Africa’s Perception of International Courts: Lessons for Multilateral Investment Court

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Introduction

The process of the establishment of the Multilateral Investment Court (MIC), to replace or operate in parallel to the current Investor State Dispute Settlement System (ISDS) system, is ongoing under the auspices of the United Nations Commission Trade Law (UNTRAL) Working Group III (Working Group III). In this forum, parties are invited to make submissions with a view to building support for on the establishment of the court. As expected, the submissions reveal varying concerns, perceptions and interests of states.

There has been a notable poor participation by Sub Saharan Africa (SSA) region, despite technical support offered to developing states. While a few SSA countries, particularly South Africa, has been vocal, many others have been mute. This may suggest a low buy-in for the idea, limited ability to participate

or simple lack of interest of immediate concern for the reforms relative to other pressing issues in the region.

The establishment of a permanent international court of this nature also conjures up memories of African experience with other permanent international courts, particularly the International Criminal Court (ICC) and the International Court of Justice (ICJ). Over the years, African states have expressed concerns of negative disproportionate treatment by international courts. This has inspired preference for homegrown solutions and, even, a push for use of African regional courts. Will the MIC suffer the same fate?

This post explores the extent to which negative perceptions of international courts by SSA may affect the MIC. It discusses equitable inclusion as a mitigating strategy to endear the court to SSA. It is acknowledged that some of the perceptions are rooted in other factors that cannot be practically addressed within the framework of MIC.

Perceptions of international Courts

Over the years, decisions and operations of international courts, especially the ICC and ICJ, have been perceived as anti-African. This has prevailed, notwithstanding justifiable reasons in some cases for such decisions. As a result, a negative perception has taken root in the African region, especially the Sub Saharan Africa. International Courts have been castigated as pro-west and out of sync with African problems.

A review of the history of the ICC shows it has largely investigated and prosecuted crimes against humanity committed in Africa, despite similar crimes being committed in other regions. This has not gone down well with African leaders. Some have even called for withdrawal of their states from the enabling statutes, in protest. The characterization of the prevailing international courts as anti-African casts a shadow on the establishment of the MIC, being a similar permanent court. Equitable inclusion may ameliorate this.

The idea of Equitable Inclusion

Equitable treatment involves considering special circumstances of different parties to accord a fair treatment. This post uses equitable inclusion to mean

the use of affirmative action approach to accommodate the unique situation of states in SSA.

The practice of differential treatment is not new in international trade and investments. World Trade Organization (WTO) recognizes concerns of both developing and developed countries through use of differential treatment in its rules. This post argues that this treatment should be extended to Working Group III discussions with specific reference to benefit for SSA. It also acknowledges the effort made to include some concerns of developing countries in the current proposals, which sets the stage for further discussion on equitable inclusion.

The Need for Equitable Treatment of Sub Saharan Africa

SSA occupies a unique position in global affairs. It is not a position of privilege but a fragile global standing. Such a position makes it practically difficult for SSA to negotiate favourably in global matters.

A review of the submissions from SSA to the Working Group reveals an emphasis on special treatment and a call for technical support. Uganda, in one of its submissions, has called for special consideration for developing states and technical support. On the other hand, South Africa has emphasized substantive reforms. These submissions are rooted in the view that SSA is at a disadvantage relative to other regions.

There are many factors that place SSA in a position of need and apparent handicap, but some factors stand out. Huge sovereign debt and reliance on developed nations and multilateral institutions for economic development. To keep manageable debt, in some cases, lenders impose harsh conditions, even leading to adoption of painful fiscal and investment policies for developing states. Though justifiable, this adds to the perception of disadvantage, which should be considered as a challenge for equitable inclusion in the ongoing discussions for establishment of MIC. Such a consideration provides a basis for equitable treatment in the framework of MIC establishment.

The challenge of corporate state capture also stands out. This is where large foreign investors have influence in the internal affairs of states that are in much need of foreign investment. Relatedly, business related violations of human

rights are on the rise in Africa. This raises concerns for redress in the framework of the MIC in a bid to mitigate negative perceptions.

Further, there is a strong view that foreign courts are meant to promote interests of developed countries with little concern for Africa. This observation has led to backlash against the International Criminal Court and International Court of Justice (ICJ). To reverse this, there is need for deliberate mechanisms in the nature of equitable treatment in favour of African states. Appointments, procedures and decisions of the court should take into account the circumstances and interests of SSA.

Taking into account the unique circumstances of SSA and the overarching presence of the European Union in the discussions, there is also a genuine apprehension that SSA may not benefit automatically. The process is also likely to be informed by the workings of similar establishments such as the International Court of Justice . These observations make a case for equitable inclusion.

Using Equitable Inclusion to Mitigate Negative Perceptions

This post presents equitable inclusion as a solution to redress negative perception of international courts in SSA. This involves application of equitable principles at every point of the establishment of the MIC. The provisions already made should be amplified and communicated better to the SSA. If this is not done, it is likely that this court will suffer the same ending, with low uptake or rejection in SSA.

It would also be beneficial to include a procedure for seeking damages on behalf of communities affected by activities of foreign investors, which will appeal to SSA. There have been rampant cases of communities suffering from activities of foreign investors. Mechanisms for damages for such cases should be very clear. The locus for seeking redress against states should also be open to community organizations and persons acting in public interest to sue investors at the court.

Conclusion

SSA faces unique challenges and is not in a good position to benefit from the reforms of ISDS without equitable inclusion. Its history with international courts

particularly makes it hard to embrace another international court easily. This calls for a deliberate effort to ensure SSA is not left behind in the establishment of the MIC. A publicity campaign to demonstrate the benefits of the MIC would be a great benefit in helping SSA to join the discussions with more confidence. There is need to address fears of repeating the fate of ICC in Africa.

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