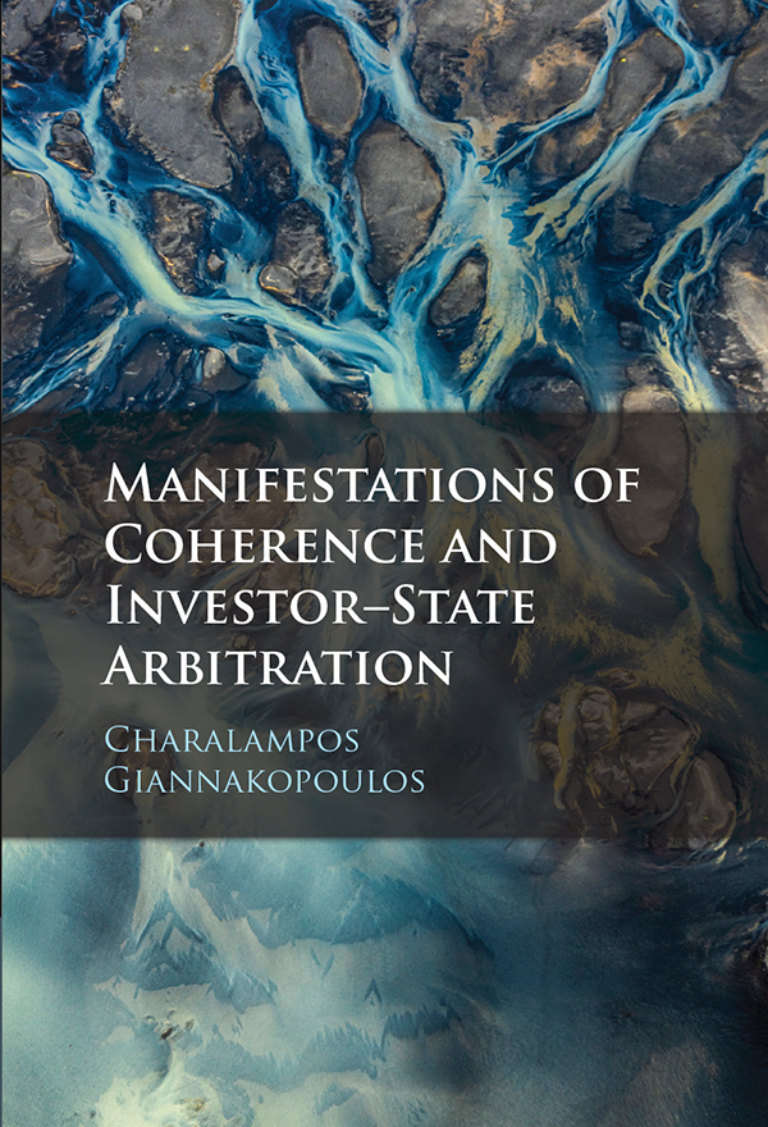
Manifestations of Coherence and Investor–State Arbitration
Charalampos Giannakopoulos

MANIFESTATIONS OF COHERENCE AND INVESTOR–STATE ARBITRATION

Coherence is highly valued in law. It is especially sought after in investor–state dispute settlement, where charges of incoherence in arbitral awards have long been raised by states and scholars. Yet coherence is a largely underexplored notion in international law. Often, coherence is treated as a mere ideal to strive towards or simply as a different way to describe the legal consistency of judicial outcomes. This book takes a different approach. It views coherence as an independent concept having two dimensions: a substantive and a methodological one. Both are critical for legal reasoning by international courts and tribunals, including by investor–state tribunals, and the book illustrates through several case studies some of the ways this conclusion is borne out in practice. A fuller understanding of coherence in international law has implications for the way we should understand the concept of law, the practice of legal reasoning, and judicial professional ethics.

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PREFACE AND ACKNOWLEDGEMENTS

This book is a product of my doctoral studies, which I undertook at the Graduate Institute of International and Development Studies. Interestingly, coherence was not the topic I had initially chosen to pursue. This was, rather, general principles of law and their use in investor–state arbitration. I came to coherence almost by accident. Coherence kept turning up in my readings, often in vague and under-analysed ways but undoubtedly as an important concept.

Indeed, coherence is a largely underexamined concept in international law. It is frequently seen as a good thing and as an ideal towards which to strive, but there appears to be little study on any other aspects of it or on any implications that it may have in the legal field. International lawyers agree that coherence is a desirable goal to pursue but tend to stop there and do not scrutinise the matter further. Legal reasoning is therefore an especially fruitful area for one to examine coherence. In international investment law in particular, the relevance and potential practical implications of coherence for legal reasoning are demonstrated in the debate on investor–state dispute settlement reform taking place at Working Group III of the United Nations Commission on International Trade Law (UNCITRAL). The Working Group's mandate is to improve, among other concerns, the coherence of investor–state awards.

The present study thus seeks to take the first steps towards unpacking coherence and identifying its implications – both theoretical and practical – for legal reasoning in international law. While my primary focus in this book is on investor–state arbitration, my intention has been to also contribute to the international legal field more generally. Indeed, the remarks made in the book can be extrapolated and made to cover general international law with only minor modifications. At the same time, I also wanted my examination of coherence to be attuned to the latter's theoretical dimensions. This has often resulted in the book's chapters having to perform a balancing act between theory and practice, as well as between international investment and general international law. Every

effort has been made for all of these aspects to complement each other as much as possible. My overall hope is for this study to create greater awareness about coherence and its manifold manifestations in international law and legal reasoning.

In seeing this project to completion, I have collected a few debts of gratitude that I wish to acknowledge here. First and foremost, I am grateful to Zachary Douglas for giving me the opportunity to embark on the doctoral adventure in the first place. I am grateful to Thomas Schultz and George Letsas for kindly agreeing to serve as examiners. Andrea Bianchi, Joost Pauwelyn, and Fuad Zarbiyev have all influenced significant parts of this book with their teaching. While at the Graduate Institute, I was fortunate to benefit from the institute's financial assistance throughout my studies. On several occasions, I had the opportunity to work at the Investment Agreements Section at the United Nations Conference on Trade and Development (UNCTAD), which greatly improved my understanding of investment treaties. I am grateful to Elisabeth Tuerk, Diana Rosert, and Hamed El-Kady for their continued trust.

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The book is dedicated to my family. The biggest debt of gratitude is owed to them. None of the above would have been possible without their continued support and encouragement.

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ABBREVIATIONS

BIT	bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSU	Dispute Settlement Understanding
ECHR	European Convention on Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EU	European Union
FCTC	Framework Convention on Tobacco Control
FET	fair and equitable treatment
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICFA	Investment Cooperation and Facilitation Agreement
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICSID	International Centre for Settlement of Investment Disputes
ICSID Rep	International Centre for Settlement of Investment Disputes Reports
ILC	International Law Commission
ILR	International Law Reports
IPA	Investment Protection Agreement
Iran-US CTR	Iran-United States Claims Tribunal Reports
ISDS	investor–state dispute settlement
ITLOS	International Tribunal for the Law of the Sea
LCIA	London Court of International Arbitration
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	most-favoured-nation

OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
Recueil des cours	Recueil des cours de l'académie de droit international de la Haye (Collected Courses of the Hague Academy of International Law)
RIAA	Reports of International Arbitral Awards
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WTO	World Trade Organisation

Introduction

Coherence is often described as an ideal towards which to strive. We tend to place value on coherence because it implies that something, or someone, makes sense and is intelligible. Being incoherent, by contrast, causes frustration and confusion. Coherence is thus thought to be a highly desirable attribute to have in virtually every aspect of one's life. It is sought after in the way one talks, writes, thinks, forms justified beliefs, or acts. Coherence figures prominently in contemporary approaches to ethics and the structure of epistemic justification across different disciplines, including in theories about the nature of truth as well as about theoretical and practical reasoning.[1] We typically wish for our various fields of knowledge, our science, and the ordering systems of our societies to be coherent. The legal field is no exception. Indeed, there appears to be large consensus that the concept of coherence suits law and legal reasoning particularly well.[2]

This book does not deal with coherence at large. It does not, for example, seek to present a comprehensive account of coherence across disciplines.[3] Its scope of inquiry is rather limited to the international legal field. Further still, it only seeks to investigate some of the implications emanating from having expectations of coherence in law, with a particular focus on the inner workings of a specific domain of public international law, that is, international investment law and the practices of ISDS tribunals.

This introductory chapter serves to set the stage for the book's investigation. To that end, it outlines the impetus behind the choice of coherence as a subject for inquiry (Section I.1), the principal, so-called

[1] See Y. Radi, 'Coherence', in J. d'Aspremont and S. Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham: Edward Elgar, 2019) 105, 105.
[2] Ibid., 107 (and references therein).
[3] For an effort in that direction, see A. Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and Its Role in Legal Argument* (Oxford: Hart, 2015).

'bottom-up' perspective from which the subject of coherence is examined in the book (Section I.2), the core thesis advanced in relation to the nature of coherence and its role in judicial reasoning in ISDS (Section I.3), and the division of labour amongst the book's chapters (Section I.4).

I.1 Three Reasons to Investigate Coherence

The impetus for this book's inquiry rests on three kinds of interconnected considerations. In the first place, over the past several years states and commentators have expressed widespread concern about instances of perceived incoherence in international investment law and in the decisions produced by ISDS tribunals in particular.[4] In their discussions on ISDS reform at UNCITRAL's Working Group III, state delegations have overwhelmingly identified a perceived lack of coherence in ISDS decisions as a key cause for concern, alongside related concerns about a lack of consistency, predictability, and correctness.[5] Delegations participating in Working Group III thus seek to take steps to enhance coherence in ISDS in an effort to improve the overall regime's legitimacy and to strengthen its rule of law footprint.[6]

However, in the second place, coherence remains a largely undertheorised concept in practice and its exact content is opaque in the ISDS context. For instance, discussion in the literature tends to be structured around the imperative of consistency of arbitral outcomes.[7] Moreover, scholarship making direct reference to the idea of coherence

[4] It is to be noted, however, that this book takes no strong views as to whether international investment law or ISDS are in fact incoherent. Putting such a statement forward would require an empirical examination of coherence in international investment law and ISDS. Yet, as explained in Section I.2, such examination appears premature at this stage, given the general absence of debate or consensus with respect to the content of the concept of coherence and with respect to its implications vis-à-vis legal reasoning.

[5] E.g., see UNCITRAL Working Group III (Investor–State Dispute Settlement Reform), 'Possible Reform of Investor–State Dispute Settlement (ISDS): Consistency and Related Matters', UN Doc A/CN.9/WG.III/WP.150 (28 August 2018).

[6] UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of its Thirty-fourth Session (Vienna, 27 November–1 December 2017) – Part II', UN Doc A/CN.9/930/Add.1/Rev.1 (26 February 2018), 3 (para 11).

[7] E.g., K. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Leiden: Brill/Nijhoff, 2017); Y. Banifatemi, 'Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?', in R. Echandi and P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (Cambridge: Cambridge University Press, 2013) 200.

tends to simply state that coherence is desirable[8] and often regards coherence as exclusively synonymous or interchangeable with concepts such as legal certainty, predictability, and legal authority.[9] Further, despite its centrality in UNCITRAL's Working Group III, coherence is a generally under-examined subject in that context as well. In the Working Group's discussions, coherence is neither given an independent content compared to the three other causes for concern (in fact, coherence is often lost in discussions about the consistency of outcomes) nor is its relationship with these other causes for concern made clear (thus, e.g., coherence is often seen as coterminous with predictability and its potential relationship to correctness has not been examined in much detail).[10]

[8] E.g., see F. Baetens, 'Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms' (2017) 8 *Journal of International Dispute Settlement* 432; E.-U. Petersmann, 'The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication' (2013) 4 *Journal of International Dispute Settlement* 5; Z. Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2 *Journal of International Dispute Settlement* 97, 99; S. W. Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas' (2011) 2 *Journal of International Dispute Settlement* 353, 357; D. McRae, 'The WTO Appellate Body: A Model for an ICSID Appeals Facility?' (2010) 1 *Journal of International Dispute Settlement* 371.

[9] E.g., C. Schreuer, 'Coherence and Consistency in International Investment Law', in Echandi and Sauvé (n. 7) 391, 391:

> Coherence and consistency are desirable qualities in any legal system. A legal system is coherent if its elements are logically related to each other and if it shows no contradictions. A legal system is consistent if it treats identical or similar situations in the same way and if it gives equal treatment to the participants in the system.

Similarly, C. Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', in M. Fitzmaurice, O. Elias, and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Martinus Nijhoff, 2010) 129, 139 ('The need for a coherent case law is evident. It strengthens the predictability of decisions and enhances their authority.').

[10] E.g., see UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of its Thirty-fifth Session (New York, 23–27 April 2018)', UN Doc A/CN.9/935 (14 May 2018), 5–8 (paras 20–44), where, under the general heading 'coherence and consistency', coherence is scarcely mentioned as an independent concept and is often lost in discussions regarding consistency, certainty, and predictability. See also, UNCITRAL Working Group III (n. 6), 3ff (paras 9ff).

Further, see A. Roberts and Z. Bouraoui, 'UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness', *EJIL: Talk!* (5 June 2018), reporting on the interventions made by individual state delegations on consistency and coherence during the early Working Group III sessions, many of which seem to have regarded the two concepts as interchangeable.

Crucially, under-theorisation is not unique to the context of ISDS and its potential reform. The same applies with respect to general international law, wherein one often finds at most passing references to coherence. For instance, one finds in the ILC's work on the fragmentation of international law references to the existence of a link between coherence and the principle of systemic integration under Article 31(3)(c) of the VCLT.[11] Yet, even in such references, coherence seems to be regarded primarily as coterminous to mere legal security and predictability.[12] That is to say, coherence tends to be regarded as a formal principle devoid of any independent substantive content of its own.[13]

Furthermore, in the third place, a review of the international law literature also shows that coherence is frequently approached in a methodologically monolithic manner. The common way in which coherence is viewed can be described as 'top-down', whereby one looks at whether international law coheres as a system on the whole, or at whether particular, specialised regimes of international law cohere, either between themselves or with general international law.[14] That is unfortunate since law is a field where expectations of coherence seem to apply at every corner one looks – in the legal system on the whole, in individual pieces of legislation and individual legal norms, as well as in pronouncements by judicial bodies. This means that there are in principle multiple levels of inquiry into the subject of coherence in ISDS: not only between international investment law and other regimes or strictly within international investment law itself ('top-down') but also in relation to the

[11] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission', UN Doc A/CN.4/L.682 (13 April 2006), 211 (para 419) ('This is all that article 31(3)(c) [of the VCLT] requires; the integration into the process of legal reasoning – including reasoning by courts and tribunals – of a sense of coherence and meaningfulness.').

[12] See ibid., 248 (para 491) ('Fragmentation puts to question the coherence of international law. Coherence is valued positively owing to the connection it has with predictability and legal security.').

[13] See, e.g., the following passage, ibid.: 'Coherence is, however, a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so.'

[14] E.g., see S. Gáspár-Szilágyi, D. Behn, and M. Langford (eds.), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge: Cambridge University Press, 2020); M. Andenas, M. Fitzmaurice, A. Tanzi, and J. Wouters (eds.), *General Principles and the Coherence of International Law* (Leiden: Brill/Nijhoff, 2019); M. Andenas and E. Bjorge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge: Cambridge University Press, 2015).