Harmonising International Investment Law with International Law Through the Framework of the Multilateral Investment Court (MIC)

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Introduction

The aim of this post is to illustrate how the MIC can be used as a tool for harmonising international investment law (IIL) with general international law and other branches of international law. The increase in investor state arbitrations has led to a growing increase in the overlap between investment obligations and environmental, human rights and other international obligations . This may cause conflicts between the different branches of international law where more than one branch of international law is implicated in the investment dispute. This has led to the fragmentation of international law with calls to rebalance the system to allow for the consideration of broader public international law in the settlement of investor state disputes. Section II

illustrates how fragmentation plays out in the context of international investment law. The ways in which the MIC can play a role in resolving fragmentation are explored in section III and section IV concludes the post.

Fragmentation in International Investment Law

The development of international law has resulted in the creation of specialised legal institutions and spheres of legal practice to deal with various aspects of international relations. Conflicts that would have been resolved by 'general international law' are now subject to specialist legal systems such as trade law, investment law, human rights law, environmental law, law of the sea etc, with each of these possessing their own principles, rules and institutions.

International investment law and international human rights law are both lex specialis within international law. They focus on specific subject matters and have adopted mechanisms and rules to address conflicts that may arise in their respective fields. Despite being part of different branches of law, in practice, human rights and international investment law have been shown to have significant overlaps due to state regulatory conduct in fulfilment of obligations arising out of non-investment treaties and how these often impact state obligations arising from investment agreements.

Despite these overlaps, states have to a larger extent had difficulty in invoking human rights defences when faced with investor-state claims arising out of a regulatory or policy measure that was enacted for the protection of its citizens or the achievement of some other international obligation. There is a view that arbitral tribunals have not adequately engaged with the state's obligations arising from other branches of international law and have decided disputes on the basis of the IIA alone. Fragmentation occurs at this point as arbitral tribunals resolving investment disputes may overlook the state's human rights obligations and resolve the dispute with reference to the IIA only. Investor state dispute settlement (ISDS) has therefore been viewed as favouring the interests of investors over all other interests, including those of local communities and the host state's other international obligations.

Given the limited consideration of obligations beyond the substantive content of IIAs, some states have acted to expressly introduce broader issues into the provisions of IIAs to allow for the protection of wider rights beyond those of the

investor and make provision for the protection of their right to regulate. The Nigeria -Morocco BIT imposes obligations for investors requiring them to comply with human rights protection. The Supplementary Act on Investment of the Economic Community of West African States provides that investors should uphold human rights standards in the area of their investments and refrain from operating in a manner that undermines human rights obligations, labour standards and environmental and social obligations. The Protocol to the Agreement Establishing The African Continental Free Trade Area On Investment (AfCFTA Investment Protocol) provides for express protection of the states right to regulate and the incorporation of investor obligations with a focus on human rights, labour, the environment, indigenous peoples and local communities and socio-political rights. These areas which from part of different branches of international law have traditionally been excluded from the application and interpretation of the protections in IIAs.

While this is a welcome development, these developments are limited to intra-Africa IIAs and have not spread to IIAs being concluded with and by other economies. To the extent that the AfCFTA Investment Protocol limits investor protection and incorporates more onerous obligations for African investors, non-African investors will have an advantage over African investors. This creates a more favourable regime for non-African investors and parallel investment law systems. This furthers the fragmentation of IIL in relation to African economies.

The Multilateral Investment Court as a Solution

The creation of the MIC presents an opportunity to address the fragmentation problem through interpretations adopted by the judges of the MIC in their judgements. They may adopt approaches that do not impede the ability of states to fulfil their other international law obligations. This is of particular importance for countries in Sub-Saharan Africa because they have taken an active role in trying to achieve an equitable balance between investor protections and the protection of other rights.

To address this concern, the subject matter jurisdiction of the court becomes important. The MIC must be empowered to interpret the substantive rules contained in IIAs considering general international law and considering any other relevant treaties that are applicable between the State parties.

Such a provision would grant the judges of the MIC the authority to interpret and apply the provisions contained in IIAs, in a manner that is consistent with the rights and obligations contained in other relevant *lex specialis* thereby giving effect to the protection of host states policy space, the rights of individuals affected by investment activity and the harmonisation of international law.

This approach of application may arguably be extendable such that even where there are no express provisions incorporating protections found in other international law regimes into IIAs, these can still be considered in the settlement of investment disputes with due regard being had to the same. Approaching the interpretation of IIAs in this manner, will show that the achievement of investment objectives need not come at the expense of other equally important international obligations. This however would not allow for the inclusion of all rules of international law in the interpretation of IIAs. The clause making provision for subject matter jurisdiction in this matter would be limited to treaties that are relevant to the dispute and that are applicable between the state parties, i.e., that have been ratified by both state parties to the IIAs.

This process of harmonisation through interpretation is known as systemic integration, which is based on two presumptions. The first being that international law provides the framework for addressing questions which the treaty at hand does not resolve. The second presumption being that States do not intend to act inconsistently with general international law or with pre-existing treaty obligations. The principle of systemic integration finds its legal basis in Article 31(1)(3)(c) of the VCLT which provides that when interpreting treaties, any relevant rules of international law applicable in the relations between the parties shall be taken into account. The provision for extended subject matter jurisdiction, coupled with the use of Article 31 (1)(3)(c) of the VCLT would allow the MIC judges to be able to consider other rules of international law such as human rights or environmental rights in the resolution of an investment dispute.

It is important to note that the judges would not be applying another treaty to determine the questions raised in the dispute but rather employing a tool to interpret the treaty that it is obliged to apply. Care needs to be taken to ensure

that the distinction between direct application of external treaty provisions to resolve the dispute and the use of external treaty provisions to interpret the applicable treaty is maintained. An example of this form of interpretation can be found in *Tulip v Turkey* where the ad hoc committee found that:

> "Provisions in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention. This is not to add obligations extraneous to the ICSID Convention. Rather, resort to authorities stemming from the field of human rights for this purpose is a legitimate method of treaty interpretation."

A conclusion that can be drawn from the decision of the ad hoc committee is that if resort to human rights law is legitimate to interpret references to procedural issues in the ICSID Convention, it seems equally legitimate to resort to human rights law in interpreting the substantive provisions of investment treaties.

Extending the courts subject matter jurisdiction and interpretive power in the constitutive treaty of the MIC and resorting to systemic integration, the applicable law as determined by the parties does not operate to exclude a wide range of considerations that ought to be considered when settling investments disputes.

This allows for the protection of the interests of Sub -Saharan African countries and the fulfilment of their non- investment law obligations and by extension, the rights of citizens, even where they have not been able to negotiate treaty reforms that incorporate other areas of international law. In this way, the harmonisation of international investment law with non-investment treaties can thus be achieved making use of the framework of the MIC.

Conclusion

In reforming IIL through the creation of the MIC, consideration must be given to the fact that IIL does not exist in a vacuum. IIL must be applied alongside other areas of public international law in a manner that does not impede the achievement of broader public international law objectives. Allowing the MIC to

make use of relevant non-investment law treaties as a tool for interpreting IIAs will enable IIL jurisprudence to develop in a manner that gives due regard to the general body of international law and limit contestation and conflict between the goals of IIL and the goals of other branches of law such as environmental and human rights law. It would also enable other non-investment law obligations to be considered in the interpretation of the IIA even where these are not expressly incorporated into IIAs and bridge the gaps between different generations of IIAs.

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