Aristotle’s Statistics: Consistency and Accuracy in International Mass Claims

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I Introduction

It is hardly controversial to say that consistency and accuracy are among the most important principles that inform judicial and arbitral decision-making. Consistency is about compatibility—consistency—with relevant earlier decisions, or *jurisprudence constante*, whereas accuracy refers to the legal and factual correctness of the decision taken.

Ideally, of course, one would hope that a judge or an arbitrator try to meet both requirements and make decisions that are both consistent with relevant earlier decisions and, in one’s own view at least, correct in terms of both fact and law. However, there are situations in which it will not be possible to be both consistent and correct at the same time or, stated differently, there are situations in which consistency trumps accuracy, or vice versa.

This paper will argue that accuracy is more important than consistency in one-off arbitral decision-making, whereas consistency is more important than accuracy in a mass claims situation. This argument is explored in the particular context of investment treaty arbitration where the issue has now become relevant, as a result of the recent emergence of mass investor claims.

II Arbitration and Accuracy

Accuracy in arbitral decision-making is a debated and long-standing issue.¹ While there are prominent international arbitrators and arbitration

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practitioners who argue that it is important, and indeed that international arbitrators even have a duty,\(^2\) to follow *jurisprudence constante*, few arbitrators would probably go so far as to say that they have to follow precedent no matter what, even when they fundamentally disagree with it, that is to say, even when in their view the earlier jurisprudence on a particular issue is simply wrong.\(^3\) In other words, there is no “expectation of absolute consistency;” arbitral tribunals are not compelled to always rule consistently with decisions issued by other, earlier tribunals.\(^4\) Indeed, most international arbitrators and arbitration practitioners would probably agree that accuracy, or correctness, of their decision is more important than consistency with earlier arbitral jurisprudence, in

\(^2\) See Saipem SpA v Bangladesh, Decision on jurisdiction and recommendation on provisional measures, ICSID Case No. ARB/05/07; IIC 280 (2007) at para. 67: “The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law” (internal citations omitted, emphasis added).
