Making the Multilateral Investment Court Beneficial for African Local Communities

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Introduction

The treatment of local communities in the settlement of investment disputes has been extensively examined (see, e.g., here, here, and here). They are invisible and their voice is the weakest in the international investment regime. This observation seems to be shared by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III, for which, and ‘‘as a matter of legitimacy of the ISDS system, it would be important that affected communities and individuals as well as public interest organizations be able to participate in ISDS proceedings beyond making submissions as third parties”, (UNICTRAL, ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019) A/CN.9/970, 7 paras 31–33), implying that the current participation of these communities is not satisfactory.

This contribution explores reforms that can adequately protect the rights and interests of local communities in the settlement of investment disputes. More specifically, it examines the extent to which the Multilateral Investment Court (MIC) can improve the participation of these communities in ISDS and ensure a better protection of their rights and interests, with an emphasis on African communities.

ISDS and the Ongoing Reforms

The question of how to reform the current investor-state dispute settlement (ISDS) mechanisms is a thorny question which still divides the international investment law and business community with proposals that can be grouped into three main camps: Incrementalists, Systemic reformers and Paradigm shifters. In Africa, a consensus is slow to emerge on this question, at least at the continental level where the Pan African Investment Code did not solve the issue but rather left itto the discretion of national governments (see article 42(1) of 2016 PanAfrican Investment Code). In the same vein, the recently adopted Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) seems not to include any dispute settlement mechanism. Although the official version is not publicly available, article 46 of the Draft version submitted to the Heads of African State at the African Union Summit of 2023 February, states that Rules and procedures governing dispute prevention and the management and resolution of disputes between an investor of any of the African Union member states and the host state in which their investment is located shall be set out in an annex to be negotiated in the 12 months following the adoption of the protocol on investment.

Regarding the MIC, some authors have already expressed pessimism about its potential benefits to developing countries in general and to Africa more specifically. Many see this as a maneuver aimed at perpetuating western hegemony and neocolonialism in the international investment regime. However, all the different reform options are imperfect in some ways. And the idea of a MIC is not new for Africa given that the Arab Investment Court, which was established by the Unified Agreement for the Investment of Arab Capital in the Arab States and existed for more than 30 years, involves some African countries, such as Djibouti, Egypt, Libyan Arab Jamahiriya, Mauritania, Somalia,

Sudan, Tunisia (see here). Even though the current idea of MIC was proposed and championed by the EU, it presents opportunities and African countries. at least those participating in the discussions of the Working Group III where this reform is currently being discussed, should seize this opportunity to influence its design and advocate for some features, some of them being important for their local communities: a behind enemy lines' approach as defined by Georges Abi-Saab: "within the territory controlled by the enemy, it is still possible to engage and avoid the soft option of staying away from the battlefield in comfort, doing nothing about it other than crying injustice from afar or throwing stones at windows, while leaving the decision to the opposite party and undergoing its consequences".

The contribution adopts a twofold approach looking, first, at the current participation of these African communities in the settlement of investment disputes and, second, how the MIC can address some of the challenges these communities are facing.

The participation of African local communities in the settlement of investment disputes

Currently, local communities do not have locus standi in the settlement of investment disputes and therefore, can only participate as non-disputing parties and submit amicus curiae briefs. However, non-disputing parties' participation was not envisioned at the creation of the investment regime. The first investment tribunal to grant amicus curiae submission was the ad hoc tribunal in *Methanex Corporation v. USA*, under the UNCITRAL Rules. ICSID tribunals started to authorize third parties' submissions in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic* and, in 2006, ICSID Arbitration Rules were amended to enable third parties' submissions, notably with the introduction of ICSID Arbitration Rule 37(2).

This Rule 37(2) calls for some remarks: First, non-disputing parties do not have a 'right' to file the written submission. It is rather a possibility or an option. Secondly, litigant parties must be consulted but can they veto against the submission of amicus curiae briefs by non-disputing parties? Thirdly, such participation is only limited to filing a written submission without the possibility

to participate in the other stages of the proceedings. However, there seems to be an inherent conflict with this rule because, on the one hand, the non-disputing party is expected to bring a different perspective or knowledge than the disputing parties while, on the other hand, that party has not access (or has very limited access) to the files of the litigants. ICSID Rules were recently amended and non-disputing parties submissions are now mentioned at Rule 67 of ICSID Arbitration Rules. This new provision incorporates the main elements of ICSID Arbitration Rule 37(2) and has new features such as the obligation to disclose third-party funding that the non-disputing party may obtain. So far, this new provision has not been applied in a dispute involving African communities.

Amicus curiae submission in cases involving Sub-Saharan African countries

Amicus curiae submission has been requested in more than 100 ICSID cases. African local communities have requested amicus curiae submissions in cases such as *Bernhard von Pezold and Others v Zimbabwe, Border Timbers Ltd and Others v Zimbabwe, Piero Foresti and al. v. South Africa and Biwater Gauff limited v. Tanzania*.

In Bernhard von Pezold and Others v Zimbabwe and Border Timbers Ltd and Others v Zimbabwe, which were heard together, though not formally consolidated, affected indigenous people, in collaboration with an NGO, asked permission to submit observations as non-disputing parties. This permission was refused. But it is important to analyze the reasoning of the tribunal and the arguments of the parties as they shed light on the perception that important actors of ISDS (arbitrators and litigant parties) have vis-à-vis indigenous people rights.

The indigenous communities, the Chikukwa, Ngorima, Chinyai and Nyaruwa peoples, claimed to have a distinct cultural identity and social history which is inextricably linked to their ancestral lands which are also at the heart of this dispute (p. 6). While recognizing that some parts of their expropriated properties are of ‘particular cultural significance’ to those peoples, claimants were opposed to such participation. Claimants also invoked the lack of independence of indigenous communities vis-à-vis of the host State as a ground of refusal (p. 10).

The respondent State, first, agreed to refuse any third submission and justified this position saying that it "had not anticipated that there could be any person or organisation with an interest in the matter apart from the Parties" (p. 2). However, after the petition of the local communities, the state did not raise any specific argument to support such participation. Even worse, the respondent never put the rights of these communities in issue in the proceedings. As the state-party to the litigant, which was expected to defend and protect these community rights, did not raise the concerns of its people, the the tribunal used this as a justification for the refusal of the people's participation (p. 18).

By contrast, the amicus curiae participation was granted in *Biwater Gauff limited v. Tanzania* (with limited impact on the decision of the arbitral tribunal) and in *Piero Foresti and al. v. South Africa*, but this latter case was discontinued.

All in all, local communities' participation through third party submissions can lead to unsatisfactory results. It is possible to question the efficiency of this form of participation which cannot be seen as an effective remedial mechanism: in fact, arbitral tribunals have not developed a coherent and transparent methodology for assessing amicus curiae applications and these submissions tend to have little impact on tribunals' final outcomes. How can the MIC improve such a participation?

The MIC and the protection of Local Communities' interests

The design and the features of the MIC are currently under negotiation at the UNCITRAL Working Group III. Some of these features can be beneficial to local communities.

Permanent members of the MIC

One of the main features of the MIC is the appointment of permanent members to adjudicate investment disputes, by states and before the disputes arise (p. 10). This contrasts with the current ad hoc system where arbitrators are appointed on a case-by-case basis, by the litigant parties and once the dispute has arisen. The appointment of permanent members, with expertise in (public) international law, seems to be best suited to settle matters involving national public policy issues. In *Eco Oro v Colombia,* Prof Sands criticized the lack of

sensitivity of arbitrators to the difficulties of governmental decision-making (Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Partial Dissent of Professor Philippe Sands QC, p. 12). This could be explained by the fact that many of the current arbitrators in ISDS come from the field of 'commercial arbitration involving dispute of private law' and are less familiar with the public (international) law features of the investment treaty regime (pp. 10-11). This lack of sensitivity to public policy issues is further evidenced by the cautious attitude that some arbitral tribunals have adopted vis-à-vis human rights-based arguments. Replying to the respondent's argument according to which it should be given a margin of appreciation in the determination of its public interest, the Tribunal in Bernhard von Pezold and Others v. Republic of Zimbabwe, noted that '*due caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law* (p. 156). Such as cautious attitude can be detrimental to communities' rights which are not 'lesser rights' (p. 19).

Additionally, some previous studies have pointed out the fact that arbitrators have allegedly an 'apparent interest to interpret the treaties in ways that create favourable conditions for foreign investors to bring claims' and that can favor their multiple reappointments (p. 540). They can also play multiple roles in the proceedings as arbitrators, counsel, experts, etc. This situation increases the risks of conflicts of interests given the financial implications of these different roles. The proposal for the establishment of an investment court tries to mitigate or nullify the influence of these factors with full-time employment, ethical requirements, and transparent appointment process. This court may therefore lead to more correctness and consistency, which can ultimately be beneficial to communities given that most of the recent investment agreements contain provisions for the protection of these communities (see, for example, article 35 of Draft Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA). Unfortunately, these recent agreements are not always interpreted, by arbitrators, in accordance with the intention of the treaty parties and the current ISDS system has limited options

for the review of arbitral decisions (revision and annulment of the award but no appeal).

Investment Advisory Centre (IAC)

An assistance mechanism is included in the proposal for the establishment of a standing mechanism for the settlement of international investment disputes (pp. 8-9). The main beneficiaries being considered for such a mechanism are (developing) states. This mechanism can also be of particular importance for these communities since, even participating as amicus curiae requires legal expertise that they may not possess. So far, they have mainly been assisted by NGOs, on pro bono basis, in drafting their third-party submissions but such assistance is not always guaranteed. And the England Supreme Court underscored the difficulty, if not the impossibility, for these African communities to have access to 'sufficiently substantial and suitably experienced legal teams' to enable their participation in litigation (pp. 32-33). This need for legal assistance is especially important as some participants in UNCITRAL Working Group III discussions are advocating for granting local communities' locus standi in ISDS (p. 9). If states, with all their resources, need a legal assistance mechanism, how much more local communities which, often, are less resourced and more vulnerable? It may be prudent to first reform the practice of non-disputing parties' participation and automatically grant amicus curiae applications to local communities when the dispute is linked to investment activities taking place on territories occupied by these communities. The MIC can also explore other options to enable third party participation through intervention, joinder, or interpleader. These procedural mechanisms could ensure the effectiveness, fairness and quality of the outcome between the disputing parties and ultimately improve the legitimacy of the whole investment regime.

Conclusion

This contribution has looked at the extent to which the MIC can improve the participation of African local communities in ISDS and ensure a better protection of their rights and interests. It started by discussing the current participation of these communities in ISDS with a view of identifying the challenges these communities are facing before analyzing how the MIC can address some of these challenges. Emphasis should be placed on the selection

of MIC members and encourage the appointment of members with broad expertise in (public)international law and public issues and not experts with only commercial background. Indeed, most recent investment agreements contain provisions that protect local communities. The challenge therefore lies in how these agreements are interpreted and applied. In addition, the MIC investment advisory centre should extend its services to local communities and assist them in the drafting and submission of their briefs to investment tribunals.

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