

more prominent in international law than in many other legal contexts. The reader's expectation towards the book might be that it offers insights as to whether international law might be 'more' or 'less' of a belief system than other areas of law. This question remains open.

In sum, although the insights gained might vary depending on whether the reader is a 'believer' or not, the book offers a stimulating account of how fundamental doctrines of international law have been created, established and interlinked. It provides a wide-ranging analysis including many of the main concepts that shape international law (sources, interpretation, responsibility, statehood, customary law, *jus cogens*). In this regard, it has the potential to interest a broad variety of international lawyers. A key merit of the book is to highlight how, due to the multiple actors involved, these doctrines reflect normative choices and are often linked to a thin basis in positive law. This might lead to one of the book's potential 'effects': an 'empowerment of reformers' (at 118). It points a finger at the fact that doctrines of international law are not carved in stone but, rather, can, or even should, be normatively questioned in their current form. What is more, to view fundamental doctrines to have been 'engineered' by certain actors might encourage other actors to 're-engineer' them. As the author puts it, 'what has been unlearned needs to be reinvented' (at 119). From this perspective, the critique raised by the book with regard to the fundamental doctrines might thus be read as a broader plea against the static existence of normative doctrines. Such a plea can certainly be a fruitful contribution for legal thinking in general.

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Katharina Diel-Gligor. ***Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration.*** Leiden: Brill Nijhoff, 2017. Pp. 590. £185.00. ISBN: 9789004337909

Towards Consistency in International Investment Jurisprudence lands squarely in the middle of a rather crowded scholarly field. From James Crawford's talk of crazy quilts and Persian rugs¹ to Gabrielle Kaufmann-Kohler's 'myth-busting' ruminations,² there has certainly been no shortage of consideration of the issue of consistency in international investment jurisprudence in recent times. In fact, concerns over the apparently contradictory awards of different investment tribunals have occupied the minds of investment law scholars and practitioners for some time now.³ That having been said, it is clear from the first page that *Towards Consistency* is no

¹ Crawford, 'Treaty and Contract in Investment Arbitration', 24 *Arbitration International* (2008) 351, at 353.

² Kaufmann-Kohler, 'Is Consistency a Myth?', in E. Gaillard and Y. Banifatemi (eds), *Precedent in International Arbitration* (2008) 137.

³ The examples most often cited are the SGS arbitrations concerning umbrella clauses (ICSID, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan – Decision on Objections to Jurisdiction*, 6 August 2003, ICSID Case no. ARB/01/13; ICSID, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines – Decision on Jurisdiction*, 29 January 2004, ICSID Case no. ARB/02/6); the *CMS/LG&E v. Argentina* arbitrations regarding necessity (ICSID, *CMS Gas Transmission Company v. Argentine Republic – Award*, 12 May 2005, ICSID Case no. ARB/01/8; ICSID, *LG&E International v. Argentine Republic – Decision on Liability*, 3 October 2006, ICSID Case no. ARB/02/1); *CME/Lauder v. Czech Republic* arbitrations (UNCITRAL, *CME Czech Republic BV v. Czech Republic – Partial Award*, 13 September 2001; UNCITRAL, *CME Czech Republic BV v. Czech Republic – Final Award*, 14 March 2003; UNCITRAL, *Lauder v. Czech Republic – Award*, 3 September 2001).

superficial overview or lightly footnoted paper worked up from a conference presentation by a hardened practitioner, drawing on their experience from past campaigns. Rather, this monograph is probably about as thorough and meticulous a scholarly treatment of consistency in (specifically) International Centre for Settlement of Investment Disputes' (ICSID) jurisprudence as could be imagined.

Based on Katharina Diel-Gligor's doctoral thesis, the book is divided into three main chapters, 'Contextual Framework and Object of Study', 'Problem Analysis: Inconsistency in ICSID Investment Jurisprudence', and 'Reform Proposal: Curing Inconsistent ICSID Jurisprudence'. A notable feature is the systematic approach taken, with historical background and detailed exposition given for each issue addressed. This is evident from Chapter 1, which begins with a relatively lengthy look at the development of both international and national investment law and policy from the 19th century, concluding with a discussion of the current 'backlash' against investor–state dispute settlement (ISDS) (at 46). Subsequently, we are treated to a general introduction to ICSID, its historical development, institutional structure, and case law statistics. Whether or not these sections were strictly necessary given the more specific focus of the monograph, they are, like the rest of the book, extensively referenced. Each page is crammed with citations in a manner that not only demonstrates Diel-Gligor's command of international legal scholarship in this area but also serves as a useful tool for further reading and future research.

These opening sections precede Diel-Gligor's justification for focusing the rest of the book specifically on ICSID arbitration. The answer to the 'why focus solely on ICSID' question, Diel-Gligor explains, is both quantitative and qualitative (at 100–101). From a quantitative point of view, ICSID has continuously handled the highest caseload of the investment arbitration regimes that exist and, as a result, its case law 'constitutes a sufficiently representative basis for analysing the problem of inconsistency in international investment jurisprudence' (at 101). With regard to the qualitative justification, ICSID is portrayed as a prototype system for investor–state arbitration and, as such, it is 'suitable, if not predestined' to be the object of the author's inquiry into the issue of consistency (at 101). Whilst this is clearly a conscious decision by Diel-Gligor, and is sufficiently justified, at the same time, we have to acknowledge that as a consideration of the issue of consistency in international investment jurisprudence (as the title of the book suggests), by focusing primarily on ICSID jurisprudence, the book's contribution is necessarily, even if not significantly, more limited as a result.

Chapter 2 is where Diel-Gligor begins to get into the substance of her enquiry. One of the two main questions in the scholarship on the consistency of awards in international investment jurisprudence is the extent to which consistency is desirable, and this is not a question that *Towards Consistency* shies away from tackling. In doing so, the author looks to justify the desirability of measures designed to ensure consistency by drawing on the perspectives of legal theory and sociology of law. In relatively few pages, especially compared with the longer treatment of other issues in the book, Diel-Gligor lays out the positions of certain legal philosophers such as Lon Fuller who tie the need for consistency to the rule of law, stating that the rule of law only exists if legal norms are created and used in a regular and harmonious way, having an 'inner morality' (at 118).⁴ Dworkin's chain novel metaphor is also mentioned, based on his argument that case law must have 'general explanatory power' with regard to both past and future legal interpretations.⁵ Drawing on these sources, Diel-Gligor concludes that legal theorists and philosophers seem to agree that 'the existence and sustainability of a legal regime itself are

⁴ L. Fuller, *The Morality of Law* (1964), at 33–41.

⁵ R. Dworkin, *Law's Empire* (1986), at 225–227.

strongly contingent on a consistent and thus predictable conception and practical application of its general laws' (at 119).

Diel-Gligor then turns to international jurisprudence to show that this perspective has been 'affirmed' in legal practice by authoritative statements of international courts and tribunals (at 119).⁶ Diel-Gligor sees this as particularly significant, arguing that these judicial pronouncements affirm the arguments made by legal theorists and further demonstrate 'the fundamental desirability and need of consistent jurisprudence' (at 120). Whilst this may indeed be the case, it is perhaps worth pointing out a necessary consequence of the argument the author makes. In linking the desirability of consistency to the rule of law without further assessing the concept of the rule of law, certain issues fall outside the scope of *Towards Consistency*. Of course, this is a deliberate choice by the author, but it does nevertheless mean that ensuring greater consistency in accordance with the rule of law is, to a greater or lesser extent, presented as a positive end in itself. This, one might argue, is hardly controversial. In fact, the rule of law has even been described as 'one of the world's least objectionable political ideals'.⁷ However, as authors such as Schultz have written, the pursuit of consistent decisions only has relative value, depending on what is being made consistent.⁸ As such, in privileging consistency in accordance with the rule of law, and (even implicitly) placing less emphasis on related issues such as, for example, the desirability of the rule in question, part of the story remains untold.⁹ Especially in the context of international investment arbitration, which has come in for high-profile criticism in recent times, it is arguably important not to foreclose debate on the underlying policy implications of the rules in question before their desirability has been seriously considered.

The following sections of the book persuasively address consistency in international investment jurisprudence from a sociology of law perspective, highlighting the qualities of determinacy, predictability, reliability, equality and fairness of arbitral decisions as key motivations in the drive for consistency. The author uses these qualities to build her argument, drawing on the work of other commentators, that without consistency both the 'formal and sociological' legitimacy of the ICSID system will suffer. Whilst one can agree or disagree with the merits of this argument, which has played out at great length in the literature, the author does a skilful job of synthesizing this debate and making her case.

In the pages that follow, Diel-Gligor provides a (statistically unsecured, to use her own words [at 328]) snapshot of issues of supposed inconsistency, including areas relating to jurisdiction, subjective and objective approaches to the definition of an investment, the condition of consent in bilateral investment treaties and the effect of umbrella clauses. Ultimately, Diel-Gligor concludes that inconsistent ICSID jurisprudence can be found in all areas of international investment law, although the author stops short of providing grist to the mill of those who speak of a 'crisis of consistency' since in other areas ICSID tribunals have managed to develop consistent jurisprudence (at 329–330).

Having argued that the inconsistency of awards is indeed a real issue, Diel-Gligor suggests that in order to achieve greater consistency we must address the issue 'in a purposeful,

⁶ Citing, for example, *Continental Shelf (Libyan Arab Jamahira v. Malta)*, Judgment, 3 June 1985, ICJ Reports (1985) 13, para. 45: '[T]he justice of which equity is an emanation, is not abstract justice but justice according to the rule of law: which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to the principles of more general application.'

⁷ B. Tamanaha, *On the Rule of Law* (2012), at 2.

⁸ Schultz, 'Against Consistency in Investment Arbitration', in Z. Douglas, J. Pauwelyn and J. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 298.

⁹ *Ibid.*, at 313–315.

systematic, and strategic way' (at 331). Accordingly, Chapter 3 lays out the author's proposal for reform, in an attempt to 'cure' inconsistent ICSID investment jurisprudence (at 333). Diel-Gligor's own preferred proposal is that of establishing a preliminary reference (PR) mechanism, pursuant to which ICSID tribunals would seek guidance on contentious issues from an expert panel (at 391ff). The first thing that should be said is that Diel-Gligor makes a genuine contribution to the debate here in putting forward such a detailed draft of an ICSID PR system, especially considering that previous scholarship on such proposals has left a number of questions unanswered. In this chapter, Diel-Gligor adeptly offers a detailed blueprint for the introduction of the PR system that, crucially, does not involve revision of the ICSID Convention.¹⁰ This is based on the assumption that any attempt to revise the ICSID Convention would, in practical terms, be doomed to fail. Driven by such pragmatism, and the desire to make realistic proposals that could be implemented in practice, Diel-Gligor focuses her attention on the ICSID Arbitration Rules.¹¹

It is envisaged that the PR system would come into being through a complex two-step process. The first phase would involve the implementation of an optional ICSID PR procedure through a complement to the ICISD Arbitration Rules under Article 6(3) of the ICSID Convention to allow states to 'opt in'. The author also envisages that over time PR consent clauses could be inserted into new international investment agreements (IIAs) and that the same could be done during the revision and updating of existing IIAs, which takes place fairly regularly, and that ICSID could produce model clauses that could help in this regard (at 408–409). Over time, the practice of states opting into this procedure could come to qualify as 'subsequent practice' for the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.¹² The second phase of the author's proposal is the formal amendment of the ICSID Arbitration Rules under Article 6(1)(c), which would make the PR system standard practice, whilst leaving the possibility for states to opt out if they so wish.

Diel-Gligor then takes us through, in detail, how she envisages the ICSID PR system to work, beginning with describing the 'panel of experts' who would deal with PRs, as a 'non-autonomous sub-panel of the Panel of Arbitrators' (at 413). Interestingly, the author raises the issue of the qualifications of the members of this panel of experts, suggesting that 'it seems appropriate to raise the overall level of qualification in comparison to the "ordinary" members of the Panel of Arbitrators' (at 413), arguing that only leading and recognized authorities with broad knowledge of both international investment and public international law should be considered for this position. Even more intriguingly, Diel-Gligor, in assessing the various options available with regard to how PR Committees would be composed, opts for a model based loosely on that used to select Appellate Body members in the context of the World Trade Organization (at 417). One does wonder, given the current impasse at that institution, and the arguments made by other authors who raise concerns over the further politicization of international investment law that they argue would come with moving away from the current model that privileges party autonomy on such issues,¹³ whether further consideration of such issues would be required if *Towards Consistency* was being written today.

As mentioned above, earlier literature on preliminary references had left a number of questions unanswered, and Diel-Gligor does a good job of considering and attempting to

¹⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 159.

¹¹ ICSID Rules of Procedure for Arbitration Proceedings, April 2006.

¹² Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

¹³ Paulsson, 'Avoiding Unintended Consequences', in K. Sauvant and M. Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (2008) 258.

provide answers to these questions. For instance, the author strongly advocates placing a duty on ICSID annulment committees and ICSID tribunals to refer any admissible question to the PR Committee. In fact, Diel-Gligor's consideration of the minutiae that go along with any proposals to introduce a PR mechanism include the role of the parties and *amici curiae* in seeking a preliminary reference (which are both to be kept to a minimum) and the temporal and legal effect of the references themselves (at 442). Significant attention is given in particular to this last point, the legal value of the reference obtained. A distinction is drawn between the legal effect of a PR for the proceedings at hand and the effect for subsequent proceedings. The argument made is that PRs should be legally binding for the submitting arbitral tribunal, whilst, in the case of subsequent proceedings, the issue of the legal effect of PRs is more complex. Ultimately, Diel-Gligor rejects giving what she calls 'formal erga omnes effect' (at 444) (and even 'relaxed erga omnes' effect [at 445]), essentially binding legal force, to PRs. Instead, the author supports an approach based on a 'comply-or-explain mechanism' (at 446). This approach is borrowed from national corporate governance codices and would essentially 'imply a duty to provide substantiated explanations for any subsequent arbitral tribunal that decides to diverge from a previously rendered PR' (at 446). *Towards Consistency's* goal in this regard is to combine 'reliability of ICSID jurisprudence with a sound measure of flexibility, or, in other words, achieving the objectives of consistency and correctness without risking disproportionate interference with non-referring tribunals' interpretative authority' (at 447).

As such, after the painstaking and meticulous work in this chapter and those that preceded it, the pragmatism that is evident throughout *Towards Consistency* results in a measured, rather modest, set of proposals for reform. Diel-Gligor's objective is evident; to make realistic proposals for reform that it would not be outlandish to suggest could actually be adopted and to a large extent she succeeds in this regard. What will happen in practice is another matter, as much depends on the will of states, whose track record in relation to the last time such proposals for reform were raised at ICSID (in the context of a proposed appellate mechanism) is not particularly encouraging. As Rudolf Dolzer has argued, it is almost certainly not the case that states are against consistency. Rather, it is more likely that they perceive the downsides of any scheme that would promote consistency through creating any sort of standing mechanism as being so weighty as to convince them that it is better to put up with the inconsistency that currently exists.¹⁴

Other proposals for reform are currently on the table. For instance, the Multilateral Investment Court project that is being pushed by the Commission of the European Union,¹⁵ and the related discussions currently ongoing in the context of United Nations Commission on International Trade Law, concern a range of proposed reforms to ISDS. These reforms include more radical proposals to address inconsistency such as a multilateral court for international investment law with an appellate body. Whether or not these proposed reforms are ever implemented will depend on their being accepted by the various stakeholders in international investment law. The early indications are that states remain reluctant to wide-ranging changes, but it does seem at the moment that this is where the momentum lies in terms of bringing about reform in the context of international investment arbitration. Although the research for this book was largely carried out before these more recent developments, after spending 400 pages with the author meticulously examining a myriad of issues in ICSID arbitration, one is left wanting to know what Diel-Gligor and her fine-toothed comb would make of the proposals currently being discussed. But

¹⁴ Dolzer, 'Perspectives for Investment Arbitration: Consistency as a Policy Goal?', in R. Ehandi and P. Sauvé (eds), *Prospects in International Investment Law and Policy* (2013) 4.

¹⁵ See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>.

this is perhaps the job for the sequel to *Towards Consistency*. For now, it can be said without doubt that this is a rigorously researched, referenced and measured text that represents a significant contribution to the crowded field of scholarship on the issue of consistency of awards in international investment arbitration.

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