Introduction

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

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

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

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

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

I.1 Three Reasons to Investigate Coherence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

process of legal reasoning used by investment tribunals ('bottom-up').[15] The latter, 'bottom-up' outlook does not appear to have been commonly or extensively explored. While some scholars have moved in that direction in the ISDS context, for instance, by correctly pointing out that the question of coherence is also strongly related to the theory of legal reasoning and interpretation,[16] the broader implications of positing such a link have yet to be examined.

I.2 Coherence, from the 'Bottom-up'

Based on the above, the current understanding of the concept of coherence in international law and international investment law seems to be incomplete and monolithic. It is incomplete because coherence is not given an independent meaning from related but distinct concepts such as consistency, correctness, or predictability. This causes terminological confusion as different concepts are used interchangeably.[17] The current understanding of coherence is also monolithic because most inquiries into the subject are done from a 'top-down' perspective that looks, either

[15] The in-principle availability of 'top-down' and 'bottom-up' approaches to addressing coherence is not unique to international investment law and ISDS. For an example coming from the domain of regulatory convergence in international trade law, see R. Polanco and P. Sauvé, 'The Treatment of Regulatory Convergence in Preferential Trade Agreements' (2018) 17 *World Trade Review* 575.

[16] E.g., see G. Zarra, 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?' (2018) 17 *Chinese Journal of International Law* 137, 167; J. Kurtz, 'Building Legitimacy through Interpretation in Investor–State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law', in Z. Douglas, J. Pauwelyn, and J. E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014) 257, 274–280; V. Vadi, 'Towards Arbitral Path Coherence and Judicial Borrowing: Persuasive Precedent in Investment Arbitration' (2008) 5 *Transnational Dispute Management* 1; and generally, Radi (n. 1).

[17] By contrast, as defined and used in this book: (i) coherence relates to the degree to which a set of legal propositions are rationally related to each other and to the ordering values or ordering principles that are thought to justify them (axiological compatibility), thus having a dual dimension that is both substantive and methodological; (ii) consistency relates to the absence of contradictions between a set of legal propositions; (iii) predictability relates to the law's ability to readily supply an answer to each and every question that may be raised presently or in the future; and (iv) correctness relates to the law's ability to supply determinately and demonstrably accurate answers to questions that may be raised presently or in the future. Furthermore, as understood in the book, coherence often incorporates elements of consistency, predictability, and correctness. But there exists no equivalency or logical entailment between coherence and the latter three concepts.

for so-called 'global' coherence between different regimes of international law (e.g., between international investment and international trade law), or for so-called 'local' coherence within a specialised regime of international law (e.g., within international investment law).

It is submitted that the 'top-down' outlook would not be an appropriate direction for the inquiry of this book to take. The principal reason for this is the absence of a single legislative will behind the creation of international law. International treaties and customary international law often come about as a result of conflicting motives and objectives. At times, they may even be the result of spontaneous reactions by states to external events.[18] Further to this, the diversification of international law into a variety of functional regimes makes it unlikely that the same goals, values, or governing principles are shared throughout beyond a minimum core.[19] Similar considerations apply if one elects to look only within international investment law itself. International investment law is heavily fragmented substantively (and to some extent also procedurally), comprising thousands separate, individual treaties. Therefore, one cannot readily assume that all states who have ever signed an investment treaty did so sharing the same *ex ante* understanding about guiding values or governing principles.[20] In short, rather than being imposed from the top or found determinately at a prior moment in time, a common understanding on guiding values and governing principles in international investment law must instead be constructed case by case in the course of the regime's existence and operation.

Consequently, this book adopts the aforementioned 'bottom-up' outlook for its inquiry into coherence. Such an outlook is further warranted considering the important role that arbitrators as decision-makers play in ISDS practice. Because of international investment law's fragmented and diffuse nature, arbitrators have become de facto agents of convergence in the system contributing to its intelligibility and gradual development over time. Given this, the book undertakes a jurisprudential examination

[18] ILC Fragmentation Report (n. 11), 23 (para 34).

[19] Cf. M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 15–19.

[20] As an additional remark, considering the largely piecemeal reaction of states vis-à-vis their expressed concerns about international investment law and ISDS, as well as the current unfavourable climate towards substantive reform in the UNCITRAL Working Group III discussions, one cannot readily assume that states would be willing to enter into a single international instrument covering both the substantive and the procedural aspects of international investment protection either.

of the interplay between coherence and judicial reasoning in ISDS, as opposed to a survey approach exclusively examining investment treaties and relevant arbitral case law in an effort to determine whether these exhibit coherence to some degree.[21] The latter approach is not followed here for the added reason that it seems to put the cart before the horse in this particular context. Focusing solely on surveying investment treaties and arbitral awards for their degree of coherence *inter se* begs the question of what coherence is and what its implications are in a judicial setting. Thus, if one hopes to engage into a reassessment of ISDS with a view to enhancing its coherence, one must first form a full picture of the content of coherence and its implications with respect to legal reasoning by international courts and tribunals. This requires both theorising coherence as a concept and identifying its manifestations in judicial reasoning.

Given the choice of a 'bottom-up' outlook, the core question with which the book grapples is therefore the following:

> How do considerations of coherence manifest in international adjudication and in ISDS in particular?

Answering this question involves the examination of several other lines of inquiry, which may also be formulated as additional sub-questions to be answered. These are:

(1) What is the content of coherence? What is its relation to legal reasoning by international courts and tribunals and what role, or roles, does it play therein?
(2) Is there a role for coherence during legal interpretation by international courts and tribunals, both with respect to the interpretation

[21] Generally, cf. L. Moral Soriano, 'A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice' (2003) 16 *Ratio Juris* 296, 297, who describes this analytical process as follows: '[P]rior to asking whether the rule contained in a decision coheres with the legal system, one should ask whether the reasoning itself coheres.' According to Moral Soriano, scrutinising the coherence of judicial reasoning can still promote overall coherence in the legal system, albeit the way this is done is indirect. In particular, Moral Soriano argues (ibid., 300), overall systemic coherence is still promoted for two reasons: firstly, because an adjudicator cannot proceed to decide a case except by connecting together various parts of the legal system, even though these may not have an immediately apparent relation and, secondly, because in his or her decisions the adjudicator must also connect the norms of the legal system with political, constitutional, and moral theories, thus bringing together reasons that help to justify and support the legal system as a whole.

of international treaties as well as more broadly (e.g., analogical reasoning in ISDS)?

(3) Is there a role for coherence in the justification of decisions in international adjudication? What lessons may be drawn from a jurisprudential examination of coherence with respect to how investment arbitrators as dispute-resolving actors should discharge their duties?

Put differently, the book principally seeks to determine (i) how the concept of coherence manifests in the legal reasoning of international courts and tribunals, with a particular focus on ISDS tribunals (i.e., by way of what kind of methodology or arguments) and (ii) what could a search for coherence mean for the moral and ethical dispositions of arbitrators when deciding investment disputes. Importantly, this is not a purely descriptive inquiry. It has a normative core as it rests on certain presuppositions about the nature of law and the character of legal reasoning. These presuppositions must be made clear and be subjected to argument in the course of the inquiry.

I.3 The Thesis in a Nutshell

The book argues that the concept of coherence has a simultaneous dual dimension. One dimension of coherence is substantive (or ontological), referring to the determinate correctness or accuracy of the object to which coherence attaches. In this dimension, coherence is often seen as an ideal towards which to strive. The other dimension of coherence is methodological (or epistemic), referring to the demonstrable correctness or accuracy of the object to which coherence attaches. In this second dimension, coherence is seen as a process to be followed in order to reach and justify a decision or commit to a course of action vis-à-vis the object of one's inquiry in each case. It is argued that this interplay between substance and method is critical for legal reasoning by international courts and tribunals, including by ISDS tribunals. This is because legal reasoning is practical rather than simply theoretical. Legal reasoning is practical because it (i) seeks to commit one to a particular course of action to resolve a legal problem and (ii) is defeasible, meaning that it can be challenged and set aside not only on grounds of logical invalidity but also on grounds of implausibility and lack of persuasiveness.

Accordingly, on the substantive side, an expectation of coherence in law implies that law cannot be seen as being entirely distinct from moral

considerations. Under the rubric of coherence, elements such as respect for the law's authority and its planning function, on the one hand, meet and become combined with demands that the law leads to morally just outcomes, on the other. Coherence describes the best possible combination of the above elements. This operation is akin to a balancing act and is performed by anyone who reasons about the law. In the context of international investment law, this operation is frequently performed by the arbitrators chosen to hear disputes between investors and states. Further, on the methodological side, coherence implies two key mental processes, namely, framing and contextualisation. Framing identifies the contours of the legal problem to be addressed. It singles out the legal questions to be answered and the goal(s) to be achieved on each occasion. Contextualisation places these issues against a larger normative context that will contribute to their eventual resolution. In ISDS, such context includes the various norms, past practices, and guiding principles found in the legal system, as well as the arbitrator's appreciation of the institutional role that he or she performs within that same system.

Thus understood, coherence is an endemic feature of arbitral decision-making in ISDS, and its manifestations therein are pervasive. Because of this, searching for coherence creates a particular kind of moral responsibility in arbitrators as dispute-resolving actors. Moral responsibility is here understood as encompassing certain desirable judicial dispositions, described in the book as 'virtues' to be practised by investment arbitrators during the performance of their judicial duties.

I.4 Outline of the Book's Chapters

In putting forward the above thesis, the book follows a three-step process of proof. Firstly, it demonstrates that, contrary to conventional wisdom, coherence is not a mere formal concept that is devoid of substantive content but that it has a dual dimension that is at once substantive and methodological. Secondly, it shows that coherence in its dual dimension is necessarily implied in judicial interpretation and argumentation in international law. Thirdly, it delves deeper by pointing out that, in addition to describing the quality of the judicial outcome itself, coherence also describes a general judicial attitude of reflexivity. Reflexivity helps justify judicial outcomes and further paves the way for recognising duties of professional moral responsibility to arbitrators.

The steps of the proof are reflected in the organisation of chapters. The book consists of seven substantive chapters that can be divided

thematically as follows: conceptual foundations (Chapters 1–3), interpretation (Chapters 4–5), and justification (Chapters 6–7).

Chapters 1–3 provide a workable understanding of the concept of coherence and flesh out its relationship with legal reasoning. Questions to be answered in these chapters include: What kind of a concept is coherence? Are there any criteria normally associated with coherence? How strongly must individual elements fit together in a legal setting in order for the whole to be regarded as coherent? What roles does coherence play within legal reasoning?

Chapters 4–5 establish the link between considerations or presumptions of coherence and legal interpretation. Questions to be answered in these chapters include: Is there a connection between coherence and the VCLT rule of interpretation? What does coherence imply for the way ISDS tribunals use analogies?

Chapters 6–7 delve deeper into the relationship between coherence and judicial justification and, in so doing, also offer a synthesis of the book's main arguments and conclusions. Questions to be answered in these chapters include: Does coherence mandate reflexivity by arbitrators and, if yes, does this lead to a particular deliberative technique? What lessons could one draw regarding the professional moral responsibility of arbitrators as dispute-resolving actors?

A Coda then briefly brings the discussion back to ISDS reform and attempts a tentative assessment of the direction taken by the discussions at Working Group III, in light of the book's overall findings. This is followed by an Epilogue.