

Academic Forum
Concept Paper on Issues of ISDS Reform

**Working Group No 3: Lack of Consistency and Coherence in the Interpretation of
Legal Issues**

Members: Julian Arato, Yas Banifatemi, Chester Brown, Diane Desierto, Fabien Gelin, Csongor Istvan Nagy, Federico Ortino

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A. INTRODUCTION: PRELIMINARY REMARKS REGARDING CONSISTENCY AND COHERENCE

1. The background to the present Concept Paper is the work that is ongoing in UNCITRAL's Working Group III on Investor-State Dispute Settlement ("ISDS") Reform, and the concern that has been expressed regarding a perceived lack of consistency and coherence in the adjudication of claims brought under international investment agreements ("IIAs") (which include bilateral investment treaties ("BITs") and investment chapters in free trade agreements ("FTAs")).¹ The perceived lack of consistency has at least in part been attributed to the fact that each tribunal which is constituted to determine a claim brought under investor-State dispute settlement ("ISDS") procedures is an *ad hoc* tribunal which is typically composed to decide one particular dispute, rather than multiple disputes, and as there is no formal doctrine of precedent (*stare decisis*) in public international law, the *ad hoc* tribunals are not bound to follow the decisions and awards of other *ad hoc* tribunals.

2. In the most problematic cases, there have been claims based on similar facts, arising out of a single governmental measure, and brought under the same substantive and procedural rules which have been decided differently by different tribunals.² In other cases, the

¹ See, e.g., *Report of Working Group III on the Work of its Thirty-Sixth Session (Vienna, 29 October – 2 November 2018)*, UN Doc No A/CN.9/964, para. 2, which identifies Working Group III's mandate: "The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission". See also para. 22, which identifies Working Group III's concerns as follows: "[T]he concerns have been presented as falling into three broad categories (those pertaining to lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; those pertaining to arbitrators and decision makers; and those pertaining to cost and duration of ISDS cases)" (emphasis added).

² See, e.g., the cases dealing with the interpretation of the exceptions clause in Article XI of the United States – Argentina BIT and the "necessity" defence under customary international law: *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8, Award of 12 May 2005), paras. 304-394; *LG&E Energy Corp v Argentine Republic* (ICSID Case No ARB/02/1, Decision on Liability of 3 October 2006), para. 226; and *Continental Casualty Corporation v Argentine Republic* (ICSID Case No ARB03/9, Award of 5 September 2008), paras. 304-305. See also the inconsistent outcomes in *CME Czech Republic BV v Czech Republic* (UNCITRAL, Partial Award of 13 September 2001, and UNCITRAL, Final Award of 14 March 2003), and *Ronald Lauder v*

different outcomes may be explained, more or less satisfactorily, by differences in the facts or in the applicable rules. Before getting into an (necessarily non-exhaustive) analysis of some of the relevant the cases, it is useful to take a step back to place this concern in a broader context.

3. The concern with consistency and coherence is grounded in the ancient and deeply embedded rule-of-law imperative that like cases be treated alike.³ Although this is generally expressed in the positive mode, its flip side is an equally powerful reason for decision: different cases should be treated differently. Comparing the features of cases to determine whether they should be followed or distinguished is thus at the core of adjudicative reasoning.
4. At the same time, consistency and coherence also raise significant efficiency concerns. Consistency and coherence are of prime concern to States and investors *ex ante*, in the making of investments. With them comes predictability, enabling private and public parties to plan their business relationships in the long term. A serious lack of consistency can limit these actors' ability to plan, inefficiently raising the costs of doing business and, potentially, dampening FDI flows in the long run – precisely the opposite of what investment treaties and ISDS set out to accomplish.
5. Within the ISDS setting, as in other adjudicative settings, consistency concerns have given rise to a practice where arguments are presented based partly on the authority, generally viewed as persuasive, of previous decisions (precedents) or the authority of patterns of such decisions (*jurisprudence constante*), and to an expectation that adjudicators will at least “consider” decisions presented to them as relevantly similar. The existence of that practice in the ISDS setting is empirically established and broadly recognised.⁴
6. In all adjudicative settings, cases are routinely compared and distinguished on their facts. In the international setting, cases will also be compared and distinguished based on the relative similarity of the applicable rules of law, which under different treaties will often be different. Seemingly inconsistent decisions may thus prove consistent in view of differences in the applicable rules.

Czech Republic (UNCITRAL, Final Award of 3 September 2001), two differently composed arbitral tribunals reached divergent positions on whether the conduct of the Czech Republic amounted to a breach of obligations under the Netherlands – Czech Republic BIT (in the case of *CME*), and under the United States – Czech Republic BIT (in the case of *Lauder*).

³ See, e.g., in the context of the International Court of Justice, Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), p. 14: “The Court follows its own decisions for the same reasons for which all courts—whether bound by the doctrine of precedent or not—do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.”

⁴ See, e.g., *Metal-Tech Ltd v Uzbekistan* (ICSID Case No ARB/10/3, Award of 4 October 2013), paras. 105-106.

7. This state of affairs where seemingly identical situations are viewed as legitimately governed by different rules of law is grounded in the understanding that States enjoy a broad measure of legal sovereignty, which in turn responds notably to ideas of decentralized self-governance and democracy. In view of their sovereignty, States are naturally reluctant to create international regimes of legal rules from which it is difficult to withdraw, or to abandon to international institutions the power to develop such international rules. International investment law as we know it today eventually took shape not because States were prepared to create a harmonized international legal regime, but largely in spite of their reluctance or inability to do so multilaterally. States opted instead to internationalize and depoliticize dispute resolution without harmonizing the substantive rules. The current arrangements of ISDS through *ad hoc* arbitration are a reflection of that choice: it is the least institutionalized form of adjudication that can achieve the objectives of internationalization and depoliticization.
8. The cost of that choice in favour of State sovereignty is a lesser degree of harmonization in the treatment of foreign investment, an area now populated by thousands of treaties. In that setting, similar treaty provisions may – or may not – give rise to common understandings through the gradual development of legal arguments and reasons in investment cases. Such adjudicative developments are incremental, uneven, and move from the bottom up. In other words, *ad hoc* arbitration, flawed as it may be, is a compromise originally intended by States to achieve internationalized decision-making and depoliticization without having to agree on a multilateral investment code, or having to delegate law-making power to an international body.
9. It is important to stress that there are trade-offs in addressing inconsistencies in the interpretation of investment treaties through institutional reform. The current system of decentralised ISDS tribunals arguably addresses inconsistency in a “bottom-up” way. This has benefits and drawbacks. In terms of benefits, the current system may be said to allow for experimentation, correct solutions tend to bubble to the top over time, and higher quality reasoning is generated in the long term. In terms of drawbacks, the current system’s time lag in achieving consistency may simply be too long and thus too costly for both States and investors.
10. There are also trade-offs with a “top-down” solution through a permanent investment court or appellate body. In terms of benefits, a centralised system can achieve, relatively quickly, a high level of consistency, coherence and predictability beneficial for both public authorities and business. In terms of drawbacks, the concentration of judicial power may run the risk of achieving consistency and coherence at the sacrifice of quality and / or correctness, as well as undermining the sovereign choices made by the States parties to the underlying treaty.

11. In preparing this Concept Paper, the Academic Forum’s Working Group on “Consistency and Coherence in the Interpretation of Legal Issues” has been mindful of the comments of UNCITRAL’s Working Group III, which is charged with considering the possibility of ISDS reform. Working Group III has observed that:

“the mere existence of divergent outcomes [is] not itself a concern, as treaty provisions could be interpreted correctly yet applied differently depending on the facts of the case or the evidence submitted by the parties. Furthermore, the mere fact that similar treaty provisions might be interpreted differently [is] not considered to be a concern, as when relying on the general principles of treaty interpretation, similar treaty language might be appropriately interpreted differently. Inconsistency [is] considered more of a concern where the same investment treaty standard or same rule of customary international law was interpreted differently in the absence of justifiable ground for the distinction.”⁵

12. Working Group III has also noted that:

“there might be instances in which treaty language could appropriately be interpreted differently, the Working Group was invited to focus its deliberations on situations in which divergent interpretations were problematic, i.e. where there were unjustifiable inconsistencies.”⁶

13. The focus of this Concept Paper is on the identification of “unjustifiable inconsistencies” in arbitral decisions and awards, and considering whether any of the various proposals might offer improvements in ISDS adjudication. The proposals for ISDS reform under consideration by the Academic Forum’s Working Groups are:

- a. Scenario 1: Scenario 1 envisages the improvement of the current system of investment arbitration (“IA”), by effecting changes in respect of appointment of arbitrators or other procedural changes (for instance, appointment of arbitrators entrusted predominantly with arbitral institutions or effected jointly by disputing parties; roster-system; adoption of ethical rules; etc) (“**IA Improved**”).
- b. Scenario 2: Scenario 2 would be the current IA system, with the addition of an appellate mechanism (“**IA + Appeal**”).
- c. Scenario 3: Scenario 3 would see the abandonment of the current ISDS regime and its replacement with a multilateral investment court, with or without a built-in appeal mechanism (“**MIC**”).

⁵ Report of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fifth Session (New York, 23-27 April 2018), UN Doc No A/CN.9/935 (14 May 2018), para. 21.

⁶ Report of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fifth Session (New York, 23-27 April 2018), UN Doc No A/CN.9/935 (14 May 2018), para. 25.

- d. Scenario 4: Scenario 4 envisages the abandonment of the current ISDS regime, and its replacement with two sub-scenarios, namely (i) recourse to domestic courts only; and (ii) State-to-State arbitration (“**No ISDS**”).

14. Whether (and the extent to which) these scenarios would contribute to promoting consistency and coherence in ISDS adjudication is considered further below.

B. INSTANCES OF “UNJUSTIFIABLE INCONSISTENCIES”

15. In this Part, a number of instances of problematic inconsistency are discussed (namely, (1) the interpretation of the obligation to provide full protection and security (“**FPS**”); (2) the treaty / contract issue; and (3) the scope of the most-favoured-nation (“**MFN**”) clause.

16. In respect of each of these issues, the following questions are explored: (a) what is the inconsistency?; (b) what is the cause of that inconsistency?; (c) what is the harm being caused by this inconsistency?; and (d) what is the solution for this inconsistency (if one can be identified)?

1. Full Protection and Security

(a) What is the inconsistency?

17. The FPS clause offers the opportunity to address the issue of (in)consistency in the interpretation of international investment treaties. Three cases of inconsistency can be highlighted. The obvious case of ‘inconsistent’ interpretation is the case where two distinct investment tribunals interpret the same provision in the same treaty in two different way. For example, at issue in both *National Grid plc v Argentina* and *BG Group plc v Argentina* was Article 2(2) of the United Kingdom-Argentina BIT:

“Investments of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party.”

18. In both cases, the complainant argued that the emergency legislation adopted by Argentina had altered the regulatory framework applicable to their investment and thus the government “withdrew the protection and security previously granted to the investment”.

19. The two tribunals reached opposite decisions based, crucially, on two distinct interpretations of Article 2(2). The *BG Group plc v Argentina* tribunal rejected the

investor's claim because it found "it inappropriate to depart from the originally understood standard of 'protection and constant security'", which has been associated with situations where the physical security of the investor or its investment is compromised.⁷

20. The *National Grid plc v Argentina* tribunal, on the other hand, accepted the investor's claim because it found "no rationale for limiting the application of a substantive protection of the treaty to a category of assets – physical assets – when it was not restricted in this fashion by the contracting parties." Since the changes in the regulatory framework introduced by Argentina had effectively dismantled such framework, the tribunal concluded that they were "contrary to the protection and constant security" agreed by the respondent under the treaty.⁸
21. In terms of interpretative methodology, neither tribunal seem to pay much attention to the fact that the applicable treaty refers to "protection and constant security" rather than to the more common "full protection and security" expression. However, while the *BG Group plc* tribunal relied on the origin of notions of "protection and constant security" (or "full protection and security") under international law (limiting the scope of the protection to physical security), the *National Grid plc* tribunal relied on (a) the lack of express limitation in the treaty provision to situations involving physical threats or destruction, or to protection and security of physical assets, (b) the inclusion of the clause in the same article as the language on fair and equitable treatment, which is not limited to such physical situations, and (c) the fact that the protection of investments in the treaty is broadly defined to include intangible assets.
22. A second, similarly clear case of inconsistent interpretations is the case of two distinct tribunals interpreting two similarly worded provisions (in different treaties) in two different manners.
23. For example, the tribunal in *CME v Czech Republic* was called to interpret Article 3(2) of the Netherlands-Czech Republic BIT: "each Contracting Party shall accord to such investments full security and protection." In the parallel *Lauder v Czech Republic* arbitration, a second tribunal was called to interpret Article II(2) of the United States-Czech Republic BIT: "[i]nvestment [...] shall enjoy full protection and security".
24. While both *CME* and *Lauder* tribunals seemed to interpret the "full protection and security" obligation to provide protection beyond situations involving physical violence or destruction, they reached two opposite conclusions. Crucially, however, the reason for the opposite findings seem to reside in the different "standard of care" imposed by the two

⁷ *BG Group plc v Argentina* (Award of 24 December 2007), paras. 325-326.

⁸ *National Grid plc v Argentina* (Award of 3 November 2008), paras. 187-189.

tribunals, rather than on a different application of the same interpretation to the facts at hand.

25. According to the *Lauder* tribunal's interpretation, the relevant standard obliges the parties to exercise "due diligence in the protection of foreign investment as reasonable under the circumstances."⁹ Based on its previous findings denying the existence of any "arbitrary and discriminatory measure" by the host government, the *Lauder* tribunal concluded that "none of the facts alleged by the claimant constituted a violation by the respondent of the obligation to provide full protection and security under the treaty".¹⁰ In other words, respondent had exercised due diligence.
26. On the other hand, the *CME* tribunal did not seem to limit the "full protection and security" obligation to a standard of due (i.e., reasonable) diligence, rather the tribunal seems to have imposed an "absolute" (i.e., strict liability) obligation of protection. The tribunal stated as follows:

"The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. This is not the case. The Respondent therefore is in breach of this obligation."¹¹
27. As there is very little in terms of reasoning from both tribunals, it is difficult to appreciate why the apparent difference in the interpretation of a similarly worded provision.
28. A third, more complicated case of (in)consistent interpretation is when tribunals are called to apply the same but differently worded provision in distinct investment treaties. The crucial question here is whether or not such textual difference must lead to a different interpretation.
29. For example, the tribunal in two parallel arbitrations (*Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* and *AWG Group v Argentina*) was called to apply the so-called "full protection and security" provision in three distinct investment treaties (the Spain-Argentina BIT, the France-Argentina BIT, and the UK-Argentina BIT).¹² The tribunal noted first of all that none of the treaties actually contain the "full protection and security" phrase: the Argentina-France BIT promises that investments will be "fully and completely protected and safeguarded"; the Argentina-Spain BIT promises only that the Contracting Parties "shall protect" investments; and the

⁹ *Ronald Lauder v Czech Republic* (UNCITRAL, Final Award of 3 September 2001), para. 308.

¹⁰ *Ronald Lauder v Czech Republic* (UNCITRAL, Final Award of 3 September 2001), paras. 309-10.

¹¹ *CME Czech Republic BV v Czech Republic* (UNCITRAL, Partial Award of 13 September 2001), para. 613.

¹² *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* (ICSID Case No ARB/03/19) and *AWG Group v Argentina* (UNCITRAL) (Decision on Liability of 30 July 2010).

Argentina-United Kingdom BIT promises “protection and constant security.”¹³ Thus, the tribunal identified the following two questions: (a) are these three treaties in effect promising differing levels of protection?; and (b) is the level of protection provided by these three treaties different from that offered by the many treaties employing the terminology “full protection and security”?

30. The *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* and *AWG Group v Argentina* tribunal provides an extensive analysis of past treaty and tribunal practice, which emphasised in particular how investment tribunals had so far differed in whether or not a difference in the text of the treaty justified a different interpretation and thus a different level of protection. The tribunal’s conclusion is as follows:

“179. Having considered the specific language of each of the three applicable BITs and the historical development of the ‘full protection and security’ standard under international law, as well as the recent jurisprudence, this Tribunal is not persuaded that it needs to depart from the traditional interpretation given to this term. Consequently, the Tribunal concludes that under all the applicable BITs, Argentina is obliged to exercise due diligence to protect investors and investments primarily from physical injury, and that in any case Argentina’s obligations under the relevant provisions do not extend to encompass the maintenance of a stable legal and commercial environment.”¹⁴

31. In term of interpretative methodology, the *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* and *AWG Group v Argentina* tribunal seems to rely on several elements to reach its above-mentioned conclusion, including in particular the “context” and the historical origin of the FPS clause. With regard to context, the tribunal limited the scope of the “full protection and security” clause to physical protection as legal protection is something that is guaranteed by the fair and equitable treatment clause.¹⁵ And with regard to the origin of the provision, the tribunal rejected the claimants’ reliance on the broad interpretation made in previous arbitrations (such as *CME* and *Azurix*), highlighting that those awards did not “provide a historical analysis of the concept of full protection and security or give any clear reason as to why it was departing from the historical interpretation traditionally employed by courts and tribunals and expanding that concept to cover non-physical actions and injuries.”¹⁶

¹³ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* (ICSID Case No ARB/03/19) and *AWG Group v Argentina* (UNCITRAL) (Decision on Liability of 30 July 2010), para. 159.

¹⁴ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* (ICSID Case No ARB/03/19) and *AWG Group v Argentina* (UNCITRAL) (Decision on Liability of 30 July 2010), para. 179.

¹⁵ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* (ICSID Case No ARB/03/19) and *AWG Group v Argentina* (UNCITRAL) (Decision on Liability of 30 July 2010), paras. 171-173.

¹⁶ *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* (ICSID Case No ARB/03/19) and *AWG Group v Argentina* (UNCITRAL) (Decision on Liability of 30 July 2010), para. 177.

(b) What is the cause of inconsistency?

32. While the reasoning underlying certain investment tribunals' interpretative choices is not always clear, one key cause of the inconsistency in the interpretation of FPS clauses seems to be tribunals' different views with regard to the relevance of the "protection and security" concept under customary law. While differences in treaty "texts" do not seem to have much mattered in the context of interpreting FPS clauses, differences in appreciating the "context" of FPS clauses seem to have led to different (and at times inconsistent) interpretations. For example, the tribunal in *National Grid* justified a broad interpretation of the FPS clause, inter alia, on the fact that the FPS clause was included in the same treaty provision together with the FET clause, which applied to both physical and non-physical situations. However, the tribunal in *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina* and *AWG Group v Argentina* justified a narrower interpretation of the FPS clause (applicable to physical situations only), inter alia, on the basis that the treaty already afforded "legal protection" via another provision, the FET clause.

(c) What is the harm?

33. In practical terms, there appears to have been little harm linked to the inconsistency in the interpretation of FPS clauses, as the protection "granted" or "denied" by a "broad" or "narrow" interpretation of the FPS clause will in any event be provided in other treaty clauses, in particular the FET clause. We are not aware of a single arbitral decision where a broad interpretation of the FPS clause was the sole ground of a finding of liability. However, in terms of overall legitimacy, "unjustifiable inconsistencies" even with regard to the interpretation of FPS clauses may weaken the investment treaty system as a whole.

(d) What is the solution?

34. Three options may be put forward in this context. First, treaty drafting represents one way to address the inconsistency issue by clarifying the scope of the protection provided by the FPS clause (see for example, the 2004 and 2012 United States model BIT). However, in practical terms, while this may be relatively easy when it comes to "future" treaties, it may be more difficult and certainly time-consuming when it comes to "existing" treaties. A second option may revolve around clarifying the interpretative methodology that (different) investment tribunals follow when called upon to apply investment treaties. In addition to expressly restating the customary rule of treaty interpretation (see Art 3.2 Dispute Settlement Understanding of the WTO; Art 8.31.1 CETA), additional clarity (for example, with regard to the relationship between various investment treaty clauses or between the treaty and customary international law) may contribute to bring about more consistent interpretations. However, specifying the interpretative methodology may be in practice

difficult and in any event subject itself to different interpretations (at least in the absence of a permanent tribunal or appellate mechanism). Third, the establishment of a single (permanent) tribunal or an appellate mechanism should bring about consistency at least with regard to the interpretation of the same FPS clause or identically-worded clauses in different treaties. While such a single tribunal or appellate mechanism may not be able to bring about “absolute” consistency (ie., coherence) in the interpretation of all FPS clauses (given textual and contextual differences in the various applicable treaties), it should be able to adopt a (more) consistent methodology for interpreting whatever applicable investment treaty.

2. The Treaty – Contract Problem

(a) What is the inconsistency?

35. In cases where the investment is, or includes, a contract between the State and the investor, ISDS tribunals have proven highly inconsistent on the relationship between investment treaty norms and contractual terms expressly chosen by the parties.¹⁷ Tribunals have taken widely different positions on whether treaty provisions should take precedence over express contract terms, or whether states and investors are free to contract out of treaty norms (i.e. should treaty norms be understood as *mandatory* rules, or mere *default* rules?). Further, to the extent that some tribunals have considered that contract terms can prevail over contrary treaty norms, they have varied on the question of what is required to make such opt-out effective (i.e. are treaty provisions better understood as highly flexible defaults or *sticky defaults*?).

36. Investment treaties effectively address myriad matters of relevance to contracts between states and investors – matters which the contracting parties frequently bargain over. These range from specific rights and obligations (e.g. stabilization clauses), to damages rules, defences, and forum selection. Often treaties address these matters expressly (as with clauses providing for ISDS). Others matters are addressed only implicitly (e.g. damages rules for breach of treaty, which tend to be drawn from general international law). ISDS has yielded highly inconsistent results not only with respect to the substantive interpretation of these provisions, but for the second-order question of how far States and investors may contract around these treaty terms.

¹⁷ See Julian Arato, “The Private Law Critique of International Investment Law” (2019) 113 *American Journal of International Law* 1, 25–27; Julian Arato, “The Logic of Contract in the World of Investment Treaties” (2016) 58 *William & Mary Law Review* 351; James Crawford, “Treaty and Contract in Investment Treaty Arbitration” (2008) 24 *Arbitration International* 351 (2008); see also Zachary Douglas, *The International Law of Investment Claims* (2009), pp. 17–18.

37. This particular inconsistency in the jurisprudence arises wherever the investment in question is or involves a contract between the State and the investor, and the investment treaty covers such contracts as investments. The inconsistency here is most obvious in a series of umbrella clause cases, involving highly similar facts and parties: *SGS v. Paraguay*,¹⁸ *SGS v. Philippines*,¹⁹ and *BIVAC v. Paraguay*.²⁰ In each case, the investment involved a contract which provided *inter alia* for exclusive dispute resolution in the domestic courts of the host State. In each case, the applicable investment treaty included an umbrella clause, and provided for ISDS.
38. The tribunal's award in *SGS v. Paraguay* reflects the view that treaty provisions are, effectively, mandatory.²¹ The tribunal held the contract and treaty entailed radically separate rights and obligations. Although the investor might have waived the right to vindicate its contractual rights via ISDS (by operation of the contractual exclusive forum selection clause), it cannot be taken to have waived her right to vindicate her treaty rights via ISDS. In other words, on this view the contract triggers certain treaty rights (via the umbrella clause), but those rights remain independent from the contract and cannot be waived or abrogated by the latter.²²
39. By contrast, the tribunals in *SGS v. Philippines* and *BIVAC v. Paraguay* found that treaty and contract could not be neatly separated.²³ They held that the treaty cannot alter the bargain struck between the contracting parties. An exclusive forum selection clause opting to resolve all disputes in local courts is obviously part of that deal, presumably bought and paid for *ex ante*. Each tribunal thus held that breach could only be authoritatively determined by the contractually chosen forum, and thus any umbrella clause claims would be inadmissible prior to an authoritative finding of breach by a local court.
40. Though the problem has received less attention in other contexts, the treaty/contract issue arises even more frequently outside of the umbrella clause cases. Tribunals have resolved the treaty/contract problem in highly inconsistent ways across myriad cases involving claims of expropriation, violations of FET, and so on – not just with respect to forum selection, but also conflicting contractual provisions on damages, and substantive treaty rights. In the absence of any guidance in the underlying treaties, tribunals have approached these matters in three broad ways (more or less explicitly). Some, like *SGS v. Paraguay*, have tended to treat investment treaty norms as effectively *mandatory* – meaning that

¹⁸ *SGS v. Paraguay* (ICSID Case No. ARB/07/29, Decision on Jurisdiction of 12 February 2010).

¹⁹ *SGS v. Philippines* (ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004).

²⁰ *BIVAC v Paraguay* (ICSID Case No. ARB/07/9, Decision on Jurisdiction of 29 May 2009).

²¹ *SGS v. Paraguay* (ICSID Case No. ARB/07/29, Decision on Jurisdiction of 12 February 2010), paras. 131, 138–142.

²² *SGS v. Paraguay* (ICSID Case No. ARB/07/29, Decision on Jurisdiction of 12 February 2010), paras. 177–184.

²³ *SGS v. Philippines* (ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004), para. 128; *BIVAC v. Paraguay* (ICSID Case No. ARB/07/9, Decision on Jurisdiction of 29 May 2009), para. 142.

states and investors cannot opt-out of treaty terms by contract.²⁴ Other tribunals have understood treaty provisions as mere *defaults*, prioritizing the parties' contractual choices over treaty rules with respect to exactly the same questions.²⁵ And still others have viewed them as *sticky defaults* – rules which parties may contract around, but only by meeting some heightened threshold, like a clear statement rule, or use of some special language.²⁶

(b) What are the causes of the inconsistency?

41. Three causes of ISDS inconsistency on the treaty/contract problem stand out. First, on the front end, investment treaties rarely (if ever) address the treaty/contract relationship directly. Investment treaties usually cover at least some kinds of contracts as investments, and in some cases convert breach of certain contracts into treaty breaches (umbrella clauses, and/or provisions on investment contracts). But few, if any, address whether States and investors can contract around substantive or procedural treaty provisions – in other words, whether or not their contractual choices should get precedence over conflicting treaty norms. Secondly, on the back end, the fragmented nature of ISDS exacerbates the problem. Because there is no unified court system to decide, authoritatively, the relationship between treaty and contract in the absence of express treaty language, ISDS tribunals must address

²⁴ On ISDS as a mandatory rule, *Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (“*Vivendi I*”) (ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002), paras. 101–103 (on forum selection). On treaty/international law damages as mandatory, see *Venezuela Holdings v. Venezuela* (ICSID Case No. ARB/07/27, Award of 9 October 2014) (on damages). On substantive treaty standards as mandatory rules, see *Sempra Energy v. Argentine Republic* (ICSID Case No. ARB/02/16, Award of 28 September 2007) para. 310 (applying the stabilization requirements that it interpreted the treaty’s FET provision to mandate, without reference to the contractual provisions on stabilization); *Enron Creditors Recovery Corporation v. Argentine Republic* (ICSID Case No. ARB/01/3, Award of 22 May 2007), paras. 260–261; and *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8, Award of 12 May 2005).

²⁵ On forum selection, see *Oxus Gold v. Uzbekistan* (UNCITRAL, Final Award of 17 December 2015), para. 958(ii) (recognizing contractual waiver of ISDS jurisdiction over counterclaims). On damages, see *Venezuela Holdings v. Venezuela* (ICSID Case No. ARB/07/27, Decision on Annulment of 9 March 2017), paras. 181–84 (2017) (annulling the underlying award for failing to explain why it failed to give effect to apparent contractual caps on damages); *Siag v. Egypt* (ICSID Case No. ARB/05/15, Award of 1 June 2009), paras. 577–84 (giving effect to contractual compensation provisions). On substantive standards, see *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8, Award of 11 September 2007), para. 332 (finding that FET does not impose broad stabilization requirements, but that states and investors are free to ratchet up the level of protection that FET would entail by negotiating for a stabilization clause in the contract); *EDF Services Ltd. v. Romania* (ICSID Case No. ARB/05/13, Award of 8 October 2009), para. 217; and *Philip Morris Brands SARL v. Uruguay* (ICSID Case No. ARB/10/7, Award of 8 July 2016), para. 423.

²⁶ On forum selection, see *Crystallex v. Venezuela* (ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016), para. 481 (considering that states and investors can contract out of ISDS, but that “any such waiver would have to be formulated in clear and specific terms”, and that waiver “is never to be lightly admitted as it requires knowledge and intent of forgoing a right...” Here the tribunal rejected an exclusive forum selection clause which expressly required that all disputes be resolved in Venezuelan court); see also *Aguas del Tunari v. Bolivia* (ICSID Case No. ARB/02/3, Decision on Jurisdiction of 21 October 2005), paras. 119, 122; see also *Occidental v. Ecuador* (ICSID Case No. ARB/06/11, Decision on Jurisdiction of 9 September 2008), paras. 71–74. On damages, see *Kardassopoulos v. Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15, Award of 3 March 2010), paras. 480–81 (viewing the fair market value damages standard as a sticky default, with a strong presumption against opt-out). On contracting around substantive treaty standards, see *MNSS v. Montenegro* (ICSID Case No. ARB(AF)/12/8, Award of 4 May 2016), para. 163 (finding that “investors may waive the rights conferred to them by treaty provided [the] waivers are explicit and freely entered into” In this case the tribunal accepted a contractual waiver that disclaimed substantive BIT and other international legal rights by name, including FET).

this issue anew in near every case where the investment involves a contractual bargain. Thirdly, awareness of this has been comparatively weak. Unlike other inconsistencies at issue in this report, tribunals seem to address the treaty/contract problem only in passing – and often only implicitly – making it difficult for even informal precedent and/or dialogue across tribunals to emerge.

(c) What is the harm?

42. ISDS inconsistency with respect to the relationship between investment treaties and contract-based investments causes several significant harms for host states and investors alike. *Ex ante*, States and investors cannot know the effect of their contractual choices if and when they find themselves in ISDS down the line – whether and under what circumstances their directly bargained-for terms will prevail over the overarching treaty, or *vice versa*. Such uncertainty, if fully appreciated by all parties to a prospective contract, should lead to inefficient and costly drafting, with inefficient effects on price – and even, potentially, the parties’ willingness to contract. If unappreciated, such uncertainty is likely to lead to unfair surprise at the back end, most likely accruing to the detriment of host States.²⁷

(d) What is the solution?

43. Solutions are available on both the front and back end. The cleanest solution is for States to clarify the treaty/contract question in the underlying investment treaty, by providing: whether states and investors are free to contract around all or some of its terms, what language would be necessary to make opt-out effective.²⁸ On the back end, systemic reforms to ISDS could also remove the inconsistency in the treaty/contract relationship, as well as much of the uncertainty produced thereby. Even if left unaddressed by states in the underlying treaties, the pronouncements of a single authoritative judicial voice would, presumably, lead to a more stable jurisprudence on the treaty/contract relationship, allowing States and investors to plan more efficiently *ex ante*. Moreover, these two types of reform would be mutually reinforcing.

²⁷ For a more fulsome treatment of the harms posed by this form of second-order inconsistency, see Julian Arato, “The Private Law Critique of International Investment Law” (2019) 113 *American Journal of International Law* 1, 25–27; and Julian Arato, “The Logic of Contract in the World of Investment Treaties” (2016) 58 *William & Mary Law Review* 351.

²⁸ See, *mutatis mutandis*, CISG Art. 6, which succinctly provides that most provisions of the CISG are mere defaults, which private parties are free to contract around even where the treaty applies.

3. Most-Favoured-Nation Treatment

(a) *What is the inconsistency?*

44. Inconsistency in the interpretation and application of the MFN provision has been specifically identified by Working Group III as an example of an “unjustified inconsistency”.²⁹ The MFN clause in IIAs generally requires that investors from that State receive treatment “no less favourable” than the treatment enjoyed by investors from other States.³⁰ In some IIAs – particularly in investment chapters of FTAs – the obligation is to accord treatment which is “no less favourable” to investors from other States who are “in like circumstances”.³¹ This means that an investor may be able to rely on the MFN provision in its “basic” IIA to obtain more beneficial treatment which the host State may have agreed to grant investors from a third State, in a different IIA.
45. It appears to be widely accepted by arbitral tribunals that investors are able to make use of MFN provisions in order to import more favourable substantive rights from IIAs with third States into their own BIT, so long as the necessary conditions for invoking the MFN provision are met.³² Thus, in *Bayindir v Pakistan*, a claim brought under the Turkey – Pakistan BIT, the ICSID tribunal held that an MFN clause permitted the invocation of a FET clause in another BIT. The Turkey – Pakistan BIT did not contain an FET provision, but it included an MFN provision, which the claimant relied on to import an FET provision from other BITs which Pakistan had concluded.³³ The ICSID tribunal upheld *Bayindir*’s right to rely on the FET provisions in those other BITs, although it ultimately focused on considering whether Pakistan had breached the FET obligation it owed under the Pakistan – Switzerland BIT.³⁴ Other tribunals have also decided that a claimant is able to rely on an MFN provision to invoke the substantive protection available under another IIA.³⁵

²⁹ *Report of UNCITRAL’s Working Group III (Investor-State Dispute Settlement) on the Work of its Thirty-Fifth Session (New York, 23-27 April 2018)*, UN Doc No A/CN.9/935 (14 May 2018), para. 31.

³⁰ See, e.g., August Reinisch, “Most Favoured Nation Treatment”, in Marc Bungenberg, Jorn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (2015), p. 807; Andreas Ziegler, “Most-Favoured-Nation (MFN) Treatment”, in August Reinisch (ed), *Standards of Investment Protection* (2008), p. 59; Pia Acconci, “Most-Favoured Nation Treatment and International Law on Foreign Investment”, in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), p. 363.

³¹ E.g., NAFTA, Art 1103(1).

³² In this regard, see especially *Ickale Insaat v Turkmenistan* (ICSID Case No ARB/10/24, Award of 8 March 2016), para. 329.

³³ *Bayindir v Pakistan* (ICSID Case No ARB/03/29, Decision on Jurisdiction of 14 November 2005), paras. 231-232; see also *Bayindir v Pakistan* (ICSID Case No ARB/03/29, Award of 27 August 2009), paras. 163-167.

³⁴ *Bayindir v Pakistan* (ICSID Case No ARB/03/29, Award of 27 August 2009), para. 167.

³⁵ See, e.g., *CC/Devas (Mauritius) Ltd v India* (Award of 25 July 2016), para. 496; *Arif v Moldova* (ICSID Case no ARB/11/23, Award of 8 April 2013), para. 396; *EDF International SA v Argentine Republic* (ICSID Case No ARB/03/23, Award of 11 June 2012), paras. 930-937; *White Industries v India* (Final Award of 30 November 2011), paras. 11.2.1–11.2.9; and *Rumeli Telekom v Kazakhstan* (ICSID Case No ARB/05/16, Award of 29 July 2008), paras. 581, 591.

46. The principal area of inconsistency concerns whether the MFN clause extends to enable the investor to import more favourable procedural protections from other IIAs, such as the investor-State arbitration provision. More specific sub-questions can be identified, including (i) whether an MFN provision can be relied on to modify or override conditions on access to ISDS which are contained in the basic treaty; (ii) whether an MFN provision can be relied on to enlarge or expand the tribunal's jurisdiction; and (iii) whether an MFN provision can be relied on to invoke consent to ISDS procedures which would otherwise not exist.
47. There are decisions and awards which favour permitting the MFN clause to modify or override conditions on access to ISDS, and to expand the tribunal's jurisdiction (such as *Maffezini v Spain*,³⁶ *Siemens v Argentine Republic*,³⁷ *RosInvestCo UK v Russian Federation*,³⁸ and *Teinver SA v Argentine Republic*),³⁹ and there are decisions and awards which do not permit the MFN clause to be used in this way (such as *Salini v Jordan*,⁴⁰ *Plama v Bulgaria*,⁴¹ and *Daimler AG v Argentine Republic*.)⁴² Such inconsistent decisions are extremely difficult, if not impossible, to reconcile.

(b) What are the causes of the inconsistency?

48. The causes of the inconsistency are essentially twofold. First, MFN provisions in different IIAs are drafted in different terms; some of them are expressed in broad terms as applying to "all matters subject to this Agreement" (such as Article 4(2) of the Spain – Argentina BIT, which was at issue in *Maffezini v Spain*),⁴³ and others are expressed as applying to "treatment" (such as Article 3(1) of the Bulgaria – Cyprus BIT, which was the relevant provision in *Plama Consortium v Bulgaria*),⁴⁴ and some are expressed as applying to a specifically identified standard of treatment (such as Article 3(2) of the Mongolia-Russia BIT, which was considered in *Paushok v Mongolia*).⁴⁵ Secondly, some tribunals have adopted an approach to treaty interpretation which favours the extension of rights to investors, such as the finding of the *Maffezini* tribunal that the ISDS provision was *ejusdem generis* with the FET and MFN provision.⁴⁶ Thirdly, and relatedly, some tribunals have

³⁶ *Maffezini v Spain* (ICSID Case No 97/7, Decision on Jurisdiction of 25 January 2000).

³⁷ *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8, Decision on Jurisdiction of 3 August 2004).

³⁸ *RosInvestCo UK Ltd v Russian Federation* (Award on Jurisdiction of 5 October 2007), paras. 124-139.

³⁹ *Teinver SA v Argentine Republic* (ICSID Case No ARB/11/20, Decision on Jurisdiction of 3 July 2013), para. 186.

⁴⁰ *Salini Costruttori SpA and Italstrade SpA v Jordan* (ICSID Case No ARB/02/13, Decision on Jurisdiction of 29 November 2004).

⁴¹ *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005).

⁴² *Daimler AG v Argentine Republic* (ICSID Case No ARB/05/1, Award of 22 August 2012), para. 281.

⁴³ *Maffezini v Spain* (ICSID Case No 97/7, Decision on Jurisdiction of 25 January 2000).

⁴⁴ *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005).

⁴⁵ *Paushok v Mongolia* (Award on Jurisdiction and Liability of 28 April 2011).

⁴⁶ *Maffezini v Spain* (ICSID Case No 97/7, Decision on Jurisdiction of 25 January 2000), para. 56.

applied a presumption that the MFN clause applies to the ISDS provision unless this is expressly excluded,⁴⁷ and other tribunals have adopted the opposite approach.⁴⁸

49. A combination of these factors is for instance evident in the ICSID tribunal's decision in *Maffezini v Spain*. In *Maffezini*, the ICSID tribunal held that the MFN provision in the Argentina – Spain BIT applied to the dispute settlement provisions in that BIT, thus permitting the Argentine claimant to rely on the more favourable dispute settlement provision in the Spain – Chile BIT. The MFN clause (Article 4(2), which was preceded by an FET clause in Article 4(1)) provided that:

“In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.”⁴⁹

50. Article 4(2) thus required the States Parties to the BIT to provide FET on an MFN basis to “all matters” regulated by the BIT. This different language was noted by other tribunals, with the ICSID tribunal in *Salini v Jordan* finding that the absence of this language in Article 3 of the Italy – Jordan BIT supported a narrower interpretation.⁵⁰

51. The *Maffezini* tribunal also considered that there were “good reasons” to conclude that “dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.”⁵¹ It also considered that ISDS provisions were “essential ... to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded.”⁵² It thus concluded that:

“[I]f a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.”⁵³

52. In contrast, in *Plama Consortium Ltd v Bulgaria*, the basic BIT, between Bulgaria and Cyprus, contained a provision for international arbitration in its dispute settlement clause

⁴⁷ E.g., *Gas Natural v Argentine Republic* (ICSID Case No ARB/03/10, Decision on Jurisdiction of 17 June 2005), para 49.

⁴⁸ E.g., *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005), para. 223.

⁴⁹ Argentina – Spain BIT, Art 4(2).

⁵⁰ *Salini v Jordan* (ICSID Case No ARB/02/13, Decision on Jurisdiction of 9 November 2004), paras. 118-119; see also *ICS Inspection and Control Services Ltd v Argentine Republic* (Award on Jurisdiction of 10 February 2012), paras. 299-302.

⁵¹ *Maffezini v Spain* (ICSID Case No 97/7, Decision on Jurisdiction of 25 January 2000), para. 54.

⁵² *Maffezini v Spain* (ICSID Case No 97/7, Decision on Jurisdiction of 25 January 2000), para. 55.

⁵³ *Maffezini v Spain* (ICSID Case No 97/7, Decision on Jurisdiction of 25 January 2000), para. 56.

which was limited to determining the amount of compensation in a case of expropriation.⁵⁴ The BIT's MFN provision was contained in Article 3(1), which provided that:

“Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third States.”

53. Based on Article 3(1) of the Bulgaria – Cyprus BIT, the claimant sought to invoke ICSID arbitration on a wider range of issues by virtue of the more generous provisions for investor-State arbitration in other BITs to which Bulgarian was a party, including the BIT with Finland. The *Plama* tribunal rejected the claimant's submission, and also rejected the reasoning in *Maffezini*. It observed that all international arbitration had to be based on the agreement of the parties, which had to be “clear and unambiguous”, even where that is reached by incorporation.⁵⁵ The ICSID tribunal held that it was open to States to make it clear that the MFN provision applied to all of the BIT's provisions, as does the UK Model BIT.⁵⁶ The *Plama* tribunal rejected the *Maffezini* approach, and stated that if the approach were adopted which permitted investors to pick and choose dispute settlement clauses based on an MFN provision, this would result in chaos.⁵⁷

54. The approach of the *Plama* tribunal has been followed by multiple other tribunals, including the ICSID tribunal in *H&H Enterprises, Inc v Egypt*.⁵⁸ In this case, the claimant sought to rely on the MFN provision in Article II(2) of the United States – Egypt BIT in order to avoid the operation of the fork-in-the-road provision in Article VII(3)(a). The ICSID tribunal rejected the claimant's attempt to do so, deciding that:

“The Tribunal agrees with the Respondent that the MFN clause contained in the US-Egypt BIT cannot be used to avoid the application of the fork-in-the-road clause contained therein. The Tribunal shares in this respect the view of the tribunal in *Plama v Bulgaria*, which noted that dispute resolution provisions are separable from the remainder of the treaty and ‘constitute an agreement on their own’; accordingly, ‘an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.’”⁵⁹

⁵⁴ *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005).

⁵⁵ *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005), para. 200.

⁵⁶ *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005), para. 204.

⁵⁷ *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005), para. 219.

⁵⁸ *H&H Enterprises, Inc v Egypt* (ICSID Case No ARB/09/15, Award of 6 May 2014).

⁵⁹ *H&H Enterprises, Inc v Egypt* (ICSID Case No ARB/09/15, Award of 6 May 2014), para. 358.

(c) *What is the harm?*

55. As is the case with the other examples of inconsistency noted above, inconsistency with respect to the scope and effect of the MFN provision is harmful for investors and host States. The uncertainty means that States cannot be certain of the extent of the obligations they have entered into under IIAs, given that the MFN provision may be subjected to broad interpretation, and that carefully negotiated conditions for access to ISDS procedures may be circumvented by use of an MFN clause. Likewise, investors may be uncertain regarding the dispute resolution procedures to which they have access, or whether it is necessary to comply with preconditions to ISDS procedures included in the basic treaty under which they seek protection. In addition, there is the more general harm which inconsistency and the lack of coherence in ISDS adjudication causes to the credibility of the ISDS regime (which has also been noted in previous sections).

(d) *What is the solution?*

56. “Front end” solutions to the interpretation of the MFN provision exist in treaty drafting, as is now commonly seen in the case of new IIAs. For instance, Article 8.7.4 of the Canada – EU Comprehensive and Economic Trade Agreement provides that:

“For greater certainty, the ‘treatment’ referred to in paragraph 1 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. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute ‘treatment’, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a party pursuant to those obligations.”

57. As for the possibility of “back end” solutions such as further doctrinal work, or the creation of a permanent investment court or an appellate body, it is difficult to assess whether this would give rise to greater consistency.

58. It appears that further doctrinal work on the scope of the MFN clause may not be fruitful. In this regard, the International Law Commission (“**ILC**”) has studied the MFN clause on two separate occasions,⁶⁰ with the ILC’s recent Study Group (chaired by Professor Don McRae) stating in its “Summary of Conclusions” as follows:

⁶⁰ See, e.g., *Draft Articles on Most-Favoured-Nation Clauses with Commentaries* (1978), in *Yearbook of the International Law Commission* (1978), vol II, pt 2; *Final Report of the Study Group on the Most-Favoured-Nation Clause* (2015), UN Doc A/70/10, pp. 147-191, in *Yearbook of the International Law Commission* (2015), vol II.

“212. MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, they do not provide answers to all the interpretative issues that can arise with MFN clauses. 213. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT. 214. The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. That is, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself. 215. The application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Nonetheless, the matter remains one of treaty interpretation. 216. Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis. 217. The interpretative techniques reviewed by the Study Group in this report are designed to assist in the interpretation and application of MFN provisions.”⁶¹

59. Thus, for the ILC’s Study Group, the scope of the MFN clause is simply a question of treaty interpretation to which there is no “one-size-fits-all” answer.

60. As is apparent from the decisions discussed briefly above, as well as the conclusions of the ILC’s Study Group on the Most-Favoured-Nation Clause, the principal difficulty is that MFN provisions are not expressed in uniform language, and they are contained in differently formulated IIAs, with the result that an authoritative ruling by a permanent court or appellate tribunal may not be applicable to the interpretation of an MFN provision in another IIA. However a permanent investment court or appellate body would contribute to the reduction of unjustifiable inconsistencies in cases where the same MFN clause is at issue, as well as many (although perhaps not all) cases where identically worded MFN clauses are included in different IIAs. It may not however remove the possibility of inconsistent outcomes where differently worded MFN clauses are found in different treaties. However, this latter scenario may be referred to as an instance of ‘justified’ inconsistency or lack of coherence. In any event, the existence of a permanent court or

⁶¹ *Final Report of the Study Group on the Most-Favoured-Nation Clause* (2015), UN Doc A/70/10, paras. 212-217.

appellate body would very likely ensure at least a single (i.e., consistent) interpretative methodology.

C. CONCLUDING REMARKS

61. It is evident from UNCITRAL Working Group III's discussions that there is a need to take a varied approach to instances of inconsistency. Inconsistency may not necessarily be an evil in itself, but there are problems where inconsistencies are "unjustifiable". Further to this, Working Group III has cautioned that "seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity."⁶²
62. The Working Group has been asked to provide a "standardized chart showing whether the concern analyzed is resolved or not (or resolved only subject to certain conditions) in the different scenarios. ... Using a standardized chart will allow putting together the charts for the various concerns, in order to determine which scenarios resolve which concern and determine how many concerns each scenario resolves."
63. As noted above, the various scenarios are as follows:
- a. Scenario 1: Scenario 1 envisages the improvement of the current system of investment arbitration (IA), by effecting changes in respect of appointment of arbitrators or other procedural changes (for instance, appointment of arbitrators entrusted predominantly with arbitral institutions or effected jointly by disputing parties; roster-system; adoption of ethical rules; etc) ("**IA Improved**").
 - b. Scenario 2: Scenario 2 would be the current IA system, with the addition of an appellate mechanism ("**IA + Appeal**").
 - c. Scenario 3: Scenario 3 would see the abandonment of the current ISDS regime and its replacement with a multilateral investment court, with or without a built-in appeal mechanism ("**MIC**").
 - d. Scenario 4: Scenario 4 envisages the abandonment of the current ISDS regime, and its replacement with two sub-scenarios, namely (i) recourse to domestic courts only; and (ii) State-to-State arbitration ("**No ISDS**").

⁶² *Report of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fifth Session (New York, 23-27 April 2018)*, UN Doc No A/CN.9/935 (14 May 2018), para. 26.

64. The Working Group’s tentative conclusions are as follows:

	Scenario 1 (IA Improved)	Scenario 2 (IA + Appeal)	Scenario 3 (MIC)	Scenario 4 (No ISDS)
Unjustifiable inconsistencies	X ⁶³	√√ ⁶⁴	√√ ⁶⁵	X ⁶⁶

⁶³ Scenario 1 (ISDS improved) would not be likely *per se* to lead to a decrease or the elimination of unjustifiable inconsistencies. It may lead to qualitative improvements in the ISDS system, and may have indirect benefits, but it would not directly lead to improvements in the consistency or coherence of decision-making.

⁶⁴ Scenario 2 (ISDS plus the implementation of an appellate system) would likely have benefits for consistency in arbitral decision-making, as any “rogue” or “outlier” decisions could be appealed (depending on the scope of the appellate body’s jurisdiction).

⁶⁵ Scenario 3 (the creation of an MIC) would also have benefits for consistency in arbitral decision-making, as the same body of lawyers would be making decisions on the interpretation of IIA provisions.

⁶⁶ Scenario 4 (No ISDS) would be unlikely to lead to benefits from the perspective of unjustifiable inconsistencies as different national courts, which would not be bound to have regard to the others’ decisions, would be ruling on the correct interpretation of IIA provisions.