Why African Countries should enable Host State Citizen-Investor Arbitration, and How they Can Do It

By:

Emmanuel T. Laryea

November 1, 2019

Introduction

There is currently a lack of access to remedy in the International Investment Law for host-state citizens ("HSCs") whose interests are harmed by activities of investors (or investment activities). Under the current system, harmed HSCs are required to seek redress in domestic forums (domestic courts or other domestic forums). However, it is acknowledged that the domestic forums in many jurisdictions leave many harmed HSCs without remedy. There are several examples of such situations in Africa, where harmed HSCs have been left without remedy. A typical example is the notorious harms caused by the operation Anglo-Dutch oil giant, Shell, in the Niger Delta area in Nigeria, which remains unresolved. This author has argued elsewhere that a solution lies in

granting harmed HSCs access to remedy in international forums, particularly international arbitration, a system that has been so effective for investors in resolving their disputes with host-states. If HSCs are granted access to the arbitral system, it will be effective for them (harmed HSCs) too.

This article makes two points. First, it argues that African countries should enable their citizens' access to international arbitration. Second, it shows how African countries can enable HSC-Investor arbitration.

Why African Countries Should Enable HSC-Investor Arbitration

Under the current international investment law system, HSCs who are victims of adverse impact from investment activities are expected to seek remedies in their domestic forums (the very forums perceived to be inadequate for foreign investors, and the reason investors seek arbitration). Unsurprisingly, those forums turn out to be woefully unhelpful to victims. Often this is due to weak governance institutions that lead to lack of adequate, or lax, 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; lack of rule of law, or respect for the rule of law; political interference in judicial processes; and outright oppression of HSCs by their governments. For example, oil producing companies, particularly Shell, have flared gas in various locations in Nigeria for decades, as well as caused spills and pollution, harming inhabitants of nearby lands, causing damage to the life, health, and livelihoods of the locals.

Attempts by the victims to obtain remedies in domestic forums have been thwarted (see Eferiekose Ukala, Note, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices,' (2011) 2 *Wash. & Lee J. Energy, Climate & Environment* 97, 103; *Gbemre v. Shell Petroleum Development Company Nigeria Limited and Others* [2005] 6 AHRLR 151, 152–54 (Nigeria)). Desperate attempts at seeking remedy in courts outside of Nigeria have similarly been ineffective, mostly due to lack of jurisdiction (see, e.g., *Kiobel v. Royal Dutch Petroleum Co; Bowoto v. Chevron Corp*; *Wiwa v. Shell Petroleum Development Company*,; *The Bodo Community and Others v The Shell PetroleumDevelopment Company of Nigeria Ltd*; *Okpabi and others v*

Royal Dutch Shell plc and another; *Dooh et al. v. RoyalDutch Shell*).

Arbitration would be effective for the victims, as it would not face the jurisdictional problems that beset litigation. African countries should, therefore, enable access to international arbitration proceedings against investors for the good of their citizens, economies and hold international investors accountable. Allowing HSCs to be able to seek remedies through international arbitration has a number of benefits. First, it will ameliorate, if not eliminate, their access to remedy problems. Second, allowing HSCs to initiate arbitral proceedings will be just, fair and equitable to both investors and HSCs. After all, investors have embraced the arbitral system as their preferred avenue for remedy when they are harmed by host-states. So, it is fair and just that HSCs who they may harm are allowed access to the same system they (investors) trust against them (investors). Third, the system will help balance the rights of investors and those of HSCs; currently, the system is lopsided in favour of investors. Fourth, it may change investor behaviour for the better; when investors know 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 for possible harm may help reduce social conflict surrounding some investments, and consequent delays and costs.

How African Countries Can Enable HSCs-Investor Arbitration

The HSC-Investor Arbitration proposed here is to be seen as an alternate forum to litigation in domestic courts against an investor for harm caused by the investor. Two main legal or systemic issues may arise in respect of this proposal. The first relates to investors' consent to arbitrate. That is, as arbitration is a consensual dispute resolution mechanism, and so no tribunal will have jurisdiction unless all parties to the dispute have consented to the tribunal determining the matter, how may an investor's consent be obtained? The second issue relates to the legal basis for claims. That is, by what law, international law or domestic law, would an investor's legal liability (or non-liability) be determined?

African economies have various means for overcoming the above issues, and enabling arbitration proceedings by their citizens against investors. They can

do so through: (1) appropriate provisions in International Investment Agreements (IIAs) they conclude; (2) domestic laws and regulations; and (3) investment contracts they may sign with investors.

On investors' consent to arbitrate, three main methods may be used. First, African governments may obtain investors' standing offer of consent to all HSCs in an investment contract between the investor and the host-state, if there was such a contract. Of course, this would only work for investments that require the execution of contracts between the investor and government (such as for resource extraction or infrastructure development). Second, African governments enact in domestic law that all foreign investors are deemed to have consented to arbitration initiated by HSCs. Third, African governments may implement a mandatory domestic licensing or authorization regime for foreign investors and include in the authorization that investors have consented to arbitration proceedings initiated by HSCs.

On substantive law, three sources are plausible. First, arbitral tribunals may apply the domestic law of the host African state. Second, African governments may include, as some such as Nigeria is beginning to do, include investor obligations in IIAs (examples: the Morocco-Nigeria BIT; and Pan-African Investment Code). Third, it is arguable that there are general principles of (tort) law observed by civilised states that may be deducible, and applied, as principles of international law.

Conclusion

I have argued that there is currently a lack of access to remedy in International Investment Law for HSCs whose interests are harmed by foreign investment activities. Under the current system, harmed HSCs are required to seek redress in domestic forums, which are ineffective in some African jurisdictions and leave many harmed HSCs without remedy. This article has argued that access to remedy for harmed HSCs can, and should, be given in international forums, and that this can be done within the existing arbitral system, which has proven to be effective for investors in resolving their disputes with host-states. African countries can, and should facilitate, access to international arbitration by their citizens whose interests are harmed by foreign investors by procuring investors' consent to such arbitration, and by including in their IIAs investor

obligations. Allowing HSCs to be able to seek remedies through international arbitration has a number of benefits.

View online: Why African Countries should enable Host State Citizen-Investor Arbitration, and How they Can Do It

Provided by Afronomicslaw