

# Parsing and Managing Inconsistency in ISDS

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# Parsing and Managing Inconsistency in ISDS

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## **Abstract**

Inconsistency in legal interpretation is among the most salient problems in investor-state dispute settlement (ISDS). Some such instances have been particularly glaring, and introducing consistency into ISDS rates high on the agenda of reformers - particularly for several government delegations leading multilateral reform efforts in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. This Article starts from the position that some degree of interpretive inconsistency is endemic to any legal order. Yet systemic inconsistency tends to undermine the basic purposes of the investment treaty regime – namely protecting and promoting foreign direct investment through predictable international legal rules and institutions. With an eye to reform, seek to parse the problem of inconsistency at a more granular level, in order to distinguish between types of norms where a degree of inconsistency is (relatively) manageable and (potentially) tolerable, and those where inconsistency is unacceptable. In this regard, we focus on two key distinctions: between (1) rules and standards, and (2) norms of conduct and structural “rules of the game.” Although inconsistency is always problematic, we suggest that it is in this later category (rules of the game) where inconsistency is most destructive.

**Keywords:** Consistency – Correctness – International Investment Law – Investor-State Dispute Settlement (ISDS) – Multilateral Investment Court – Investment Arbitration Reform

## 1. Introduction

Investor-State Dispute Settlement (“ISDS”) has been bedeviled by inconsistency since coming into regular use. ISDS tribunals frequently treat like questions of interpretation in unlike manner. Identical and similar treaty terms are often interpreted in starkly different ways, producing jurisprudential inconsistency that can be decisive in particular cases. Pervasive inconsistency can produce significant costs for both States and investors, calling into question the efficiency and fairness of ISDS as an adjudicative system. Indeed, the problem of consistency has become a core tenet of the movement to reform investment arbitration – particularly among governments. Yet the value of consistency should not be cast in absolute, or overly generalized, terms. No legal order can (or should) aspire to complete consistency in interpretation. As such, the problem of inconsistency in ISDS needs to be parsed at a more granular level. As with any adjudicative system, the real questions are about where inconsistency in ISDS is more or less tolerable, how it can best be managed, and by whom. This Article thus dives deeper into inconsistency in ISDS, posing these more granular questions with a particular eye to reform.

Interpretive inconsistency in ISDS is among the most salient problems for governments as well as commentators. It is now well understood that the lack of consistency in ISDS is due at least in part to the fragmented nature of the regime. Every ISDS tribunal is constituted *ad hoc* to decide one particular dispute, under one of thousands of (often similarly drafted) investment treaties. As there is no formal doctrine of precedent (*stare decisis*) in public international law, ISDS tribunals are not bound to follow the decisions and awards of other *ad hoc* tribunals. Evidently, the very structure of dispute resolution in the investment treaty regime makes inconsistency and incoherence in interpretation likely.

Concerns about inconsistency loom particularly large on the agenda at the United Nations Commission on International Trade Law (“UNCITRAL”) Working Group III (“WGIII”) – currently the main multilateral forum working on ISDS reform. Meeting in its 36<sup>th</sup> Session in Vienna, WGIII decided to work towards addressing the 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”)).<sup>1</sup> In the view of WGIII, the most glaring cases of unjustifiable inconsistency are cases “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.”<sup>2</sup> Other apparent inconsistencies

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<sup>1</sup> See, e.g., United Nations Commission on International Trade Law (“UNCITRAL”), ‘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 (6 November 2018) para 22. (noting as a concern ripe for reform the “lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals ...”).

<sup>2</sup> UNCITRAL, ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth sesión (New York, 23–27 April 2018)’ UN Doc No A/CN.9/935 (14 May 2018) para 21. 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 (12 May 2005) paras 304-394; *LG&E Energy Corp v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) para 226; and *Continental Casualty Corporation v Argentine Republic*, ICSID Case No ARB03/9, Award, (5 September 2008) paras 304-305. See also the inconsistent outcomes in *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001) and UNCITRAL, Final Award (14 March 2003), and *Ronald Lauder v Czech Republic*, UNCITRAL, Final Award (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*).

may be wholly justifiable, where tribunals interpret similar, but materially different treaty texts – or interpret the same treaty in relation to materially different facts. Usually, however, inconsistencies in the case-law fall somewhere between these poles. Indeed, there may be problematic inconsistencies where tribunals make too much of *formal* differences in treaty texts, where different interpretations may nevertheless prove *materially* unjustifiable. Not every difference in drafting across thousands of investment treaties necessarily signals a divergent meaning.

This paper starts from the proposition that inconsistent interpretations of the law are a problem – and a particularly glaring one in the context of ISDS, where unjustifiably inconsistent interpretations of the same or similar treaty provisions are commonplace. At the same time, the law is a living thing. Inconsistency cannot be eradicated in any legal system, nor should it be. Inconsistent decisions can be arbitrary, but inconsistency may also herald course corrections or progressive development of the law.<sup>3</sup> Moreover, in an arbitral setting, consistency with prior cases should not necessarily be pursued doggedly at the expense of making best efforts to interpret the treaty at hand correctly.<sup>4</sup> The most that can be said *generally* is that all inconsistency in interpretation is potentially problematic in any judicial system. The problems with ISDS are the extent to which inconsistency pervades the system, and the types of inconsistent interpretations that have emerged.

This Article seeks to parse inconsistency in the interpretation of investment treaty provisions, with an eye to reform. Inconsistency may be a general problem, but not all instances of inconsistency are equally harmful. For example, we argue that inconsistency in the interpretation of standards may be less problematic than inconsistent interpretations of rules. Similarly, inconsistent interpretations of basic primary obligations (“norms of conduct”) may have fewer deleterious effects than inconsistent interpretations of more structural secondary rules (“rules of the game”). This is particularly so with respect to States and investors’ ability to plan in the making of investments *ex ante*.<sup>5</sup> What makes inconsistency in ISDS particularly troublesome is its range – from basic definitions to substantive obligations to procedural mechanisms. Our hope is that parsing inconsistency in the world of investment treaties will help give reformers a firmer footing from which to start.

Part 2 examines the value of consistency in general, and in ISDS in particular. We suggest that some instances of inconsistency are more immediately problematic than others: in particular with rules more so than with standards; and with structural secondary rules more so than basic primary rules. Part 3 then turns to the jurisprudence on select treaty provisions where inconsistent interpretations of similar provisions have arisen, beginning with two examples of standards of conduct: namely (1) the obligation to provide full protection and security (“FPS”); and (2) the obligation to provide fair and equitable treatment (“FET”). Part 4 then turns to two examples of the “rules of the game,” namely (1) the relationship between investment treaties and contracts; and

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<sup>3</sup> Lon Fuller, *The Morality of Law* (Yale University Press, 1969) (Rev ed) 65-70, 75-81.

<sup>4</sup> See, e.g. Wolfgang Alschner, ‘Ensuring Correctness or Pursuing Consistency? Tracking Policy Priorities in Investment Arbitration Through Large-Scale Citation Analysis,’ in Daniel Behn et al (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2020). Note that while there may well be a tension between consistency and correctness, there is no simple trade-off between the two. Correctness is a troublesome concept in legal interpretation. Unlike consistency, which is largely an objective question, correctness is largely subjective. Where there is disagreement about what the law “really means,” correctness in interpretation is in the eye of the beholder – a question to be litigated, decided, and potentially disputed again in the future. It is thus not easy to identify where the pursuit of consistency cuts against correctness, or *vice versa*.

<sup>5</sup> Julian Arato, ‘The Private Law Critique of International Investment Law’ (2019) 113 AJIL 1

(2) the scope of the most-favoured-nation (“MFN”) clause. While inconsistent interpretations across all these issues are potentially problematic, we suggest that inconsistency in the former two cases is somewhat unavoidable and comparatively manageable. By contrast, inconsistent interpretations of the treaty/contract issue and the MFN clause tend to produce far greater, and less readily manageable harms for States and investors alike. Part 5 concludes, noting that solutions are available on both the front and back end. On the front end, States can clarify particular norms in their own investment treaties. Though not likely effective (or even practicable) as a way to eradicate inconsistency in ISDS, certain front end reforms would be desirable to target particularly pernicious forms of inconsistency – especially with respect to the rules of the game like the scope of the MFN clause and the treaty/contract relationship. On the back end, systemic reforms to ISDS could also mitigate the problem of inconsistency. In this respect, the pronouncements of a single authoritative judicial voice would likely lead to greater consistency in interpretation across the board – whether a through fully integrated multilateral investment court or a more disaggregated hybrid model tethering ISDS to a central appellate mechanism. There are, however, benefits and drawbacks to such structural reforms. We suggest that, at a minimum, States should keep sight of viable targeted front-end solutions while they consider the various long-term structural options for ISDS reform on the agenda at UNCITRAL (and beyond).

## 2. Consistency as a Value

Consistency is a fundamental value in any legal system, to be fostered and promoted. Its absence, over time, tends to erode trust and faith in the law (legitimacy), and, *in extremis*, the system’s quality as law (legality).<sup>6</sup> It is not, however, an absolute value, but a relative one. No system of law can or should be completely and mechanically consistent.<sup>7</sup> The law must be interpreted and applied by human beings, which necessitates a degree of discretion in adjudicative reasoning. Still, consistency is a crucial ideal – particularly in an area of law designed to promote productive activity by private and public actors.<sup>8</sup> From a dispute resolution perspective (*ex post*), inconsistent application of the law can produce grave injustice for particular parties. From a transactional perspective (*ex ante*), inconsistent interpretations can bedevil future parties’ ability to plan.

In *ex post* terms, the concern with consistency is grounded in the basic precept of natural justice that like cases should be treated alike.<sup>9</sup> An expectation of consistency in adjudicative reasoning is an essential (though not absolute) feature of the rule of law.<sup>10</sup> In ISDS, inconsistent interpretations of legal directives can lead to unfair surprise rulings in particular cases. If sufficiently pervasive, adjudicative inconsistency can render the system arbitrary. Inconsistent

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<sup>6</sup> Fuller (n 3) 3.

<sup>7</sup> In Fullerian terms, beyond a certain minimum degree of consistent interpretation and application, without which law would not properly exist as such, the pursuit of legal consistency is more a matter of the morality of aspiration than the morality of duty. Fuller (n 3) 41, 65-70, 79-81.

<sup>8</sup> Arato (n 5).

<sup>9</sup> See, e.g., in the context of the International Court of Justice, Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Praeger 1958) 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.”

<sup>10</sup> Fuller (n 3) 65-70, 79-81.

interpretations also affect the dispute resolution process, for example by making settlement more difficult (and potentially inefficient), or by increasing the length and costs of arbitral proceedings. Moreover, if left unaddressed (or if deemed unaddressable), glaring instances of inconsistency in interpretation can shake confidence in the investment treaty regime. In international law, where States remain the masters of their treaty obligations and exit remains a very real possibility, such legitimacy problems can have immediate and tangible effects.<sup>11</sup>

Apart from *ex post* questions of justice, legality, and legitimacy, inconsistency also raises significant *ex ante* efficiency concerns. Consistency is of prime concern to States and investors in the making of investments. With it comes predictability, enabling private and public parties to plan their business relationships in the long term. True, sophisticated parties may be able to plan around particular instances of consistency through private ordering, although this will still involve potentially unnecessary transaction costs. But if pervasive enough, systemic inconsistency can stymie even these actors' ability to plan. In the context of ISDS, systemic uncertainty can inefficiently raise the costs of doing business for all concerned, and potentially dampen FDI flows in the long run – precisely the opposite of what investment treaties set out to accomplish.<sup>12</sup>

Few would defend inconsistency in ISDS as such. Here, as in other adjudicative settings, all litigants present their arguments based partly on the (persuasive) authority of previous decisions (precedents) or the authority of patterns of decisions (*jurisprudence constante*). States and investors alike rely not only on past awards rendered under the treaty in question, but also on awards interpreting identical or similar treaty provisions in other investment treaties. If only informally, there appears to be a general expectation that adjudicators will at least consider decisions presented to them as relevantly similar.<sup>13</sup>

And yet the system is riven with inconsistent interpretations of investment treaty provisions – including in cases interpreting the same treaty, identically phrased treaties, and very similar treaty provisions. For governments, in particular, inconsistency in the interpretation of investment treaty standards is high on the reform agenda. Though there is no pretense that inconsistency can (or should) be completely eradicated, there appears to be a growing consensus that the sheer scope of inconsistency in ISDS has to be addressed.

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<sup>11</sup> Laurence Helfer, 'Exiting Treaties' (2005) 91 VaLRev 1579; Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 AJIL 361 31 (discussing withdrawals from ICSID by Bolivia, Ecuador, and Venezuela, and attempts by the latter two to exit numerous BITs). South Africa has also suspended negotiation of new investment treaties. *See, e.g.*, Republic of South Africa, 'Bilateral Investment Treaty Policy Framework Review: Government Position Paper 12' (2009) <<http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf>> accessed 8 January 2020.

<sup>12</sup> Arato (n 5).

<sup>13</sup> *See, for example, Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Award (30 June 2009) para 90 stating:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, 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 certainty of the rule of law.

*See also* Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity, or Excuse?' (2007) 23 ArbIntl 357, 378; Richard Chen, 'Precedent and Dialogue in Investment Treaty Arbitration' (2019) 60 HarvLRev 45; Julian Arato, 'The Margin of Appreciation in International Investment Law' (2014) 54 VaJIntlL 545, 571-572.

Within WGIII, governments have expressed their concerns about inconsistency in terms of justice, efficiency, and the legitimacy of the system. In its Report on its Thirty-Sixth Session (2018), WGIII noted delegations' concerns as follows:

Views were expressed that the lack of consistency, coherence, predictability and correctness of arbitral decisions was a material concern and not only one of perception. It was said that such a lack negatively affected the reliability, effectiveness and predictability of the ISDS regime and its overall credibility and legitimacy. The view was expressed that this would run contrary to fostering foreign direct investment ... It was further mentioned that the lack of consistency could also have financial and political impact on States as they relied on a coherent and predictable framework when developing their investment policies. Further, investors would also be affected when deciding whether to invest in a State and whether to pursue an ISDS claim.<sup>14</sup>

Some of the most transformative proposals for reform under consideration in this forum are directly responsive to the problem of inconsistency, and justified in relation to it – such as the multilateral investment court proposed by the European Union,<sup>15</sup> or a standalone permanent appellate mechanism as recently backed by China.<sup>16</sup>

We seek to dig deeper into the inconsistency problem. It remains to be seen whether, in ISDS, the harms of inconsistency are uniform across the board, or whether they vary across different types of treaty terms. We take as given that sometimes apparently inconsistent interpretations of similarly drafted provisions are *justifiable*, due to other features of the treaty, or the broader applicable legal environment. Arguably, here, there is no inconsistency at all – no treating like cases in unlike manner. We put so-called “justifiable inconsistency” aside. Here, we seek to parse *unjustifiable* inconsistency in the interpretation of the same, identical, or equivalent treaty terms.

The discussion of inconsistent interpretations of investment treaties tends to start with the incongruent (and sometimes incoherent) outcomes. The typical concern is expressed in results-oriented fashion: it is harmful if tribunals (unjustifiably) interpret the same, identical, or equivalent treaty provisions in diametrically opposed fashion. However, in parsing and evaluating inconsistency in ISDS, and find it useful to start with the treaty provisions in question. Focusing on treaty design opens up two important questions: is the expectation of consistency equally strong across different types of treaty terms? And are the harms of inconsistency always the same? In our

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<sup>14</sup> UNCITRAL, ‘Report of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (Vienna, 29 October-2 November 2018)’ UN Doc No A/CN.9/964 (6 November 2018) para 30. The Working Group also noted that Delegations’ concerns “were particularly acute when different ISDS tribunals had reached contradicting conclusions about the same or similar substantive standard or about the same procedural issue...” and all the more so “when the facts were similar or a different outcome could not be justified.” *Id.*, at para. 31.

<sup>15</sup> UNCITRAL, ‘Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States’ UN Doc No A/CN.9/WG.III/WP.159/Add.1 (24 January 2019) (“Predictability and consistency can only be effectively developed through the establishment of a standing mechanism with permanent, full-time adjudicators.”).

<sup>16</sup> UNCITRAL, ‘Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China’ UN Doc No A/CN.9/WG.III/WP.177 (19 July 2019) 4 (characterized the inconsistency problem in ISDS as a rule of law failure, which an appellate body could help resolve).

view, it is helpful to draw two distinctions: between *rules* and *standards*; and between particular *norms of conduct* and more structural *rules of the game*.

#### a) *Rules vs. Standards*

Legal theory has long recognized a distinction between legal directives that are comparatively specific (rules) and those that are comparatively vague (standards).<sup>17</sup> Investment treaties are replete with directives of varying levels of specificity. The conventional idea is that lawmakers employ rules to make key design choices themselves, *ex ante*, and use standards to defer key normative choices to adjudicators *ex post*.<sup>18</sup> This distinction is not without its challenges in general theory,<sup>19</sup> but it proves useful in parsing the expectation of consistency (and the harms of inconsistent interpretations).

The basic idea is that lawmakers (*e.g.* legislators, treaty negotiators, or contract drafters) use precise rules to make the normative choices themselves, and to limit the discretion of future adjudicators (*e.g.* courts, arbitral tribunals). For example, a contract directive providing that “*Buyer undertakes to purchase ten bushels of apples a month for ten years at \$25/bushel*” leaves relatively little room for discretion at the adjudication phase, should a dispute arise.<sup>20</sup> By contrast, lawmakers use vague standards to put off important choices. For example, in a contract directive providing that “*Buyer undertakes to purchase a reasonable number of apples a month for ten years, at \$25/bushel,*” the term “reasonable number” functions as a standard.<sup>21</sup> It is relatively indeterminate as drafted, and, should a dispute arise, it requires an adjudicator to decide what is reasonable under the particular circumstances. Lawmakers employ vague standards for a variety of reasons, *e.g.* because they cannot agree on the details *ex ante*, or because attempting to precisely regulate a complex future relationship would be inefficient. There is no firm line between rules and standards, and they can converge over time.<sup>22</sup> The rules/standards distinction is only a relative one, useful insofar as it can help illuminate the expectations undergirding certain design choices.

Rules and standards relate differently to the value of consistency. As precise directives, rules are useful because they are predictable and can be planned around with relative ease, even if they might not turn out to capture the underlying principle particularly well over time. Here, the value of consistency is high. Inconsistency undermines the advantage of rules with respect to predictability and planning. Conversely, standards trade-off predictability for flexibility. They are

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<sup>17</sup> Frederick Schauer, ‘The Convergence of Rules and Standards’ (2003) NZLRev 303, 306. On the distinction between rules and standards generally, see Larry Alexander and Emily Sherwin, ‘The Deceptive Nature of Rules’ (1994) 142 UPaLRev 1191; Alan Chen, ‘Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules’ (1999) 2 BuffCLR 535; Louis Kaplow, ‘Rules versus Standards: An Economic Analysis’ (1992) 42 DukeLJ 557; Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 HarvLRev 1685; Russel Korobkin, ‘Behavioral Analysis and Legal Form: Rules vs. Standards Revisited’ (2000) 79 OrLRev 23; Pierre Schlag, ‘Rules and Standards’ (1985) 33 UCLALRev 379.

<sup>18</sup> Schauer (n 17) 308.

<sup>19</sup> *Ibid*

<sup>20</sup> As Schauer notes, no rule can be perfectly precise. Schauer (n 17) 308. Even in the above example one can question the meaning of “undertake,” or, perhaps, the quantity envisioned by a “bushel.” Discretion cannot be eliminated. But such a rule is *relatively* precise, leaving *relatively* little room for interpretation.

<sup>21</sup> Just as rules are only relatively precise, standards are only relatively vague. They do not leave judges with total discretion, but only comparatively more than do rules.

<sup>22</sup> Schauer (n 17) 308. For example, where standards are used to regulate complex matters, like product safety or securities regulation, adjudicators may have to develop tests in order to give guidance to future parties.



thus better suited to capturing the underlying principle adaptively over time, through judicial application *ex post*. With standards, the value of consistency is comparatively weak – not negligible, to be sure, but potentially outweighed by other goals – like adaptively maintaining the vitality of a legal directive over time. In other words, for planning purposes, the function of rules is to maximize certainty *ex ante* (which requires relatively consistent application), while the function of standards is to allow for a degree of judicial manoeuvre *ex post* (which might well require inconsistent rulings over time). From the perspective of design, where lawmakers employ rules they have reason to expect adjudicators to operate with a high degree of consistency; but where they employ standards, the expectation of consistency should be (partially) checked.

Short as they are, investment treaties typically entail a wide array of legal directives that vary widely in their precision. Typically, the main substantive obligations are framed as relatively vague standards. The obligations to afford investors FET and FPS are archetypal standards – particularly in first generation treaties where these terms are not fleshed out at all, but even in more recent treaties which develop these provisions somewhat further.<sup>23</sup> Other obligations combine features of rules and standards, like expropriation provisions – where “direct expropriation” is usually regulated through fairly precise rules, but concepts like “indirect expropriation” and “measures tantamount to expropriation” have standard-like qualities.<sup>24</sup> By contrast, procedural provisions relating to ISDS tend to be framed as relatively straightforward and precise (such as fork-in-the-road provisions, waiver clauses, domestic litigation requirements, and statutes of limitations).

As particularly vague standards, the main substantive obligations in investment treaties leave ample discretion to adjudicators to work out their meaning *ex post*. This is a design choice – one which functionally prioritizes flexibility over predictability. There is less reason to expect a high degree of consistency in the interpretation of such standards over time (quite apart from the fragmented nature of ISDS). Indeed, here, a slavish drive toward consistency might be undesirable. But we might think differently about inconsistent interpretations of precise rules relating to direct expropriation or procedural requirements like fork-in-the-road provisions or exhaustion rules.

### *b) Norms of Conduct vs. Rules of the Game*

A second fruitful distinction can be drawn between two kinds of unjustifiable inconsistencies: inconsistent interpretations of basic primary obligations (e.g. direct expropriation, FET, and FPS) and inconsistent interpretations of more structural “rules of the game” (e.g. the treaty / contract relationship, and MFN).<sup>25</sup> The former phenomenon can certainly be problematic. But inconsistent

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<sup>23</sup> E.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) (CPTPP) Art 9.6.

<sup>24</sup> See Federico Ortino ‘Refining the Content and Role of Investment ‘Rules’ and ‘Standards’: A New Approach to International Investment Treaty Making’ (2013) 28 ICSID Review 152.

<sup>25</sup> At first glance, MFN appears to be a basic primary obligation, not unlike FET, FPS, or national treatment. The directive of MFN, at bottom, a horizontal-non-discrimination norm – the State must treat an investor entitled to MFN-advantage at least as well as similarly situated investors from third States. However, in a world of thousands of IIAs with some variation in levels of protection, the scope of MFN-advantage can be extremely broad – potentially sweeping in substantive and procedural legal guarantees in any of the State’s BITs or FTAs with third States. To the extent that it potentially affects all aspects of the legal regime applicable between investor and Host State, we view

interpretations of the rules of the game are harder to tolerate – especially in a regime designed to promote economic activity by private actors.

Inconsistent interpretations of norms of conduct can produce costly uncertainty for all actors. From a private law perspective, treaty rules and standards regulating conduct are background norms to be priced into the making of investments. Inconsistent interpretations of important background norms like FET create uncertainties that can lead to inefficient price effects for both States and investors *ex ante* (if sufficiently appreciated), and can lead to unfair surprise *ex post* (if not). From a national regulatory perspective, inconsistent interpretations of norms of conduct can make it difficult to predict where and when regulation will run afoul of treaty norms, introducing costly uncertainty into the regulatory process. These are real problems, but they should not be overblown. Such inconsistencies are to an extent endemic to any legal system. The life of the law is, everywhere, one of change and development. Moreover, on their own, inconsistent interpretations of particular norms of conduct would be (relatively) manageable – including through treaty drafting, and private ordering.

Inconsistent interpretations of the rules of the game are more problematic, insofar as they create more severe uncertainty and unpredictability in the making of investments and for national regulatory choice. The difference is one of kind, rather than degree. Inconsistency here introduces doubt into a wider range of matters, the full extent of which is itself difficult to predict. For example, given the wide range of terms investment treaties (implicitly) touch upon, inconsistency as to whether States and investors can contract around investment treaty rules casts a pall of doubt over the meaning of any contract covered by an IIA. This makes the basic process of contractual bargaining under the shadow of investment treaties unpredictable and inefficient. Similarly, inconsistency about whether MFN clauses allow importation of substantive or procedural treaty rules from treaties with third States creates far-ranging uncertainty for all parties *ex ante* as to the nature and extent of the applicable law. In both cases, interpretive inconsistency makes it difficult for States and investors to know which bodies of legal rules will control their relationship. All this creates *ex ante* and *ex post* harms similar to, but more extensive than with norms of conduct (including price inefficiencies and regulatory uncertainty *ex ante*, and unfair surprise *ex post*).

Moreover, inconsistency in the rules of the game can make managing inconsistency in relation to norms of conduct more difficult. In a vacuum, States and investors should be able to manage inconsistent interpretations of norms of conduct *ex ante* – at least where the inconsistency is sufficiently serious, or where certainty on a particular issue is of special importance to them. For example, States worried about inconsistent interpretations of primary obligations like FPS and FET can clarify the meaning of such terms through treaty drafting, amendment, and/or joint interpretation (recognizing that this is easier said than done). Governments and investors can also, in theory, manage the uncertainty arising out of such inconsistencies through private agreement, by contracting for what they consider important.<sup>26</sup> But if States and investors cannot be certain

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the *scope* of the MFN clause as more than a basic norm of conduct; in this context, MFN becomes a core structural question implicating the rules of the game.

<sup>26</sup> It is true that most IIA's provide for ISDS irrespective of whether the investor has secured an arbitration clause through its own contract with the State – earning the moniker “arbitration without privity.” Jan Paulsson, ‘Arbitration Without Privity’ (1995) 10 ICSID Review—FILJ 232. Yet in many (if not most) cases the investment still involves one or more contracts. And most investments *could* be structured through contracts, in whole or in part. Even if the investor's right to arbitration is initially sourced in a treaty (arbitration without privity), it is an altogether separate question whether the investor might waive or augment its rights, obligations, and expectations by contract. As explored further below, it turns out that tribunals have reacted highly inconsistently to private attempts at ordering around investment treaties. *See infra*, § IV.a.

about the scope of MFN-advantage, they cannot be certain about whether treaty-based reforms targeting FPS and FET would be effective. Similarly, uncertainty as to the treaty / contract relationship makes private ordering an unreliable mechanism for mitigating interpretive uncertainty, insofar as States and investors cannot know *ex ante* if their attempts to contract around ambiguous treaty provisions (or interpretations) will be given effect.

### 3. Inconsistent Interpretations of Investment Standards

This Part turns to parsing inconsistency in the cases. We examine inconsistency in the interpretation of two basic substantive standards: (a) FPS and (b) FET. Both are basic primary obligations, found in many investment treaties (indeed FET is nearly omnipresent).<sup>27</sup> Both are typically drafted as vague standards, although more recent treaties have attempted to introduce (somewhat) greater specificity. And both types of standards have been interpreted in widely inconsistent ways. It is true that in both cases the exact contours of these provisions vary across treaties – but tribunals have also been highly inconsistent in how far they give such lexical differences effect, and these textual differences do not map on to the general inconsistency in approaches to either FPS or FET.

We find the level of inconsistency in the interpretation of both FPS and FET to be troubling, but somewhat in the nature of such standards and at least potentially manageable. Uncertainty in these basic standards imposes inefficient costs for both States and investors *ex ante* (in planning and transacting), and *ex post* (requiring parties to expend resources relitigating their scope in every case). It can also lead to unfair surprise rulings *ex post*, particularly where the same treaty is interpreted to entail widely different standards in relation to the same factual matrix. All this is less problematic with FPS, where the stakes are comparatively low, but this interpretive uncertainty is costly with FET – as the lynchpin obligation in most investment treaties. Nevertheless, as vague standards, we suggest that some inconsistency in the interpretation of FPS and FET is to be expected – and may even be desirable toward working out the meaning of these concepts over the long term. Moreover, States and investors can control some of the risk of uncertain *ex post* adjudication through private ordering *ex ante*.

#### a) Full Protection and Security

The interpretation of FPS clauses in ISDS provides a good example of fairly glaring inconsistency where the harm has proven relatively minimal. FPS provisions are typically fairly broad standards, imposing a basic primary obligation of vigilance on the state. They typically leave open exactly what kinds of protection and security a state is responsible to provide, and under just what circumstances. Tribunals have varied widely in how broadly they read the standard. Yet, it is unclear how problematic this inconsistency has been. As typically drafted, FPS clauses necessarily delegate to ISDS tribunals the task of determining the standard's contours *ex post*; some variation in approach is to be expected. Further, the stakes are relatively low. FPS rarely proves decisive on its own, and it is difficult to point to a case where inconsistent interpretations of the standard have been dispositive.

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<sup>27</sup> A rare exception can be found in the Turkey – Pakistan BIT, (signed 16 March 1995, entered into force 3 September 1997), which was at issue in *Bayinder v Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009). Turkey and Pakistan have since signed a BIT on 22 May 2012 which does contain the FET obligation, although this has not yet entered into force.

The cases on FPS have proven inconsistent on both the scope of matters covered by the clause, and the required standard of care. As to scope, tribunals have varied on how far to restrict the ambit of security. The tribunals in *BG Group* and *National Grid* arrived at materially opposed interpretations of the same FPS clause (in the United Kingdom—Argentina BIT) in two discrete claims against Argentina. The treaty itself provided, at Article 2(2), only that “Investments of Investors of each Contracting Party ... shall enjoy protection and constant security in the territory of the other Contract Party.”<sup>28</sup> 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.” Thus, both Tribunals had to determine whether this clause covered only the investor’s “physical security,” or whether the clause extended to “economic security.” They came to opposite conclusions – the *BG Group* Tribunal adopting a restrictive interpretation<sup>29</sup> and the *National Grid* Tribunal adopting a more expansive view.<sup>30</sup> The two Tribunals also diverged on the appropriate methodology for interpreting the FPS clause.<sup>31</sup>

Tribunals have also diverged in their interpretations of the standard of care required by FPS. In two well known cases arising out of the same factual matrix, the *Lauder* and *CME* Tribunals had to interpret similar FPS clauses in two different treaties.<sup>32</sup> According to the *Lauder* Tribunal, the FPS standard obliges the parties to exercise “due diligence in the protection of foreign investment as reasonable under the circumstances.”<sup>33</sup> In its view, the respondent had exercised due diligence.<sup>34</sup> By contrast, the *CME* tribunal seems to have interpreted FPS as imposing an “absolute” standard of protection. On its reading: “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.”<sup>35</sup> In its view, the host State failed to meet this standard. Thus, the two Tribunals differed not only in result, but

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<sup>28</sup> United Kingdom—Argentina BIT (signed 11 december 1990, entered into force 19 February 1993) art 2(2).

<sup>29</sup> *BG Group plc v Argentina*, UNCITRAL, Award (24 December 2007) paras 325-326 (finding “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).

<sup>30</sup> *National Grid plc v Argentina*, UNCITRAL, Award (3 November 2008) paras 187-189 (finding “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.” The Tribunal concluded that, since the changes in the regulatory framework introduced by Argentina had effectively dismantled such framework, they were “contrary to the protection and constant security” guaranteed by Argentina under the treaty). 1

<sup>31</sup> The *BG Group* Tribunal relied on the origin of notions of “full protection and security” under international law, which, in its view, militated toward limiting the scope of the protection to physical security. The *National Grid* Tribunal instead emphasized context, relying on: the absence of any express limitation in the treaty provision to situations involving physical threats or destruction, or to protection and security of physical assets; 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 the fact that the broad definition of investments in the treaty extends to intangible assets.

<sup>32</sup> 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”.

<sup>33</sup> *Ronald Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001) para 308.

<sup>34</sup> *Ibid* paras 309-10 (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”).

<sup>35</sup> *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001) para 613.

as to whether FPS imposed an obligation of mere due diligence (*Lauder*) or something approaching strict liability (*CME*).

These inconsistencies point to troubling unpredictability in the meaning of substantive investment treaty standards. Given the divergence among the cases, FPS clauses appear to be amorphous. *Ex ante*, it is not particularly easy to predict whether a Tribunal will give them a broad or narrow ambit, or impose a strict or moderate standard of care.

However, the stakes may not be particularly high. Few cases, if any, turn on FPS. In none of the above cases was FPS decisive on its own—with those cases imposing liability doing so primarily on the basis of other standards (especially FET). Thus, even if uncertainty as to the meaning of FPS is high, the magnitude of the risk may be comparatively low.

#### *b) Fair and Equitable Treatment*

The case law on FET exhibits a more troubling degree of inconsistency, with higher stakes than FPS. Most ISDS cases ultimately turn on FET, and thus the interpretation of the standard can be decisive. Here, tribunals have divided dramatically over just what the standard requires, enunciating tests for scrutinizing state action that range from the extremely strict to the highly deferential. Given that ISDS tribunals are constituted on a one-off basis, one must take care not to put too much stock into any individual formulation of these tests. It is not always easy to determine when the particular factors and strictness of scrutiny read into FET are really decisive, as opposed to the particularities of the facts in any given case. Moreover, FET is typically framed as a loose standard. As with FPS, some variation in approach is to be expected – and may even be desirable over time. Nevertheless, taken in the aggregate, the sheer range of levels and styles of scrutiny that have been read into FET make the standard troublingly elastic and unpredictable.

On one end of the spectrum is the *TECMED* Award, which reflects one of the most stringent interpretations of FET. In that Tribunal's view, the standard requires that the State:

... provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned

to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>36</sup>

The *TECMED* interpretation of FET has been influential, and has been adopted in numerous cases.<sup>37</sup> But it has also proven highly controversial, and has been roundly criticized by other tribunals. For example, the *El Paso* Tribunal referred to the *TECMED* interpretation as “a programme of good governance that no State in the world is capable of guaranteeing at all times.”<sup>38</sup>

Other tribunals have understood FET to entail more flexibility for the State. The NAFTA Tribunal in *Waste Management II* adopted a formulation that evokes moderate scrutiny:

... the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety as might be the case with a *manifest* failure of natural justice in judicial proceedings or a *complete lack* of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were *reasonably relied on* by the claimant.<sup>39</sup>

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<sup>36</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* [hereinafter *Tecmed*], ICSID Case No. ARB(AF)/00/2), Award (29 May 2003) para 154.

<sup>37</sup> See, e.g., *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) paras 113–115 (adopting the *TECMED* interpretation of FET, and adding that “[i]ts terms are framed as a proactive statement – ‘to promote,’ ‘to create,’ ‘to stimulate’ – rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.”); *Bayindir v. Pakistan*, ICSID Case No. ARB/03/09, Award (Aug. 27, 2009) 179 (acknowledging that *Teamed* lays out a broad conception of FET, but nevertheless accepting it as an “authoritative precedent” with respect to the doctrine of legitimate expectations”); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) 127.

<sup>38</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2001) para 342; see also Zachary Douglas, ‘Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureka and Methanex’ (2006) 22 *ArbIntl* 27, 28.

<sup>39</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) para 98 (emphasis added). *Waste Management II* is a NAFTA case, but it has been highly influential in Awards outside of the NAFTA context – including by Tribunals charged with interpreting BIT provisions that do not appear to be linked to the international minimum standard of treatment. See, e.g. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (6 July 2016) paras 323-324. Unlike most BITs, NAFTA Art. 1105 only provides for FET as an aspect of the minimum standard of treatment under customary international law. However the the relationship between the international minimum standard and FET in NAFTA Art. 1105 has itself been subject to remarkably inconsistent interpretations. Several of tribunals have held that the standard is completely limited to the customary minimum standard, reflected in the words of the 1926 *Neer* award requiring “outrage . . . bad faith . . . willful neglect of duty . . . or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” *LFH Neer & Pauline Neer v. United Mexican States*, (U.S. v. Mex.), 4 R.I.A.A. (15 October 1926) 60, 61-62 <[http://legal.un.org/riaa/cases/vol\\_IV/60-66.pdf](http://legal.un.org/riaa/cases/vol_IV/60-66.pdf)>. For example, the Tribunal in *Glamis Gold v. United States*, UNCITRAL, Award (8 June 2009) paras 22, 616, 627 (requiring an act to be “sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete ladbback of due process, evident discrimination, or a manifest lack of reasons. . . or the creation by the state of objective expectations in order to induce investment and the subsequent repudiation of those expectations”); see also *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) para 286; *Mobil Investments Canada & Murphy*

The *Waste Management II* reading of FET is significantly more lenient than the *TECMED* interpretation. It includes many of the same factors enumerated in *TECMED*, but qualifies them in ways that suggest more lenient review (e.g. “gross unfairness,” a “manifest failure of natural justice,” or a “complete lack of transparency and candour,” and protection for expectations based on representations by the State that the investor “reasonably relied on”). The *Waste Management II* formulation of FET has also proven highly influential, finding favor with Tribunals that have rejected the *TECMED* approach. Yet other tribunals have viewed the *Waste Management II* and *TECMED* formulations as mutually supportive, and cited both as though they captured the same level of strict review.<sup>40</sup> In practice the lines between the two are not altogether clear.

Still other tribunals have viewed FET in more deferential terms, taking into account the host State’s right to regulate as a legitimate countervailing interest. The Tribunal in *Saluka* took note of the formulations in *TECMED* and *Waste Management II* (among others), but noted that:

if their terms were taken too literally, they would impose upon host States[] obligations which would be inappropriate and unrealistic ... In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.<sup>41</sup>

Similarly, the Tribunal in *El Paso* noted that

Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances ... [FET] is a standard entailing reasonableness and proportionality...[although a] reasonable general regulation can be

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*Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability (22 May 2012) para 152. The three parties to the NAFTA (Canada, Mexico, and the United States) have all consistently advocated this limited view of FET under Art. 1105. See Interpretation of the Free Trade Commission of Certain Chapter Eleven Provisions (July 31 2001), <<http://www.state.gov/documents/organization/38790.pdf>> accessed 8 January 2020; Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatments in Historical Context* 246 n. 690 (2013). By contrast, a number of NAFTA tribunals have treated FET as an autonomous treaty standard, broader than the international minimum standard. See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) para 100 (holding Mexico in breach of FET for failing to provide a “transparent and predictable framework”); *Pope & Talbot v. Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) 110. The broad approach seems to be dominant, with yet a third line of cases adopting reasoning closer to the cases like *Glamis* (i.e. that Art. 1105 exclusively incorporates custom), but hewing toward the broader cases in finding that custom has substantially evolved since 1926. See, e.g. *Merrill & Ring Forestry v. Canada*, ICSID Case No. UNCT/07/1, Award (31 March 2010) para 192 (finding that FET protects against “all such acts or behavior that might infringe upon a sense of fairness, equity and reasonableness”); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) para 117 (noting that the rise of BITs has itself played a role in the development customary international law beyond *Neer*).

<sup>40</sup> *Oko Pankki Oyj v. Estonia*, ICSID Case No. ARB/04/6, Award (19 November 2007) 242 (treating both *Waste Management II* and *TECMED* as persuasive, without drawing distinctions between them).

<sup>41</sup> *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), paras 304-305.

considered a violation of the FET standard if it violates a specific commitment towards the investor.<sup>42</sup>

Finally, a number of tribunals have understood the FET standard as requiring only a very minimal level of treatment. In the view of the *Genin* Tribunal:

while the exact content of this standard is not clear ... [a]cts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.<sup>43</sup>

Thus, in *Genin*, the Tribunal was uncomfortable extending FET beyond narrow scrutiny for willful negligence or bad faith—a far cry from *TECMED*'s robust programme of good governance.

The above survey is not intended to provide an exhaustive account of every available approach to FET in the cases. Suffice it to say that, taken together, these cases make clear that FET's contours have been expounded by tribunals in extremely varied ways, ranging in restrictiveness from the extremely strict *TECMED* standard to the still relatively comprehensive *Waste Management II* standard, to the more deferential standards in *Saluka* and *El Paso*, and, at the other end, the highly deferential approach in cases like *Genin*. It is not easy to draw firm lines between these approaches, and tribunals often blend them together. But, viewed across the cases, the FET standard takes on the image of an accordion – sometimes narrow, but capable of stretching to extreme lengths.

Taking the cases at face value, interpretations of FET have been highly inconsistent. This doubtless leads to costly surprises *ex post* and can in turn impose transaction costs *ex ante*. But it remains to be seen how problematic inconsistency really is in this context.

First, as with FPS, a degree of uncertainty in the interpretation of FET is built in. FET is a standard *par excellence*. In its classical form, this obligation is no more precise than the four words: “fair and equitable treatment.” Even in its more modern specified form, FET obligations remain broad and open textured. In adopting such elastic language, treaty drafters are making the choice to defer questions about the meaning and scope of the standard to future adjudicators (ISDS tribunals). As such an expectation of strong consistency is unwarranted. Different tribunals will come to different views, and some degree of working the standard out over time is to be expected. Certainly, some of the variation in approaches is due to the fragmented structure of adjudication in ISDS. But the design choice to regulate through broad standards also plays a role. A degree of inconsistency is in the nature of standards of this kind, and is indeed the trade-off for a degree of flexibility which, over the long term, may be desirable.

This is not to say that the sheer variety of approaches to FET is unproblematic, or without cost. It evidently makes planning more difficult *ex ante* for both States and investors. However, it also bears noting that, on its own, inconsistency, here, might be relatively manageable. FET is at bottom a simple norm of conduct articulating (open textured) limits on State action. True, its content has varied so greatly as to make prediction difficult. But States and investors have some tools at their disposal to navigate such uncertainty *ex ante*. At least in principle, private ordering

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<sup>42</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2001) paras 372-374.

<sup>43</sup> *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) para 367.



could be a promising option (putting aside the uncertain treaty / contract relationship, to which we will return below). The idea would be that, to the extent that either the State or the investor is concerned about how a tribunal will interpret the standard *ex post*, they can mitigate these concerns *ex ante* by structuring their relationship through a more precise contract.<sup>44</sup>

Private ordering is not a panacea. Sophisticated States and investors for whom consistency problems in ISDS are highly salient can make clear-eyed choices about whether to contract around uncertain investment treaty terms (which will involve transaction costs), to mitigate uncertainty through insurance (which can affect price), or to run the risk of uncertain *ex post* adjudication. But States and investors for whom these problems are less salient may see less reason to contract under the shadow of a BIT. In such instances, States, especially, may find themselves subject to surprise costs – such as where FET is unexpectedly read, *ex post*, to require a strict obligations of regulatory stability on the *TECMED* model.<sup>45</sup> Given the level of inconsistency across interpretations of FET, it is not easy to wave such concerns away by invoking the precept that “ignorance of the law is no excuse.”

### *c) Summary*

In sum, FPS and FET are basic primary obligations, typically formulated as broad standards. Interpretations of both, but especially FET, have been inconsistent and widely varied. Especially in the context of FET, these inconsistencies can be decisive in particular cases, cutting to the balance between investor protection and the State’s regulatory autonomy. In both cases, as standards, a degree of inconsistency is to be expected. This is a feature of regulating through open textured standards, where future adjudicative flexibility is (or should be) envisioned. Further, such inconsistency is at least potentially manageable for sophisticated parties *ex ante*, through contract or other private ordering mechanisms (price, insurance, *etc.*). This is not to say that inconsistent interpretations of these standards are unproblematic, or without cost. Especially with regard to FET the sheer variety of approaches is cause for concern. But inconsistency in the interpretation of substantive investment treaty standards may give less cause for alarm than in relation to more structural matters, considered below.

## **I. Inconsistency in the Rules of the Game**

Inconsistency exerts a greater sting in ISDS with respect to interpretations of more structural rules of the game – where it introduces uncertainty not only with regard to States’ and investors’ expectations about particular rights and obligations, but into the paths available for setting and managing expectation *ex ante*. Two examples stand out. The first is inconsistency with respect to the relationship between investment treaties and contracts – i.e. to what extent States and investors may contract around treaty terms. The second entails inconsistency in the interpretation of MFN clauses – i.e. to what extent MFN entitles an investor to “import” more favourable substantive

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<sup>44</sup> At least assuming the availability of opt out, which will itself turn out to be a source of much more problematic inconsistency. *See infra*, § IV.a.

<sup>45</sup> See Federico Ortino, ‘The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?’ (2018) 21 JIEL 845.

obligations and/or procedural mechanisms from separate treaties between the host State and third States.

Inconsistency in both of these matters is highly surprising and costly. There is little reason to think that treaty drafters intended to delegate discretion to adjudicators to work out the answers on a case-by-case basis. And, moreover, these forms of second-order inconsistency resist private ordering – making them far more difficult and costly to plan around. Unlike inconsistency in the interpretation of primary standards like FET and FPS, inconsistent interpretations of the treaty/contract relationship and MFN strongly undermine the purposes of the investment treaty regime: protecting and promoting investment and making investment more efficient.

#### *a) The Treaty / Contract Relationship*

Most investment treaties cover contracts within the definition of investment, but very rarely do IIAs articulate the relationship between treaty and contract. 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.<sup>46</sup> 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*?).<sup>47</sup>

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, to damages rules, defenses, and forum selection. Often treaties address these matters expressly (as with clauses providing for ISDS). Other 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.

The inconsistency in approaches to the treaty / contract problem is well illustrated by a series of umbrella clause cases, involving highly similar facts and parties: *SGS v. Paraguay*,<sup>48</sup> *SGS v. Philippines*,<sup>49</sup> and *BIVAC v. Paraguay*.<sup>50</sup> 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. Where the cases diverge is whether the treaty or contract provision should take priority.

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<sup>46</sup> See Julian Arato (n 5) 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 *ArbIntl* 351 (2008); see also Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 17–18.

<sup>47</sup> Julian Arato (n 5).

<sup>48</sup> *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010).

<sup>49</sup> *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004).

<sup>50</sup> *BIVAC v Paraguay*, ICSID Case No ARB/07/9, Decision on Jurisdiction (29 May 2009).

The Award in *SGS v. Paraguay* reflects the view that treaty provisions are, effectively, mandatory.<sup>51</sup> The Tribunal held that 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 its right to vindicate its 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.<sup>52</sup>

By contrast, the tribunals in *SGS v. Philippines* and *BIVAC v. Paraguay* found that treaty and contract could not be neatly separated.<sup>53</sup> 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.

Although the treaty / contract problem has received more attention in the context of the umbrella clause, it arises far more frequently in other contexts. In fact, the problem arises whenever the covered investment in question is or involves a contract between the State and the investor. 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 States and investors cannot opt out of treaty terms by contract.<sup>54</sup> Other tribunals have understood treaty provisions as mere *defaults*, prioritizing the parties’ contractual choices over treaty rules with respect to exactly the same questions.<sup>55</sup> And still others have viewed them as *sticky defaults* – rules which parties may

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<sup>51</sup> *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010) paras 131, 138–142.

<sup>52</sup> *Ibid* paras 177–184.

<sup>53</sup> *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004) para 128; *BIVAC v. Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction (29 May 2009) para 142.

<sup>54</sup> 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 (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 (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 (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 (22 May 2007) paras 260–261; and *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005).

<sup>55</sup> On forum selection, see *Oxus Gold v. Uzbekistan*, UNCITRAL, Final Award (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 (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 (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 (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 (8 October 2009) para

contract around, but only by meeting some heightened threshold, like a clear statement rule, or use of some special language.<sup>56</sup>

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, as with FET and FPS, the fragmented nature of ISDS exacerbates the problem on the back-end. 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 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 explored here, 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.

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, could lead to inefficient and costly drafting exercises, with inefficient effects on price – even potentially dampening the parties’ willingness to contract. If unappreciated, such uncertainty is likely to lead to unfair surprise *ex post*, most likely accruing to the detriment of host States.<sup>57</sup>

#### *b) Most-Favoured-Nation*

As for MFN, the principal inconsistency concerns whether the obligation enables an investor to invoke more favorable arrangements found in extrinsic treaties (between the host State

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217; and *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (6 July 2016) para 423.

<sup>56</sup> On forum selection, see *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (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 (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 (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 (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).

<sup>57</sup> For a more fulsome treatment of the harms posed by this form of second-order inconsistency, see Julian Arato (n 5) 25–27; and Julian Arato (n 46) 351.

and third States). In the case law and literature, this practice is often referred to as relying on MFN to import treaty terms.<sup>58</sup> The MFN clause in IIAs generally requires that investors from that State receive treatment “no less favorable” than the treatment enjoyed by investors from other States.<sup>59</sup> In some IIAs – particularly in investment chapters of FTAs – the obligation is to accord treatment which is “no less favorable” to investors from other States who are “in like circumstances.”<sup>60</sup> As the argument goes, an investor can invoke the MFN provision in an applicable IIA to obtain more beneficial arrangements afforded by the host State to nationals of third States with which it has more favorable IIAs. The cases differ as to whether MFN can be used in this way to import more favorable procedural terms, substantive terms, both, or neither.

The divergence in approaches here is well known. Inconsistency in the interpretation and application of MFN has been specifically identified by Working Group III as an example of an “unjustified inconsistency.”<sup>61</sup> The most salient split relates to whether MFN allows importing procedural mechanisms from third-party treaties, including conditions on access to ISDS or even host State consent to arbitration. Some decisions and awards favor permitting the MFN clause to modify or override conditions on access to ISDS, and to expand the tribunal’s jurisdiction,<sup>62</sup> while others do not permit the MFN clause to be used in this way.<sup>63</sup> Most cases have interpreted MFN clauses as permitting the investor to import favorable substantive standards from treaties with third states.<sup>64</sup> Yet, here too, some recent tribunals have closed off this possibility as well,<sup>65</sup> prompting new questions (and inconsistencies) about whether invoking MFN to import *any* third party treaty terms is appropriate.<sup>66</sup>

The area of greatest inconsistency concerns whether the MFN clause extends to enable the investor to import more favorable procedural terms from third-State IIAs. Specific questions have included: (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

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<sup>58</sup> See Simon Batifort & J. Benton Heath, ‘The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Breaks on Multilateralization’, 111 AJIL 873 (2018) (adopting the term “importation” as a widely used and convenient shorthand, while acknowledging that “it does not precisely reflect the operation of MFN clauses.”); Christopher Greenwood, ‘Reflections on ‘Most Favoured Nation’ Clauses in Bilateral Investment Treaties’, in David D Caron et al (eds), *Practising Virtue: Inside International Arbitration* (OUP 2016) 556, 559–61 (emphasizing that, as a matter of law, third-party treaty provisions are neither “written into” nor “incorporated” into the basic treaty via an MFN clause).

<sup>59</sup> See, e.g., August Reinisch, ‘Most Favoured Nation Treatment’, in Marc Bungenberg, Jorn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (Hart 2015) 807; Andreas Ziegler, ‘Most-Favoured-Nation (MFN) Treatment’, in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 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* (OUP 2008) 363.

<sup>60</sup> E.g., North American Free Trade Agreement between Canada, The United States and Mexico (signed 17 December 1992, entered into force 1 January 1994) (NAFTA) art 1103(1).

<sup>61</sup> UNCITRAL, ‘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.

<sup>62</sup> See, e.g. *Maffezini v Spain*, ICSID Case No 97/7, Decision on Jurisdiction (25 January 2000); *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004); *RosInvestCo UK Ltd v Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (5 October 2007) paras 124-139; *Teinver SA v Argentine Republic*, ICSID Case No ARB/11/20, Decision on Jurisdiction (3 July 2013) para 186.

<sup>63</sup> *Salini Costruttori SpA and Italstrade SpA v Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction (29 November 2004); *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005); *Daimler AG v Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012) para 281.

<sup>64</sup> See, e.g. *White Industries v India*, UNCITRAL, award (30 November 2011).

<sup>65</sup> See, e.g. *İçkale Insaat v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016).

<sup>66</sup> See Simon Batifort & J. Benton Heath (n 58).

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.

The split is well illustrated by the awards in *Maffezini v. Spain* and *Plama v. Bulgaria*. In *Maffezini*, the Tribunal held that the MFN provision in the Argentina—Spain BIT extended to matters of dispute settlement, permitting the Argentine claimant to rely on more favorable dispute settlement arrangements in the Spain—Chile BIT.<sup>67</sup> The claimant sought to avoid local court litigation requirements conditioning access to arbitration in the Argentina—Spain BIT which were absent from the Spain—Chile BIT, and portrayed the latter arrangement as more favorable treatment which could be “imported” via MFN.<sup>68</sup> The *Maffezini* Tribunal agreed, finding that “dispute settlement arrangements are inextricably related to the protection of foreign investors,”<sup>69</sup> and, being “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.”<sup>70</sup> It 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 ....<sup>71</sup>

In extending the MFN clause to procedural matters, *Maffezini* itself made much of the fact that the MFN clause in question expressly applied to “all matters subject to this Agreement.” Subsequent tribunals have split on whether to extend this reasoning to more laconic MFN clauses, such as that in the Argentina—Germany BIT which refers only to “treatment,” without express extension to all matters covered by the Treaty.<sup>72</sup> The *Siemens v. Argentina* Tribunal interpreted this MFN clause to allow invoking third State BITs to avoid domestic litigation requirements,<sup>73</sup> while the Tribunal in *Winterschall v. Argentina* took the opposite view.<sup>74</sup>

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<sup>67</sup> *Maffezini v Spain*, ICSID Case No 97/7, Decision on Jurisdiction (25 January 2000) para. 54.

<sup>68</sup> Argentina—Spain BIT (signed 3 October 1991, entered into force 28 September 1992) art IV(2) “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.”

<sup>69</sup> *Maffezini v Spain*, ICSID Case No 97/7, Decision on Jurisdiction (25 January 2000) para 54.

<sup>70</sup> *Ibid* para 55.

<sup>71</sup> *Ibid* para 56; *See also Gas Natural v Argentine Republic*, ICSID Case No ARB/03/10, Decision on Jurisdiction (17 June 2005) para 49.

<sup>72</sup> Argentina—Germany BIT (signed 9 April 1991, entered into force 8 November 1993) art 3(1) (“Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords ... to investments or returns of investors of any third State”) and Article 3(2) (“Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment, or disposal of their investments to treatment less favourable than that which it accords to ... investors of any third State”).

<sup>73</sup> *Siemens* (“the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered by the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.”) Noting that *Maffezini* emphasized the “all matters subject to this Agreement” language in the Argentina—Spain BIT, the *Siemens* Tribunal acknowledged that the MFN clause in the Argentina—Germany BIT was narrower. Still, it concluded that “the term ‘treatment’ and the phrase ‘activities related to the investments’ are sufficiently wide to include settlement of disputes.” *Id.*, para. 103.

<sup>74</sup> *Winterschall Aktiengesellschaft v. Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) para 172; *see also ICS Inspection & Control Services Ltd. V. Argentine Republic*, UNCITRAL, Award on Jurisdiction (10 February 2012) para 296.

*Plama* well illustrates the more restrictive approach. There, the Bulgaria—Cyprus BIT only provided for arbitration to determine the amount of compensation in a case of expropriation.<sup>75</sup> The claimant invoked the treaty’s MFN provision<sup>76</sup> to unlock access to ICSID arbitration on a wider range of issues by reference to the more generous ISDS provisions in Bulgaria’s BITs with third parties. The *Plama* tribunal rejected the claimant’s theory, and also questioned the reasoning in *Maffezini*. It observed that all international arbitration is based on the agreement of the parties, which must be “clear and unambiguous.”<sup>77</sup> Rejecting the *Maffezini* approach, *Plama* tribunal considered that an interpretation of MFN which permitted investors to pick and choose dispute settlement clauses from various IIAs would be chaotic, and “cannot be the presumed intent of the [the] Contracting Parties.”<sup>78</sup> Instead, the Tribunal shifted the default – finding that it is open to States to extend MFN to procedural matters, but that “the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.”<sup>79</sup> Several other tribunals have followed the *Plama* approach with respect to other procedural matters and pre-conditions on arbitration.<sup>80</sup>

With respect to importing substantive terms, tribunals have until recently mostly accepted that investors may invoke MFN to import more favorable substantive rights from IIAs with third States. Thus, in *Bayindir*, 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 FET protection from other BITs which Pakistan had concluded.<sup>81</sup> The Tribunal upheld *Bayindir*’s right to rely on the FET provisions in those other BITs.<sup>82</sup> However, the tribunal in *Içkale* recently found that even importation of substantive terms is impermissible,

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<sup>75</sup> *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005).

<sup>76</sup> Bulgaria—Cyprus BIT (signed 12 November 1987, entered into force 18 May 1998) art 3(1) (“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.”).

<sup>77</sup> *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) para 200.

<sup>78</sup> *Ibid* para 219.

<sup>79</sup> *Ibid* para 204.

<sup>80</sup> *See, e.g., H&H Enterprises, Inc v Egypt*, ICSID Case No ARB/09/15, Award (6 May 2014) para 358 (“[T]he 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 explicitly adopted the *Plama* tribunal’s view “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.’”); *see also Winterschall v. Argentina*, ICSID Case No ARB/04/14, Award (8 December 2008); and *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012).

<sup>81</sup> *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 231-232; *see also Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009), paras. 163-167.

<sup>82</sup> *Bayindir v Pakistan* (ICSID Case No ARB/03/29, Award of 27 August 2009), para. 167. *See also CC/Devas (Mauritius) Ltd v India*, PCA Case No. 2013-09, Award (25 July 2016) para 496; *Arif v Moldova*, ICSID Case no ARB/11/23, Award (8 April 2013) para 396; *EDF International SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012) paras 930-937; *White Industries v India*, UNCITRAL, award (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.

casting new doubt on the question of whether MFN clauses can be used to import third party treaty terms at all.<sup>83</sup>

Unlike with other matters considered here, spotting glaring inconsistencies in the MFN cases is not always easy on a granular case-by-case level. 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, at issue in *Maffezini*),<sup>84</sup> and others are expressed as applying to “treatment” (such as Article 3(1) of the Argentina—Germany BIT, at issue in *Siemens* and *Winterschall*, and Article 3(1) of the Bulgaria—Cyprus BIT, at issue in *Plama*).<sup>85</sup> The International Law Commission (ILC) identifies at least six broad types of formulations of MFN clauses in IIAs, which can be found alone or in combination across various treaties.<sup>86</sup> To the extent that these drafting differences signal different intentions about the extent to which MFN allows importation of procedural or substantive terms, Awards interpreting different provisions differently may not necessarily be inconsistent at all.<sup>87</sup> Moreover, Tribunals frequently make efforts to distinguish and reconcile themselves with prior MFN cases – if not always entirely successfully.<sup>88</sup> However, the distinctions in the treaties are not always clear cut, and the lines in the case law do not neatly map on to drafting differences. At a high level of altitude, at least, the cases appear broadly inconsistent on the big questions, rendering the scope of MFN in any treaty uncertain at best.

Similarly, to the treaty / contract problem, inconsistent interpretations of MFN introduce marked uncertainty into the rules of the game. Uncertainty as to whether MFN clauses permit importation of procedural provisions, substantive provisions, or neither, makes it difficult for States and investors to predict the legal framework applicable to an investment – potentially leading to price inefficiencies *ex ante* and/or unfair surprise *ex post*. All this also introduces

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<sup>83</sup> *Içkale Insaat v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016) para. 329. See further Simon Batifort & J. Benton Heath (n 58).

<sup>84</sup> *Maffezini v Spain*, ICSID Case No 97/7, Decision on Jurisdiction (25 January 2000) .

<sup>85</sup> *Siemens v. Argentina*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004); *Winterschall v. Argentina*, ICSID Case No ARB/04/14, Award (8 December 2008); *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005).

<sup>86</sup> The ILC separates out the following six types of formulations: (1) the MFN clause refers simply to the “treatment” accorded to the investor or investments; (2) the scope of “treatment” is expressly extended to “all” treatment, or “all matters covered by this Agreement”; (3) the term “treatment” is related to specific aspects of the investment process, such as “management,” “maintenance,” “use,” “disposal,” and / or “establishment; (4) MFN treatment is related only to specific obligations under the treaty, such as FET; (5) MFN treatment is to be provided only to investors or investments “in like circumstances” to investors or investments from a third State; and (6) where a territorial limitation is introduced. The ILC also notes that MFN provisions in IIAs also frequently provide for exceptions. International Law Commission, ‘Final Report of the Study Group on the Most-Favoured-Nation Clause’ (2015) vol II ILC Ybk paras 59–66.

<sup>87</sup> For a contrary view, Zachary Douglas, ‘The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails’ (2010) 2 JIDS 97 (casting doubt on the relevance of nuanced differences in the wording of MFN clauses for purposes of interpretation, and suggesting that all MFN clauses should be interpreted in light general international law); but see Stephan Schill, ‘Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – a Reply to Zachary Douglas’ (2011) 2 JIDS 353 (concurring with Douglas as to the relevance of general international law in interpretation, but cautioning that this does not alleviate tribunals from taking a “BIT by BIT” approach to interpretation.).

<sup>88</sup> *Plama* makes some effort to reconcile its approach with that of *Maffezini* itself, although the *Plama* approach certainly cannot be reconciled with all of *Maffezini*’s progeny. *Plama*, paras. 220–221 (emphasizing dicta in *Maffezini* that suggested limits to procedural importation where this would enable a claimant to override “public policy considerations” that the treaty parties “might have envisaged as fundamental conditions for their acceptance of the agreement in question.”), citing *Maffezini*, para. 62.



substantial uncertainty into the State's regulatory process. Moreover, such unpredictability cannot readily be avoided by contract. Private ordering is no simple matter where it is unclear which rules will have to be contracted around. Uncertainty about the scope of importation via MFN casts a cloud of doubt over which constellation of rules, across all of the host State's treaties, will apply.

## II. Conclusion: Inconsistency and Reform

It is evident from UNCITRAL Working Group III's discussions that government delegations already appreciate the need to take a varied approach to confronting inconsistency in ISDS. Inconsistency is not necessarily an evil in itself, but there are certainly problematic instances of unjustifiable inconsistencies in the cases. As WGIII has cautioned, "seeking to achieve consistency should not be to the detriment of the correctness of decisions, and ... predictability and correctness should be the objective rather than uniformity."<sup>89</sup> We have argued that parsing inconsistency in ISDS helps reveal that the problems attending inconsistency vary substantially depending on the type of treaty term in question. Inconsistency may be potentially problematic in all contexts, but the value of consistency is higher rules than with standards, and substantially more so with rules of the game as opposed to primary obligations.

Inconsistency in ISDS can be addressed. Indeed, enhancing consistency is a guiding value in reform discussions at UNCITRAL WGIII. Solutions are available on both the front and back end. The former entail clarifying treaty norms, while the latter entail institutional reforms focused on dispute resolution. But before turning to particular reform options, two preliminary points are important to bear in mind.

First, we hope to have shown that consistency should not be understood as a single universal value in adjudication, to be maximized wherever possible. Total, mechanical consistency is impossible in the law, and not always even a desirable ideal. Moreover, inconsistent case law is more vexing in some contexts than others. Parsing the problems of inconsistency in ISDS can be helpful in thinking through reform priorities.

Second, it should be understood in discussing solutions that there are no silver bullets here. All ways forward are fraught, bedeviled by practical difficulties and unavoidable trade-offs. Possible solutions will be more in the nature of "imperfect alternatives," in the conception of Puig and Shaffer, varying in effectiveness vis-à-vis achieving consistency, trade-offs vis-à-vis other important values, and practical viability.

On the front end, the obvious response to inconsistency is for States to clarify problematic provisions in their treaties. This could entail issuing joint interpretations of existing treaties, or responsive treaty drafting – whether through added "for greater certainty" clauses or through rethinking certain provisions from scratch. States could provide further guidance on any of the interpretive questions considered above – be it the appropriate standard of vigilance in FPS, the applicable standard of review for FET violations, the scope of MFN, or whether States and investors can contract around the treaty. Indeed, recent investment treaties frequently pursue such strategies. However, front end fixes are not likely to prove an effective *general* solution to the problems of inconsistency.

First, with over 3,000 extant treaties, systematic front end reform poses serious practical difficulties. Amending even a single treaty is a difficult political process, and joint interpretations

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<sup>89</sup> UNCITRAL, '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.

are not necessarily any easier to produce. Comprehensive reform to enhance consistency BIT-by-BIT is hardly an option. As States update their treaties, concerted efforts to introduce consistency and certainty on a handful of key, salient questions could be viable in the mid- to long-term. But it is by no means an easy path, and not one likely to resolve concerns about consistency across the board. Another possibility is front end reforms multilaterally. Some of the reforms on the table at UNCITRAL WGIII would serve this function – particularly in the case of the multilateral omnibus treaty on procedural reforms proposed by Chile, Israel, Japan, Mexico, and Peru.<sup>90</sup> But multilateral reform has its own pragmatic difficulties, and the current mandate at UNCITRAL is, in any case, currently limited to procedural matters.

Second, more conceptually, pursuing consistency through drafting can be counterproductive. Investment treaties are relatively short agreements designed to cover an enormous range matrix of potential future matters – by affording a wide range of legal relationships with protection against a wide variety of possible State actions. It would be difficult to predict every potential future contingency, and likely inefficient to attempt to resolve everything up front. Moreover, drafting complexity can introduce its own problems, from unintended rigidity to problematic interaction effects among different provisions. Hence the pervasive use of broad standards in investment treaties. Brevity in investment treaties is ultimately a design choice – one which inevitably necessitates some degree of adjudicative discretion on the back end.

That said, targeted front end reforms can go a long way. Though brevity is probably a virtue for investment treaties in general, this does not mean that certain matters could not benefit from greater clarity up front. As States update their investment treaties, selective front end drafting can help resolve some of the most vexing inconsistency problems – particularly those regarding the rules of the game. The cleanest solution to the treaty / contract problem is for States to express in the treaty whether and how States and investors can contract around the treaty’s terms.<sup>91</sup> Similarly, front end solutions are possible with respect to MFN – and, indeed, here States are turning to drafting solutions with greater frequency in recent treaty practice. For instance, Article 8.7.4 of the Canada—EU Comprehensive and Economic Trade Agreement (**CETA**) expressly closes the door on importation by clarifying that “treatment” includes neither dispute resolution procedures nor substantive obligations in third State treaties (absent concrete measures taken pursuant to those obligations).<sup>92</sup> These are matters on which drafting solutions are promising and would have significant impact for both States and investors in planning *ex ante* – even if front end solutions cannot (and should not) be employed to address inconsistency across the board.

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<sup>90</sup> UNCITRAL, ‘Possible reform of investor-State dispute settlement (ISDS): Submission from the Governments of Chile, Israel, Japan, Mexico and Peru’ UN Doc No A/CN.9/WGIII/WP.182 (2 October 2019).

<sup>91</sup> This could be done by expressly indicating in the treaty whether States and investors are free to contract around all or some of its terms, and, if a sticky approach is desirable, specifying what language would be necessary to make opt-out effective. 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.

<sup>92</sup> Comprehensive Trade and Economic Agreement between Canada and the European Union (signed 30 October 2016, entered into force 21 September 2017) (CETA) art. 8.7.4 states:

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.

On the back end, systemic reforms to ISDS can go a long way toward mitigate interpretive inconsistency (*inter alia*).<sup>93</sup> Two of the more dramatic proposals on the table at UNCITRAL WGIII call for erecting major new multilateral bodies for the resolution of investment disputes: the fully integrated Multilateral Investment Court (MIC) championed by the European Union<sup>94</sup>; and a somewhat less integrated appellate mechanism, proposed by several States including, recently, China.<sup>95</sup> Both proposals involve major multilateral institutions that serve several different values and interests. But among the prime justifications for both approaches are their purportedly signal virtues in responding to concerns about consistency and predictability.

As envisioned by the EU, the MIC would replace ISDS altogether with a two-tiered standing Court, comprised of a court of first instance and a court of appeal. Judges would be appointed to each instance for a fixed term of years, meaning that there would be formal continuity in adjudicators over time. The pronouncements of a single authoritative judicial voice would, presumably, lead to greater consistency across all issues, allowing States and investors to plan more efficiently. The Court would not be tethered to its own substantive investment treaty, but would piggyback on IIAs already in force among its member states. The Court would thus still be responsible for resolving disputes arising under (potentially) myriad different investment treaties. However, one can expect that a standing Court would introduce far more consistency into the interpretation of common treaty provisions. Relatedly, one can also expect it to take a more consistent approach to determining the effects of different drafting choices – which would in turn enhance States’ ability to confidently plan in negotiating treaty language. Moreover, such enhanced consistency would enable the Court to send other kinds of signals to States and investors over time, for example by clarifying under what conditions (or through which magic words) it will allow them to contract around treaty norms.

The appellate mechanism approach (**IA+appeal**) splits the difference between ISDS and the MIC. Rather than two instances, this mechanism would supplement traditional *ad hoc* ISDS with a standing tribunal for resolving appeals (presumably, at minimum, as to legal questions). At least for matters resolved on appeal, this approach would enhance consistency in similar ways to the MIC – though the effects might be weaker among first instance ISDS tribunals (still largely staffed by party-appointed arbitrators).

But at the same time, it must be understood that these institutional choices have trade-offs. Consistency is not the only value at stake – nor even necessarily an end-in-itself. “Top-down” solutions like a permanent investment court or appellate mechanism can achieve, relatively quickly, a high level of consistency, coherence and predictability beneficial for both public authorities and business. Even with respect to standards, a court can balance the priorities of certainty and flexibility over time – certainly more coherently than a loose collection of arbitral panels. But at the same time, the concentration of judicial power may run the risk of achieving consistency and coherence at the sacrifice of quality and / or correctness. Consistency is not a value in a vacuum, and could prove wholly undesirable where a Court adopts an interpretation that its member states (or even certain powerful member states) view as consistently wrong. This, after all, at least partly explains the current crisis at the WTO Appellate Body, which the United States has singlehandedly starved of judges based (in part) on long-standing complaints about what it

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<sup>93</sup> See Malcolm Langford, Daniel Behn, Gabrielle Kaufman-Kohler and Michele Potesta, ‘UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions – An Introduction’, (2020) 21 Journal of World Investment and Trade #.

<sup>94</sup> UNCITRAL, Submission from the European Union and its Member States (n 15).

<sup>95</sup> UNCITRAL, Submission from the Government of China (n 16).

viewed as consistently incorrect interpretations on matters like antidumping methodology (the “zeroing” cases).<sup>96</sup> Relatedly, in generating a consistent case jurisprudence, a more integrated Court (or appellate mechanism) may arguably weaken States’ control over the meaning of their investment treaties over time – although this may be more a problem of perception than of reality. Indeed, as compared to ISDS, one might argue that systematic jurisprudence can be sovereignty-enhancing – e.g. insofar as it could send clearer signals to States about the prospective effects of their drafting choices than a one-off arbitral award, thereby empowering States to better capture their treaty goals and control misinterpretation risks

The alternative approach to reforming ISDS at UNCITRAL focuses less on institutional transformation and more on granular procedural enhancements (“**ISDS Improved**”). This incremental approach to reforming the current system has its own trade-offs. The evident drawback is that, in the near term, the *ad hoc* nature of ISDS tends to generate inconsistent interpretations on important legal questions, stymying planning *ex ante* and leading to unfair surprises *ex post*. Important as they might be, incremental reforms to ISDS procedure will not likely address that particular problem. But, at least arguably, short-term inconsistency has underappreciated benefits: such as better fostering experimentation by creating space for innovative solutions to bubble up over time; and arguably leading to higher quality reasoning through dialogue in the long term. These benefits are more compelling in the context of primary standards, and less so with respect to rules of the game where the costs of inconsistency are particularly high. However, the latter can always be addressed separately, through targeted front-end treaty reforms as described above.

Finally, removing ISDS from investment treaties altogether remains a possibility (**No ISDS**). Though not currently high on the multilateral reform agenda at UNCITRAL, this option has some support in WGIII among governments (e.g. South Africa<sup>97</sup> and Brazil<sup>98</sup> have both expressed skepticism about ISDS), and non-governmental organizations.<sup>99</sup> This has also been considered by governments in their bilateral and regional treaty practice, as in the USMCA (which removes ISDS as between the United States and Canada).<sup>100</sup> One version of this approach would replace ISDS with compulsory State-to-State arbitration of investment treaty disputes (“SSDS”).<sup>101</sup> Another would leave the resolution of investment treaty disputes entirely to domestic courts. Suffice it to say, here, that these options would have complex and unpredictable effects for consistency. Certainly both options would reduce opportunities for inconsistent interpretations to arise in the *international* adjudication of investment disputes – if only by drastically limiting the number of claims (in SSDS) or by eliminating such claims at the international level altogether. But both options can give rise to inconsistency in other ways. Insofar as fewer claims would rise to the

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<sup>96</sup> Jennifer Hillman, ‘Three Approaches to Fixing the World Trade Organization’s Appellate Body: the Good, the Bad, and the Ugly?’ IIEL Issue Briefs <<https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>> accessed 8 January 2020

<sup>97</sup> UNCITRAL, ‘Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of South Africa’, UN Doc No A/CN.9/WG.III/WP.176, para. 37 (17 July 2019) (“Countries must not rush into assuming that ISDS policies must be a part of their investment agreements and must be mindful of the origins of the ISDS.”).

<sup>98</sup> UNCITRAL, ‘Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Brazil’, UN Doc No A/CN.9/WG.III/WP.171 (28 March 2019).

<sup>99</sup> Lise Johnson & Lisa Sachs, *Inconsistency’s Many Forms in Investor-State Dispute Settlement and Implications for Reform*, CCSI Briefing Note (November 2018).

<sup>100</sup> Agreement between the United States of America, the United Mexican States, and Canada, 12/13/19 (USMCA), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

<sup>101</sup> Johnson & Sachs, *supra* note 98, at 10 (“it is unclear that anything short of a reversion to state-to-state dispute settlement will minimize the risk of inconsistency across law and policy spheres”).

international level in SDDS (or none, without either ISDS or SDDS), a greater number of investment disputes would shift to the domestic plane. In effect, this would leave dispositive treaty interpretation in the hands of national courts. At least from the narrow perspective of consistency, it is not clear that this would be an improvement from the *status quo*. There is no guarantee that national courts are particularly likely to interpret investment treaty norms consistently – vis-à-vis SDDS tribunals, other national jurisdictions, and even internally within a single jurisdiction. It should also be borne in mind that shifting away from third-party international adjudication removes a protection explicitly designed to police the risk of discriminatory treatment by national courts, including through bad faith inconsistency in the interpretation of investment treaties.

As explored by other contributions to this Volume, there may be good reasons to withdraw from ISDS.<sup>102</sup> But with respect to inconsistency, it is not clear that a reversion to SDDS and / or national courts would do much to mitigate the problem as such. What seems more likely is that changing the loci of potential inconsistency will shift some of the risks of inconsistency from States to investors (for better or worse).

We hope to have shown that inconsistency in ISDS is problematic, but that it is not just one problem. Starting from the presumption that total consistency is not a realistic or even desirable goal, we have argued that inconsistent legal interpretations in the cases can be more or less worrisome depending on the type of treaty norm in question. Inconsistency is more troubling in the interpretation of hard crystalline rules than of muddy standards. And, especially given that IIAs erect a body of law intended to incentivize private commercial action, inconsistency with respect to structural rules of the game is significantly more troubling than with basic rules of conduct. We do not claim that these are the only relevant distinctions. Rather, we have sought to illustrate how in ISDS, as in any adjudicative setting, the value of consistency is a relative one and a variegated one. In our view, this nuance should, in turn, help illuminate priorities for reform. On the one hand, we suggest that parsing inconsistency in ISDS can help tease out the signal virtues (and potential trade-offs) of more transformative back-end institutional reforms like the MIC and an appellate mechanism. On the other hand, parsing inconsistency has a payoff when it comes to front-end treaty drafting. Not everything can (or should) be clarified up front. But as States go about updating or amending their treaties, a focus on the rules of the game for ISDS could go a long way toward mitigating inconsistency's worst stings.

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<sup>102</sup> UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions, (2020) 21 Journal of World Investment and Trade #-#.