

'Coherence'

Yannick Radi*

1. Introduction

'Coherence' is one of the fundamental concept used in human sciences, e.g. in ethic,¹ epistemology² and law.³ By the same token, 'coherence' or concepts attached to it, e.g. 'precedent' and 'analogy',⁴ are often referred to and discussed in both international legal theory and international legal practice.⁵ In fact, 'coherence' raises fierce debates among international law scholars and practitioners. On one end of the spectrum, some regard coherence as a pathological desire,⁶ while on the other end, others view coherence as inherent to (international) law.⁷ These debates concern various issues discussed in international legal theory and practice, namely the unity/fragmentation of international legal scholarship,⁸ the unity/fragmentation of international law,⁹ and the content-determination of international law.

* Professor of Public International Law, University of Louvain (UCL).

¹ See e.g. D Horsey, 'A Coherence Theory of Truth in Ethics' (2006) 127 Philosophical Studies 493; J Rawls, *A Theory of Justice* (Revised ed, Harvard University Press 1999).

² See e.g. J Kvanvig, *The Value of Knowledge and the Pursuit of Understanding* (Cambridge University Press 2003); E Olsson, *Against Coherence: Truth, Probability, and Justification* (Oxford University Press 2005).

³ See e.g. R Alexy and Aleksander Peczenik, 'The Concept of Coherence and its Significance for Discourse Rationality' (1990) 3 Ratio Juris 130; S Berteau, 'Does Arguing from Coherence Make Sense?', (2005) 19 Argumentation 433; R Dworkin, 'No Right Answer?' in P Hacker and J Raz (eds), *Law, Morality and Society* (Clarendon Press 1977) 58; K Kress, 'Coherence' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd ed, Wiley-Blackwell 2010) 521; N McCormick, 'Coherence in Legal Justification' in W Krawietz and ao (eds), *Theorie der Normen* (Duncker & Humblot 1984) 37; J Raz, 'The Relevance of Coherence' in J Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994).

⁴ See in this volume the chapters on the concepts of 'precedent' and 'analogy'.

⁵ D Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press 2014), 251.

⁶ S Singh, 'Narrative and Theory: Formalism's Recurrent Return' (2014) 84 British Yearbook of International Law 304, 314.

⁷ Pulkowski (n 5), 251.

⁸ See e.g. G Hernandez, 'The Responsibility of the International Legal Academic – Situating the Grammarian within the 'Invisible College'' in J d'Aspremont ao (eds), *International Law as a Profession* (Cambridge University Press 2016); Singh (n 6), 315-320.

⁹ See International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification of International Law', Doc A/CN.4/L.682.

This chapter is mainly concerned with 'coherence' as it is discussed with respect to the content-determination of international law.¹⁰ More precisely, it focuses on the political struggle and the views expressed in both international legal theory and practice. As it appears in this chapter, these discussions of 'coherence' and the content-determination of international law are closely tied to the issues and concepts of indeterminacy,¹¹ interpretation,¹² and legal reasoning. For this reason, this chapter also addresses these issues and concepts in order to shed light on 'coherence'.

To guide this inquiry into the discussions conducted in international legal theory and practice, this chapter first proposes a brief overview of the fundamental issues debated among legal theorists in relation to 'coherence' and the content-determination of the law; it also summarizes the findings of one of the first philosopher ever to have conceptualized 'coherence': Aristotle (Section 2).¹³ It then introduces and critically analyzes the main arguments put forth by international legal theorists -mainly the opponents- as to the relevance of 'coherence' in the discussion of the content-determination of international law (Section 3). Finally, the chapter discusses coherence from the standpoint of international legal practice; more precisely, it focuses on international investment law which, because of the features and density of its treaty and arbitration practices, provides an insightful case-study (Section 4).

2. A theoretical and philosophical guide to the discussion of 'coherence' and the content-determination of international law

2.1 Insight into legal theory

¹⁰ For a discussion of the unity/fragmentation of international law, see in this volume the chapters on the concepts of 'system' and 'fragmentation'.

¹¹ See in this volume the chapter on the concept of 'indeterminacy'.

¹² See in this volume the chapter on the concept of 'interpretation'.

¹³ See Aristotle, *Topics* (Kessinger Publishing 2010). For commentaries of *Topics*, see GEL Owen (ed), *Aristotle on Dialectic – the Topics*, *Proceedings of the Third Symposium Aristotelicum* (Clarendon Press 1968); WA De Pater, *Les Topiques d'Aristote et la dialectique platonicienne, méthodologie de la définition* (Ed Saint Paul 1965); Y Pelletier, *La dialectique aristotélicienne – Les principes clés des Topiques* (Bellarmine 1991). The introduction to Aristotelian dialectic in this chapter is mainly based on the above-mentioned work of Pelletier.

Legal theorists have provided various accounts of 'coherence', more specifically of 'coherence' in the legal reasoning of judges. In doing so, they have attempted to answer various questions, notably whether coherence matters in judicial reasoning, what constitutes coherence, and whether coherence is a sufficient condition in the judicial reasoning.

There is a large consensus among legal theorists that the concept of 'coherence' 'suits' law and judicial reasoning very well.¹⁴ For some theorists, this is due to the fact that coherence is a *conditio sine qua non* of the principle of legal certainty common to legal systems.¹⁵ In support of the relevance of 'coherence', other authors, notably Raz, argue that judges are not legislators and therefore that they cannot modify the content of the law for the sake of a solution that they regard as more appropriate, which should lead to the adoption of decisions coherent with the settled law.¹⁶ For Dworkin, the importance of 'coherence' is linked to the role that he assigns to law as a justification for the exercise of state coercion. In his view, law must be interpreted as coherent, i.e. as the voice of a community of principles, because this coherence is best capable of providing a general justification for the exercise of state coercion.¹⁷ For other authors, 'coherence' is a matter of professionally responsible hermeneutics; in Balkin's words: 'If we do not assume that the legal norms we are trying to understand are coherent, we will have no way of determining whether our conclusions are due to a failure of our own understanding... An interpretation of how doctrine should be applied will be suspect if it makes the regulatory scheme seem more arbitrary or incoherent'.¹⁸

¹⁴ See J Dickson, 'Interpretation and Coherence in Legal Reasoning' Stanford Encyclopedia of Philosophy (2010) available at <http://plato.stanford.edu/entries/legal-reas-interpret/>.

¹⁵ S Murenzi, 'La cohérence dans le raisonnement des juges européens' in S Besson and A Ziegler (eds), *Le juge en droit européen et international / The Judge in European and International Law* (LGDJ / Schulthess 2013) 173, 173.

¹⁶ See Raz (n 3).

¹⁷ See R Dworkin, *Law's Empire* (1988 Harvard University Press).

¹⁸ J Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105, 151, quoted in Pulkowski (n 5).

Numerous conceptualizations of 'coherence', notably the one of MacCormick,¹⁹ have a similar common denominator as to what constitutes coherence. This denominator is well encapsulated in this definition provided by Kress: 'An idea or theory is coherent if it hangs or fits together, if its parts are mutually supportive, if it is intelligible, if it flows from or expresses a single unified viewpoint'.²⁰ In this respect, it has been noticed in the literature that such definitions leave the question of what exactly constitutes 'coherence' partly unanswered.²¹ For this reason, some authors add to this 'normative' understanding of 'coherence', a 'methodological' account of this concept. Indeed, they conceive of 'coherence' as a method of reasoning. For instance, Alexy and Peczenik set out ten criteria deemed to allow the evaluation of coherence.²² In a similar way, Thagard proposes a constraint satisfaction approach to 'coherence', the aim of which being to 'turn a set of elements into as coherent a whole as possible by taking into account the coherence and incoherence relations that hold between pairs of elements of this set'.²³ Such methodological approaches raise another issue, that they share with their 'normative' counterparts, namely the fact that they can lead to a set of possible decisions all coherent with the settled law.

In such situations, some theorists argue that coherence is insufficient and that other criteria are called upon to play a role in the determination of the content of the law. For instance, Alexy and Peczenik acknowledge that the subjectivity of the judge comes into play.²⁴ By the same token, MacCormick gives a role to consequentialist arguments.²⁵ Others argue that a theory of 'coherence' must be complemented with a theory of epistemic responsibility, based on a deontic approach conceived in terms of duty-fulfillment, or on an aretaic approach

¹⁹ See MacCormick (n 3).

²⁰ Kress (n 3), 521.

²¹ See Dickson (n 14).

²² See Alexy and Peczenik (n 3).

²³ P Thagard, *Coherence in Thought and Action* (MIT Press 2000), discussed in A Amaya, 'Ten Theses on Coherence in Law' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064295.

²⁴ See Alexy and Peczenik (n 3).

²⁵ See MacCormick (n 3).

focusing on the exercise of a number of intellectual virtues.²⁶ On the other hand, Dworkin's account of integrity in adjudication is often viewed as a form of 'coherence' allowing judges to identify a unique interpretation of the law.²⁷

2.2 Insight into Aristotelian philosophy

Among lawyers, Aristotle is frequently viewed as the 'founding-father' of jus naturalism. If this opinion is the product of an erroneous understanding²⁸ of the Aristotelian philosophy of law,²⁹ it is more fundamentally the result of the misunderstanding of Aristotelian metaphysics.³⁰ Contrary to Plato, Aristotle believes that human beings are deprived of any certainties and that they are forced to live in contingency. In such an understanding of human condition, truth and unity are replaced with plausibility and coherence. In that context, as for 'practical issues', analytic logic, i.e. the logic which is used for demonstrations in physics and mathematics, is inoperative. Indeed, human beings cannot base their reasoning on unchangeable certainties and therefore pretend to reach sure conclusions. On the contrary, Aristotle puts forth that to tackle practical issues, they can only rely on opinions to try to reach plausible conclusions, the plausibility of which is assessed in light of their coherence with the body of existing opinions. For Aristotle, coherence is therefore the milestone that guides human beings to determine the solutions to practical issues in a context characterized by contingency.

This is precisely the virtue of dialectic to reach coherence. Dialectic logic, as described and conceptualized by Aristotle, animates both the activity of reason and dialogue. However, he argues that dialogue is the most suitable 'space' for the development of the dialectic activity. This dialogue between two or more

²⁶ See Amaya (n 23), 11-12.

²⁷ See Dworkin (n 17). For a discussion as to whether Dworkin adjudicative theory constitutes an example of coherence, see Dickson (n 14).

²⁸ In that sense, see J Lenoble and F Ost, *Droit, mythe et raison – Essai sur la dérive mythologique de la rationalité juridique* (Facultés universitaires Saint-Louis 1980), 356.

²⁹ Aristotelian philosophy of law is not compiled in specific books but is rather the product of a cross-reading of Aristotle's works, whose *The Nicomachean Ethics* constitutes the cornerstone. Aristotle, *The Nicomachean Ethics* (Oxford University Press 1998). For an analysis of his philosophy of law, see *ibid*, 354-438; M Villey, *Philosophie du droit – Définitions du droit. Les moyens du droit* (Daloz 2001), 43-71.

³⁰ P Aubenque, *Le problème de l'être chez Aristote* (Presses universitaires de France 2009), 401-02.

persons aims, through the exchange of arguments, at reaching a conclusion which is plausible, i.e. coherent with the body of existing opinions. On the basis of this dialectic *ethos*, Aristotle distinguishes dialectic from sophistic and niggling which respectively pursue the appearance of wisdom and victory. Beyond these teleological differences, Aristotle is aware of the fact that pure dialectic dialogues are rare and that the intention of the participants to the dialogic activity may not be the plausibility and the coherence of the conclusion, but rather the appearance of wisdom and victory.

Equipped with these philosophical and theoretical 'tools', we can now turn to the discussion of 'coherence' from the standpoint of international legal theory.

3. 'Coherence' and the content-determination of international law in international legal theory

The concept of 'coherence' is in vogue in international legal theory, be it to be promoted or criticized. As to the content-determination of international law on which this chapter focuses, the proponents of the relevance of 'coherence' put forth arguments similar to those of legal theorists mentioned above, notably the fact that coherence is necessary and that 'without some degree of coherence, law is scarcely conceivable'.³¹ The opponents to this concept, notably critical legal scholars, criticize this concept mainly on the basis of arguments relating to the inner features of law and legal reasoning. This is well-illustrated by this opinion expressed by Koskenniemi: 'Law is an interpretative craft. But it [mainstream Anglo-American jurisprudence] underestimates the open-endedness of the interpretations and mistakes 'coherence' as the point of legal activity ... Law is an argumentative practice that operates in institutional contexts characterized by adversity. Its point is to persuade but also to 'win' against polemical adversaries ... From this perspective, law is not a supporter of social consensus but a participant in its conflicts, giving form to social adversity in order to support some values against others, to affirm or contest prevailing distributionary

³¹ Pulkowski (n 5), 251.

structures.³² Two points which are crucial for the discussion of 'coherence' from the standpoint of international legal theory deserve attention here: the open-endedness of interpretations (Section 3.1), and the view expressed that international law constitutes a sort of 'battlefield' (Section 3.2).

3.1 The open-endedness of interpretation

The argument of the open-endedness of interpretations that is used to argue the irrelevance of 'coherence' relates to the (alleged) features of international law rules, notably the fact that they would be irreducibly indeterminate. This view on international law's indeterminacy, although it is not always so radical, is shared by an increasing number of scholars.³³

While the indeterminacy of international law is undoubted, the radical indeterminacy thesis can be contested at both the factual and the disciplinary levels. As to the former, this is a matter of real life that international courts and tribunals manage to interpret the law; for that reason, this would be up to the proponents of the thesis of the radical indeterminacy of the law to prove -what they actually never do- that this indeterminacy makes interpretation irreducible.³⁴ In fact, international law and its rules have (at least) a core meaning for lawyers. In a similar vein, international law does not operate in the world of absolutes; recourse is made to a certain number of criteria which emerge from practice,³⁵ and as put by Rorty 'a criterion is a criterion because some particular social practice needs to block the road of inquiry, halt the regress of interpretation, in order to get something done'.³⁶ This brings us to the

³² M Koskenniemi, 'Law, Teology and International Relations: An Essay in Counterdisciplinarity' (2011) 26 *International Relations* 3, 19-20. For a similar critique referred to by Koskenniemi, see D Kennedy 'The Turn to Interpretation' (1985) 58 *Southern California Law Review* 251.

³³ See e.g. G I Hernandez, 'Interpretive Authority and the International Judiciary' in A Bianchi (ed), *Interpretation in International Law* (Oxford University Press 2015) 167, 167.

³⁴ A Bianchi, 'Textual interpretation and (international) law reading: the myth of (in)determinacy and the genealogy of meaning' in PHF Bekker (ed), *Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts* (Cambridge University Press 2010) 34, 50

³⁵ *ibid.* For the view that the law-applying authorities are not really using the same criteria, especially with respect to law-ascertainment, and that they do not really have the sense that they belong to the same linguistic community, see J d'Aspremont, *Formalism and the Sources of International Law – A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011), 213.

³⁶ R Rorty, *Consequences of Pragmatism (Essays : 1972-1980)* (University of Minnesota Press 1986), xii, quoted in Bianchi (n 34), 49.

disciplinary answer to the proponents of the radical indeterminacy thesis. Their argument seems to be valid from an external point of view; but it is not from inside the box of international law. Indeed, from this internal point of view, if lawyers were to accept the infinite regress of interpretation and the radical indeterminacy of the law, this would mean that law would lose its disciplinary core,³⁷ and in the end its '*raison d'être*'. This would be a disciplinary '*hérésie*' and also a practical non-sense as it would run counter the real life of courts and tribunal as well as societal expectations.

As to 'coherence', all this entails that it is a relevant concept in the discussion of the content-determination of international law; this also means that there exists a legal basis that can constitute the point of reference for coherence. The fact that this legal basis is partly indeterminate, i.e the fact that there is contingency in the law, does not constitute an obstacle. As said by Bianchi, '[t]o take contingency to mean that another interpretation or another argument can always be found does not necessarily jeopardise the coherence of law'.³⁸ But more fundamentally, indeterminacy and contingency are not incompatible with the concept of 'coherence'. Indeed, since Aristotle coherence can be conceived of as an objective to be reached and a milestone in a context precisely characterized by indeterminacy and contingency. To put it differently, indeterminacy and contingency constitute the realm of 'coherence'.

3.2 International law as a battlefield

For Koskeniemi, the fact that law gives form to social adversity in order to support some values against others disqualify 'coherence'. If one conceives of international law as a set of rules, one can agree that it is made and applied in contexts of adversity and that they constitute the output of balancings of competing interests.³⁹ This is all the more true as this applies also to domestic

³⁷ D Jacobs, 'Sitting on the Wall, Looking in: Some Reflections on the Critique of International Criminal Law' (2015) 28 Leiden Journal of International Law 1, 9.

³⁸ Bianchi (n 34), 50.

³⁹ See Y Radi, *La standardisation et le droit international – Contours d'une théorie dialectique de la formation du droit* (Bruylant 2013), 140-41.

legal systems.⁴⁰ That being said, there is no necessary antinomy between such an approach to international law rules and international law and the concept of 'coherence'. Indeed, 'coherence does not commit us to ignoring the law's complexity or to espousing an unrealistic ideal of a tensionless legal order'.⁴¹ On the contrary and in a way similar to the relation between 'coherence' and indeterminacy, the concept of 'coherence' only makes sense in a sphere characterized and triggered by conflicting interests; conflicts constitute the background where coherence is at work. As to whether coherence is an objective and a milestone in such conflictual contexts is then a matter of standpoints and professional capacity, which brings us to the discussion of international law as an adversarial practice.

As above-mentioned, Koskeniemi argues that law is an argumentative practice that operates in institutional contexts characterized by adversity, its point being to persuade but also to 'win' against polemical adversaries. One concurs that law is an argumentative practice that operates in such a context characterized by adversity; on the other hand, it is an over-generalization to state that law boils down to persuasion, victory and polemical adversaries. Indeed, such a viewpoint annihilates what is, in our view, specific to each international law profession, especially the profession of counsel/lawyer on the one hand and judge/arbitrator on the other.⁴² As to the former, they aim indeed at persuading and convincing without paying attention to other objectives. Their function is to perplex the adversary and win the argument.⁴³ Their argumentative practice is close to sophistic and niggling as defined in Section 2. On the other hand, the argumentative practice of adjudicators is closer to dialectic, the aim of which being, as explained above, to reach an interpretation which is as coherent as

⁴⁰ See M Waibel, *Demystifying the Art of Interpretation* (2011) 22 *European Journal of International Law* 571, 573.

⁴¹ S Berteau, 'The argument from coherence' in *IVR Encyclopedia of Jurisprudence, Legal Theory and Philosophy of Law* available at <http://ivr-enc.info>, quoted in Pulkowski (n 5), 255.

⁴² On the professions of international law, see J d'Aspremont and S Singh (eds), *International Law as a Profession* (Cambridge University Press 2016).

⁴³ I Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' in A Bianchi and S Singh (eds), *Interpretation in International Law* (Oxford University Press 2015) 61, 64.

possible with the settled law.⁴⁴ Even if the idea that coherence is an objective inherent to the exercise of the judicial function is to be denied, it remains that the dialectic that characterizes judicial reasoning -and that some characterize as a consistent legal reasoning-⁴⁵ brings indirectly coherence to the settled law. For all these reasons, 'coherence' is in our view a relevant concept to make sense of the content-determination of international law. The relevance and importance of coherence also appear from the standpoint of international legal practice.

4. Coherence and the content-determination of international law in international legal practice

From the point of view of international legal practice, the question whether coherence should play a role to determine the content of international law is discussed in general public international law and in a number of specific issue areas, e.g. international criminal law,⁴⁶ international human rights law,⁴⁷ and most notably in international investment law (IIL). This is due to a series of features introduced below which makes this field an insightful case-study for the purpose of this chapter. At the core of this debate as to whether coherence should play a role in the content-determination of investment treaty standards, there are three fundamental issues: the legal certainty of the actors involved in IIL as well as the nature of arbitration reasoning and, beyond, of the arbitration function (Section 4.2). Before entering into this, it is first needed to briefly introduce the features of the regime that are relevant in the discussion of coherence and the content-determination of international investment law (Section 4.1).

4.1 Contextualization of the debate about coherence and the content-determination of international investment law.

⁴⁴ In that sense, it has been noted in the literature that international judges 'seem to be generally heedful of the need to achieve the overall consistencies of international law rules', d'Aspremont (n 37), 213.

⁴⁵ See e.g. (n 23).

⁴⁶ See e.g. L S Sunga, *The Emerging System of International Criminal Law – Developments in Codification and Implementation* (Kluwer Law International 1997).

⁴⁷ See e.g. L R Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 *Cornell International Law Journal* 133.

Three main features play a role in this debate. The main one relates to the indeterminacy that characterizes various provisions of most international investment agreements (IIA), notably the indirect expropriation and the fair and equitable treatment standards.⁴⁸ This is well illustrated by the bilateral investment treaty (BIT) concluded between the United Kingdom and Argentina (UK-Argentina BIT). Its provision on expropriation reads as follows: 'Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (...) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompts, adequate and effective compensation.'⁴⁹ This provision states clearly the conditions of legality of expropriation. On the other hand, it is terse with respect to the criteria to be used to determine the occurrence of a measure having an effect equivalent to nationalisation or expropriation (indirect expropriation). As to the fair and equitable treatment standard, article 2.2 of the UK-Argentina BIT provides: '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.'⁵⁰ The indeterminacy of terms like 'fair' and 'equitable' is so manifest that it does not require any explanation.

The second and third features of international investment law impacting on the debate relate to the institutional design of international investment law. As is well-known, this field is characterized by the bilateral nature of its treaty practice and the *ad hoc* nature of its arbitration practice. Indeed, this field is made of a network of -mostly- bilateral investment treaties. So far 2954 BIT have been concluded, 2319 having entered into force.⁵¹ Arbitration practice is also

⁴⁸ As a reaction to the criticisms addressed against this indeterminacy, one witnesses a tendency in the IIA recently concluded to refine and clarify the content of these standards, see e.g. Comprehensive Economic and Trade Agreement concluded between the European Union and Canada.

⁴⁹ Article 5(1), Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (entered into force 19 Feb 1993).

⁵⁰ *ibid.*

⁵¹ See the UNCTAD Investment Policyhub available at <http://investmentpolicyhub.unctad.org/IIA>.

characterized by such a great density. For instance, as of December 31, 2015, the International Centre for Settlement of Investment Disputes had registered 549 cases in total.⁵²

As discussed in the following subsection, the question that has been fiercely debated among IIL experts is whether coherence should guide *ad hoc* arbitration tribunals in the determination of the content of BIT standards.

4.2 Coherence and the content-determination of international investment law

As it emerges from the arguments put forward notably in arbitration awards, three issues are at the core of this debate: legal certainty, the nature of arbitration reasoning and the nature of the arbitration function.

Since its inception, one has witnessed a systemization of international investment law.⁵³ As a result, coherence has become an objective to be promoted, not only for scholars, but also and mainly for arbitration tribunals,⁵⁴ with the view to reinforce legal certainty for host states and foreign investors. In line with this approach, a stream of arbitrators argue that arbitration tribunals should be guided by coherence when giving content to investment treaty standards. This is well-illustrated by the award rendered in the *Burlington v Ecuador* case wherein the majority of the Tribunal stated: 'Subject to the specifics of a given treaty and of the circumstances of the case under review, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards establishing certainty in the rule of law'.⁵⁵ In other words,

⁵² See the ICSID Caseload – Statistics (Issue 2016-1) available at [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20\(English\)%20final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf)

⁵³ See i.e. Radi (n 39), 243-43; SW Schill, *The Multilateralization of International Investment Law*, Cambridge (Cambridge University Press 2009).

⁵⁴ Contra see e.g. the opinion expressed by the Tribunal in the *Romak* case: '[It is for the legal doctrine as reflected in articles and books, and not for arbitrators in their awards, to set forth, promote or criticize general views regarding trends in, and the desired evolution of, investment law]', *Romak S.A. (Switzerland) v The Republic of Uzbekistan*, Award, 26 November 2009, UNCITRAL, PCA Case No AA280, para 171.

⁵⁵ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), Decision on Liability, 14 December 2012, para 187.

the majority of the Tribunal opined that international investment law should develop in a coherent manner, precisely in order to ensure that States and investors enjoy legal certainty. A similar opinion has been expressed by the *Institut de Droit International*: 'Consistency of solutions in investment arbitration contributes to legal certainty for all actors involved.'⁵⁶ On the other hand, other experts deny any role to coherence to give substance to treaty standards.⁵⁷ They do so, not only because legal certainty appears to them irrelevant in the institutional context described above, but also because they argue that using coherence as a guide in the content-determination of these standards would be incompatible with the nature of arbitration reasoning and, more generally, the nature of the arbitration function.

Such a viewpoint is here again well-illustrated by the *Burlington v Ecuador* award wherein Arbitrator Stern dissented from the majority of the Tribunal when stating that 'she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend'.⁵⁸ Such a viewpoint on how a case should be decided is in our view mistaken. Of course, arbitrators are endorsed with the task to decide by taking into account the specific facts of the case and the law applicable as agreed on by the parties. However, within this frame, arbitrators can and should aim at contributing to the coherent development of international law.⁵⁹ In the same vein as coherence is not incompatible with arbitration reasoning, it is not incompatible either with the nature of the arbitration function. In that sense, we disagree with the Tribunal

⁵⁶ Art 2, Institut de Droit International, 'Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties' Eighteenth Commission, Session of Tokyo (2013).

⁵⁷ This viewpoint is advocated by part of the literature, see e.g. C Kessedjan, 'To Give or Not to Give Precedential Value to Investment Arbitration Awards', in C A Rodgers and R P Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 49; E de Brabandere, 'Arbitral Decisions as a Source of International Investment Law' in E de Brabandere and T Gazzini (eds), *International Investment Law. The Sources of Rights and Obligations* (Martinus Nijhoff Publishers 2012) 245.

⁵⁸ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), Decision on Liability, 14 December 2012, para 187.

⁵⁹ See also, Institut de droit international (n 56): 'The quest for consistency does not require the mechanical application of prior practice without regard to the particular circumstances of the case or the need for the interpretation and development of the law.'

appointed in the *Romak v Ouzbekistan* which stated: 'The Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of "arbitral jurisprudence." The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general⁶⁰.' Here again, of course the primary function of an arbitration tribunal is to settle a dispute. That being said, this function is not by essence incompatible with ensuring the coherent development of international investment law.

There is no technical obstacle to erect coherence as the milestone of the content-determination of international (investment) law.⁶¹ On the other hand and as illustrated by the words used by the arbitrators in the *Burlington v Ecuador* award, i.e. 'duty', the controversy boils down to an issue of deontology. The role to be given to coherence depends to a large extent on one's own conception of the arbitration reasoning and of the arbitration function.

5. Conclusions

As analyzed in this chapter, 'coherence' raises fierce political struggles among international lawyers when it comes to the discussion of the content-determination of the international law. This is due to the fact that this concept leads to enter into fundamental discussions of a theoretical and practical nature. From the standpoint of theory, the discussion focuses on the *ethos* of international law, be it conceived in terms of rules or argumentative practices, as well as the essence of legal reasoning and of the judicial function. From the standpoint of practice, the discussion zeroes in on the *telos* of international law, especially as to whether it can and should secure legal certainty for the members of the international society. Discussions about the *ethos* and *telos* of international

⁶⁰ *Romak S.A. (Switzerland) v The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para 171.

⁶¹ For a detailed discussion of this point which relates to the role of precedent in international investment law, see Y Radi, 'Le précédent en droit international des investissements – Réflexions d'un internationaliste sur les considérations théoriques et les enjeux pratiques d'une discussion passionnée', Proceedings of the French Society of International Law, *Le précédent en droit international* (Pedone 2016).

law have always existed and will continue to exist, and so will those on the concept of 'coherence'.

The contribution of this chapter to these discussions is twofold. First, it argues that the features of international legal rules as well as the nature of judicial reasoning and of the judicial function make 'coherence' a valid concept to think about the content-determination of international law. Furthermore, it puts forth that coherence makes sense in practical terms inasmuch as it matches the interests of the members of the international society towards legal certainty.

Of course, given the complexity and the contingencies that characterize this society and its legal order, coherence is an objective that is difficult to reach. For all that, it does not mean that it is the unrealistic chimera product of a pathological desire;⁶² instead, it is in our view a pragmatic answer to a practical necessity.

⁶² See Singh n 6.