

Academic Forum on ISDS

Working Group Four

Incorrectness of ISDS Decisions

Introduction

At the thirty-fourth and thirty-fifth sessions of UNCITRAL Working Group III, concerns were raised over the consistency and correctness of ISDS decisions.¹ Consistency and correctness are distinct concepts: inconsistent ISDS decisions can be correct,² and consistent ISDS decisions can be incorrect.³

This paper evaluates potential policy responses to incorrect ISDS decision-making under four alternative reform scenarios: (i) ‘ISDS improved’ (procedural changes, including appointment of arbitrators), (ii) ‘ISDS + appellate mechanism,’ (iii) ‘multilateral investment court,’ and (iv) ‘no ISDS’ (with alternative domestic court and inter-State sub-scenarios).

That evaluation begins with analysis of existing criticism of ISDS decisions. In particular, three categories of such criticism are considered: review mechanisms, State practice, and other sources of criticism (including criticism by arbitrators, scholars, and international organizations). These distinct categories of criticism reflect the nature of the international legal process, where correctness of decision-making may be evaluated through (i) international dispute settlement procedures, which normally provide for some form of review of arbitral awards, (ii) State practice, which includes the development of new treaties as well as the clarification of existing

¹ Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150 (28 August 2018) (Secretariat Note on Consistency), para 4.

² The Secretariat has noted that inconsistent ISDS decisions can be considered ‘justifiable’ or ‘unjustifiable’. Secretariat Note on Consistency, paras 6-7.

³ Consistent ISDS decisions can be consistently incorrect. See, eg, Secretariat Note on Consistency, para 8 (‘seeking to achieve consistency should not be to the detriment of the correctness of decisions . . . predictability and correctness should be the objective rather than uniformity’); Government of Thailand (April 2018) (‘Consistency is not an absolute guarantee for accuracy of treaty interpretation . . . an emerging *jurisprudence constante* based on a defect in legal reasoning is definitely not something desirable’) (quoted in Anthea Roberts and Zeineb Bouraoui, ‘UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability, and Correctness’ (2018) EJIL Talk <https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/>).

treaties through subsequent agreement and subsequent practice,⁴ and (iii) subsidiary means for the determination of rules of law.

With respect to criticism under existing review mechanisms, this paper considers in particular the distinction, under current rules, between forms of incorrectness that lead to set aside or annulment of ISDS decisions and forms of incorrectness that do not.

Regarding criticism reflected in State practice, this paper examines how State disapproval of ISDS decisions can relate to incorrectness in different ways, including instances of disapproval that merely reflect decisions by States to respond, for policy reasons, to ISDS decisions that may be ‘correct’ in a legal sense. Such responses can include providing interpretative guidance to tribunals with respect to existing IIAs or making different policy and treaty-drafting choices in future IIAs.

The paper then considers criticism of ISDS decisions reflected in sources other than existing review mechanisms and State practice. Such sources include ISDS decisions themselves (criticizing prior ISDS decisions), separate opinions by arbitrators in ISDS disputes (criticizing majority opinions), scholarly commentary, and reports and submissions by international organizations.

Based on consideration of the above categories of criticism of ISDS decisions, this paper identifies and analyzes two core characteristics generally associated with incorrect ISDS decision-making: misidentification and misapplication of applicable law.

But confirming the incorrectness of particular ISDS decisions can be challenging, even with respect to heavily criticized ISDS decisions, for several reasons. First, rules in IIAs often are expressed in open-textured terms that can be applied in significantly different ways. Second, the general rule of interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties requires the interpreter to consider a number of factors in addition to the ordinary meaning of treaty text; as a result, similar or even identical provisions in two different treaties might be applied differently.⁵ Third, decisions by ISDS tribunals, just as decisions of international courts or tribunals in general, are not binding sources of international law but a subsidiary means for determining rules of international law;⁶ the precedential value of ISDS

⁴ See International Law Commission (ILC) Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (2018), Conclusion 7(1) (‘Subsequent agreement and subsequent practice . . . contribute in their interaction with other means of interpretation, to the clarification of the meaning of a treaty’).

⁵ ITLOS, *The Mox Plant Case* (Ireland v. United Kingdom, Case No. 10), Provisional Measures, Order of 3 December 2001, para 51 (‘. . .the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*’) [Emphasis in original].

⁶ Albeit ISDS tribunals have in principle considered themselves not bound by previous decisions, they have, however, taken different approaches on the role of previous decisions in the evolution of the case-law. See, eg, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No.

decisions, therefore, is determined by their persuasiveness rather than authority.⁷ Fourth, identifying applicable law under IIAs can be challenging, given, with respect to IIAs generally, a lack of consensus concerning the content of some customary international law rules,⁸ and with respect to particular IIAs, the frequent need to identify the precise relationship between customary international law rules and treaty rules under each instrument.⁹ Fifth, under existing review mechanisms, analysis normally is limited to issues concerning the procedural integrity of an arbitration and does not extend to evaluating the substantive correctness of an arbitral award. Sixth, a State's disapproval of an ISDS decision does not necessarily establish that the decision was incorrect (or even perceived to be incorrect); State disapproval can also signal a need to provide more detailed textual guidance to ISDS tribunals with respect to existing or changing policy preferences.

Accordingly, with respect to evaluating policy options in response to incorrect ISDS decision-making, two competing considerations should be addressed. First, criticism of the legal reasoning and outcomes of many ISDS decisions has been significant, which has raised questions concerning the correctness of ISDS decision-making and, more generally, the substantive legitimacy of the ISDS regime.¹⁰ Second, criticism of particular ISDS decisions, even when widespread and intense, does not necessarily establish the incorrectness of those decisions.

ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para 67, and Award (30 June 2009), para 90 (although 'not bound by previous decisions', the tribunal 'must pay due consideration to earlier decisions of international tribunals'). Cf *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/06, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), para 97 (ICSID tribunals 'should in general seek to act consistently with each other,' but 'in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State').

⁷ The persuasiveness of ISDS decisions varies considerably and turns on a number of factors, including the expertise of tribunal members in public international law. See ILC Draft Conclusions on Identification of Customary International Law (2018), Conclusion 13(1), Commentary 3 (the value of decisions of courts and tribunals on questions of international law 'varies greatly . . . depending both on the quality of the reasoning [. . .] and on the reception of the decision, particularly by States and in subsequent case law').

⁸ See, eg., *Bilcon of Delaware v. Canada*, Award on Jurisdiction and Liability (17 March 2015), para 433 ('The crucial question – on which the Parties diverge – is what is the content of the contemporary international minimum standard that the tribunal is bound to apply').

⁹ For example, the interplay between the 'essential security' exception under Article XI of the U.S.-Argentina BIT and the customary international law defense of necessity has vexed a number of ISDS tribunals and *ad hoc* Committees, as discussed below.

¹⁰ See, eg, Christina Binder, Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) (Christina Binder, Ursula Kriebaum, August Reinisch, Stephen Wittich eds.) (Oxford), 608-30, 619, 623 (interpretation of Article XI of the Argentina-US BIT by several ISDS tribunals 'difficult to recognize as treaty interpretation' under the Vienna Convention and 'disregards the intentions of the States parties'); William Burke-White, *The Argentine Financial*

Recognizing those two competing considerations, this paper ultimately evaluates policy options in response to a broad understanding of ‘incorrect’ ISDS decision-making, to include instances of questionable legal analysis that cast doubt on the reliability of legal conclusions and outcomes in ISDS cases. Such consideration of incorrect ISDS decision-making allows the development of policy options that can support not only the avoidance of incorrect ISDS decision-making in a strict sense, but also, more expansively, the achievement of correct ISDS decision-making, the core elements of which can be understood as the correct identification and precise application of applicable law. Those two core elements can be supported by:

- ***State practice*** (including the development of treaty text, interpretive documents during treaty negotiations, non-disputing Party submissions, and joint interpretations; policy options also should include consideration of increased levels of institutionalization)
- ***Practice of arbitral institutions*** (including the possibility of greater involvement in the process of drafting of decisions).
- ***Practice of arbitrators*** (in particular with respect to demonstrated competence in public international law)
- ***Non-disputing party practice*** (participation as *amici curiae* in particular disputes)
- ***Practice of international organizations*** (in particular by providing substantive guidance on the correct identification and precise application of law)

The above categories of support for the correct identification and precise application of applicable law in ISDS cases are discussed in the context of the four alternative reform scenarios. Advancing such identification and application of applicable law can increase confidence in the reliability of legal conclusions and outcomes in particular ISDS cases and, on a systemic level, the substantive legitimacy of the ISDS regime.¹¹

Sources of Criticism of ISDS Decisions

To establish a foundation for evaluating potential policy responses to incorrect ISDS decision-making under the four alternative reform scenarios, three categories of criticism of ISDS decisions are discussed below: (i) existing review mechanisms, (ii) State practice, and (iii)

Crisis: State Liability under BITs and the Legitimacy of the ICSID System, U of Penn, Inst for Law & Econ Research Paper No. 08-01 (January 2008) 3 (characterizing a series of ISDS awards issued in cases brought against Argentina as exhibiting ‘extremely poor legal analysis’; the awards ‘have the potential to undermine the legitimacy and authority of BIT arbitrations before ICSID’).

¹¹ See, eg, Jürgen Kurtz, Building Legitimacy through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law, Melbourne Legal Studies Research Paper No. 670, 23 (quality of legal reasoning ‘matters a great deal when it comes to fostering state commitment to the system’).

other sources of criticism (including other ISDS decisions, separate opinions in particular ISDS decisions, scholarly commentary, and reports and submissions by international organizations).

1. Existing Review Mechanisms

This section examines the extent to which incorrectness of ISDS decisions is addressed under existing review mechanisms. Two broad categories of existing review mechanisms can be identified: review by ICSID *ad hoc* Committees under ICSID Convention annulment procedures and review by courts located in the arbitral seat under various domestic arbitration laws. Both review mechanism categories provide for limited review of incorrect ISDS decisions; generally, and as discussed below, the mechanisms allow review for certain procedural, but not substantive, errors.¹²

Review of incorrect ISDS decisions: procedural errors

The role of ICSID *ad hoc* Committees ‘is a limited one, restricted to assessing the legitimacy of the award and not its correctness.’¹³ The ICSID annulment procedure also has been described as concerning “procedural errors in the decisional process” rather than an inquiry into the substance of the award,¹⁴ or, alternatively, as being “confined to determining whether the integrity of the arbitral proceedings has been respected.”¹⁵ Similarly, as a general matter,¹⁶ review of arbitral awards under various domestic arbitration laws by courts located in the arbitral seat concerns procedural, rather than substantive, issues;¹⁷ stated another way, issues that

¹² The Secretariat has observed that existing review mechanisms ‘address the integrity of and fairness of the process rather than the consistency, coherence or correctness of the outcomes[.]’ Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement, A/CN.9/WG.III/WP.149 (5 September 2018) para 10.

¹³ ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID (2016) (ICSID Paper on Annulment), 36 (quoting *M.C.I. Power Group v. Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (19 October 2009), para 24).

¹⁴ ICSID Paper on Annulment pp 31-32 (quoting Broches, ‘Observations on the Finality of ICSID Awards,’ in *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 298).

¹⁵ ICSID Paper on Annulment p 37 (quoting *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision of the *ad hoc* Committee on the Application for Annulment (10 December 2010) (unofficial translation from Spanish)).

¹⁶ The scope of judicial review of arbitral awards available under applicable domestic arbitration law varies across jurisdictions. See, eg, WW Park, ‘Why Courts Review Arbitral Awards’ in R Briner, L Yves Fortier, K P Berger and J Bredow (eds), *Liber Amicorum Karl-Heinz Böckstiegel* (Carl Heymanns Verlag 2001) 595, 597 (referring to ‘[s]everal models’ for review of awards at the arbitral seat, the ‘most popular’ of which ‘gives losers a right to challenge awards only for excess of authority and basic procedural defects such as bias or denial of due process,’ while ‘[a]nother paradigm’ permits review of ‘an award’s substantive legal merits’).

¹⁷ See, eg, Julian Lew, ‘Does National Court Involvement Undermine the International Arbitration Process?’ (2009) 24 *Am U Int’l L Rev* 489, 495 (‘Article 34 [of the UNCITRAL Model Law] provides for those exceptional conditions where the court [in the arbitral seat] may

concern the integrity of an arbitration¹⁸ rather than the correctness of an arbitral award. At the same time, however, issues of integrity and correctness can overlap.¹⁹

ICSID Convention Article 52(1) sets out the exclusive grounds for annulment of ICSID awards, including, under Article 52(1)(b), ‘that the Tribunal has manifestly exceeded its powers[.]’ In a number of instances, ICSID *ad hoc* Committees have found that a tribunal ‘has manifestly exceeded its powers’ by making incorrect jurisdictional findings, including when tribunals have (i) exercised jurisdiction that did not in fact exist,²⁰ (ii) exceeded their jurisdiction,²¹ or (iii) rejected jurisdiction that in fact existed.²²

The capacity of ICSID annulment committees to review correctness on issues of jurisdiction is qualified in two ways. First, with respect to the manifest excess of powers ground for annulment, the ‘manifest’ qualification has led a number of ICSID annulment committees to conclude that if an arbitral tribunal takes one of a number of inconsistent positions held in arbitral practice on a particular jurisdictional issue, the tribunal does not commit an annulable error, even though one or more of the inconsistent positions, by implication, might be incorrect. Decisions on umbrella clauses in *SGS v Paraguay*,²³ MFN clauses and international dispute settlement in *Impregilo v Argentina*,²⁴ domestic litigation requirements in *Kilic v Turkmenistan*,²⁵ and the definition of investment (for the purposes of the foreign nationality test) in *Caratube v Kazakshtan*²⁶ are examples of this practice. In such cases, an *ad hoc* Committee’s decision not to annul an award does not imply that a tribunal’s jurisdictional finding was correct, but only that the finding reflects one of the competing views held in practice.

set aside or overturn an award . . . There is no provision allowing the national court to review the tribunal’s decision on the merits’).

¹⁸ See, eg, Park (n.[]) 595 (‘Court scrutiny of an arbitration’s integrity promotes a more efficient arbitral process by enhancing fidelity to the parties’ shared pre-contract expectations’).

¹⁹ See, eg, Joshua Karton, ‘The Structure of International Arbitration Law and the Exercise of Judicial Authority’ (2015) 8 *Contemp Asia Arb J* 229, 231 (‘if arbitral authority is unconstrained, then arbitral justice is likely to be at best idiosyncratic and unpredictable, and at worst entirely arbitrary’).

²⁰ See, eg, *Patrick Mitchell v. Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006).

²¹ See, eg, *Occidental Petroleum Corporation v Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (2 November 2015).

²² See, eg, *Helnan International Hotels A/S v Egypt*, ICSID Case No. ARB/05/19, Decision of the *Ad Hoc* Committee (14 June 2010); *Malaysian Historical Salvors v Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009).

²³ *SGS Societe Generate de Surveillance S.A. v Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment (19 May 2014), para 122 (the tribunal ‘simply chose one of the alternatives that it had’).

²⁴ *Impregilo S.p.A. v Argentina*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment (24 January 2014).

²⁵ *Kilic v Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment (14 July 2015).

²⁶ *Caratube International Oil Company LLP v Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment (21 February 2014), paras 143-144 and 166.

Secondly, the findings of ICSID annulment committees, including findings on correctness, apply only to the disputing parties in a particular case. An ICSID annulment committee's conclusions on correctness may subsequently be rejected, either explicitly or by necessary implication, by arbitral tribunals or indeed by other ICSID annulment committees. As one example, the ICSID *ad hoc* Committee in *Patrick Mitchell v. Congo* identified 'the existence of a contribution to the economic development of the host State' as an 'essential . . . characteristic' and 'unquestionable criterion' of 'investment' under ICSID Convention Article 25,²⁷ while, in a subsequent decision, the ICSID *ad hoc* Committee in *Malaysia Historical Salvors v. Malaysia* found that 'investment' under ICSID Convention Article 25 does not require such a contribution.²⁸

In non-ICSID investment arbitration, domestic courts review ISDS decisions in accordance with the law of the seat, which usually provides for review (of variously expressed stringency) of jurisdictional findings by arbitral tribunals. Applying domestic arbitration law, courts in a number of jurisdictions have set aside ISDS decisions due to incorrect jurisdictional findings, including Canada,²⁹ the Netherlands,³⁰ Singapore,³¹ Sweden,³² and the UK.³³ It is difficult to generalise about the practice of domestic courts with respect to review of jurisdictional findings by ISDS tribunals, in light of the limited number of cases, the peculiarity of issues addressed, and differences in applicable domestic arbitration laws.

Review of incorrect ISDS decisions: substantive errors

Incorrectness of ISDS decisions on substantive matters rarely falls within the express mandate of existing review mechanisms. The ICSID annulment procedure 'does not provide a mechanism to appeal alleged misapplication of law or mistake of fact.'³⁴ In principle, 'even a "manifestly incorrect application of the law" is not a ground for annulment.'³⁵ In non-ICSID investment arbitration, reviewing courts in the arbitral seat in most instances can review arbitral awards 'only for excess of authority and basic procedural defects such as bias or denial of due process[.]'³⁶

²⁷ *Patrick Mitchell v Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006), para 33.

²⁸ *Malaysian Historical Salvors* para 80.

²⁹ *Mexico v Metalclad Corporation* [2001] BCSC 664.

³⁰ *Russia v Veteran Petroleum Limited et al*, Hague District Court, C/09/477160, C/09/477162, C/09/481619, Judgment (20 April 2016).

³¹ *Swissbourgh Diamond Mines (Pty) Limited v. Kingdom of Lesotho* [2018] SGCA 81.

³² *RosInvestCo v Russia*, Swedish Court of Appeal, [2013] Case No. T10060-10.

³³ *Griffin v Poland*, [2018] EWCH 409.

³⁴ ICSID Paper on Annulment para 72.

³⁵ *Ibid* para 72.

³⁶ Park (n.[]) 597. In some jurisdictions, review of an ISDS tribunal's substantive findings may be possible. See, eg, Report by the Committee on International Commercial Disputes of the Association of the Bar of the City of New York, 'The "Manifest Disregard of Law" Doctrine and International Arbitration in New York' (2012) (New York City Bar Report), 12 (providing

Under ICSID annulment procedures, correctness of ISDS decisions on substantive matters may be indirectly challenged on two grounds. First, ICSID annulment committees have accepted that the manifest excess of powers ground for annulment under Article 52(1)(b) includes the failure by an ICSID tribunal to apply the proper law. A number of decisions have been annulled on this basis, either partially³⁷ or fully.³⁸ But the misapplication of the proper law, even if manifest, is not annulable error under the ICSID Convention,³⁹ although ‘*ad hoc*’ Committees have taken different approaches to whether an error in the application of the proper law may effectively amount to non-application of the proper law.⁴⁰ The distinction between misapplication of law and non-application of law remains unsettled.

A second way of indirectly challenging the correctness of ISDS decisions on substantive matters under ICSID annulment procedures is by relying on the annulment ground under Article 52(1)(e), ‘that the award has failed to state the reasons on which it is based[.]’ ICSID annulment committees have set aside a number of awards on this basis, either partially⁴¹ or in full.⁴² At the same time, however, the ‘correctness of the reasoning or whether it is convincing is not relevant’ under Article 52(1)(e),⁴³ although ‘a majority of *ad hoc* Committees have concluded that “frivolous” and “contradictory” reasons are equivalent to no reasons and could justify an annulment.’⁴⁴

The capacity of ICSID annulment committees to review correctness on substantive matters is more heavily qualified than regarding issues of jurisdiction. In both instances, relevant authorities agree that, in principle, incorrectness of a decision is not in itself a ground for annulment. There is some disagreement in practice whether challenges to correctness can be effectively articulated so as to fit within the exclusive grounds for annulment under Article 52(1),⁴⁵ but the general rule remains that mere incorrectness does not constitute annulable error.

‘comparative analysis of grounds of substantive judicial review of arbitral awards’ in several jurisdictions).

³⁷ See, eg, *Venezuela Holdings, BV v Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (9 March 2017); *Enron Creditors Recovery Corp. v Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment (30 July 2010).

³⁸ See, eg, *Sempra v Argentina*, ICSID Case No. ARB/02/16, Decision on the Application for Annulment (29 June 2010); *Klöckner v Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment (3 May 1985).

³⁹ ICSID Paper on Annulment para 90.

⁴⁰ ICSID Paper on Annulment para 93.

⁴¹ See, eg, *Tidewater Investment SRL v Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment (27 December 2016); *TECO Guatemala Holdings LLC v Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 April 2016).

⁴² See *Klöckner; Mitchell*.

⁴³ ICSID Paper on Annulment para 105.

⁴⁴ ICSID Paper on Annulment para 107.

⁴⁵ The *Caratube ad hoc* Committee, for example, recognized that ‘errors of fact or of law’ by an ICSID tribunal could potentially be ‘so egregious as to give rise to one of the grounds for annulment listed in Article 52(1) of the Convention.’ *Caratube* para 72.

In non-ICSID investment arbitration, correctness of ISDS decisions on substantive matters in most instances cannot be challenged. Under the UNCITRAL Model Law, ‘[t]here is no provision allowing the national court [in the arbitral seat] to review the tribunal’s decision on the merits,’⁴⁶ although in a number of jurisdictions review of substantive issues remains available in some form.⁴⁷

2. State Practice

A second source of criticism of ISDS decisions, State practice, has reflected disapproval of a number of ISDS decisions in recent years. But disapproval of ISDS decisions by States does not establish the incorrectness, or even the perceived incorrectness, of those decisions. In many, if not most,⁴⁸ instances to date, State practice reflecting disapproval of ISDS decisions may reflect a perceived need by States to provide clearer policy guidance to arbitral tribunals applying investment treaty obligations or disapproval of policy implications of their decisions, rather than the incorrectness (perceived or actual) of those decisions.⁴⁹ As detailed in the chart below, in recent years, through a variety of approaches, including the clarification of existing treaty language and the development of new language in new treaties, States have responded to particular findings in a number of ISDS decisions.

⁴⁶ Lew (n.[]) 495.

⁴⁷ See, eg, New York City Bar Report (n.[]) 12.

⁴⁸ Decisions by States to seek annulment or set-aside of ISDS decisions, discussed in the previous section, reflects the view of those States that the decisions were, in some respect, incorrect; that particular form of State practice is not discussed here.

⁴⁹ See Catherine A. Rogers, ‘The Politics of International Investment Arbitrators’ (2013) 12 Santa Clara J Int’l L 223, 234 n. 45 (‘interpretations that differ from what States expected are not the same thing as improper interpretation of “ambiguous language in investment treaties”’) (quoting Gus Van Harten, Pro-Investor or Pro-State Bias in Investment Treaty Arbitration? Forthcoming Study Gives Cause for Concern, Int’l Inst. Sust. Devel. (13 April 2012)).

ISDS Decision	Finding	Response by States
Maffezini v Spain ⁵⁰	Most-favored-nation obligation extends to dispute settlement provisions in other treaties	CETA: most-favored-nation obligation does not extend to dispute settlement provisions in other treaties. ⁵¹ CAFTA-DR (draft): ‘The Parties share the understanding and intent that [the MFN] clause does not encompass international dispute resolution mechanisms . . . and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.’ ⁵²
SGS v Pakistan ⁵³	Claimant failed to provide clear and convincing evidence that Parties to treaty intended umbrella clause to elevate breach of contract to breach of treaty.	Switzerland Note on Switzerland-Pakistan BIT: Swiss authorities ‘alarmed’ by ‘very narrow interpretation’ of umbrella clause; clause intended to apply to ‘commitments that a host State has entered into with regard to specific investments of an investor’ ⁵⁴
Abaclat v Argentina ⁵⁵	Definition of ‘investment’ under treaty includes sovereign debt	India Model BIT: ‘investment’ does not include sovereign debt ⁵⁶

⁵⁰ *Maffezini v Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000).

⁵¹ See EU-Canada Comprehensive Economic and Trade Agreement (CETA) art 8.7(4) (clarifying that ‘treatment’ under the provision ‘does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements’).

⁵² Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) art 10.4 footnote 1 (28 January 2004 draft) (Draft CAFTA-DR Maffezini Footnote) (‘The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties’ shared understanding of the Most-Favored-Nation Treatment Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement’).

⁵³ *SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003), para 167.

⁵⁴ Katia Yannaca-Small, ‘Interpretation of the Umbrella Clause in Investment Agreements’ (2006), OECD Working Papers on International Investment 2006/03, p 16 (quoting Note on the Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13, *SGS v. Pakistan*, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy Secretary General (1 October 2003) (Switzerland Note on Switzerland-Pakistan BIT).

⁵⁵ *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011).

⁵⁶ Model Text for the Indian Bilateral Investment Treaty (2015) Article 1.7 (‘For greater clarity, Investment does not include . . . any interest in debt securities issued by a government or government-owned or controlled enterprise’).

ISDS Decision	Finding	Response by States
Pope & Talbot v Canada ⁵⁷	Adopts ‘additive’ interpretation of the NAFTA minimum standard of treatment obligation (Article 1105(1)): the ‘fairness elements’ in Article 1105(1) (‘fair and equitable treatment’) are ‘distinct from’ customary international law. ⁵⁸	NAFTA FTC Interpretation: ‘fair and equitable treatment’ does not ‘require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.’ ⁵⁹
S.D. Myers v Canada ⁶⁰	‘[A] majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 [national treatment] essentially establishes a breach of Article 1105 as well.’	NAFTA FTC Interpretation: ‘A determination that there has been a breach of another provision of the NAFTA . . . does not establish that there has been a breach of Article 1105(1).’
TECMED v Mexico ⁶¹	Fair and equitable treatment obligation under treaty requires Parties not to frustrate investor’s ‘basic’ expectations.	China-Hong Kong Investment Agreement: frustration of an investor’s expectations does not breach minimum standard of treatment obligation. ⁶²
Micula v Romania ⁶³	Repeal of economic incentives prior to stated date of expiration breached fair and equitable treatment obligation under treaty.	CPTPP: ‘For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed, or maintained, or has been modified or reduced, by a Party, does not constitute a breach of [the minimum standard of treatment obligation], even if there is loss or damage to the covered investment as a result.’ ⁶⁴

⁵⁷ *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2 (10 April 2001), para 113.

⁵⁸ *Pope & Talbot* paras 111, 113.

⁵⁹ Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions (31 July 2001) (NAFTA FTC Interpretation).

⁶⁰ *S.D. Myers, Inc. v. Canada*, Partial Award (13 November 2000), para 266.

⁶¹ *TECMED v Mexico*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), para 154.

⁶² Mainland [China] and Hong Kong Closer Economic Partnership Arrangement Article 4(4) (‘the mere fact’ that an action ‘may be inconsistent with an investor’s expectations does not constitute a breach of this Article, regardless of whether there is loss or damage to the covered investment as a result’).

⁶³ *Micula v Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013), para 872.

⁶⁴ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) art 9.6(5).

ISDS Decision	Finding	Response by States
Bilcon v. Canada ⁶⁵	Quotes language from the <i>Merrill & Ring v. Canada</i> decision finding that the international minimum standard of treatment “protects against all such acts or behavior that might infringe a sense of fairness, equity, and reasonableness”	Mexico non-disputing Party submission: ‘Mexico concurs with Canada’s submission that decisions of arbitral tribunals are not themselves a source of customary international law and that the <i>Bilcon</i> tribunal’s reliance on <i>Merrill & Ring</i> was misplaced.’ ⁶⁶

With respect to evaluating potential policy responses to incorrect ISDS decision-making, the State practice outlined above, disapproving of a number of ISDS decisions, is noteworthy in two respects. First, States have relied on a range of approaches – including joint interpretation mechanisms, non-disputing Party submissions, treaty drafting, and treaty negotiating history – to express disapproval of ISDS decisions. Second, the relationship between such expressions of disapproval by States and incorrectness of ISDS decisions varies considerably. States at times have clearly characterized certain ISDS decisions as incorrect,⁶⁷ while in other instances have merely expressed a need to adopt a policy that departs from the findings of one or more prior ISDS decisions.⁶⁸

Notably, State practice also can express approval of ISDS decision-making, as illustrated by the ‘Drafters’ Note’ on ‘In Like Circumstances’ recently prepared by the CPTPP negotiating States.⁶⁹ In that Drafters’ Note, the CPTPP negotiating States cite a number of ISDS decisions that, in their view, reflect an ‘existing approach’ to the interpretation of ‘in like circumstances’

⁶⁵ *Bilcon* para 435 (quoting *Merrill & Ring Forestry v. Canada*, UNCITRAL, Award (31 March 2010), para 210).

⁶⁶ Second Submission of Mexico Pursuant to NAFTA Article 1128, *Mesa Power LLC v. Canada*, PCA Case No. 2012-17 (12 June 2015) (Mexico *Mesa* Submission), para. 10. See also Second Submission of the United States of America, *Mesa Power LLC v. Canada*, PCA Case No. 2012-17 (12 June 2015), para. 8 (‘The *Bilcon* tribunal incorrectly adopted standards from prior NAFTA Chapter Eleven awards, which are not founded in State practice and *opinio juris*’) (United States *Mesa* Submission).

⁶⁷ See, eg, Switzerland Note on Switzerland-Pakistan BIT (Swiss authorities ‘alarmed’ by ‘very narrow interpretation’ of applicable umbrella clause by the *SGS v. Pakistan* tribunal); United States *Bilcon* Submission (characterizing as ‘incorrect’ *Bilcon* tribunal’s adoption of customary international law standards that were ‘not founded in State practice and *opinio juris*’).

⁶⁸ See, eg, Draft CAFTA-DR Maffezini Footnote (observing that unlike the ‘unusually broad most-favored-nation clause’ at issue in the *Maffezini* case, the CAFTA-DR most-favored-nation provision ‘is expressly limited in its scope’).

⁶⁹ Drafters’ Note on the Interpretation of ‘In Like Circumstances’ Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favored-Nation Treatment), available at <https://www.tpp.mfat.govt.nz/text> (CPTPP Drafters’ Note).

under the CPTPP national treatment and most-favored-nation treatment provisions that should be followed by tribunals constituted under the CPTPP investment chapter.⁷⁰

3. Other Sources of Criticism of ISDS Decisions

Apart from existing review mechanisms and State practice, a wide range of additional sources reflect criticism of ISDS decisions. Such sources include ISDS decisions themselves (criticizing prior ISDS decisions), separate opinions by arbitrators in ISDS disputes (criticizing majority opinions), scholarly commentary, and reports and submissions by international organizations.

Relying on such sources, together with consideration of existing review mechanisms and State practice, this section identifies and analyzes two core systemic characteristics generally associated with incorrect ISDS decision-making: misidentification and misapplication of applicable law. This paper analyzes misapplication of law under four subcategories: (a) excessively broad or narrow interpretation of legal obligations, (b) lack of textual basis and/or authority for legal obligations, (c) interpretation of standards that are unworkable as a policy and/or practical matter, and (d) insufficiently precise and/or diligent application of law.

A. Misidentification of applicable law

ICSID *ad hoc* Committees, on several occasions, have found that ISDS tribunals have failed to apply proper applicable law or applied incorrect law.⁷¹ A failure to apply applicable law and/or the application of incorrect law are errors that fall within the scope of existing review mechanisms.⁷²

Identifying the correct law in ISDS cases can be challenging, particularly because applicable law under IIAs normally includes international law rules that are incorporated into each IIA from rules external to the particular instrument,⁷³ either through express reference to such rules in treaty text⁷⁴ or by taking into account relevant rules of international law.⁷⁵ Article

⁷⁰ CPTPP Drafters' Note para 1.

⁷¹ See, eg, Enron Decision on Annulment para 393 ('[T]he Tribunal did not in fact apply Article 25(2)(b) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue'); Sempra Decision on Annulment para 208 ('...the Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law).

⁷² See n [].

⁷³ See Kurtz (n []) 30 ('As a general class, investment treaties are deeply and often explicitly embedded in the fabric of public international law').

⁷⁴ See, eg, NAFTA Article 1131 ('A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law').

⁷⁵ See, eg, *Saluka* award para 254 (finding that expropriation provision in applicable BIT 'imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order').

XI of the U.S.-Argentina BIT - which states, in part, that the treaty does not preclude application by a Party of measures ‘necessary’ to maintain public order or protect ‘its own essential security interests’ - provides one example of an IIA provision that has given rise to considerable uncertainty with respect to the precise relationship between rules set out in the treaty’s text and other international law rules that might (or might not) be incorporated as applicable law under the treaty. In the context of several ISDS claims brought by U.S. investors against Argentina, tribunals and *ad hoc* Committees have made a range of findings with respect to the relationship between Article XI of the U.S.-Argentina BIT and the customary international law necessity defense reflected in Article 25 of the ILC Articles.⁷⁶

B. Misapplication of Applicable Law

The second characteristic generally associated with incorrect ISDS decision-making, misapplication of applicable law, is analyzed in the context of four subcategories: (a) excessively broad or narrow interpretation of legal obligations, (b) lack of textual basis and/or authority for legal obligations, (c) interpretation of standards that are unworkable as a policy or practical matter, and (d) insufficiently precise or diligent application of law.

Excessively broad or narrow interpretation of legal obligations

Some interpretations of legal obligations by ISDS tribunals have been heavily criticized as excessively broad or excessively narrow. The *Metalclad v. Mexico* tribunal’s interpretation of the NAFTA expropriation obligation,⁷⁷ for example, has been criticized as excessively broad;⁷⁸

⁷⁶ See, eg, *CMS v. Argentina* Decision on Annulment paras. 131-132 (by ‘simply assuming’ that Article 25 of the ILC Articles and Article XI of the U.S.-Argentina BIT were ‘on the same footing’ the tribunal committed legal error); *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award (5 September 2008), para 162 (application of Art. XI ‘may be such as to render superfluous a detailed examination of the defense of necessity under general international law applied to the particular facts of the present dispute’); *Enron v. Argentina* Decision on Annulment para 377 (tribunal failure to apply customary international law as reflected in Article 25 of the ILC Articles constituted a failure to apply applicable law).

⁷⁷ *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para 103 (finding that expropriation under NAFTA Article 1110 includes ‘covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State’);

⁷⁸ See *Blusun S.A. v Italy*, ICSID Case No. ARB/14/3, Award (27 December 2016), para 398 (‘sweeping’); *WNC Factoring Ltd. v Czech Republic*, PCA Case No. 2014-34, Award (22 February 2017), para 397 (‘overly broad’); *ECE Projektmanagement International GmbH v Czech Republic*, PCA Case No. 2010-5, Award (19 September 2013), para 4.812 (the *Metalclad* tribunal’s interpretation of NAFTA Article 1110 has ‘been criticized as extending too far the boundaries of protection against indirect expropriation’).

by contrast, the *SGS v. Pakistan* tribunal's interpretation of an umbrella clause provision⁷⁹ has been criticized as excessively narrow.⁸⁰

Lack of textual basis/authority for legal obligations

The *TECMED v. Mexico* award provides one example of an ISDS decision that has been heavily criticized for failing to identify legal authority supporting the tribunal's interpretation of a legal obligation under an IIA. The *TECMED* tribunal found that the fair and equitable treatment obligation under the Spain-Mexico BIT 'requires the Contracting Parties to provide to international investment treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.'⁸¹ The *ad hoc* Committee in the *MTD v. Chile* case characterized the *TECMED* tribunal's finding as 'questionable,' reasoning that obligations under IIAs 'derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have.'⁸² Scholars have criticized the *TECMED* decision on similar grounds.⁸³

Legal standard unworkable as a policy/practical matter

A third example of misapplication of applicable law (actual or perceived) concerns interpretations of IIA provisions that are, as a matter of policy and/or practice, unworkable. As

⁷⁹ See *SGS v. Pakistan* award para 170 (finding that the umbrella clause provision 'was *not* meant to project a substantive obligation like those set out in Articles 3 to 7' of the Switzerland-Pakistan BIT) (emphasis in original).

⁸⁰ See Switzerland Note on Switzerland-Pakistan BIT ('the Swiss authorities are alarmed about the very narrow interpretation' of the applicable umbrella clause by the *SGS v. Pakistan* tribunal); *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) paras 120, 125 (reasons offered by *SGS v. Pakistan* tribunal in support of its 'highly restrictive interpretation' of an umbrella clause provision were 'unconvincing').

⁸¹ *TECMED* para 154.

⁸² *MTD Equity and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007) para 67. See also *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), Dissenting Opinion of Professor Pedro Nikken, para 25 (observing that 'arbitral awards linking fair and equitable treatment to the concept of "legitimate expectations" have not substantiated or explained how such an interpretation results from the application of the rules of international law contained in Article 31.1 of the VCLT' and characterizing the *TECMED* tribunal's language on investor expectations as 'a dictum that has been severely criticized').

⁸³ See Christopher Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' (2013) 30 J Int'l Arb 361, 370 (the *TECMED* tribunal 'referred to no authority in support of its pronouncement'); Zachary Douglas, 'Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex' (2006) 22 Arb Int'l 27, 28 ('[N]o authority was cited by the [*TECMED*] tribunal in support of its *obiter dictum*').

discussed above, the *TECMED* tribunal's finding with respect to basic expectations has been criticized due to a failure to cite supporting authority. Subsequent ISDS decisions relying on the *TECMED* decision also have been criticized on grounds that a sweeping 'basic' or 'legitimate' expectations obligation would be unworkable in practice. As noted by UNCTAD, some ISDS decisions 'have gone so far as to suggest that any adverse change in the business or legal framework of the host country may give rise to a breach of the FET standard'; such an approach is 'unjustified, as it would potentially prevent the host State from introducing any legitimate regulatory change[.]'.⁸⁴

Scholars have raised similar criticisms with respect to the 'basic' or 'legitimate' expectations standard.⁸⁵

The ISDS decision in *Plama v. Bulgaria*, which found that the denial of benefits provision under the Energy Charter Treaty ('ECT') could only be invoked by a State 'prospectively,' before a claim is submitted to arbitration,⁸⁶ has similarly been criticized for adopting an unworkable standard. Under the ECT provision, a Contracting Party can deny the benefits of the treaty's investment protections to legal entities that are organized, but have no substantial business activities, in its territory. Scholars have criticized the *Plama* decision on grounds that practical difficulties would arise if the ECT denial of benefits provision could only be invoked after a claim has been submitted to arbitration.⁸⁷

Insufficiently precise or diligent application of law

A fourth category of misapplication of law concerns insufficiently precise and/or diligent application of law. In the *Lucchetti* case, for example, the tribunal's general references to canons of treaty interpretation were strongly criticized in a dissenting opinion by one member of the *ad hoc* Committee reviewing the award; as argued in that dissenting opinion, the *Lucchetti* tribunal had failed to 'diligently and systematically' apply Vienna Convention rules on treaty

⁸⁴ UNCTAD, 'Fair and Equitable Treatment', UNCTAD Series on Issues in International Investment Agreements II (2012), 67.

⁸⁵ See, eg, Douglas (n.[]) 28 (arguing that the basic expectations standard under *TECMED* is '[a]ctually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain').

⁸⁶ *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005), para 165.

⁸⁷ See Loukas A. Mistelis & Crina Mihaela Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (2009) 113 Penn State L Rev 1301, 1315 (To 'proceed with a thorough review of each and every investment made in its territory . . . [would] be an impossible task'); Anthony C. Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20 ICSID Rev 357, 386 ('The Host State may not even be aware at the time of the existence of a new investment made in its territory let alone the nationality of that investor, the extent of its business activities in its Home State, and the nationality of its underlying ownership').

interpretation, and more generally, had failed to ‘meet . . . the accepted standard of reasoning.’⁸⁸ Application of customary international law rules by ISDS tribunals has been similarly criticized as lacking sufficient rigor; in particular, States,⁸⁹ as well as scholars,⁹⁰ have criticized ISDS tribunals for purporting to apply customary international law rules without analysis of the two required elements for establishing the existence of such rules: State practice and *opinio juris*.

Whether insufficiently precise or diligent application of law falls within the scope of existing review mechanisms, or even constitutes legal error, would depend on the context of a particular case. In some instances, States have argued that an ISDS tribunal’s failure to analyze State practice and *opinio juris* when purporting to apply customary international law constituted a failure to apply that law.⁹¹ By contrast, in *Lucchetti*, the *ad hoc* Committee found that the tribunal’s failure to ‘give a full picture of the various elements which should be taken into account for treaty interpretation under the Vienna Convention’ did not constitute annulable error, or even ‘a lack of precision such as to leave a doubt about the legal or factual elements upon which the Tribunal based its conclusion.’⁹² As noted above, the dissenting opinion by one member of the *Lucchetti ad hoc* Committee was far more critical of the tribunal’s failure to diligently apply Vienna Convention rules on treaty interpretation.⁹³ The *CMS ad hoc* Committee sharply criticized the tribunal’s ‘cryptic’ and ‘defective’ application of Article XI of the U.S.-Argentina BIT, but ultimately found that the tribunal did apply the provision and that there was ‘accordingly no manifest excess of powers.’⁹⁴

C. Systemic Criticisms Concerning Extra-Legal Influences on ISDS Outcomes

A number of scholars in recent years have raised systemic criticisms of the ISDS regime, finding, in a wide variety of contexts, the existence of extra-legal influences on ISDS outcomes.

⁸⁸ *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (5 September 2007) (*Lucchetti*), Dissenting Opinion of Sir Franklin Berman, paras 12-13.

⁸⁹ See Mexico *Mesa* Submission para 11 (Bilcon tribunal’s failure to analyze state practice and *opinio juris* ‘amount[ed] to a failure to apply the proper law of the arbitration’); United States *Mesa* Submission para 8 (‘the Bilcon tribunal incorrectly adopted standards from prior NAFTA Chapter Eleven awards, which are not founded in State practice and *opinio juris*’).

⁹⁰ See Patrick Dumberry, ‘The Role and Relevance of Awards in the Formation, Identification, and Evolution of Customary Rules in International Investment Law’ (2016) 33 J Int’l Arb 269, 281-282 (arguing that several ISDS tribunals based their support for the existence of a customary international law prohibition against arbitrary conduct ‘on the previous findings of other tribunals’ rather than on State practice and *opinio juris*).

⁹¹ See Mexico *Mesa* Submission para 11 (Bilcon tribunal failed ‘to apply the proper law of the arbitration’); United States *Mesa* Submission para 8 (‘the Bilcon tribunal failed to apply customary international law when interpreting and applying [NAFTA] Article 1105(1)’).

⁹² *Lucchetti ad hoc* Committee para 129.

⁹³ See *Lucchetti*, Dissenting Opinion of Sir Franklin Berman, paras 12-13.

⁹⁴ *CMS* Decision on Annulment para 136.

Factors giving rise to such extra-legal influences have included (i) policy views,⁹⁵ (ii) disputing party appointments,⁹⁶ (iii) shifts in stakeholder mood,⁹⁷ (iv) capacity to defend claims,⁹⁸ and (v) an ‘asymmetrical claims structure’.⁹⁹ Notably, however, scholars have not found that extra-legal influences, of any variety, have led to incorrect decisions in particular ISDS cases.¹⁰⁰

Addressing Incorrectness of ISDS Decisions under the Four Reform Scenarios

As stated in the concept papers proposal circulated to Academic Forum members, each concept paper will ‘examine whether, in which ways, and to what extent the concern or issue at stake would be addressed’¹⁰¹ under four alternative reform scenarios. The issue of incorrect ISDS decision-making is discussed below under each of the four scenarios.

1. ISDS Improved (‘changes in respect of appointment of arbitrators or other procedural changes’¹⁰²)

This section addresses policy options aimed at reducing the risk of incorrect ISDS decision-making, but without the introduction of significantly greater levels of

⁹⁵ Michael Waibel and Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration* (January 2017), available at <http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf>, 24 (‘arbitrators do not simply apply the law as it stands when deciding investment disputes,’ but rather ‘appear’ to be influenced, ‘at least, in some cases,’ by their policy views).

⁹⁶ Sergio Puig and Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, Arizona Legal Studies Discussion Paper No. 16-31 (August 2016), 44 (appointment by a disputing party ‘itself causes some of the bias towards one’s appointing party’).

⁹⁷ Malcolm Langford and Daniel Behn, ‘Managing Backlash: The Evolving Investment Treaty Arbitrator?’ (2018) 29 *Eur J Int’l L* 551, 579 (finding ‘modest and suggestive evidence that investment treaty arbitrators have shifted their behaviour on some types of outcome’).

⁹⁸ Daniel Behn, ‘Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art’ (2015) 46 *Georgetown J Int’l L* 363, 406 (finding capacity to defend investment treaty claims, when considered together with the ‘stronger regulatory governance structures’ of developed states, is ‘a major determinant in outcome in investment treaty arbitration’).

⁹⁹ Gus Van Harten, ‘Arbitrator Behaviour in Assymetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50 *Osgoode Hall L J* 211, 213 (finding ‘statistically significant evidence’ that arbitrators favour the position of claimants over respondent states).

¹⁰⁰ Establishing the existence of ‘incorrect’ ISDS decision-making through empirical work is particularly challenging. See Rogers (n [] 234 (empirical research cannot ‘isolate what legal outcome would otherwise have resulted in the absence of any hypothesized influences [. . .] it is impossible to control for the most essential variable (implicitly or explicitly) being tested – the “correct” legal outcome in a particular case’); Van Harten, (n [] 223 (‘It is difficult, if not impossible, to identify the “appropriate” spread of outcomes against which actual outcomes should be measured’).

¹⁰¹ Academic Forum on ISDS Concept Papers Proposal (Academic Forum Proposal), 1.

¹⁰² Academic Forum Proposal 1.

institutionalization or the elimination of ISDS. The policy options are addressed in the context of the following categories: (i) State practice, (ii) practice of arbitral institutions, (iii) practice of arbitrators, (iv) non-disputing party practice, and (v) practice of international organizations.

A. State practice

States can provide guidance on the correct identification and precise application of applicable law under IIAs in treaty text, in documentation developed during treaty negotiations, when making submissions in ISDS cases, or in instruments developed outside the context of treaty negotiations and disputes.

Treaty text

States can include guidance in treaty text aimed at supporting the correct identification and precise application of applicable law, as illustrated by the CETA agreement, which includes a detailed provision entitled ‘Applicable law and interpretation’.¹⁰³ As discussed above, issues of incorrect ISDS decision-making often have concerned the relationship between treaty law and customary international law; States can provide guidance on such issues in treaty text, as illustrated by the CPTPP agreement.¹⁰⁴ States also can clarify in treaty text their shared understanding of the content of particular customary international law obligations, which can further reduce of the risk of incorrect ISDS decision-making.¹⁰⁵ In addition, States can support the correct identification and precise application of applicable law by setting out in treaty text requirements (or, at a minimum, expectations) that ISDS arbitrators have expertise in public international law.¹⁰⁶

At the same time, States should also take note not to equate length and complexity of treaty instruments with their improved quality: public international law, just as domestic law, is capable of dealing with complicated matters in brief and elegant terms, and excessive use of adjectives, footnotes, annexes, and side-notes may confuse more than it clarifies.

¹⁰³ CETA Article 8.31 (‘When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the *Vienna Convention on the Law of Treaties*, and other rules and principles of international law applicable between the Parties’).

¹⁰⁴ See CPTPP Annex 9A (confirming shared understanding of the Parties that customary international law ‘results from a general and consistent practice of States that they follow from a sense of legal obligation’).

¹⁰⁵ See CPTPP Article 9.6(2) (clarifying the content of the ‘fair and equitable treatment’ and ‘full protection and security’ obligations included in Article 9.6(1)).

¹⁰⁶ See, eg, CETA Article 8.27.4 (requiring tribunal members to have ‘demonstrated expertise in public international law’); Netherlands Model Investment Agreement Article 20(5) (requiring appointing authority to make ‘every effort to ensure’ that tribunal members have expertise in public international law).

Documentation developed during treaty negotiations

During treaty negotiations, States can reach, and document, shared understandings on issues of importance for the correct identification and precise application of applicable law. States can choose to include, or not to include, such shared understandings in treaty text. The CPTPP negotiating States opted not to include in treaty text their shared understanding with respect to the interpretation of ‘in like circumstances’ under the national treatment and most-favored-nation treatment obligations; instead, the CPTPP negotiating States expressed that shared understanding in a ‘Drafters’ Note’.¹⁰⁷ Similarly, the CAFTA-DR negotiating States documented a shared understanding that did not appear in treaty text, through use of a ‘disappearing footnote’ that clarified the scope of the most-favored-nation obligation under the treaty.¹⁰⁸

Submissions in ISDS cases

Recent IIAs often include mechanisms for non-disputing Party submissions, which allow a Party to an IIA to make submissions to ISDS tribunals on issues of treaty interpretation in ISDS claims brought against another Party to the treaty.¹⁰⁹ Some IIAs also include filtering mechanisms permitting Parties to an IIA, in certain limited circumstances, to issue binding¹¹⁰ or non-binding¹¹¹ guidance with respect to whether a particular claim should be allowed to proceed.

Instruments developed in contexts other than negotiations and disputes

Apart from the settings of treaty negotiations and ISDS disputes, States also can provide views on treaty interpretation issues through the development of instruments addressing particular interpretive issues, which can be binding or non-binding depending on the applicable IIA. The NAFTA Parties, for example, have issued both binding¹¹² and non-binding¹¹³ guidance on questions of NAFTA treaty interpretation.

¹⁰⁷ See CPTPP Drafters’ Note.

¹⁰⁸ See Draft CAFTA-DR Maffezini Footnote.

¹⁰⁹ See, eg., China-Canada BIT Article 27.

¹¹⁰ See, eg., CETA Article 13.21(4) (providing that if a joint determination by the CETA Financial Services Committee or the CETA Joint Committee ‘concludes that Article 13.16.1 [prudential measures carve-out] is a valid defense to all parts of the claim in their entirety, the investor is deemed to have withdrawn its claim and the proceedings are discontinued’).

¹¹¹ See, eg., ECT Article 21(5) (providing that tribunals constituted under the ECT ‘may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the [challenged] tax is an expropriation’).

¹¹² See NAFTA FTC Interpretation.

¹¹³ See NAFTA FTC Statement on Non-Disputing Party Participation (7 October 2003); NAFTA FTC Statement on Notices of Intent to Submit a Claim to Arbitration (7 October 2003).

B. Practice of arbitral institutions

Arbitral institutions in ISDS cases could take on a more active role in ensuring the correctness of ISDS decisions. For example, one significant policy change in the practice of arbitral institutions, which would require approval of States, would be greater involvement in the process of drafting of decisions (along the lines of Secretariat's and Registry's in other international dispute settlement institutions).¹¹⁴ One advantage, particularly relevant to consistency but also to improved quality of legal reasoning, would be additional support for the consistent application of proper technical terminology and reasoning of public international law.

With respect to arbitrator expertise, arbitral institutions, in consultation with States, could consider establishing more demanding substantive requirements for ISDS arbitrators. Such requirements could include demonstrated competence in public international law, in particular with respect to treaty interpretation, the formation of customary international law rules, and sources of international law.

C. Practice of arbitrators

As noted above, arbitral institutions, in consultation with States, could consider establishing more demanding substantive requirements for ISDS arbitrators, particularly with respect to demonstrated competence in public international law. Consistent with such an initiative, existing and aspiring ISDS arbitrators could opt to make publicly available detailed summaries of relevant public international law experience.

Notably, a decision to abandon arbitrator appointments by disputing parties altogether - as reflected in recent EU treaty practice, under which ISDS cases are to be heard by three-Member divisions of a standing Tribunal – could provide opportunities for States to ensure that all members of permanent, standing ISDS tribunals are competent in public international law. The CETA agreement includes such a requirement.¹¹⁵

D. Non-disputing party practice

Participation by non-disputing parties in ISDS disputes as *amici curiae* also can support the correct identification and precise application of applicable law in ISDS cases. The *Philip Morris v. Uruguay* ISDS case provides one high-profile example of third party *amicus curiae* participation that contributed significantly to an ISDS tribunal's analysis when deciding a dispute.¹¹⁶

¹¹⁴ Additional support could be provided by the creation of some form of advisory facility. See International Bar Association, Consistency, Efficiency and Transparency in Investment Treaty Arbitration (November 2018) (IBA Report) 21 (discussing potential creation of advisory facility 'to which a tribunal might refer a contentious legal interpretation and receive guidance in advance of its ruling').

¹¹⁵ CETA Article 8.27.4

¹¹⁶ *Philip Morris Brands SARL et al v. Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) para 391 (referring to 'thorough analysis' of history of tobacco control and related

E. Practice of international organizations

International organizations also can support the correct identification and precise application of applicable law by providing detailed guidance on ISDS-related interpretative issues outside the context of particular ISDS disputes. With respect to such guidance, recent contributions by the ILC,¹¹⁷ UNCTAD,¹¹⁸ the OECD,¹¹⁹ ICSID,¹²⁰ and UNCITRAL¹²¹ are noteworthy.

2. Current ISDS system + appellate mechanism

The introduction of one or more appellate mechanisms to the investment arbitration regime could serve as an effective response to incorrect ISDS decision-making (actual or perceived) to the extent that existing review mechanisms are flawed due to (i) excessively narrow grounds for review, (ii) inadequate performance by existing decision-makers (members of ICSID *ad hoc* Committees and domestic court judges); and/or (iii) a lack of capacity to provide institutionalized guidance to ISDS tribunals.

A. Grounds for review

The creation of one or more appellate mechanisms would offer opportunities to reconsider the existing scope of review of ISDS decisions. The extent to which expanded grounds for review of ISDS awards could affect – and, in particular, discipline - decision-making by ISDS tribunals should be considered.¹²²

measures set out in amicus submissions by the World Health Organization and the Pan-American Health Organization].

¹¹⁷ See ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice; ILC Draft Conclusions on Identification of Customary International Law.

¹¹⁸ See, eg, UNCTAD, Scope and Function, UNCTAD Series on Issues in International Investment Agreements II (2011).

¹¹⁹ See OECD Consultation Paper, Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview (March 2018).

¹²⁰ See ICSID Paper on Annulment.

¹²¹ See UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016).

¹²² See, eg, Tom Ginsburg, The Arbitrator as Agent: Why Deferential Review is Not Always Pro-Arbitration (John M. Olin Program in Law and Economics Working Paper No. 502) (2009) 2 ('If review [of arbitral awards] is too limited, arbitrators might deliver very poor quality decisions that undermine the attractiveness of arbitration as a whole'); see also Irene M. Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 NYU J Intl L & Pol 1109, 1143 ('the awareness that another court may review a decision creates incentives for more diligent decision-making at the lower level').

B. Decision-makers

As a policy response to incorrect ISDS decision-making (actual or perceived), the effectiveness of creating one or more appellate mechanisms would depend in significant part on the decision-makers who would be reviewing ISDS decisions. The introduction of one or more appellate mechanisms would, in turn, introduce one or more new sets of decision-makers to review ISDS decisions. Compared to decision-makers under existing review mechanisms (members of ICSID *ad hoc* Committees and domestic court judges), whether such new sets of decision-makers under newly-created appellate mechanisms would be more likely to support the correct identification and precise application of applicable law in ISDS cases should be considered. As noted above, the establishment of standing tribunals provides an opportunity for States to ensure that all members of such tribunals are competent in public international law, as illustrated by the CETA agreement.

C. Institutionalization and Predictability: Experience of the WTO Appellate Body

The creation and practice of the WTO Appellate Body illustrates how institutionalization can support correctness – or, at a minimum, coherence and predictability - in tribunal decision-making. Under the current Dispute Settlement Understanding (“DSU”) of the WTO, disputes are first examined by a 3-member panel composed on an *ad hoc* basis for each case,¹²³ with the availability of appellate review by the Appellate Body, a seven-member standing entity.¹²⁴

Although the *stare decisis* principle does not exist in WTO dispute settlement proceedings, the Appellate Body has regarded ‘security and predictability’ as one of the key principles of WTO dispute settlement proceedings.¹²⁵ ‘Ensuring “security and predictability” [. . .] implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.’¹²⁶ Indeed, the creation of the Appellate Body reflects the ‘importance of consistency and stability in the interpretation of [the] rights and obligations under the [WTO] agreements.’¹²⁷ As stated in one frequently cited concurring opinion by an Appellate Body member, in the context of a WTO dispute involving the so-called ‘zeroing’ practice in anti-dumping investigations and conflicting approaches to that practice adopted in previous WTO panel reports:

In matters of adjudication, there must be an end to every great debate [. . .] At a point in every debate, there comes a time when it is more important for a system of

¹²³ See Understanding on Rules and Procedures Governing the Settlement of Disputes Articles 6, 8.

¹²⁴ See DSU Article 17.

¹²⁵ See Appellate Body Report, United States – Final Anti-dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (Apr. 30, 2008), para 157 (observing that WTO dispute settlement is a ‘central element in providing security and predictability to the multilateral trading system’).

¹²⁶ *Ibid.*, at para. 160.

¹²⁷ *Ibid.*, at para. 161.

dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.¹²⁸

The creation and practice of the WTO Appellate Body illustrates how institutionalization can support predictability of decision-making in international dispute settlement. Notably, however, the WTO Appellate Body oversees the interpretation of one set of WTO agreements, unlike the ISDS regime, which is composed of thousands of IIAs. Creating one or more appellate institutions to oversee the interpretation of certain IIAs could support predictability – and, perhaps, correctness – with respect to the interpretation of those agreements, but ultimately might not have a systemic impact. In addition, institutionalization can advance, but does not ensure, correctness: the risk of consistent, but consistently incorrect, decisions by one or more appellate institutions should be considered.¹²⁹

3. Multilateral investment court

A multilateral investment court can serve as an effective policy response to incorrect ISDS decision-making to the extent that causes of incorrectness (actual or perceived) can be addressed by far greater levels of institutionalization.

A. Centralized interpretive guidance

The development of a single, permanent, centralized institution would create opportunities for providing authoritative interpretive guidance on the correct identification and precise application of applicable law under IIAs.¹³⁰ As discussed above, the creation and practice of the WTO Appellate Body illustrates how institutionalization can support correctness – or, at a minimum, predictability - in tribunal decision-making.

Concentrating interpretative authority in one centralized, multilateral court – rather than distributing such authority among several appellate bodies that might be attached to particular IIAs – could greatly advance predictability on a systemic level with respect to the application of IIA provisions. One risk, however, associated with such a concentration of interpretative authority would be the potential for a multilateral investment court to seek to harmonize textual differences across treaties, which might advance predictability – but not necessarily correctness – in ISDS decision-making.

B. Decision-makers

As a policy response to incorrect ISDS decision-making (actual or perceived), the effectiveness of creating a multilateral investment court would depend in significant part on the

¹²⁸ Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (4 February 2009), para 312 (concurring opinion).

¹²⁹ See n []; see also IBA Report 29 (‘A permanent or semi-permanent appellate body would not be a guarantee for accurate treaty interpretation’).

¹³⁰ See IBA Report 32 (‘A standing investment court [. . .] would likely promote greater uniformity in reasoning than the current system of appointment’).

decision-makers who would be identifying and applying applicable law under IIAs. Decision-makers under the current ISDS regime consist of *ad hoc* tribunals composed of party-appointed arbitrators, with the availability of limited review by members of ICSID *ad hoc* Committees or domestic court judges.

Compared with that set of decision-makers, whether a new set of decision-makers, serving on a multilateral investment court, would be more likely to correctly identify and precisely apply applicable law under IIAs should be considered. As noted above, the establishment of a multilateral investment court would provide an opportunity for States to ensure that all members of the court are competent in public international law, as illustrated by the CETA agreement.

Notably, a multilateral investment court would eliminate arbitrator appointments by disputing parties. Although some scholars have identified such appointments as contributing to extra-legal influences on ISDS outcomes,¹³¹ scholars have not found that extra-legal influences have led to incorrect decisions in particular ISDS cases, and the risk of extra-legal influences on legal outcomes also applies to cases decided by permanent judges.¹³²

C. Risk of consistently incorrect decisions

Although a shift from party-appointed arbitrators to permanent judges on a multilateral investment court almost certainly would advance the predictability of how IIAs are applied, whether that shift would also advance the correct identification and precise application of applicable law under those agreements is less certain. The risk of consistent, but consistently incorrect, decisions by a multilateral investment court should be considered.¹³³

4. ‘No ISDS’ (recourse to domestic courts or inter-State procedures)

In jurisdictions in which domestic courts do not have authority to hear claims alleging breaches of investment treaty obligations, the lack of authority to apply investment treaty obligations would eliminate the risk of incorrect application of investment treaty obligations. In jurisdictions in which domestic courts do have authority to hear foreign investors’ claims alleging breaches of international investment law provisions, issues of correctness of ISDS decisions would continue to arise, with the focus of analysis shifting from the application of investment treaty rules by arbitrators to the application of such rules by domestic judges. In such instances, incorrectness of domestic judgments interpreting and applying investment treaty

¹³¹ See, eg, Puig and Strezhnev (n.[]) 44 (finding appointments by disputing parties contribute to arbitrator bias).

¹³² See, eg, Van Harten (n.[]) 216 (collecting sources addressing ‘various factors that may influence judicial decision making, including doctrinal, attitudinal, economic, strategic, and institutional factors’); Susan D. Franck et al, ‘Inside the Arbitrator’s Mind’ (2017) 66 Emory L J 1115, 1118 (citing ‘research showing that judges, like other human beings, are . . . prone to predictably irrational decisionmaking’).

¹³³ See n []; see also IBA Report 29 (‘A permanent or semi-permanent appellate body would not be a guarantee for accurate treaty interpretation’).

provisions would form part of the broader debate about international law in domestic courts. That debate includes issues concerning, with respect to domestic judges, a lack of specific expertise in public international law and the related risk of misinterpretation and/or misapplication of international investment law provisions by domestic courts.

Eliminating ISDS in favor of inter-State procedures to resolve international investment disputes would shift the risk of incorrect application of investment treaty obligations from investor-State arbitrators to inter-State decision-makers, who might serve in an *ad hoc* capacity or for some fixed term. Analysis also would shift from existing ISDS review mechanisms to review mechanisms that could apply to inter-State disputes. For review of inter-State decisions, States may agree to create new review mechanisms or to rely on existing international courts or tribunals.¹³⁴

Based on the discussion above, the extent to which concerns associated with incorrect ISDS decision-making can be addressed under the four reform scenarios can be summarized as follows:

Concern	ISDS Improved	ISDS + Appeal	MIC	No ISDS
Incorrect identification of applicable law	~ ¹³⁵	~ ¹³⁶	~ ¹³⁷	X ¹³⁸

¹³⁴ See, eg, Chester Brown, ‘Supervision, Control, and Appellate Jurisdiction: The Experience of the International Court’ (2017) 32 ICSID Rev 595; Michael Reisman, ‘The supervisory jurisdiction of the International Court of Justice: international arbitration and international adjudication’ (1996) 258 Hague Recueil 9.

¹³⁵ A range of actors could support the correct identification of applicable law by ISDS tribunals. Such support could be particularly effective with respect to reinforcing the correct identification of customary international law. Correctly identifying the precise relationship between treaty law and customary international law under particular investment treaties would remain a key challenge.

¹³⁶ Institutionalization, including the development of one or more appellate mechanisms, likely would lead to advances in finality, predictability, and coherence in ISDS decision-making. But the extent to which the development of one or more appellate mechanisms also would lead to advances in correctness - ie the correct identification and precise application of applicable law - is less clear. With respect to the appellate mechanism/correctness relationship, one key factor would be the extent to which appellate-level decision-makers have public international law expertise.

¹³⁷ Introducing far greater levels of institutionalization through the development of an MIC almost certainly would lead to advances in finality, predictability, and coherence in ISDS decision-making. But the extent to which the development of an MIC also would lead to advances in correctness – ie the correct identification and precise application of applicable law – is less clear. With respect to the MIC/correctness relationship, one key factor would be the extent to which MIC decision-makers have public international law expertise.

¹³⁸ Eliminating ISDS would ‘resolve’ incorrectness concerns only in the sense that investment treaty obligations would no longer be applied by ISDS tribunals. Shifting application of

Concern	ISDS Improved	ISDS + Appeal	MIC	No ISDS
Excessively broad/narrow interpretation of obligations	~ ¹³⁹	~	~	X
Lack of textual basis/authority for legal obligations	~	~	~	X
Legal standard unworkable as policy/practical matter	~	~	~	X
Insufficiently precise/diligent application of law	√ ¹⁴⁰	~	~	X

Members of Working Group Four

- Daniel Behn
- Manjiao Chi
- Eric De Brabandere
- Anna De Luca
- Mark Feldman
- Malcolm Langford
- Jaemin Lee
- Martins Paporinskis
- Catharine Titi

investment treaty obligations from ISDS tribunals to domestic courts and/or inter-State tribunals would not, on its own, address concerns arising from incorrect ISDS decision-making.

¹³⁹ With respect to interpretations that are (i) excessively broad or narrow in scope, (ii) not supported by treaty text, or (iii) unworkable in practice, a range of actors could provide support to address such concerns. But eliminating the risk of such interpretations remains challenging, particularly given the nature of how investment treaty obligations are drafted (often in open-textured terms) and interpreted (under Vienna Convention rules).

¹⁴⁰ A range of actors could support the precise and diligent application of law under investment treaties. With respect in particular to two areas of fundamental importance for such precision and diligence – (i) treaty interpretation (under the Vienna Convention) and (ii) the application of customary international law (in particular, consideration of State practice and *opinio juris*) – concerns should be resolvable through focused and sustained support by a range of actors.