The Proposed Multilateral Investment Court: A Missing Issue of Importance to Africa

By:

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Introduction

Most in the International Investment Law community would be aware of the ongoing work by the United Nations Commission on Transnational Trade Law's (UNCITRAL's) Working Group III on reforming the Investor-State Dispute Settlement (ISDS) system. This work has been actuated by criticisms of the ISDS system (or, more precisely, the Investor-State Arbitration (ISA) system). A major proposed reform is the establishment of a standing Multilateral Investment Court (MIC) to replace or co-exist with the ISA system.

One of the criticisms of the ISA system is that it caters to the needs of investors only; it is not available to others whose rights may be breached by investors. Yet, it is well documented that international investment activities in many developing countries, particularly in Africa, sometimes do have serious adverse

impact on host-state populations (HSPs). The notorious devastating practices of oil and gas extracting companies in Nigeria is a typical example (see Ukala; Gbemre v Shell).

Under the current system, harmed HSPs are required to seek redress in domestic forums (domestic courts or other domestic adjudicatory forums). But these forums have left many harmed HSPs without a remedy (see UNHCR; EU).

Unfortunately, HSPs' access is missing in the proposed MIC too, in its current iteration. Like the ISA system it seeks to reform, the MIC focusses on investors. I have argued elsewhere that UNCITRAL can play a critical role in facilitating HSPs' access to the arbitration system (see Laryea). This post argues that UNCITRAL has a unique opportunity to facilitate HSPs' access to the MIC as a solution to their lack of access to remedies.

This post is divided into four parts, including this introduction. Part II highlights the lack of access problems for harmed HSPs. Part III presents the proposed MIC as solution, and Part IV concludes the post.

Lack of Access to Effective Remedies for HSPs and Desperation

The ISA system was conceptualized and developed to serve as an investor protection mechanism as a response to perceived disadvantages that foreign investors may face if they are to seek redress in national courts against host-state governments of developing countries (see Gas Natural v Argentina). Consequently, under the current system, harmed HSPs are expected to seek remedies in their domestic forums, the very forums perceived to be inadequate for foreign investors.

Unsurprisingly, some of those forums have proven to be woefully unhelpful to victims. Desperate for remedies, some harmed HSPs who are unable to obtain remedies at home have resorted to seeking remedies outside their domestic jurisdictions. An example is the ultimately unsuccessful case of Kiobel v. Royal Dutch Petroleum Co., decided in 2013, in which a group of Nigerians sued Shell in the US under the Alien Tort Claims Act for alleged torts committed by Shell in Nigeria. Another example is *Bowoto v. Chevron Corporation*, in which claims by group of desperate Nigerians failed. In *Wiwa v. Shell Petroleum Development Company,* again in the USA, Shell agreed to settle the night before the trial

commenced in 2009, after 13 years of litigation.

In *The Bodo Community and Others v The Shell Petroleum Development Company of Nigeria Ltd*, where more than 15,000 sued Shell in the UK in relation to oil spills from Shell's pipelines in the Niger Delta had adversely affected local populations, Shell settled, agreeing to pay £55m, though not admitting liability.

In *Dooh et al. v. Royal Dutch Shell* a suit was initiated in the Netherlands against Shell on behalf of a group of Nigerians who had been adversely impacted by Shell's operations in the Niger Delta area. As can be seen from the above examples, there is a woeful lack of access to effective remedy for harmed HSPs is some countries, particularly African countries with weak governance and judicial systems. This has led to affected victims having to follow arduous, long and torturous paths in their attempts at procuring remedies, most which have been ineffective. The result is that lives and livelihoods are destroyed by emboldened investors who perpetrate the harm because they have not had to pay for the harms they cause.

Multilateral Investment Court as A Solution

A. MIC As the best Solution

Granting HSPs access to the proposed MIC will resolve the access to international forum and provide them with effective remedies. With that, instead of going to a weak or ineffective domestic court, harmed HSPs would go to the MIC. The complainant may be an individual or a group of people, possibly in a class action. It will be one court for all; harmed investors (who may be individuals or corporations) and harmed HSPs.

There are two major challenges to facilitating access through arbitration, namely the proper law for the determination of liability and investor consent (see Laryea). These would be easier to solve when facilitating access through the MIC. The constituent instrument of the MIC, which is likely to be a treaty, can specify the substantive laws that the court may apply in determining an investors liability and remedies to be granted. These would likely include IIAs, domestic law of the host state (as well as the home of the investor), and general principles of law (covering tort, delict and other public law obligations).

And, in a court system, investors' consent may not be an issue, as it may be possible to seize the court with jurisdiction without their consent. Investors in a territory are deemed to be subject to the jurisdiction of the legal and judicial system of the territory in which they operate.

B. Benefits of Granting HSPs Access to the MIC

Allowing HSPs to be able to seek remedies in the MIC would have several benefits. First, it would ameliorate, if not eliminate, problems with access to remedy by HSPs. Second, it will be just, fair, and equitable to both investors and HSPs (see Arcuri and Montanaro). After all, investors have embraced international forums as their preferred avenue for remedy when they are harmed by host-states. So, it is fair and just that HSPs who they (investors) may harm are allowed access to the same system they trust for remedy against them (investors). Third, the system will help balance the rights of investors and those of HSPs, changing from its current lopsidedness in favor of investors. Investors, as non-state actors, have access to international forums that is serving their interests in a so-called state-based system of international law.

Once upon a time, they did not have such access; they needed their home states to seek redress on their behalf (in state-to-state dispute settlement). But international law was changed, principally with the promulgation of the ICSID Convention to enable them gain direct access against host states. The same can, and should, be done for HSPs. Fourth, it may change investor behavior for the better. When investors know that they may be made to pay for harms they cause, they are likely to take steps to avoid causing harm. Fifth, such an avenue for remedies may help reduce social conflict surrounding some investments, and consequent delays and costs. Sometimes frustrated harmed HSPs who do not have legitimate avenues for remedies resort to belligerency and sabotage of the investment. These may be reduced where there are trusted forums for remediation.

Conclusion

This post has discussed the well documented access to remedy problems facing some HSPs who are harmed by international investors, particularly in Africa. This is because under the current system, harmed HSPs are required to seek redress in their domestic, though foreign investors often have access to

international forums under IIL for redress when they are harmed. Unfortunately, the domestic forums in many African jurisdictions leave their harmed HSPs without a remedy, as the Nigerian examples demonstrate. Often this is due to weak governance institutions that leads to lack of adequate laws; lack of enforcement of laws if they exist; corruption on the part of public authorities, including law enforcement agencies, judiciaries and other adjudicatory bodies; incompetence on the part of government officials; lack of rule of law, or lack of respect for the rule of law; political interference in judicial processes; and outright oppression of HSPs by their governments.

Harmed HSPs in such jurisdictions need access to international forums of repute, free from the blights of domestic forums, for effective remedies. The proposed MIC presents an ideal opportunity. Granting HSPs access would resolve their long-standing access to remedy problems. It is unfortunate that in its iteration, the MIC does not seem accommodate HSPs. This needs to be rectified. The MIC presents too great an opportunity to be missed.

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