Consistently Inconsistent Awards: An African Perspective on Consistent Awards Under A Multilateral Investment Court

By:

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Introduction

The Investor-State Dispute Settlement (ISDS) system in its current form has been viewed as being malignant to the Global South. Africa in particular, has been a strong critic of the system with the most radical action against ISDS coming from South Africa, which has stated that investment arbitration awards are "*directly opposed to the legitimate, constitutional and democratic policies of the country*". The United Nations Commission on Trade Law (UNCITRAL) has now mandated its Working Group III (WG3) to lead ISDS reform efforts. One of the key areas of reform under the purview of WG3 is the inconsistency, incoherency, unpredictability and incorrectness of investment arbitration awards. Within this reform framework, the EU has proposed the establishment

of a Multilateral Investment Court (MIC) to replace the current system of ad-hoc arbitration. According to the EU, the MIC will issue awards which are more consistent, coherent, predictable and correct unlike the current ad-hoc arbitration system. While African states were involved in the discussions setting up the International Centre for Settlement of Investment Dispute (ICSID) in the 1960s their concerns with ISDS were largely ignored by former colonial powers who led the process. Over half a century later, the warnings the African states made then have come true. To avoid the same mistake made in the 1960s, current discussions on the MIC should borrow from African investment dispute mechanisms. Intra-African investment agreements, trade agreements and regional economic communities provide insight on how the MIC can draw from African dispute resolution mechanisms, particularly to combat inconsistent decisions. This blog explains the issue of inconsistent awards and their enablers, overviews African institutions and practices for tackling this issue in the investment field, and argues that the MIC statute needs to draw lessons directly from African investment dispute mechanisms.

The Issue of Inconsistent Awards

Inconsistency – referring to inconsistency, incoherency, unpredictability, and incorrectness - is inherent in any legal system and is often tolerable. It becomes intolerable when it undermines the rule of law principle. This sacrosanct principle dictates that judicial decision makers have a legal and moral obligation to strive for consistency and predictability, which can be attained through following precedents. The lack of a rule of precedent is one of several enablers of inconsistency in the current system of ISDS. Precedence in international public law does not strictly speaking exist, however the International Court of Justice has through its Article 38 managed to develop the related notion of a *jurisprudence constante*. The concept of *jurisprudence constante* grants relative persuasiveness to precedents once they are reiterated. The doctrine requires a consistent line of decisions passed by courts to establish settled law. While some investment arbitration tribunals have followed the decisions of previous tribunals, tribunals do not often engage substantively with prior jurisprudence.

Another enabler of inconsistent awards is an appellate mechanism within ISDS which only reviews a limited set of procedural issues of awards and not their

consistency. Inconsistency can also be attributed to the fragmented nature of investment arbitration awards, particularly the over 3000 different investment treaties with different but similar provisions. Moreover, investment arbitration tribunals are constituted on an ad-hoc basis meaning that adjudicators of investment disputes are themselves not consistent. As such, inconsistency in investment arbitration manifests in four ways, which are currently under deliberation by WG3. These are unjustified inconsistency in identical or similar investment treaty provisions, unjustified inconsistency in the same investment treaty standards or customary international law; unjustified inconsistency in matters relating to a state's intent and broader societal goals; unjustified inconsistency with state regulatory powers.

Investment Dispute Resolution Mechanisms In Africa

Intra-African investment disputes are mainly resolved through the courts of regional economic communities (REC), through investment arbitration and prospectively under the Dispute Settlement Body (DSB) established and to be implemented under the African Continental Free Trade Agreement (AfCFTA). RECs are the pillars of intra-African trade and investment agreements. COMESA is the largest regional economic community in Africa with an estimated gross domestic product (GDP) of about USD768 billion and 560 million people. Under the COMESA Investment Treaty disputes can be referred to the COMESA Court of Justice (COMESA Court). The Economic Community of West African States (ECOWAS), is the second largest REC with a GDP of USD734.8 billion and population of 317 million. Investment disputes within ECOWAS are referred to the ECOWAS Court of Justice (ECOWAS Court), in accordance with the Supplementary Act Adopting Community Rules on Investment and The Modalities for Their Implementation.

Investment arbitration clauses can be found in intra-African Bilateral Investment Treaties and the Pan-African Investment Code. As the continent moves towards a single market under the AfCFTA, new intra-African investment disputes will be referred to the Dispute Settlement Body (DSB) of the AfCFTA. This an ad-hoc body based on the dispute settlement body of the World Trade Organisation.

The MIC, African Dispute Resolution Mechanisms and Consistent Awards

According to Bungenberg and Reinisch, the small group of judges and the appellate mechanism as envisioned under the MIC can lead to higher degree of consistency (than with the current ISDS system) even without precedence. Article 9 of the Draft MIC Statute provides that there will be 24 judges who in terms of Article 14 will serve in office for a non-renewable 9 years. Bungenberg and Reinisch suggest that the number of judges in a first instance court matter could be between 3 or 7 judges. Such composition of adjudicators will allow a more a consistent reasoning behind decisions as the same judges will preside over all investment cases for a constant period. If judges deviate from the same interpretation and application of particular substantive or procedural provisions, they will need to provide extensive reasons for such deviation, an aspect which is not available under ISDS. Africa's regional courts constitute less judges except the Panels of the AfCTA which are ad-hoc. The COMESA Court has 12 judges, 7 in the first instance division and 5 in the appellate division who serve for a renewable 5 year term. There are only seven judges in the ECOWAS Court and they serve for a renewable term of 5 years. Panellists in the first instance division of the Dispute Settlement Body (DSB) of the AfCTA are ad-hoc just like ISDS. However, they are selected from a closed list of about 88 panellists. The current restrictive appeal mechanism of ISDS contributes to inconsistency because parties can only appeal on procedural matters. Article 46 of the Draft MIC Statute, expands the right to appeal to substantive issues. Such a mechanism will foster consistent awards as the appellate body can create a jurisprudence constante. African investment dispute mechanisms adopt similar approaches to the MIC thus making it suitable for African investment disputes.

As noted above, a contributory factor to inconsistency is that tribunals are constituted on an ad hoc basis, meaning that each tribunal only decides on the dispute and investment treaty before it. To counter this factor, adjudicators ought to frequently decide on more than just one case meaning that they ought to be somewhat permanent adjudicators. The Draft MIC Statute, clearly stipulates that judges will be only 24 and permanent for a non-renewable term of 9 years. This may lead to more predictable outcomes as parties may be able to predict the interpretation and application to be made by a particular judge based on previous cases.

However, the limited number of judges may result in a predictable but narrow jurisprudence of the MIC. The AfCTA's Panel mechanism constituting a standing roll of adjudicators containing adjudicators appointed by each state may be the better option to avoid a narrow jurisprudence. The AfCFTA's approach supports the Kaufmann-Kohler and Potestà's analysis which reveals that investors are more open to this semi-permanent roster model where the disputants select 'their' adjudicator(s) from a roster of previously elected adjudicators.

Conclusion

The unpredictability created by inconsistent ISDS awards is problematic for international investment law as it creates instability, yet its purpose is to create stability for foreign investment. This is also a problem for Africa. While the EU's proposal for a MIC addresses inconsistency, it is too euro-centric. WG3 discussions need to avoid the mistake of excluding African voices which was done during the establishment of ICSID in the 1960s. In its current form the MIC indirectly perpetuates an unequal ISDS system by failing to adequately accommodate non-European approaches. It inadequately addresses the question of protection of state police powers of developing countries by creating a system without precedence and with only a narrow pool of adjudicators. While no doctrine of precedence exists in public international law the MIC's draft statute can form the basis for establishing a jurisprudence constante similarly to the International Court of Justice. AfCTA's Dispute Settlement Protocol appears to be the most comprehensive system that can bring about consistency to investment disputes. The MIC statute therefore needs to draw lessons directly from African investment dispute mechanisms. WG3 ought to draw from the discussions leading to the establishment of the DSB and its subsequent practices.

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