The Proposed Multilateral Investment Court vis-a-viz sub-African Investment Interests for the settlement of International Investment Disputes

By:

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Globalisation of commercial activity extends into international investments, evidenced by over 2,500 bilateral investment treaties (BIT) or International Investment Agreements (IIA) in the international investment regime. Within these BITs is an embedded Investment State Dispute Settlement (ISDS) system executed through an Arbitration Mechanism. The ISDS system serves as a dispute resolution tool for achieving the purpose of the IIA. The purpose of the IIA is for the protection of foreign investment from the harmful policies and governance of host states. In addition, many IIAs contain certain common standards and principles that regulate the investment relationship, such as the notorious fair and equitable treatment (FET), stabilization clauses, and so on.

Thus, the overarching aim behind the norms and principles of international investment management is the creation of a system of legal safeguards against the actions of the host states. This simplistic paradigm of international investment law regime has become increasingly problematic due to the expansion and inclusion of various indirect stakeholders in the investment agreements, the growing recognition of public socio-economic realities like regulatory rights, and development rights, that are being pushed for larger consideration from ignored stakeholders mostly like the public.

The globalisation of trade and investment necessitated the adoption of a saner dispute settlement mechanism as a framework for the resolution of conflicts rather than the use of brute military force or espousal- where the interest of the investor is not satisfactorily resolved. This is coupled with the non-existence of an international court system and legal code that provides for the resolution of investment disputes. The present ISDS system emerged to fill the stability void occasioning the absence of a dispute resolution mechanism that fosters international investments while protecting foreign investors. The present ISDS works through a system of arbitration forum procedure that protects foreign investors through international standards or other arbitration rules like the United Nations Commission on International Trade Law (UNCITRAL), the Court of Arbitration of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), and others by including these rules in BITs. Together, the arbitration rules/standards and the BIT maintain the right of foreign investors to bring an action against a sovereign host state in a prior chosen arbitration forum like the World Bank Group International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA) in The Hague, among many others.

While it can be said that the ISDS has brought some benefits such as contributively expanding the body of customary international, it is also true that the ISDS system has not been particularly favourable from a developing perspective. ISDS agreements executed through International Investment Agreements (IIA) do begin with an unflattering history and purpose that has fostered mistrust and ambivalence around binding ISDS and other newer mechanisms that mimic its makeup and purpose. The ISDS was created as many global south countries decolonised in the 1940s to ensure legal

protection to colonial investors. From the beginning, the ISDS system was founded on the continuation of socio-economic inequalities, even though it was also used to facilitate trade and investment. Currently, in the absence of any uniform and harmonised international investment standards, the ISDS system continues to operate mostly for the benefit of the foreign investors with not much consideration given to the interest of the host sovereign state. Under the ISDS system, investment disputes can only be filed by an investor. Upon the filing of the case, three third-party arbitrators are appointed, where both the investor and the state appoint one member each and the third arbitrator is appointed by the mutual agreement of the state and the investor. This is in line with many international conventions and model laws regarding arbitration, especially the UNCITRAL Model Law. The Arbitrators receive evidence, examine the claim, decide the case using the terms of the IIA (rather than the respective national laws of the disputants and award a binding decision and settlement. The skewed nature of the international investment regime system as seen from the absence of a satisfactory dispute resolution system, IIA protective terms interpretative stability, and an all-round wholesome governance system has culminated in a legitimacy crisis.

Many African countries are parties to Bilateral Investment Treaties (BITs) with the Investor State Arbitration (ISA) embedded therein which makes them eligible for submission at the arbitration for a dispute resolution. As a result, about 28 African countries have been sued as defendants in international arbitration tribunals for violating their treaty obligations. Some of these countries include Nigeria, Ghana, South Africa, Egypt, Tanzania and so on. Records from 2019 show that African States have been sued by a total of 106 known investment treaty arbitration claims, representing eleven per cent of all known investor-state disputes worldwide. The first case against Africa was instituted in 1993 however, the highest period and rise of arbitration in Africa was between 2013-2018. The chief effect of the ISDS/ISA system for Africa is that it protects the protraction of inequality, where struggling economies continue to finance rich and established foreign investors through a system of frivolous claims and awards. Many of Africa's investment dispute claims have been instituted by Western investors, especially from Europe, over suspected violations of BITs in 90 per cent of the cases. Thus, in recent times some African countries are becoming aware of their losing outcomes and have raised

concerns about the ISA system for its many systemic challenges that include high arbitration costs and inconsistent decisions. Major investment stakeholders agree that the ISDS is in dire need of reform. One of the new reform proposals is the design of a Multilateral Investment Court (MIC). The overall objective behind the MIC is to set up a permanent entity that resolves investment disputes and possibly leads to the gradual departure from the ISDS/ISA system.

The proposed MIC is to comprise of a court of first instance and an appeal body where disputants can take their cases upon failure at the court of first instance. The Court would adjudicate claims brought under investment treaties when member states agree to defer to its authority. The precise design, functioning and technicalities of the MIC would depend on the conclusion of current international negotiations. The court appears to be largely endorsed. The court is designed to function through tenured, permanent, and prior appointed adjudicators/judges and is assisted by a Secretariat. The MIC is a test drive for the proposal for an International Court System rather than the tired ISA system. The MIC replicates the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Vietnam IPA and the EU-Singapore IPA provide for a first-instance tribunal and an appeal mechanism, by setting out the size of the court system, the qualifications of the judges, the duration of their appointment, their remuneration and the limitations on their professional engagements outside the court, the applicable law and the scope of the appellate body's review of the first instance decision, as well as time limits for appealing and so on.

The court system aim to follow the objectives of adhering to the rule of law, independence and neutrality of judges, publicly appointed judges, uniform interpretation of the law, efficient and expedient procedures, protecting states' right to regulate, transparency, and an appeal mechanism. Some of the potential advantages of the MIC has the potential of ensuring consistency of court decisions, greater formality to investment court decisions, reinforcing the independence and neutrality of judgement, improving expedience of investment disputes, and more accessibility for Small and Medium Enterprises (SMEs) to bring investment disputes, and so on. The MIC would be regulated by a series of procedural laws and an applicable law to guide its operations. Currently, negotiations for the setting up of the MIC taking place within the

UNCITRAL Working Group III as a viable option for the reform of the ISDS system.

So far, the MIC does not appear to arise from the decades of outcry from developing countries on the abuses it has experienced in the ISDS/ISA system, but from recent investment treaties that have been concluded between the EU and other countries to move beyond the usual ISA system to a more permanent and formal bilateral investment court. The endorsement of the Court of Justice of the European Union (CJEU) its Opinion 1/17, confirms the compatibility of the Investment Court System found in the EU Treaties, especially the CETA. Accordingly, Alvarez Zarate exposes the insincerity and duplicity behind the EU's push for a "MIC" arising from the budgetary risks of more than 213 claims against EU countries. For once, the EU finds itself at the receiving end of an ISDS system rigged against host states. Regardless, the MIC is a welcome development to the global call for the ISDS system. It is certainly not the absolute answer to the issues that plague the ISDS/ISA system, but it is an expression of reform efforts. The proposed multilateral investment court addresses several of the ISDS reform calls which aim at improving the current system.

One of the reform benefits of the MIC is that it would potentially ensure the consistency of investment awards because of the presence of permanence in the appointment of interpreters and adjudicators with a harmonisation mandate. Also, it can potentially reduce the costs of proceedings, because of the presence of adjudicators who may not be paid per sitting like arbitrators but are subject to an annual allowance. Another benefit is the replication of familiarity with a domestic court. This includes the setting of a legal court system, permanent supporting staff that assists the judges in legal research and so on. The MIC proposal increases confidence in the investment dispute resolution process by ensuring the independence and neutrality of the judges and judgement. This is because the current ISDS system creates a conflict of interest between arbitrators where they are torn between doing justice to the arbitration case and securing the opportunity to be reappointed for new arbitration appointments.

Despite its positive highlights, the MIC proposal is not without its shortcomings, especially from an African context. First, it does not address the main concern

of the ISDS system, which is repurposing the IIAs and rebalancing the interests between foreign investors and host states and even third-party stakeholders like the local community and civil society. It also does not facilitate States including African States to appear before the court as claimants or plaintiffs or initiate actions as counter-claimants as seen in the Pan-African Investment Code, which is fundamental to the ISDS system. This is because the substantive protection of investment agreements for states such as investor's obligations to protect human rights and the environment are dependent on the host governments bringing cases before the court Specifically, it does not the proposed MIC does not appear to address numerous African BITs with unbalanced terms up for arbitration any time soon. This is because the fundamental terms of this BIT which touches the substance of investment treaty law remain firmly in place. The MIC proposal while contributing to the legitimacy of a reformed MIC may lead to the politicising of the process which may affect transparency, flexibility, and accuracy of judgements, especially with an appellate system that comes from within any organ affiliated with the MIC that appoints judges. Another shortcoming of the MIC from the African perspective is the MIC's position with Africa's domestic and regional investment redress systems especially the investment courts or dispute resolution system like the AfCFTA DSM. If the MIC proposal sees the light of day, it is not clear whether the African investment dispute should be heard in the MIC, thereby ignoring its own DSM and its jurisprudential development. It is also not clear whether the MIC would serve as an appellate body for unresolved disputes, or it would be part of the fragmentation of DSMs suffered in the international system. Also, the MIC does not take into consideration Africa's leaning and preference for non-binding dispute resolution that is based on investor-state cooperation towards common interests and dispute prevention, rather than the reactive stance of dispute resolution.

While MIC is a welcome development and promises several advantages such as partially resolving the ISDS legitimacy issue. It also does not appear to address Africa’s core issues with the current international investment regime or Africa’s collective investment position as identified in the Pan African Investment Code. African countries are advised to carefully determine whether the MIC proposal aligns with their best interests and not make decisions based on diplomatic niceties. Besides, countries like Brazil show that IIAs/ISDS systems are not that essential to attracting and keeping foreign investments.

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