treaties and investor-state arbitration to accommodate states' right to regulate reinforce the relevance of the question whether investment treaties are necessary and needed at all. If investment treaties and investment arbitration are not bringing about the neutrality and efficiency that underlie them, the question arises as to why their reform is necessary and must be pursued at all costs but a return to municipal law and domestic courts for investment protection must never be raised or considered (p. 347).[19]

African states and other actors recognize that a shift is necessary in investment treaties.[20] The extent of the shift is being debated and Dagbanja offers an approach rooted in constitutional analysis as the basis for changes in the investment system. However, the political economy of the international system, the realities of material power, and the prospect of economic prosperity fueled by foreign investment could impact realization of the vision that Dagbanja articulates in his book. Dagbanja briefly turns to these matters, but the assessment could have benefited from more detailed analysis. Chapter five considers the politics of investment treaty-making which has significant implications for the origins, formation, and contents of investment treaties of the modern bilateral investment treaties (BITs) era. In chapter one, Dagbanja also briefly traces the background to contemporary IIL, situates BITs in the postcolonial era calling them "instruments of neocolonialism" (p. 5), and refers to the Calvo doctrine (p. 5). While Dagbanja recognizes, in chapter 3, Third World efforts to establish a new international economic order (NIEO) and encourages a return to these debates, a dedicated assessment of mechanisms that the Third World sought to develop which may have led to a different trajectory for investment law would have been apt. This is particularly relevant given that Dagbanja prioritizes domestic law. For example, the *Charter of Economic Rights and Duties of States* also prefers domestic laws and regulations in accordance with "national objectives and priorities" as well as states' "economic and social policies".[21] However, the movement to establish a NIEO was fiercely contested and the neoliberal system that now prevails was preferred. BITs proliferated,

19 *See* Dagbanja, *supra* note 6, at 349 (noting that there is, "a legitimate question of whether the time has come to return to the protection of foreign investment under municipal law. Ongoing reforms of the investment treaty regime challenge the need to continue with them.").

20 This is demonstrated in recent intra-African investment instruments which incorporate some limited reforms. *See* AFCFTA Investment Protocol, *supra* note 17.

21 G.A. Res. 3281 (XXIX), at art. 2 (Dec. 12, 1974) (describing the Charter of Economic Rights and Duties of States, UN Doc A/3235).

investment arbitration outside domestic jurisdictions multiplied, and wider public interest became often subordinated to the interests of transnational capital.

Many factors continue to pull African states towards submitting their most pertinent economic systems and policies to international disciplines as was the case in the immediate post-NIEO era. In Dagbanja's view, "[w]hat Africa needs for the realization of its development goals is strong governance systems that respect rights, including domestic legal systems that work for both domestic investors and foreign investors, not an international legal and institutional regime that favours, pampers, and privileges foreign investors" (pp.354-355). Dagbanja's call is for African states to give primacy to their constitutional orders and the interest of the people from whom they derive sovereign authority. His book invites the reader to imagine, visualize, and operationalize an investment system that is based on the obligations of African states as articulated in their constitutions and general international law.