Project-Affected Local Communities, Africa and the Multilateral Investment Court

By:

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Introduction

International investment law is criticised for its lopsided nature that prioritizes corporations and their investments over the interests of host states and local communities in the investment relationship. Traditionally, investment treaties have not included state rights, and until recently, did not contain any investor obligations. There is therefore a normative or substantive imbalance, which in turn leads or contributes to a procedural imbalance. Without state rights or investor obligations the breach of which will be the basis of a claim, states have generally been disadvantaged in the investor-state dispute settlement ('ISDS') system. Similarly, while investors have contractual and treaty rights they can enforce by international arbitration, local communities do not, despite exposure to investment-related harms like (i) physical and/or economic displacement from lands and other resources without adequate consultation or

compensation; (ii) degradation of the environment arising from the nature of the activity undertaken or failure to contain its effects; and (iii) human rights violations including the use of violence or arbitrary arrests to suppress community protests against a company's operations. (Kaitlin Cordes et al, 2020).

This essay discusses the opportunity the proposed multilateral investment court ('MIC') presents for states to holistically address the imbalances in international investment law by granting local communities a binding international remedy for corporate human rights violations and other investment-related harms. It argues that concerns about granting local communities such a right are overstated especially since it can be done with sufficient guardrails to prevent an upset to the ISDS system. For African states, this should be a priority in the MIC negotiations given corporate abuses of their local communities, especially in natural resource-rich areas, and their obligation under Article 21(5) of the African Charter on Human and Peoples' Rights 1981 ('African Charter') to prevent or remedy such exploitation.

Disenfranchisement of Local Communities in the Investment Law Regime

The international investment law system (as currently structured) is only focused on providing legal protections for the investor and its property rights. Conversely, local communities do not have access to any international mechanisms for binding redress for such corporate human rights violations or other investment-related harms. .

Yet, most developing countries including in Africa have rule of law challenges that hamper access to justice for vulnerable local communities against powerful corporate entities. Political leaders who are motivated by their own self-interest or external corrupt influences tend to take the side of corporations even against their own people. (Sornarajah, 2017, p 269). Courts are not sufficiently resourced, or even if they are, not sufficiently independent to hold accountable the corporations and/or their powerful political allies in the host state.

Without a fair chance of obtaining justice at home, affected local communities may have to resort to one of two options: (i) transnational litigation in a foreign state where the defendant has sufficient business contacts or assets or (ii) a

"vicarious" claim against the host state before an international human rights body whose jurisdiction the state has accepted. However, these options also have peculiar challenges. Foreign domestic courts may decline jurisdiction on prudential grounds such as *forum non conveniens*. They may also outrightly declare that they lack jurisdiction over the claims of foreign plaintiffs alleging extraterritorial violations, like the US Supreme Court did in the 2018 case of *Jesner v Arab Bank Plc*. Following the *Jesner case*, the US federal courts, which used to be the main and preferred destination for transnational litigation, are no longer available to foreign plaintiffs. While other jurisdictions such as England and Canada are available, they lack the 'attractive features of the [US] legal system'.

As an alternative to transnational litigation, affected local communities may present their claims to international or regional human rights bodies to 'vicariously' hold the host state liable for failing to prevent corporate human rights abuses and other investment-related harms. Nevertheless, remedies at such bodies are often inadequate or ineffective. Not all such bodies have the power to issue binding decisions. Even in cases where binding decisions are issued, there is the problem of non-compliance and lack of effective mechanisms for judgment enforcement. In any event, the state-centric nature of the human rights regime makes it impossible to join the non-state actors like corporations as respondents to the suit. This in turn prevents the human rights court or other body from making reparation orders directly against the corporate entity, the actual perpetrator and, possibly, the better resourced to pay compensation.

Balanced Investment Treaties and Local Communities

One of the measures states are beginning to adopt to recalibrate the lopsided investment law regime is the conclusion of 'balanced investment treaties'. This new generation of IIAs are meant to reform the unequal nature of the investment relationship and counterbalance investment protection with (i) investor obligations; (ii) the right of the host state to regulate to protect essential public interest objectives; and (iii) enhanced procedural rights of the host state in the ISDS system. (See e.g, Morocco-Nigeria BIT, ECOWAS Supp Act on Investments). As between host states and investors, balanced investment treaties may level the playing field. The affirmation of the right of the host state

to regulate and the inclusion of a state's procedural right to make original claims or counterclaims would ensure that host states are no longer disadvantaged within the ISDS system.

But as far as local communities are concerned, the trajectory of the state practice on balanced investment treaty initiatives does not show that such treaties would satisfactorily remedy investors' lack of accountability for investment-related harms. The new generation of IIAs, which are mainly intra-African, have far reaching provisions that impose binding investor obligations relating to human rights, the environment, and labor conditions. Therefore, they can potentially ground claims by affected local communities against foreign investors. However, they all stop short of giving local communities procedural access to the ISDS system for such claims. (See e.g, Morocco-Nigeria BIT, ECOWAS Supp Act on Investments).

Undoubtedly, some progress has been made with the conclusion of some new IIAs to reset the unequal investment law regime. The investor obligations under those IIAs, for instance, provide clear bases for a host state to raise an investor's abuse of the rights of local communities as a defence to the investor's claim or as a counterclaim if the treaty or the rules of the arbitration allow counterclaims. However, this amounts to indirectly enforcing investor accountability on behalf of local communities, an approach beset with further weaknesses. For instance, there may be cases where the state is complicit in the investor's human rights abuses and therefore cannot make a human rights claim or counterclaim for reasons of the clean hands doctrine. Also, sometimes, even states that are human rights friendly may not raise the human rights claim, counterclaim or defence for political or economic reasons. Without the ability to enforce such obligations in their own right within a binding international dispute settlement system, local communities are left to protect their rights in the domestic forum of the host state that is deemed to be inadequate for the investor, or in a foreign national court with all the challenges it comes with.

The MIC and Local Communities

At its 50th Session in 2017, UNCITRAL tasked its Working Group III with a broad mandate to review ISDS and propose possible reforms. The Working Group

identified various problems with the current structure and practice of ISDS including lack of diversity in arbitral tribunals, lack of transparency in proceedings and lack or apparent lack of independence and impartiality of members of arbitral tribunals. At its 38th Session in January 2020, the Working Group began consideration of possible reforms that could be implemented. One of the key reform options the Working Group has considered and over which negotiations are ongoing is a standing multilateral investment body or mechanism (i.e., a multilateral investment court). At the request of the Working Group, the UNCITRAL Secretariat prepared and submitted a Note on a 'Standing Multilateral Mechanism', which has been the reference point for negotiations on the MIC since its 42nd Session held in New York from 14 to 18 February 2022.

So far, one thing that has not featured in the Secretariat's draft nor the deliberations of the Working Group on the draft text for the proposed MIC is potential access to the Tribunal by project-affected local communities for redress. Notwithstanding, the MIC as currently conceived, could be beneficial to Africa by providing consistency in the interpretation and application of investment treaties especially with the appellate chamber that is being considered as part of the Court. The election of a standing Court instead of ad hoc party-appointed adjudicators and the institution of a code of conduct for judges could also enhance impartiality in decision making and ensure higher ethical conduct as compared to what pertains in the current system.

Yet, given the particular context of Africa, the MIC will be more beneficial for the continent if project-affected local communities would have access to it. Africa is still largely a capital importing region. Most of the investment attracted go into natural resource extraction which have profound environmental impacts, and serious implications for the health, communal property rights, and other human rights of local communities. Given that the interests of the host state and its local communities are not always in sync when it comes to holding investors accountable for investment-related harms, a multilateral mechanism that gives affected local communities the opportunity to assert their own claims to obtain legal redress is warranted.

The MIC negotiations presents African states the opportunity to holistically address the investor accountability gap and provide their local communities with the right to obtain remedies for investment-related injuries in their own

right. This will benefit Africa more by bringing the needed balance to the investment law regime whose asymmetrical nature has overly privileged investment protection over interests of host states and their local communities.

Beyond the need to obtain an optimal outcome for African states and their peoples, there are legal imperatives that warrant negotiation for access by project-affected local communities to the MIC. A state not only has an obligation to prevent human rights violations by non-state actors, it also has a duty to provide remedies for human rights violations that may be committed by private actors. Access to an international mechanism that allows for corporate human rights violations, and other investment related injuries to be settled directly between the investor and local communities would shield the state from potential liability for failure to remedy the investor's violations. This makes both legal and economic sense given that in all cases where a state may be 'vicariously' liable for failing to prevent or remedy corporate human rights violations, the actual perpetrator is the corporation. Therefore, the public interest is better served if the actual perpetrator, the company, bears its own liability including any compensation or other reparation.

For African states, the obligation to prevent or remedy human rights violations of private (economic) actors is complemented and reinforced by Article 21(5) of the African Charter which requires state parties to 'eliminate all forms of foreign exploitation particularly [those] practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.' Negotiating and concluding a multilateral treaty framework that grants local communities access to an MIC to be able to obtain redress for the adverse human rights, environmental or social impacts of investment activities would be an effective way for state parties to the African Charter to discharge their Article 21(5) obligation.

Conclusion

This essay highlights the imbalance in international investment law, emphasizing its focus on protecting investments without holding investors directly responsible for harms to local communities. It argues that the MIC negotiations provide a chance to bridge this accountability gap by allowing communities to bring claims against investors in the Court. African states,

bound by Article 21(5) of the African Charter, are particularly obligated to negotiate for such outcome to protect their citizens from exploitation by multinational corporations.

This position may face the argument that granting local communities access to the MIC could potentially disrupt and inconvenience investors, thus discouraging investment in member states of the Court. However, such a claim would be alarmist and flawed, as access to the MIC can be implemented with adequate safeguards to alleviate any perceived concerns that states or investors may have. These safeguards could include requiring claims to be made in a representative capacity to prevent multiplicity of suits and imposing a criterion that claims must pass a *serious or widespread violations* test to prevent litigation over isolated or trivial incidents. Another option might be that, instead of granting a full-fledged right to independently file claims against investors, local communities could intervene in existing cases between investors and host states as participating parties, ensuring that the Court considers the extent to which their rights and interests are involved and adjudicates the case in a manner that addresses the interests of all parties.

Therefore, African states should propose during the MIC negotiations the inclusion of measures to grant project-affected local communities access to the MIC, allowing them to assert claims against investors for corporate human rights violations and other investment-related harms.

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