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Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?

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Abstract

Due to the problem-centric nature of its mandate, empirical research has been relatively central in the United Nations Commission on International Trade Law (UNCITRAL) investment arbitration reform process. In this article, the authors seek to provide a state-of-the-art summary and assessment of empirical studies on the six identified concerns of states: legal cost, duration of proceedings, consistency, correctness, diversity and independence. The article asks: (1) What do we know? and (2) Does it matter? The survey of evidence reveals an emerging base of quantitative, qualitative and computational evidence for justifying some but not all concerns and understanding their causes. However, there are challenges in accessing all relevant data, modelling outcomes and evaluating whether there was normatively a problem.

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The article concludes by indicating that some concerns are clearly justified, others not, and others fall within an unknown category.

Keywords

empirical legal studies – investment arbitration reform – quantitative methods – costs and duration of proceedings – consistency and correctness – diversity and independence – United Nations Commission on International Trade Law (UNCITRAL) Working Group III

Introduction

Empirical research has been surprisingly central in recent processes in reforming international investment arbitration. Unlike previous attempts, the mandate for Working Group III (WG III) in the United Nations Commission on International Trade Law (UNCITRAL) is not focused on a generally-agreed upon problem. Rather it invites states to identify concerns, consider whether reform is desirable, and develop preferable solutions. In all three phases, empirical research has played an important role. Empirical findings have helped shape the choice and framing of issues by states (especially concerns with the lack of arbitral diversity and independence and excessive costs), been quoted and discussed in plenary sessions (including on questions of inconsistency, correctness of awards and length of proceedings), and mobilized increasingly to both inflect and reflect on the diverse solutions proposed.

This empirical turn is very much a creature of times. It reflects the emergence of a burgeoning empirical research field on investment treaty arbitration and the broader empirical turn in international law.[1] Scholars have used a range of methods – quantitative, qualitative and computational – to analyze the international investment regime, probing its origins, functioning and effects, and to address doctrinal questions. Such empirical research has been greatly facilitated by the rapid expansion and proliferation in the number of treaties, arbitrations and accompanying actors, facilitating the analysis of broader

1 See generally Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, 'The Data-Driven Future of International Economic Law' (2017) 20(2) JIEL 217; Sergio Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda' (2013) 36(2) Fordham Intl L J 465; Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106(1) AJIL 1; Susan D Franck, 'Empirical Modalities: Lessons for the Future of International Investment' (2010) 104 ASIL Proceedings 33.

patterns and the development of generalizable findings. The receptiveness to empirical research is also a product of the design of the reform process. Given that debates on investment treaty arbitration are often polarized, the mandate for UNCITRAL WG III provides that that its work 'should not be undertaken based on mere perceptions, but on facts'.[2]

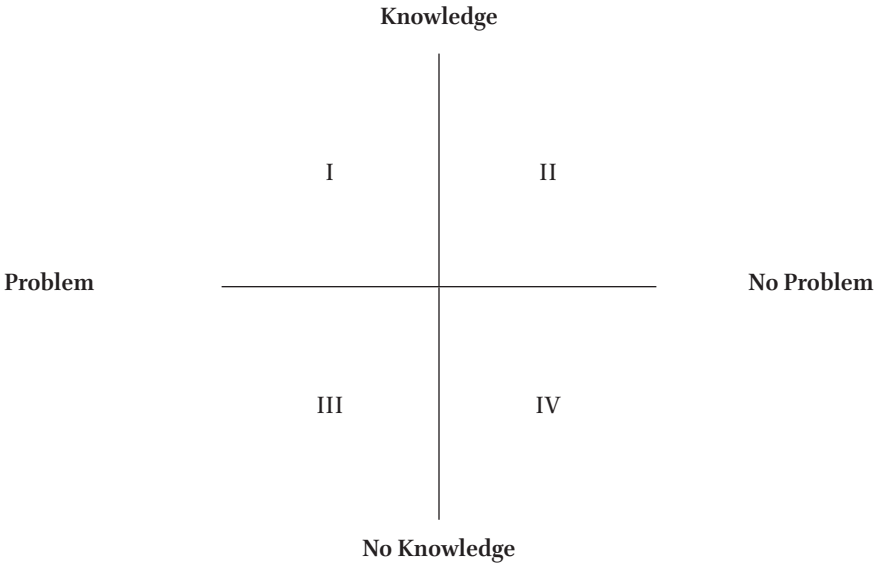
In this article, we seek to precisely do that: provide a state-of-the-art summary and assessment of the empirical research on the identified concerns of states in the reform of investment treaty arbitration in UNCITRAL WG III. These concerns are reflected in the six working group themes identified for the first phase of the Investor-State Dispute Settlement (ISDS) Academic Forum's collective work: excessive costs; excessive duration of proceedings; lack of consistency in legal interpretation; incorrectness of decisions; lack of arbitral diversity; and lack of independence, impartiality, and neutrality of ISDS adjudicators.

In adopting an empirical perspective on each issue, we ask two simple but difficult questions: (1) What do we know? and (2) Does it matter? While both questions are central to the UNCITRAL process, each comes with inherent and recurrent tensions. First, the current knowledge about investment treaty arbitration suffers from a range of epistemological challenges: some issues are understudied, other issues are difficult to study, and results can be challenging to interpret or compare across time. For example, we know a lot about the patterns of arbitral diversity but less about how it affects decision-making. To be sure, some of these challenges will dissipate with time. The rise of larger datasets is generating better testing of statistical significance and observation of long-term trends and the widening of the methodological palette (with experimental, computational and qualitative approaches) permits scholars to address new questions. The field remains, however, nascent.

Second, and in a similar vein, there is an evaluative challenge in assessing whether a problem really matters. This might be due to empirical ambiguity (the problem is modest or the results are partly counter-intuitive) or normative ambiguity (the idea of the problem is contested or its elements can be weighted differently). So, for example, we can measure the length of proceedings and determine, with increasing precision, what causes delays. Yet, it is not clear whether delay is a real problem. The empirical evidence points to the

2 UNCITRAL, 'Report of the United Nations Commission on International Trade Law, Fiftieth Session' (3–21 July 2017) UN Doc A/72/17, para 245; see discussion in Chiara Giorgetti and others, 'Reforming International Investment Arbitration – An Introduction' (2019) 18(3) LPICT 303.

FIGURE 1.1 Empirical Perspectives: Epistemological vs Evaluative



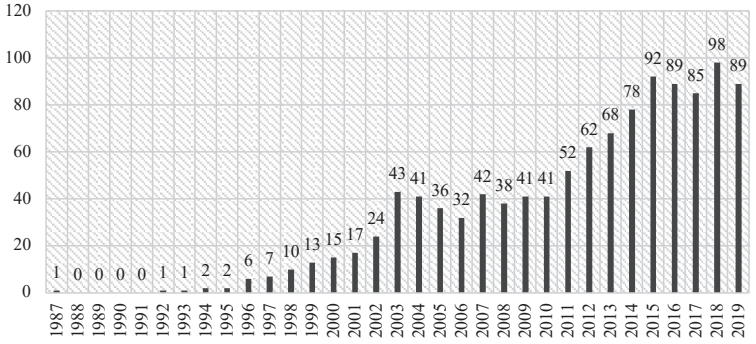
significant contributing role of respondent states and the normative evaluative standard is unclear.

In addressing these epistemological and evaluative tensions, we have sought to map our findings onto a 2x2 framework. As Figure 1.1 indicates, empirical research can fall within any of the four quadrants below: from areas where we have good knowledge of a concrete problem (Quadrant I) to poor knowledge of a problem of an uncertain nature (Quadrant IV). In between, we find good knowledge but no problem (Quadrant III) and poor knowledge but a likely problem (Quadrant III). In each section, we summarize the current position along this frame.

Before turning to the six areas, we present the latest descriptive statistics on ISDS caseload up through 1 January 2020 from the PITAD database. As of this date, there were 1,126 cases based on substantive bilateral investment and free trade agreements (see Figure 1.2). This is complemented by a further 157 cases based on contracts and domestic foreign direct investment (FDI) law cases; and 141 annulments which were or are administered under the Convention of the International Centre for Settlement of Investment Disputes (ICSID).[3] The caseload of treaty-based investment arbitrations has been on an upward

3 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

FIGURE 1.2 All ISDS Cases by Year (1,126 cases as of 1 January 2020)



SOURCE: Data retrieved from the PluriCourts Investment Treaty and Arbitration Database (PITAD) <https://pitad.org> accessed 1 January 2020.

trajectory since the early 2000s but appears to be plateauing at around 80 cases registered per year in the past years.

As Table 1.2 shows, 756 of the 1126 cases have been finally resolved, whether decided, settled or discontinued. The results, in the decided cases are relatively even: in 52.8% of the cases the investor has lost on jurisdiction or the merits, while in 47.2% they have won fully or partially. However, we note that in 26.9% of these decided cases, the final award is not publicly available and we are reliant on secondary information about outcomes (see Table 1.3).

There is a notable asymmetry for the types of parties that engage in investment treaty arbitration. On one side, the home state of the claimant-investor is strongly represented by the United States, followed by the Netherlands, the United Kingdom, Germany, Canada and Spain (see Figure 1.4). Likewise, host states in investment treaty arbitration are overwhelmingly middle-income states (see Figure 1.5). Of the 1,126 cases, low-income states are respondents in 5%, lower middle-income 24%, upper-middle income 45% and high-income states 26%.[4] The litigation is also unidirectional across development status.

4 'Low-income economies are defined as those with a gross national income (GNI) per capita, calculated using the World Bank Atlas method (in USD), of USD 995 or less in 2017; lower middle-income economies are those with a GNI per capita between USD 996 and USD 3,895; upper middle-income economies are those with a GNI per capita between USD 3,896 and USD 12,055; high-income economies are those with a GNI per capita of USD 12,056 or more.' See World Bank Income Groups (WBIG) <https://datahelpdesk.worldbank.org/knowledgebase/articles/ 906519-world-bank-country-and-lending-groups> accessed 1 January 2020.

TABLE 1.3 All ISDS Cases by Outcome (1,126 cases as of 1 January 2020)

Outcome Type	No		No
Investor loses	284	*Investor loses on jurisdiction*	*131*
		Investor loses on merits	*153*
Investor wins	262	*Investor partial win*	*138*
		Investor full win[a]	*124*
Case settled/discontinued	210	*Case settled*	*133*
		Case discontinued	*77*
Case pending	370		
Total	**1126**		

SOURCE: PITAD.

a At the liability/merits stage, a full and partial win are not categorized according to the ratio of amount claimed and awarded or the number of successful claims. Rather, the distinction between full win and partial win is based on whether the claimant-investor – in a holistic assessment of the case – was made whole by the arbitral tribunal. At the jurisdiction stage, a full win is scored when no jurisdictional objections are sustained, and a partial win is scored where the jurisdiction of the tribunal is restricted in scope.

For example, there is no decided case in which a claimant-investor from a middle or low-income state has sued a high-income state.[5]

In terms of the economic sectors subject to investment treaty arbitrations, Figure 1.6 shows the distribution. Historically, the extractive industries and other types of investments with high sunk costs were the most frequently sued sector in investment treaty arbitration, with investors winning most cases arising from the extractive industry sector.[6] However, while the extractive industries and electricity sector still hold the largest share of cases by economic sector, there has been considerable diversification in the past decade with arbitration of a high number of manufacturing, banking and construction disputes.

The type of the arbitral institutions administering investment treaty arbitrations is also diversifying. During the past decade, ICSID has been losing

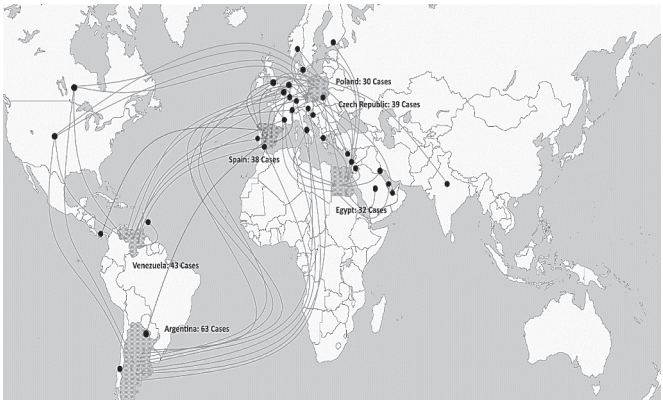
5 Daniel Behn and others, 'Private or Public Good? An Empirical Perspective on Investment Arbitration' in Massimo Iovane and others (eds), *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (OUP 2020) (forthcoming).

6 Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Arbitrator?' (2018) 29(2) EJIL 551.

FIGURE 1.4 Most Frequent Claimant Home State in ISDS Cases (as of 1 January 2018)

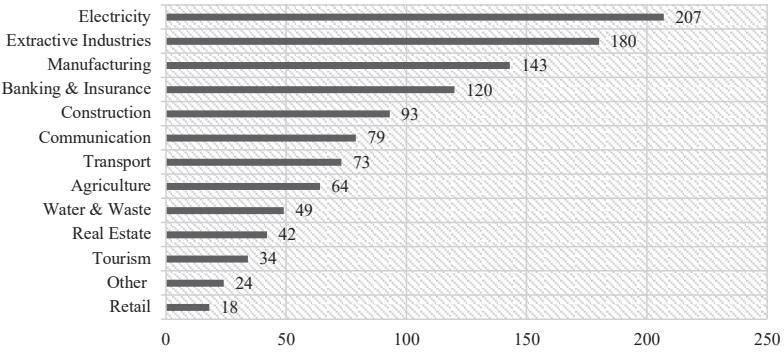
SOURCE: Author's map based on PITAD data.

FIGURE 1.5 Most Frequent Respondent Host State in ISDS Cases (as of 1 January 2018)



SOURCE: Author's map based on PITAD data.

FIGURE 1.6 All ISDS Cases by Economic Sector (1,126 cases as of 1 January 2020)



SOURCE: PITAD.

TABLE 1.7 All ISDS Cases by Institution (1,126 cases to 1 January 2020)

Institution	**No**	**%**		**No**	**%**
ICSID	620	55.1	*ICSID*	*620*	*55.1*
Non-ICSID	506	44.9	*Ad hoc UNCITRAL*	*217*	*19.2*
			PCA	*168*	*14.4*
			SCC	*70*	*6.2*
			ICC	*38*	*2.1*
			LCIA	*6*	*1.5*
			Other	*7*	*1.5*
Total	**1126**	**100**			

SOURCE: PITAD.

market share annually (see Table 1.7). If one were to add in the nearly 100 cases that are known to be completely confidential non-ICSID cases (about 25 at the Permanent Court of Arbitration (PCA), about 25 at the Stockholm Chamber of Commerce (SCC) and about 25 to 50 ad hoc cases) then ICSID is close to losing its majority percentage of market share for investment treaty arbitration cases.

1 Excessive Costs and Insufficient Recoverability of Cost Awards

The issue of costs in investment treaty arbitration has been hotly contested for many years. The claim is that it is an exceptionally expensive form of

adjudication. In terms of empirical studies relating to the costs related to investment treaty arbitration, there are a handful of data-centric projects that have sought to comprehensively map just how expensive this form of adjudication has been for parties.[7]

7 Gabriel Bottini and others, 'Excessive Costs and Recoverability of Cost Awards in Investment Arbitration' (2020) 21(2–3) JWIT 251–99; Daniel Behn and Ana Maria Daza, 'The Defense Burden in Investment Arbitration?' (2019) PluriCourts Working Paper; Susan D Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (OUP 2019); Sergio Puig, 'Contextualizing Cost-Shifting: A Multi-Method Approach' (2019) 58(2) VJIL 261; Daniel Behn, 'Performance of Investment Treaty Arbitration' in Theresa Squatrito and others (eds), *The Performance of International Courts and Tribunals* (CUP 2018) 77–113; Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (OUP 2018); Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (2018) 21(4) Intl Arb L Rev 111; William Park, Catherine Rogers and Stavros Brekoulakis, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (International Council for Commercial Arbitration 2018); UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations 2018); Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill 2017); Miriam Harwood and others, 'Third-Party Funding: Security for Costs and Other Key Issues' in Barton Legum (ed), *The Investment Treaty Arbitration Review* (2nd edn, Law Business Research 2017); Christine Sim, 'Security for Costs in Investor-State Arbitration' (2017) 33(1) Arb Intl 427; Sergio Puig and Anton Strezhnev, 'Affiliation Bias in Arbitration: An Experimental Approach' (2017) 46(2) JLS 371; Rachel Wellhausen, 'Recent Trends in Investor-State Dispute Settlement' (2016) 7 JIDS 117; Gus Van Harten and Pavel Malysheuskii, 'Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants' (2016) Osgoode Research Paper No 14/2016; Valentina Frignati, 'Ethical Implications of Third-Party Funding in International Arbitration' (2016) 32(3) Arb Intl 506; Kateryna Bondar, 'Allocation of Costs in Investor-State and Commercial Arbitration: Towards a Harmonized Approach' (2016) 32 Arb Intl 45; Susan D Franck and Lindsey Wylie, 'Predicting Outcomes in Investment Treaty Arbitration' (2015) 65 Duke L J 459; Arthur Rovine, 'Allocation for Costs in Recent ICSID Awards' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 658–88; Matthew Hodgson, 'Cost Allocation in ICSID Arbitration: Theory and (Mis)Application' (2015) 152 Columbia FDI Perspectives; Michelle Bradfield and Guglielmo Verdirame, 'Costs in Investment Treaty Arbitration' in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill 2014) 411–42; Wendy J Miles, 'Costs Allocation in Investor-State Arbitration' (2014) 80(4) Arb 413; Beth Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 World Pol 12; Albert Jan van den Berg, 'Time and Costs: Issues and Initiatives from an Arbitrator's Perspective' (2013) 28(1) ICSID Rev 218; David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD 2012); Susan D Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88(4) U Wash L Rev 769; Susan D Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (2011) 51(1) VJIL 825; Lucy Reed, 'Allocation of Costs in International Arbitration' (2011) 26(1) ICSID Rev 76; David Smith, 'Shifting Sands: Cost-and-Fee Allocation in International Investment

1.1 *Legal Costs and Tribunal Fees*

The costs of investment treaty arbitrations can be divided into (1) legal costs: counsel costs and experts costs; and (2) tribunal fees: arbitrator fees, and tribunal, arbitral institution and hearing venue. The former can be quite substantial, and the latter not insignificant. Already in 2010, United Nations Conference on Trade and Development (UNCTAD) reported that costs had recently 'skyrocketed';[8] and, in 2012, a survey by the Organisation for Economic Co-operation and Development (OECD) showed that total legal costs and tribunal fees in ICSID cases averaged USD 8 million.[9]

Table 1.8 shows recent studies on legal costs. The largest cost component of any investment treaty arbitration are generally legal costs. Examining publicly available ICSID final awards between 2011 and 2017, Commission and Moloo find that the average claimant's and respondent's legal costs were respectively USD 6,043,915 and USD 5,217,247.[10] Similarly, they find that the average respective party costs in UNCITRAL arbitrations between 2010 and 2017 were USD 6,077,585 and USD 4,596,807.[11] Of 19 of 57 annulment decisions with available data, they find that the average cost for an annulment applicant are USD 1.36 million and for the respondent, USD 1.45 million.

Behn and Daza find similar results in a recent comprehensive study using PITAD data up to 1 February 2019. For all known investment treaty arbitration cases where cost data is available, claimant's legal costs in 169 cases were USD 6,067,184: respondent's legal costs in 177 cases were USD 5,223,974.[12] In an earlier study by Franck, with data up to 2011, she reports that combined costs

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Arbitration' (2011) 51 VJIL 749; UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (United Nations 2010); Thomas Webster, 'Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues' (2009) 25(4) Arb Intl 469; Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86(1) NC L Rev 1; Noah Rubins, 'The Allocation of Costs and Attorney's Fees in Investor-State Arbitration' (2003) 18 ICSID Rev 109.

8 UNCTAD 2010 (n 7) 16–18.

9 ibid; see also UNCTAD, *IIA Issues Note: Reform of Investor-State Dispute Settlement* (United Nations 2013); European Commission, *Investor-to-State Dispute Settlement (ISDS): Some Facts and Figures* (European Union 2015).

10 Commission and Moloo (n 7) 187–88 (dataset: 145 ICSID arbitrations between 2011 and 2017, data on legal costs is available for claimants in 90 arbitrations and for respondents in 88 arbitrations; information on tribunal fees is available for 68 awards).

11 ibid 189 (dataset: 61 UNCITRAL arbitration between 2010 and 2017, data on legal costs is available for claimants in 36 arbitrations and for respondents in 41 arbitrations; information on tribunal fees is available in 38 awards).

12 Behn and Daza (n 7).

TABLE 1.8 Legal Costs (USD)

Study	Period	Arbitral rules	Sample (no. Awards)	Average claimant costs	Sample (no. Awards)	Average respondent costs	Inflation-adjusted year
***Commission and Moloo* (2018)**	2011–2017	ICSID	90	6,043,915	88	5,217,247	2017
***Commission and Moloo* (2018)**	2010–2017	UNCITRAL	36	6,077,585	41	4,596,807	2017
***Behn and Daza* (2019)**	1987–2019	ICISD and UNCITRAL	169	6,067,184	177	5,223,974	2018

SOURCE: Author's summary table of data in Commission and Moloo (n 7) and Behn and Daza (n 7).

(claimant and respondent costs) average USD 9.3 million (in 2011 inflation-adjusted dollars (a median of around USD 6 million).[13]

Turning to the fees associated with tribunals, it was estimated in 2010 that 18% of the overall amount of any given investment treaty arbitration was the cost of the tribunal, but that ratio has now fallen below 10%.[14] Table 1.4 summarizes four studies of tribunal fees. In 2007, Franck found that tribunal fees averaged USD 581,332.[15] A decade later, using inflation-adjusted calculations for the period 2011 and 2017 that included data on tribunal fees, Commission and Moloo found an average of USD 922,087 for ICSID arbitrations and a similar figure for UNCITRAL arbitrations – although the average tribunal fees for an ICSID annulment is half that at USD 472,000.[16] The most recent and comprehensive study of tribunal fees, by Behn and Daza, uses PITAD data

13 Franck, *Arbitration Costs* (n 7) 203–06 (USD 10.7 million in 2018 values) (dataset: all publicly available ITA awards as of 1 January 2012, see appendix I).

14 For the ratio up to 2010, see Gaukrodger and Gordon (n 7) 19 (dataset: survey of 143 available ISDS awards listed as of August 2011: 28 provided information on arbitral fees and legal expenses, 81 provided some information on costs, and 62 provided no such information). On the most recent ratio, see Behn and Daza (n 7).

15 Franck, 'Empirically Evaluating Claims' (n 7) 68–69 (dataset: out of the 102 awards, only 50 contained tribunal's costs and expenses (TCE) decisions and only 17 quantified TCE).

16 Commission and Moloo (n 7) 188, 190; see also Franck, *Arbitration Costs* (n 7) 272–73 (comparing ICISD, SCC and ad hoc arbitration and finding that SCC might be the least expensive forum and ad hoc arbitration might be the most expensive).

TABLE 1.9 Tribunal Fees (USD)

Study	Period	Arbitral rules	Sample (no. Awards)	Average tribunal fees	Median tribunal fees	Inflation-adjusted year
***Franck* (2007)**	1987–2007	ICSID and UNCITRAL	17	581,333	501,370	non-adjusted
***Commission and Moloo* (2018)**	2011–2017 (FY)	ICSID	68	922,087	876,816	2017
***Commission and Moloo* (2018)**	2010–2017 (FY)	UNCITRAL	48	960,641	730,104	2017
***Behn and Daza* (2019)**	1987- 2019	ICISD and UNCITRAL	193	947,622	746,708	2018

SOURCE: Author's summary table of data in Franck, 'Empirically Evaluating Claims' (n 7), Commission and Moloo (n 7) and Behn and Daza (n 7). FY = financial year

and arrives at a similar conclusion to Commission and Moloo.[17] Average tribunal costs are in the vicinity of USD 1 million.

Are the legal costs and tribunal fees a problem in investment treaty arbitration? The empirical data illustrates that tribunals fees are only a fraction of the legal costs encountered by the parties. Legal costs are high and the evaluative question is whether this is relatively high compared to other forms of international adjudication. Another issue impairing a full assessment of the issue of costs is the informational gaps, the costs are rarely particularized by tribunals. Finally, a remaining issue to address is the extent to which such high costs might limit access to justice.[18]

1.2 *Amounts Awarded and Claimed*

Studies of earlier arbitrations find relatively modest levels of compensation. Examining awards prior to 2007, Franck finds that the average amount awarded by tribunals was about USD 10.4 million.[19] Extending the sample to the end of

17 Behn and Daza (n 7); see also similar findings in Franck, *Arbitration Costs* (n 7) 206–08.

18 See the discussion in Franck, *Arbitration Costs* (n 7) 297–338 (finding that over 95% tribunals failed to address costs in a meaningful way before final awards and identifying regular gaps in basic costs).

19 Franck, 'Empirically Evaluating Claims' (n 7) 57–58 (dataset: 102 awards from 82 cases of which 52 were concluded by the end of 2006).

2011, Franck finds an increase to USD 16.6 million (inflation-adjusted to 2011).[20] Focusing exclusively on the pool of cases where investors obtained damages, she finds that investors up to 2011 received an average award of USD 47 million (median: USD 11 million) (inflation-adjusted to 2011).[21]

In a study covering all publicly available arbitral awards though 1 August 2017, Behn finds an increase to USD 149.1 million (non-inflation adjusted). However, this figure is partly affected by 6 extra-large awards.[22] Taking out the six awards where over USD one billion was awarded and the five successful awards where no compensation was awarded, he finds that the average compensation (149 awards) amounts to approximately USD 72.8 million. This amounts to a grand total of approximately USD 10.2 billion in total across the entire universe of all investment treaty arbitrations (non-inflation adjusted).[23]

Studies in the past few years show a further increase. The UNCTAD's 2018 World Investment Report finds that the average amount awarded was USD 504 million and the median USD 20 million (non-inflation adjusted).[24] Excluding the three cases relating to the Yukos arbitrations, however, the average amount awarded falls to USD 125 million. A recent study by Behn and Daza of all investment arbitration cases with known amounts awarded up through 1 February 2019 (193 awards) is an average of USD 482.5 million (inflation-adjusted to 2018) and a median of USD 31 million (inflation-adjusted to 2018).[25]

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20 Franck, *Arbitration Costs* (n 7) 164 (USD 19 million inflation-adjusted to 2018); see also Franck and Wylie (n 7) 467–95.

21 Franck, *Arbitration Costs* (n 7) 164 (USD 52 million and a median of USD 12 million inflation-adjusted to 2018); see also Franck and Wylie (n 7) 467–95.

22 Behn, 'Performance of Investment Treaty Arbitration' (n 7) 103 (There are six cases where the claimant-investor was awarded in excess of one billion USD: *Hulley Enterprises v Russia*, PCA, UNCITRAL, Award (18 July 2014) (40.0 billion USD); *Veteran Petroleum v Russia*, PCA, UNCITRAL, Award (18 July 2014) (8.2 billion USD); *Yukos Universal v Russia*, PCA, UNCITRAL, Award (18 July 2014) (1.8 billion USD); *Occidental II v Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) (1.8 billion USD); *Venezuela Holdings v Venezuela*, ICSID Case No ARB/07/27, Award (9 October 2014) (1.6 billion USD); *Crystallex v Venezuela*, ICSID Case No ARB(AF)/11/2, Award (4 April 2016) (1.4 billion USD). However, it is equally important to note that annulment committees have significantly reduced the amount of compensation awarded in *Occidental II* and *Venezuela Holdings*, and the three Yukos awards have been set-aside in the courts of the Netherlands (pending high court review).

23 ibid 104.

24 UNCTAD 2018 (n 7) 95 (noting that these amounts do not include interest or legal costs and some of the amounts awarded may have been subject to set-aside or annulment proceedings and finding that, in cases decided in favor of the claimant-investor, the average amount claimed was USD 1.3 billion and the median USD 118 million).

25 Behn and Daza (n 7).

Are these high awards a problem? This question cannot be answered simply from an empirical perspective. However, empirical research provides two insights that should be used in any reflection. The first is that investors only obtain a share of what they claim, but that share is relatively constant.[26] Up to 2007, Franck found that the total amount of damages claimed in 44 cases (both wins and losses) averaged USD 343.4 million[27] (non-inflation adjusted); which had risen to approximately USD 623 million by end of 2011 (adjusted for inflation to 2011 with a median of USD 100 million) (non-inflation adjusted) – well above her figures for average compensation awarded.[28] With an expanded dataset of 676 investment arbitrations filed from 1990 through 2014, Wellhausen finds that the average compensation claimed is now significantly higher, at USD 884 million (non-inflation adjusted).[29] Franck also finds no statistically significant difference for ICSID arbitration awards in regard to amount claimed or outcome as compared to arbitral awards from other arbitral institutions.[30]

However, focusing on the compensation ratio over time, Langford and Behn, find stability.[31] For a subset of 148 cases between 1990 and 1 August 2017 where the investor won on the merits and information is available on both the amount of compensation claimed and awarded, they note a remarkable stable relationship between the claim and compensation awarded. Between 1990 and 2004, the ratio was 44%; fell to 36% for the period 2005 through 2010; and hovered around 36% between 2011 and 1 August 2017. The overall rate across all periods is 39%. These figures are consistent with the UNCTAD's 2018 World Investment Report stating that successful claimants were awarded about 40% of the amount claimed. Similarly, Nottage and Ubilava find that the overall average in their dataset works out to an average amount awarded that is 35% of the average claimed amount.[32] However, these findings raise a

26 Observing the difference between the amount that a claimant-investor claims and the amount that is actually awarded by a tribunal may also better take into account the circumstances of the case. However, there has been concerns that these figures may be misleading if it is true that claimant-investors typically overclaim, especially since it may pressure states to settle or prompt tribunals to agree on a higher amount.

27 Franck, 'Empirically Evaluating Claims' (n 7) 57–58 (dataset: 102 awards from 82 cases of which 52 were concluded by the end of 2006).

28 See discussion on comparing claims and awards in Franck, *Arbitration Costs* (n 7) 170–75.

29 Wellhausen (n 7) 133 (dataset: 325 cases and noting that the mean compensation increased significantly by the 45 claims in which the investor sought USD 1 billion or more in compensation).

30 Franck, 'The ICSID Effect?' (n 7) 914.

31 Langford and Behn (n 6).

32 UNCTAD 2018 (n 7) 95 (amounts do not include interest or legal costs and some of the amounts awarded may have been subject to set-aside or annulment proceedings.

normative concern. If tribunals use the claimant's assertion as the standard envelope for assessing a claim, and claimants were to strategically increased the amount claimed over time, there are question marks over the proper calculation of damages and ultimately the correctness of the award. This is an area for further research.

A second empirical insight into assessing the magnitude of compensation comes from Van Harten and Malysheuski. They argue that the beneficiaries of compensation awarded in investment treaty arbitration have overwhelming been companies with over USD 1 billion in annual revenue and investors with over USD 100 million in net wealth. The result is that the average legal costs often dwarf the levels of compensation awarded to successful claimants in cases brought by small and medium-sized companies.[33]

1.3 *Cost Orders and Third-Party Funding*

1.3.1 Allocation of Costs

Most jurisdictions around the world follow the 'loser pays' approach to costs and fees allocation.[34] Yet, the rule that each party should bear its own costs has been characterized as a 'general principle of law for international tribunals.'[35] Under the 2013 UNCITRAL Arbitration Rules, the costs of an arbitration is borne by the unsuccessful party as a default principle, although the tribunal has discretion to allocate the costs reasonably taking into account the circumstances of the case.[36] In comparison, ICSID tribunals are granted broad discretion in deciding costs apportionment between the parties.[37] Parties can also agree on

UNCTAD find that in cases decided in favor of the claimant investor, the average amount claimed was USD 1.3 billion and the median USD 118 million. The average amount awarded was USD 504 million and the median USD 20 million); see also Nottage and Ubilava (n 7).

33 Van Harten and Malysheuski (n 7).

34 Rubins (n 7).

35 Bradfield and Verdirame (n 7) 418; see also Carlos Espósito, 'Article 64' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1778.

36 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new art 1(4) as adopted in 2013) GA Res 68/109 (adopted 16 December 2013) (UNCITRAL Arbitration Rules 2013) art 42; see also a similar trend in recent treaty practice, such as eg Armenia–Singapore Agreement on Trade in Services and Investment (2019) art 3.22

37 ICSID Convention, arts 60, 61 and ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006) art 28(1); ICSID Additional Facility Rules (April 2006) art 58; for other similar arbitral rules conferring wide discretion to the tribunal, see eg Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force 1 January 2017) (SCC Rules) arts 49–50; Singapore International

cost allocations and tribunals will usually enforce those agreements.[38] Costs are generally allocated according to three normative rules: loser pays (English rule or costs follow the event (CFTE)); pay your own way (also called American rule) or allocation pro rata (also called relative success).[39]

The empirical studies conducted to date demonstrate that there is no uniform and standard practice of cost allocation in investment treaty arbitration.[40] Reviewing awards pre-2007, Franck finds that there was no universal approach for costs allocations taken by tribunals but identified the 'pay your own way' as the dominant one.[41] In contrast, examining 59 ICSID and UNICTRAL awards in the period between 2005 and 2009 with respect to the issue of costs, Webster finds that tribunals have adopted the 'cost follow the event' principle in 64% of the cases.[42] In a review of cases rendered by ICSID tribunals between 2004 and 2010, similar to the earlier study by Franck, Reed finds that tribunals ordered the parties to bear their own legal costs and pay half of the tribunal fees in 43 out of 67 cases; in 24 cases tribunals ordered one party to pay all or a part of the other party's legal costs and/or ICSID costs; and in 6 cases the 'loser pays' rule was applied.[43] Looking at 88 decisions in the period of 2006 to 2014, Rovine finds that costs have shifted more frequently since the 2007 study by Franck (33% after 1 June 2006 as compared to 24% before 1 June 2006).[44]

Reviewing awards pre-2012, Franck still identifies the 'pay your own way' as the dominant approach taken both for parties' legal fees and tribunal costs.[45]

Arbitration Centre Rules (in force 1 August 2016) (SIAC Rules) art 35(1) and Arbitration Rules of the Court of the International Chamber of Commerce (in force 1 March 2017) (ICC Rules) art 38(5).

38 Franck, *Arbitration Costs* (n 7) 193.

39 Reed (n 7); Franck, *Arbitration Costs* (n 7) 190–93 and Franck, 'Rationalizing Costs' (n 7).

40 Commission and Moloo (n 7) 199; Miles (n 7) 415–16 (dataset: 168 final awards rendered between 2006 and 2013); Reed (n 7).

41 Franck, 'Rationalizing Costs' (n 7) (dataset: pre-2007 awards and showed that there was no universal approach for how tribunals addressed costs); see also Smith (n 7) 779 (dataset: 31 awards between 2008 and 2009 and finding that the percentage of decisions taking the 'pay your own way' approach has increased to 41.9%); see also Diel-Gligor (n 7) 246.

42 Webster (n 7) 493–501; see also Stephan W Schill, 'Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration' (2006) 7 JWIT 653.

43 Reed (n 7) 79.

44 Rovine (n 7) 667; See also Miles (n 7) (finding that less than half of decisions the loser pays approach was taken and in the remaining costs decisions, the 'pay your own way' principle was applied); Bondar (n 7) (drawing on the 2014 empirical study by Hodgson and finding that most ICSID tribunals follow the 'pay your own way' approach claiming but in about 60% of the awards no approach is identified by the tribunal and even when identified, tribunals often deviate from the approach); Hodgson (n 7).

45 Franck, *Arbitration Costs* (n 7) 213–14; see also Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (n 7) (dataset: pre-2007 awards and showed that there was no universal

When this approach was not adopted, tribunals shifted costs with an equal divide in which party was responsible for contributing.[46] Franck identifies some factors (i.e. proportion of success, the conduct of the parties, the novelty and complexity of the issues, as well as, equity considerations) influencing the approach taken by tribunals.[47] Looking at 67 cases in the period 2010 to 2013, Bradfield and Verdirame find that cost shifting has been applied in 46.3% of the cases (a 4.4% increase from the Smith 2008 to 2009 survey and a 13.7% increase from the pre-2007 Franck survey).[48] Bradfield and Verdirame's study also shows that there is significantly more cost-shifting in UNCITRAL cases (cases within the sample were decided in accordance with the 1976 UNCITRAL Rules). Finally, they highlight that '[t]he only certainty surrounding the underlying principle regarding costs is that there is no certainty in the principles applied.'[49]

A more recent study by Commission and Moloo examining investment arbitration awards rendered under ICSID (125 awards between 2011 and 2017) and UNCITRAL (59 awards between 2010 and 2017) shows however that the majority of ICSID tribunals are now adjusting their costs award in favor of the successful party aligning their practice with UNCITRAL tribunals.[50] Commission and Moloo also note that most tribunals render decisions on the allocation of costs at the award stage.[51] Franck's most recent study on

approach for how tribunals addressed costs and finding that 'pay your own way' approach is the dominant one); Smith (n 7) 779 (dataset: 31 awards between 2008 and 2009 and finding that the percentage of decisions taking the 'pay your own way' approach has increased to 41.9%); see also Diel-Gligor (n 7) 246.

46 Franck, *Arbitration Costs* (n 7) 213–15 (when considering net cost allocation, nearly 60% of ITA awards followed the pay your own way approach and for the rest, tribunals shifted to investors (20.4%) and states (22.2%) equally); see also Franck, 'Empirically Evaluating Claims' (n 7) 69–70.

47 Franck, *Arbitration Costs* (n 7) ch 7; Franck, 'Rationalizing Costs' (n 7) 826; see also Rubins (n 7); Bradfield and Verdirame (n 7) 419–21; Franck, 'Empirically Evaluating Claims' (n 7) 67–71.

48 Bradfield and Verdirame (n 7) 425–26 (dataset: 67 claims of which 51 applied ICSID Rules and 16 applied the UNCITRAL Rules).

49 ibid 416.

50 Commission and Moloo (n 7) 196.

51 ibid (authors also highlight a few instances where tribunals have rendered decisions on the allocation of costs at an earlier stage (ie *Pope & Talbot Inc v Canada*, UNCITRAL, Decision by Tribunal (27 September 2000) para 12; *Hassan Awdi, Enterprise Business Consultants, In and Alfa El Corporation v Romania*, ICSID Case No ARB/10/13, Award (2 March 2015) para 532; *Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/21, Reasoned Decision on the Proposal for Disqualification of Arbitrator L Yves Fortier, QC (28 March 2016) para 58; *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction (8 March 2017) paras 638–39.

costs demonstrates that tribunals' costs rationalization, although improving over time, remains weak justified by 'equity and discretion' but ignoring 'precedential concerns, equality of arms, settlement efforts and public interest';[52] potentially limiting access to justice.[53]

Franck's most recent study indicates a certain inequality when the 'loser pays' rule is applied, namely that it is primarily for the benefit of winning investors than for the winning states.[54] Finding the same pattern, a study by Behn and Daza, including all cases where information about cost shifting is known up through 1 February 2019, arrives at two findings in investment treaty arbitration cases. First, where the claimant-investor is successful (157 cases), costs were shifted onto the losing party (i.e. the respondent state) in 97 cases (62%) and there was no cost shifting in 60 cases (38%). Second where the respondent state was successful in defending itself (199 cases), costs were shifted onto the losing party (i.e. the claimant-investor) in 108 cases (54%) and there was no cost shifting in 91 cases (46%).[55]

1.3.2 Third-Party Funding

An issue related to costs in investment arbitration is the increased reliance on third-party funding (TPF)[56] by claimant-investors in recent years. The 2018 International Council for Commercial Arbitration/Queen Mary Report on Third-Party Funding (ICCA-QM Report) states that a third-party funder typically refers to a non-disputing party providing part or all the funding for the costs of a party to an arbitration proceedings, most commonly in return for remuneration dependent on the outcome of the dispute.[57] Commission and

52 Franck, *Arbitration Costs* (n 7) chs 7 and 9.

53 ibid ch 9 (finding that finding that over 95% tribunals failed to address costs in a meaningful way before final awards and identifying regular gaps in basic costs).

54 Franck, *Arbitration Costs* (n 7) 218–19.

55 Behn and Daza (n 7).

56 Harwood (n 7) (referring to *RSM Production Corp v Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014) para 83).

57 For the definition of TPF, see Stavros Brekoulakis and Catherine Rogers, 'A Framework for Understanding Practice and Policy' (2 October 2019) Academic Forum on ISDS Concept Paper 2019/13; Park, Rogers and Brekoulakis (n 7) 50:

> The term 'third-party funding' refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party: a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.

See also EU–Canada Comprehensive Economic and Trade Agreement (signed 30 October 2016, entered into force 21 September 2017) (CETA) art 8(1) defining TPF as: 'any funding

Moloo report that TPF is known to have been used by claimants in at least 22 arbitrations.[58]

While providing a number of benefits (e.g. access to justice), TPF is also regarded by some as problematic (e.g. conflicts of interest, increase in the number of cases).[59] However, there is little empirical evidence about the use of TPF in investment arbitration. For example, the ICCA-QM Report notes that there is no evidence yet regarding whether the increased number of investment arbitration claims or the high damage claims are at all related to TPF, or whether TPF leads to additional speculative, marginal, or frivolous cases.[60] There is some evidence, although only anecdotal, which points in two opposite directions.[61] Some report that third-party funders are unlikely to fund frivolous or speculative claims and that these funders engage in a rigorous assessment of the claimant's likelihood of success on the merits before deciding to fund a case. Others report that a considerable share of ISDS cases are affected by third-party funding. More data on this topic is needed.[62]

1.3.3 Security for Costs

Security for costs is defined as a measure making the right of a claimant to proceed on his claim contingent providing a partial security guarantee that can be called upon in the event of an eventual award on legal costs assessed against the claimant by the arbitral tribunal.[63] It is used to address unmeritorious claims[64] and situations where a claimant is insolvent and thus incapable of sat-

provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute'; EU–Viet Nam Investment Protection Agreement (signed 30 June 2019) art 3.28(i); For a comprehensive discussion on the challenges in defining TPF, see Park, Rogers and Brekoulakis (n 7) 47–80; see also Commission and Moloo (n 7) 201; Frignati (n 7) 508; IBA Guidelines on Conflicts of Interest in International Arbitration (23 October 2014) (IBA Guidelines) Explanation to General Standard 6(b).

58 Commission and Moloo (n 7) 202.

59 Park, Rogers and Brekoulakis (n 7) 200–02; see also Harwood (n 7); Gaukrodger and Gordon (n 7) 39–42; Tara Santosuosso and Scarlett Randall, 'Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance' (2018) Law and Justice in the Americas Working Paper Series 8.

60 Park, Rogers and Brekoulakis (n 7) 204.

61 ibid.

62 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session (Vienna, 14–18 October 2019)' (23 October 2019) UN Doc A/CN.9/1004, para 98.

63 Bradfield and Verdirame (n 7) 415.

64 Webster (n 7) 474.

isfying any adverse cost award. Security of costs issues have gained attention in recent years primarily in relation to third-party funded investment arbitration cases. On this issue, two questions arise: can arbitral tribunals order security for costs; and should they order security for costs when the claimant uses TPF?

It is arguable whether a tribunal has the power to grant security for costs without an express legal rule on the matter.[65] Based on a survey of the relevant investment arbitration cases, the ICCA-QM Report points out that the power to order security for costs is rarely exercised by investment arbitration tribunals.[66] In reviewing the small number of investment arbitration cases dealing with this issue, the Report finds that investment arbitration tribunals tend to adopt a stricter test to order security for costs than in the commercial arbitration context. The practice of investment arbitration tribunals indicates that sufficient evidence of the potential inability of the claimant to pay the respondent's costs at the end of the proceedings is necessary for the tribunal to order security for costs. The mere presence of TPF might however not set a presumption of the claimant's impecuniosity.[67] Finally, the Report notes that investment arbitration tribunals have yet to find a consistent approach to ordering security for costs.[68]

1.4 *Conclusions on Costs*

From an empirical perspective, the costs associated with investment arbitration are a consistently and frequently studied area, as is cost shifting. At this point, what we can draw from the data is that the fees relating to arbitrators and tribunals are only a fraction of the costs that a party will experience in a typical investment arbitration. If a typical investment tribunal costs approximately USD 1 million, then each parties' contribution would be about USD 500,000. Even if these numbers are substantial, compared with the costs of counsel they might not be viewed as excessive although to be sure, there may be individual cases where the costs relating to arbitrator fees or tribunal fees are excessive,

65 Park, Rogers and Brekoulakis (n 7) 170; Chin Leng Lim and others, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (OUP 2018) 443; see ICSID Convention, art 47 (not explicitly providing for security for costs); ICSID, 'Proposal for the Amendments of ICSID Rules: Working Paper #3' vol 1 (August 2019); see also recent treaty practice referring to security for costs (eg Belarus–India BIT (signed 24 September 2018) art 28).

66 Park, Rogers and Brekoulakis (n 7) 170–75; Brekoulakis and Rogers (n 57). See also Gabriel Bottini and others (n 7).

67 Park, Rogers and Brekoulakis (n 7) 176–83.

68 ibid; see also Franck, *Arbitration Costs* (n 7) 322–24; ICSID, 'Proposal for the Amendments of ICSID Rules: Working Paper #2' vol 1 (March 2019) 229–36.

but they may well be outliers. Tribunal costs fall thus in Quadrant II (clear knowledge, not a major problem).

Legal costs are higher. The average claimant's legal costs are around USD 6 million and the average respondent's costs are around USD 5 million. However, compared to international commercial arbitration or complex domestic court litigation, it is not clear that investment treaty arbitration is uniquely expensive. As states improve their ability to defend investment treaty arbitration cases, the amount of time and costs spent by counsel in proving their case has increased.[69] A typical investment treaty arbitration now can have thousands of pages of documentary evidence and almost every case requires the engagement of a quantum expert. A process to simplify certain types of claims in investment treaty arbitration may be able to reduce the cost burden for both states and investors. Thus, counsel costs may be closer to Quadrant I (there might be a problem). In regard to cost-shifting, we see a potential trend towards shifting costs over time and the current state-of-the-art is that successful claimants are more likely to have costs shifted onto the losing party than if the respondent is successful. Enhanced transparency on tribunals' rationale and objectives for cost allocations is highly desirable for a complete understanding of cost decisions. Moreover, we lack information and data on TPF, its extent and its effect on the investment treaty arbitration system. Here we are clearly in Quadrant III or IV (we lack information to properly assess whether there is problem).

2 Excessive Duration of Proceedings

One frequent critique of investment treaty arbitration is that its process is excessively lengthy and that arbitration – which is often touted as being time effective – does not provide the same benefits in investment treaty arbitration. However, and somewhat surprisingly, there appears to be a dearth of empirical studies relating to the nature and causes of the duration of proceedings in investment treaty arbitration.[70]

69 See Franck, *Arbitration Costs* (n 7) 279–96 (discussing potential factors impacting costs).

70 The overview does not repeat literature already referred to in section 1 relating to costs, which often overlaps with issues of duration: Daniel Behn and others, 'Why the Delay? Explaining Length of Proceedings in International Investment Arbitration' (January 2019) PluriCourts Working Paper; Lucy Greenwood, 'Revisiting Bifurcation and Efficiency in International Arbitration Proceedings' (2019) 36(4) J Intl Arb 421; ICSID, 'Annual Report 2018' (2018); Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017); ICSID, 'Annual Report 2017' (2017); Suha Ballan, 'Investment Treaty Arbitration and Institutional Backgrounds:

2.1 *Average Length of Proceedings*

In a recent study focusing on all investment treaty arbitration cases up through 1 November 2018, Behn, Berge, Langford and Usynin find that the average length of an investment treaty arbitration is 3.73 years (see Table 2.1). Unsurprisingly, cases that are settled or discontinued before a jurisdiction award or cases where the claimant lost on jurisdiction have significantly shorter duration than other cases.

TABLE 2.1 Duration of Proceedings for All ISDS Cases

Type	Cases	Days	Years	Std dev (years)
Average – All	635	1263	3.46	2.2
Average – Decided	444	1361	3.73	0.57
Non-Decided				
Settled	97	793	2.17	1.56
Discontinued	60	1055	2.89	3.02
Settled after jurisdiction	30	1628	4.46	3.51
Discontinued after jurisdiction	4	8789	24.08	2.82
Decided				
Investor loss on jurisdiction	109	1042	2.85	1.28
Investor loss on merits	127	1382	3.79	1.66
Investor win on merits	208	1515	4.15	2.28

SOURCE: Behn and others (n 70) 10.

An Empirical Study' (2016) 34(1) Wis Intl L J 31; ICSID, 'Updated Background Paper on Annulment for the Administrative Council of ICSID' (2016); ICSID, 'Annual Report 2015' (2015); Adam Raviv, 'Achieving a Faster ICSID' in Jean Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Resolution System: Journeys for the 21st Century* (Brill 2015) 653–717; Lucy Greenwood, 'Does Bifurcation Really Promote Efficiency?' (2011) 28 J Intl Arb 105; UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (United Nations 2010).

These findings comport with a study by Franck,[71] Behn[72] and Commission and Moloo's analysis of ICSID decisions.[73] Importantly, this period does not include the amount of time that is often spent at the enforcement stage of the proceedings in domestic courts (which can take upwards of 5 years depending on the number of appellate review stages that are possible in a particular domestic system) or through the annulment process in ICSID cases (average of about 2 years).[74] Turning to ICSID annulments, the duration of proceedings are significantly shorter than for the underlying arbitration. According to Behn and others, the average time from date of registration to ICSID ad hoc Committee Decision is 1.91 years (see Table 2.2). This largely comports with an earlier study by Behn.[75]

TABLE 2.2 Duration of Proceedings for All ICSID Annulments

Type	Cases	Days	Years	Std dev (years)
Average – All	87	639	1.75	0.93
Average – Decided	61	697	1.91	0.67
Non-Decided				
Discontinued after Failure to Pay Fees	6	574	1.57	0.90
Annulment Discontinued	20	485	1.33	1.42
Decided				
Annulment in Full	5	771	2.11	0.70
Annulment Partial	9	735	2.01	0.78
Annulment Rejected	47	681	1.87	0.66

Source: Behn and others (n 70) 11.

71 Franck, *Arbitration Costs* (n 7) 122 (finding that on average it takes 43 months or 3.5 years from date of case registration to date of final award).

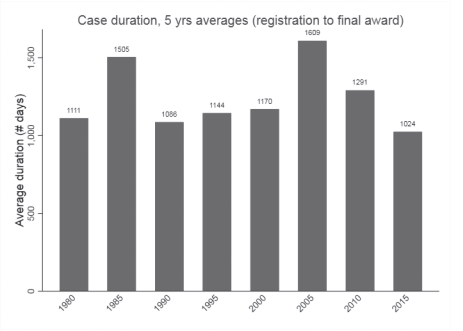
72 Behn, 'Performance of Investment Treaty Arbitration' (n 7); see also Raviv (n 70) 659–60; Bonnitcha and others (n 70) 89.

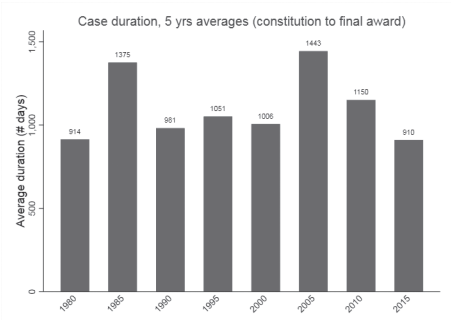
73 Commission and Moloo (n 7) ch 10: 'ICSID calculated the duration of arbitrations from the date of a tribunal's constitution to conclusion, reporting as follows based on its fiscal year (1 July–30 June): FY 2010 (thirty-seven months); FY 2011 (twenty-five months); FY 2012 ('between three to four years'); FY 2013 (between three to four years); FY 2014 (on average just over three and a half years); and FY 2015 (on average, thirty-nine months).'

74 See discussion in Behn, 'Performance of Investment Treaty Arbitration' (n 7).

75 ibid.

FIGURE 2.1 Case Duration from Registration to Award and Tribunal Constitution to Award





SOURCE: Behn and others (n 70) 14.

2.2 *Trends in the Duration of Arbitral Proceedings*

In the context of a reform process, it is useful to consider the current trends and whether investment treaty arbitration proceedings are becoming longer or shorter on average. Figure 2.1 shows the five-year averages for the period between the registration of the case and final award. The long-term average is a little over 1,000 days, which also covers the past few years. However, it is notable that in the period 2005 to 2014, the length increased significantly.[76] Potential explanations for this increase could be the greater complexity of the cases and a larger set of actors being involved in dispute resolutions. The same trend is seen for the average period between constitution of the tribunal and

76 See also Franck, *Arbitration Costs* (n 7) 123–24 (finding a tendency for newer cases to take longer to complete than older one).

the final award. In relation to annulments, ICSID has found that the length of ICSID annulments is on average 22 months.[77]

2.3 *Explaining Delays*

2.3.1 Bifurcation and Arbitral Institution Hypotheses

Few studies focus on the cause of delays. The literature that exists has centered on the effects of bifurcation and the choice of arbitral institution. The common wisdom in arbitration has been that bifurcation saves time. Weak cases can be dismissed at the jurisdictional stage without needing to deal with the entire consideration of the merits. However, in 2011, Greenwood questioned whether bifurcation might be a cause of the problem rather than the solution:

> The empirical data, limited as it is, does demonstrate that bifurcating proceedings may not necessarily result in parties getting to a final award any more quickly, although there may be other advantages to splitting the proceedings in a particular way. The assumption that bifurcation is always beneficial in terms of saving costs and time in international arbitration may not always be warranted and, as ever, each case should be looked at on its own merits.[78]

Since then, descriptive statistics confirm the likelihood of this suggestion. In 2017, Behn claimed, based on a sample of 278 cases, that the duration of proceedings in investment treaty arbitrations was lengthened by the bifurcation of proceedings between jurisdiction and the merits; and the trifurcation of proceedings cases: trifurcation – the separation of proceedings into a jurisdiction, merits and quantum phase, where the cases passed the jurisdictional hurdle.[79] Raviv and Franck find similar results with smaller samples.[80]

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77 ICSID 2016 (n 70) (dataset: FY 2010–FY 2016) 22–23.

78 Greenwood, 'Does Bifurcation Really Promote Efficiency?' (n 70) (reviewing 174 concluded ICSID cases reported on ICSID's website and 19 concluded ICSID Additional Facility cases.

79 Behn, 'Performance of Investment Treaty Arbitration' (n 7).

80 Raviv (n 70) 688 (referring to Greenwood, 'Does Bifurcation Really Promote Efficiency?' (n 70) 107 (finding that 45 bifurcated ICSID cases took an average of 3.62 years while non-bifurcated cases took 3.04 years to conclude)); Franck, *Arbitration Costs* (n 7) 8 (finding that many (but not all) bifurcated were 'considerably longer').

TABLE 2.3 Duration of Proceedings for All Bifurcated Cases

Type	Cases	Days	Years	Diff
Loss on jurisdiction: bifurcated	73	1045	2.86	
Loss on jurisdiction: unified	36	1036	2.84	0.02
Loss on merits: bifurcated	43	1638	4.49	
Loss on merits: unified	84	1250	3.43	1.06
Partial win on merits: bifurcated	45	1821	4.99	
Partial win on merits: unified	59	1251	3.43	1.56
Full win on merits: bifurcated	38	1964	5.38	
Full win on merits: unified	55	1542	4.22	1.16

Source: Behn and others (n 70) 16.

With data up to 1 November 2018, Behn and others report rather conclusively that Greenwood's instincts were correct. First, a bifurcated case takes between one and a half years longer to complete than a non-bifurcated case (see Table 2.3).[81] Second, this result is statistically significant when controlled for other factors (see Table 2.4). Why is this the case? The reason is quite simple. In the overwhelming majority of cases, the claimant-investor wins on jurisdiction (see Figure 4.1). This means that in most bifurcated cases, the wheels of litigation must be restarted after the jurisdiction award for the merits phases. The result is a partial duplication of earlier hearings and processes that could have also addressed the merits of the case. In a 2019 study, Greenwood confirms those findings and argues that bifurcation can work in saving time (and consequently costs) only if the challenge to jurisdiction succeeds.[82] Unless there

81 Behn and others (n 70); see also Franck, *Arbitration Costs* (n 7) 132–34.

82 Greenwood, 'Revisiting Bifurcation and Efficiency' (n 70) 424–25 (reviewing 38 ICSID cases resulting in a final award between 1 January 2016 and 31 December 2018 of which 12 proceedings were bifurcated and finding that where jurisdiction was upheld in bifurcated proceedings and there was a final award, the proceedings took, on average, two years longer than non-bifurcated cases and eighteen months longer than the general average of proceedings).

is 'a significant likelihood of success on the merits of the bifurcated issue, then bifurcation should not be ordered'.[83]

Some have suggested that the cause of delays in investment treaty arbitration is the type of arbitral institution used or the treaty that is invoked. In 2016, Ballan argued that the lengthier proceedings were ICSID's with an average of 1,643 days;[84] NAFTA proceedings were shorter at 1,566 days, while non-ICSID arbitrations were dramatically lower at 1,137 days. Using information from the arbitral institutions, Commission and Moloo report varying periods across institutions from establishment of tribunal constitution to awards: the majority of cases administered under the post-2015 SCC Arbitration Rules taking between 6 to 12 months from the time of registration of a case until the rendering of an award[85] and 16 to 17 months for cases at the London Court of International Arbitration (LCIA) in the period 2013 to 2017.[86] However, these figures also include commercial and domestic arbitrations so they are not particularly comparable. As we shall see, these differences are statistically significant but not necessarily of great importance.

2.3.2 Multivariate Regression Analysis

Any proper analysis of the causes of delay requires an analysis of the multiple factors. These could include the complexity and nature of the case as well as the type of arbitrators and the nature of the parties. In an initial test of a number of possible explanations, Behn and others examined eight specific factors: (1) development level of respondent state (on the basis that lower income states may have less effective legal representation); (2) type of arbitral institution; (3) legal basis – treaty or non-treaty case; (4) bifurcation of proceedings; (5) arbitrator challenge; (6) arbitrator replacement; (7) economic sector; and (8) dissenting opinion (on the basis that it may indicate a more complex case or delays in award writing). Using a 'survival' regression analysis, the authors calculated the factors that were most likely to extend the number of days in a proceeding. The resulting hazard ratios for registration-to-final award are reported in their paper.

83 ibid 429; see also Franck, *Arbitration Costs* (n 7) 276–78 (finding that bifurcation does not significantly impact on the costs but on the length of the proceedings).

84 Ballan (n 70) 71.

85 ibid (noting that these are for all arbitrations – domestic and international, commercial and investment).

86 ibid.

The authors make the following observations on their findings.[87] The most significant delay factors concern procedural events that occur during an arbitration, namely bifurcation, arbitrator challenges and arbitrator replacement. They are significantly and strongly associated with longer case durations. Likewise, cases where there is a dissenting opinion from one of the arbitrators is strongly and consistently associated with a longer case duration than cases without dissenting opinions. This may reflect delays caused by arbitral disunity or it may reflect the complexity of the case. Further testing will seek to disentangle this effect.

The remainder of the preliminary results are slightly or very ambiguous. First, as to differing arbitration rules, the results depend on how duration is calculated. If one examines the time from the reported registration to award, cases based on: (1) the SCC Arbitration Rules; and (2) other rules (such as the LCIA, ICC, etc.) are strongly and consistently associated with shorter case durations than ICSID cases. However, if one looks at the time from constitution of the tribunal to the final award (not shown), the SCC effect is slightly less significant (but stronger), while there is some indication that ad hoc UNCITRAL cases or Permanent Court of Arbitration (PCA) UNCITRAL cases are associated with shorter time spans than ICSID cases. Importantly, these results hold when one controls for time and changes to the arbitral rules at different arbitral institutions (see time fixed effects model). Second, the development level of the respondent state by World Bank Income Group categories is inconsistently related to the duration of cases, but case duration does decrease in a movement from a low income to lower-middle income respondent state. Thirdly, contract or FDI law-based ICSID cases are generally shorter than treaty-based cases. Finally, there are only some weak indications that cases involving secondary and tertiary sector investments are associated with shorter case durations than primary sector cases (such as the extractive industries).

2.4 *Conclusions on Duration of Proceedings*

Recent studies on the duration of investment arbitration proceedings provide a fairly clear picture on the nature of duration and, increasingly, the causes of delay. The average period for both first instance investment arbitration cases and annulments is relatively constant at 3.73 and 1.91 years respectively with a slight decrease in length in the past 5 years. The analysis of the causes of length

87 See similar findings in Franck, *Arbitration Costs* (n 7) 126–32.

of proceedings shows that excessive delay is often caused by the parties themselves (i.e. bifurcation and/or arbitrator challenges).

Thus, we possess now significant knowledge, but it is less clear whether there is a problem, as Álvarez Zárate and others also demonstrate later in this Special Issue.[88] The length of proceedings is much shorter than in many other international adjudicative proceedings.[89] Another study indicates that litigation in some selected developed state jurisdictions is more effective than investment treaty arbitration, but not in other less developed ones.[90] However, Franck demonstrates a potential relationship between time and costs where increased time might lead to increased costs.[91] Our current analysis suggests nevertheless that it is the parties themselves, especially states, that are largely responsible for longer proceedings (e.g. because of bifurcation, arbitrator challenges and arbitrator replacement). This raises the question of whether it is, or should be, a major issue for the reform process. Thus, duration of proceedings may fall into Quadrant II (good knowledge, no problem).

To be sure, states could develop mechanisms that would restrain their use – and investor's use – of such mechanisms, tying themselves to the mast of efficiency. In other words, greater awareness by states of their own contribution to delay could lead them to decrease the length of procedures. Moreover, case management techniques could be fully and properly introduced. Yet, it should also be said that the relatively efficient nature of investment arbitration in comparative perspective should guide the development of proposed reforms, such as appellate review and a multilateral investment court. Investment arbitration is generally speedy because it is decentralized. If efficiency is valued by states, then new institutional reforms will need to take into account lessons learned from adjudicative systems elsewhere in international and national law.

88 For an extended analysis, see José Manuel Álvarez Zárate and others, 'Duration of Investor-State Dispute Settlement Proceedings' (2020) 21(2–3) JWIT 300–35.

89 ibid.

90 Bonnitcha, Poulsen and Waibel (n 70) 90–91 (English, German, Swiss and US courts take on average between 14 and 18 months to resolve a dispute whereas Italy and India, 3 and 4 years, respectively).

91 Franck, *Arbitration Costs* (n 7) 136–40 (explaining however that as not all data on costs is available, this potential relation must be interpreted with caution).

3 Lack of Consistency and Coherence in the Interpretation of Legal Issues

The issue of consistency of investment treaty arbitration decisions refers to 'the question of whether adjudicatory bodies are resolving the same or similar questions in similar fashion in successive cases.'[92] Noting the diversity in the investment treaty regime itself, the UNCITRAL WG III explains that 'predictability and correctness should be the objective rather than uniformity.'[93]

From the perspective of international courts and tribunals in general, inconsistent resolution of cases is nothing particularly new. Divergent legal applications and application of rules to facts is a regular feature of international adjudication and a key subject of the fragmentation debate.[94] However, some evidence suggests a gradual decline in fragmentation.[95] The increasing cross-citation, informal dialogue between courts, and the active leadership role of the International Court of Justice (ICJ) has dampened somewhat the regularity of conflicting jurisprudence and outcomes. Yet, in most of these cases of conflict, it is between two judicial institutions: e.g. the European Court of Human Rights (ECtHR) and the ICJ, or the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICJ.[96] In the case of investment treaty arbitration conflicting interpretations can occur between tens or hundreds of separate tribunals addressing similar treaty provisions. Coordination in this terrain is challenging. This section explores the issues of divergent interpretations and the use of citations.[97]

92 OECD, *Government Perspectives on Investor-State Dispute Settlement: A Progress Report* (OECD 2012) 17.

93 UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters' (28 August 2018) UN Doc A/CN.9/WG.III/WP.150, 3.

94 Martti Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553.

95 Mads Andenas, 'Jurisdiction, Procedure and the Transformation of International Law' (2012) 23 Eur J Bus L 127.

96 Malcolm Langford, 'The New Apologists: The International Court of Justice and Human Rights' (2015) 48(1) Retfærd 49.

97 For an overview of the empirical literature, in addition to that already referred in sections 1 and 2, see Julian Arato, Chester Brown and Federico Ortino, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21(2–3) JWIT 336–73; Wolfgang Alschner, 'Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration Through Large-Scale Citation Analysis' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2020) (forthcoming); Thomas Schultz and Niccolò Ridi, 'Arbitration Literature' in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2020) (forthcoming); Szilard Gáspár Szilágyi, Daniel Behn and Malcolm

Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (CUP 2020) (forthcoming); Niccolò Ridi, 'The Shape and Structure of the "Usable Past": An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10(2) JIDS 200; Jorge Viñuales, 'Foreign Investment and the Environment in International Law: Current Trends' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 12–37; Wolfgang Alschner and Kun Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' (2018) University of Ottawa Research Paper; José E Alvarez, *Boundaries of Investment Arbitration: The Use of Trade and European Human Rights Law in Investor-State Disputes* (Juris 2018); Silvia Steininger, 'What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31(1) LJIL 33; Vivian Kube and Ernst-Ulrich Petersmann, 'Human Rights Law in International Investment Arbitration' in Andrea Gattini and others (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 221; José E Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris 2017) 519–648; Dolores Bentolila, *Arbitrators as Lawmakers* (Kluwer Law International 2017); Daniel Behn and Malcolm Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration' (2017) 18(1) JWIT 14; Jansen Calamita and Elsa Sardinha, 'The Bifurcation of Jurisdictional and Admissibility Objections in Investor-State Arbitration' (2017) 16(1) LPICT 44; Damien Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citations Analysis' (2017) 20(2) JIEL 279; Maria Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill 2017); Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017); Patrick Dumberry, 'The Importation of the FET Standard Through MFN Clauses: An Empirical Study of BITs' (2016) 32(1) ICSID Rev 116; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP 2015); José Antonio Rivas, 'ICSID Treaty Counterclaims: Case Law and Treaty Evolution' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 779; Jonathan Bonnitcha, *Substantive Protection Under Investment Treaties: A Legal and Economic Analysis* (CUP 2014); Andrea Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) Lewis & Clark L R 461; Anne Hoffmann, 'Counterclaims in Investment Arbitration 28(2)' ICSID Rev 438; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013); Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013); Andrea Kupfer Schneider, 'Error Correction and Dispute System Design in Investor-State Arbitration' 5 YBAM 194; Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29(1) Berkeley J Intl L 200; James Crawford, 'Ten Investment Arbitration Awards that Shook the World: Introduction and Overview' (2010) 4 D R Intl 71; Roland Kläger, 'Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness' (2010) 11(3) JWIT 435; David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010) 30 Northwestern J Intl L & Bus 383; José Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' in Karl Sauvant (ed), *Yearbook on International*

3.1 *Inconsistency and (In)Coherence – Textual Analysis*

Medium-to-large-N doctrinal studies (textual analysis of many cases) on consistent investment treaty arbitration practice find consistency in some areas, such as jurisdictional determination, but significant inconsistency in others, such as interpretation of substantive standards, damage calculations, disqualification decisions and annulment proceedings.[98] Specific issues, such as counterclaims, *amicus curia* and bifurcation, are highlighted as lacking consistency.[99] Alschner and Hui find the same in the interpretation of new treaty language concerning general public policy exceptions.[100] Studies examining more specific standards of investment protection show that investment treaty arbitration tribunals have mostly adopted divergent interpretations leaving some to argue

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Investment Law and Policy 2008/2009 (OUP 2009) 379–478; Kathleen S McArthur and Pablo A Ormachea, 'International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction' (2009) 28(3) Rev Lit 559; James Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2008) 18(1) Duke J Comp & Intl L 77; Jeffrey Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of Developing Jurisprudence' (2007) 24(2) J Intl Arb 129; Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' (2007) 19(2) EJIL 301; Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L R 1521; Susan D Franck, 'The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?' (2005) 12 UC Davis J Intl L & Pol 47.

98 See Franck, 'The Legitimacy Crisis' (n 97) 1554–82; see also Franck, 'The Nature and Enforcement of Investor Rights Under Investment Treaties' (n 97) 49; Fauchald (n 97) 358–59 (dataset: 98 ICSID decisions from 1998 to 2006 and finding that tribunal contribute to a coherent development of international law); McArthur and Ormachea (n 97); Diel-Gligor (n 7) 457 (widespread jurisprudential inconsistency in investment treaty arbitration); Crawford (n 97) (dataset: ten arbitral awards with 'conflicting lines of authority')

99 Bjorklund (n 97) 473–74 (dataset: reviewing case law involving counterclaims); Hoffmann (n 97) (dataset: reviewing most decisions dealing with counterclaims); Rivas (n 97) (dataset: ICSID cases with counterclaims); Commission and Moloo (n 7) 78–85 (on the issue of bifurcation); Levine (n 97) 214 (reviewing recent trends in investment arbitration and finding that arbitral tribunals have taken a 'discretionary and largely not formalized' approach); Calamita and Sardinha (n 97) 70 (finding that arbitral tribunals show some consistency with respect to the 'fundamental values' that needs to be balanced when deciding to bifurcate or not, but suggest that the 'analytical rigour' of tribunals' assessment could be improved on the conclusions reached); Cleis (n 97) 32–53 (describing inconsistency and lack of legal certainty in the dealing of disqualification requests and arguing that this can be explained by the lack of formal rule of binding precedent in arbitration- topic further discussed in section 6); ICSID 2016 (n 70) (discussing, inter alia, inconsistency in annulment proceedings– further discussed in section 4).

100 Alschner and Hui (n 97) (finding that respondent states fail to raise new public policy exceptions provisions but also that arbitral tribunals have ignored them or adopted interpretations reducing their impact).

that more precisely defined standards of protection are needed in international investment treaties.[101] Other scholars though have looked at the level of consistent application of interpretative approaches such as proportionality analysis – finding some move towards consistency.[102]

Focusing on arbitral practice in specific context, the conflicting jurisprudence resulting from the Argentinian economic crisis is explained by Schneiderman 'as the inevitable but aberrant expressions of arbitral power.'[103] Examining 49 cases concerning investor challenges to environmental regulation, Behn and Langford find some consistency in the patterns of outcomes although doctrinal outliers persist.[104] Examining different samples of cases in which parties raise human rights, some authors identify a lack of methodology in the judicial interpretation and application of human rights law by arbitrators[105] whereas others highlight synergies between the regimes.[106] Bentolila finds some consistency on specific issues such as the interpretive methods applied by tribunals

101 Dumberry (n 97); Crawford (n 97); Franck, 'The ICSID Effect?' (n 7); and Kläger (n 97); Diel-Gligor (n 7) 294–316; Bonnitcha (n 97) chs 4, 5, 7; Paparinskis (n 97).

102 Henckels (n 97) 122–25, 194–97 (dataset: 97 investment tribunal decisions up to 2014 and identifying a gradual move towards a proportionality-based methodology; Stone Sweet and Grisel (n 97) 244–46; for a more critical view see Van Harten, *Sovereign Choices and Sovereign Constraints* (n 97) (finding that arbitrators generally show no judicial restraint).

103 Schneiderman (n 97) 413; see also Schneider (n 97) (using the Argentinean cases to explore the judicial theory of error connection); see also Alvarez and Khamsi (n 97).

104 Behn and Langford, 'Trumping the Environment?' (n 97) 31 (environmental cases are defined as: '(1) a domestic environmental measure is under direct challenge by the foreign investor; or (2) the host state argues that at least one of the measures at issue is justified for environmental reasons;' dataset: 49 concluded cases as of 1 October 2016'); see also Viñuales (n 97) (dataset: 114 investment arbitration cases finding 'a jurisprudential line suggesting that environmental considerations are now normalized or 'mainstreamed' in the reasoning of investment tribunals'); Chester Brown and Domenico Cucinotta, 'Treatment Standards in Environment-Related Investor-State Disputes' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019) 208 (finding that arbitral tribunals are becoming increasingly sensitive to environmental concerns but that might not mean that such concerns have been influential in the outcome of cases).

105 Kube and Petersmann (n 97) (dataset: investment arbitration cases with references to human rights); see also Alvarez (n 97) (dataset: 64 awards with one or more European Convention on Human Rights references from 1990 through 1 June 2016).

106 Steininger (n 97) (dataset: 46 awards with references to human rights in a broad sense between 1989 and 2015); Fry (n 97) (finds that 'investment arbitration seems to be consistent with human rights, instead of undermining them'). For a more theoretical perspective on the interaction of human rights law and international investment law, see Eric De Brabandere, 'Human Rights Considerations in International Investment Arbitration' in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention on Human Rights* (Brill 2012) 183.

to the offer to arbitrate in investment treaties.[107] Similarly, she finds consistent arbitral practice in considering indirect shareholdings as investments[108] and similiar consistencies on certain other issues pertaining to remedies.[109]

3.2 *Precedent as a Consistency Guarantee – Citation Analysis*

The use of citations in ISDS awards may be a marker of consistency and their presence may suggest less inconsistency. Citation analysis thus permits a more empirically-driven perspective on consistency. To be sure, the notion of 'hard' or formal precedent (stare decisis doctrine), which is not a feature of arbitration in general, must be distinguished from a softer idea of precedent (acknowledging past awards as sources of authority).[110] Using citation practice as a mean to measure the extent of precedent-based decision-making, Stone Sweet and Grisel note that since 2005, about 90% of all ISDS awards that include citations tend to cite to prior arbitral awards and more predominantly to awards rendered under ICSID whereas in the pre-2000 period, arbitral tribunals tended to cite to the ICJ and other international courts.[111] Stone Sweet and Grisel argue that one key driver toward precedent-based practice is the fact that 'at least one member of a relatively small group of elite arbitrators is usually present on any tribunal, and repeat arbitrators that specialize in chairing tribunals dominate the production of awards.'[112]

Reviewing citation practice in arbitration proceedings in three different institutional contexts (ICSID, North American Free Trade Agreement (NAFTA), New York Convention (NYC)), Ballan's study claims that ICSID-administered cases and NAFTA-based cases refer to case law more

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107 Bentolila (n 97) 201–02.

108 ibid 216–20.

109 ibid 228–30 (finding that awarding 'compound interest, at least regarding expropriation of rights in rem, is the "the rule" in investor-state arbitral awards or a "jurisprudence constant"').

110 Stone Sweet and Grisel (n 97) 119 (dataset: 2016 Yale Law School Dataset on Investor-State Arbitration compiled by Alec Stone Sweet as principal investigator, and Sheng Li, Meng- Jia Yang, Michael Chung, Moeun Cha, and Tara Zivkovich as research assistants); on the definition on precedent see also Alec Stone Sweet, 'Path Dependence, Precedent, and Judicial Power' in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics and Judicialization* (OUP 2002).

111 Stone Sweet and Grisel (n 97) 152 (dataset: all final investment treaty arbitration awards on the merits up to 2015); see also Commission (n 97) 149–51 (dataset: 207 publicly available decisions between 1972 and 2006 of which 37 are decisions and awards from non-ICSID tribunals).

112 Stone Sweet and Grisel (n 97) 155; see also Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' (2007) 23(3) Arb Intl 357.

frequently than non-ICSID cases.[113] While the categorization of types of cases in this way is odd (treaties versus administering institution), one finding is that NAFTA-based cases do tend to refer primarily to NAFTA case law.[114] Finally, drawing from an original data set of 'external citations' from and to investment arbitration awards and panel decisions of the World Trade Organization (WTO), Charlotin's study indicates an 'intriguing discrepancy' between these two fora: the former rarely cite external sources whereas the second 'indulge in it unashamedly.'[115] Charlotin also finds that both tribunals are rarely cited by other international courts and concludes, through the use of network analysis, that both fora have limited influence over international courts and tribunals generally.

Empirically investigating the similarity of treaties cited by arbitral tribunals, Alschner shows that arbitral tribunals might prioritize consistency over correctness as most citations connect highly dissimilar IIAs. This empirical study indicates that, for tribunals, treaty similarity is generally not a relevant factor in selecting applicable precedent but rather the promotion of a systemic coherent jurisprudence.[116] Alschner points to a mismatch between the policy priorities expressed by states ('correctness > consistency') and the practice of tribunals ('correctness < consistency'). Finally, Schultz and Ridi highlight the high tendency for investment arbitration tribunals to refer to public international law scholarship as opposed to international investment law scholarship.[117]

The use of citation analysis has therefore illustrated a certain network of references between international courts and tribunals and among arbitral tribunals, suggesting the possibility of greater consistency. But it remains unclear as to why these references are made: the cases cited might or might not have led to a specific conclusion. Nevertheless, citations indicate the influence of a corpus of cases in the decision-making process and thereby a certain practice of precedent.

3.3 *Conclusions on Inconsistency*

Empirical approaches to studying inconsistency paint a mixed picture. The conclusions depend on the specific issues studied, the analytical framework, terminology, and methodology used. It is particularly interesting to observe

113 Ballan (n 97) 82 (dataset: cases concluded on the merits between 2001 and 2011).

114 ibid 89; see also Alschner (n 97).

115 Charlotin (n 97) 299.

116 Alschner (n 97) (dataset: all publicly available final awards as of 31 January 2019, 4531 citations between ITA decisions).

117 Schultz and Ridi (n 97).

that doctrinal research reveals systemic inconsistency in specific areas while many quantitative citation analysis studies suggest an emerging *jurisprudence constante* at a more abstract level. While inconsistent interpretation and application is expected respectively for differently worded treaties or factual situations, it appears that unjustified inconsistency is present – with most research highlighting the decentralized nature of arbitrators and diversity of arbitrators as the principal reasons.

Scholars have proposed various reforms to remedy the perceived lack of consistency[118], but whether inconsistency is a problem depends on how much one weights the need for legal certainty versus other factors (e.g. enhancing the sociological legitimacy of a decision, reflecting a changing interpretative consensus over time). Some emphasize that investment treaty arbitration depends upon the quality of the decisions and not upon consistency among decisions; others emphasize that inconsistency in decisions on treaty 'rules' is more problematic than inconsistency on 'standards', since the latter are intended to be open for greater arbitral discretion.[119]

The concern with inconsistency and coherence may therefore fall between Quadrant I and II: some knowledge, partly problematic. Future research could further investigate the existence, causes and remedies for inconsistency within the international investment regime and between regimes.

4 Incorrectness of Decisions

Determining whether an arbitral decision is 'correct' or not is a herculean task, doctrinally or empirically. However, there is a growing field of empirical research that examines the presence of non-legal factors in arbitral decision-making.[120] Noting that divergent interpretations have been discussed in the

118 See Arato, Brown and Ortino (n 97); see also Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration' (n 97) 1521, 1545–46; Franck, 'The Nature and Enforcement of Investor Rights Under Investment Treaties' (n 97); Franck and Wylie (n 7) 524; see also Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112(3) AJIL 361.

119 Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 297–316; see also Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32(3) ICSID Rev 528; as to standards and rules, see Arato, Brown and Ortino (n 97).

120 For an overview, which does not include references already mentioned in sections 1 to 3, see: Wolfgang Alschner, 'Correctness of Investment Awards: Why Wrong Decisions Don't

above section, this section will discuss alleged biases against developing states,

Die' (2019) 18(3) LPICT 345; Daniel Behn, Tarald Laudal Berge and Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration' (2018) 38(3) Northwestern J Intl L & Bus 333; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018); Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29(2) EJIL 507; Piero Bernardini, 'Annulments of Awards' in Andrea Gattini and others (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 168; Tomer Broude, Yoram Haftel and Alexander Thompson, 'Who Cares About Regulatory Space in BITs? A Comparative International Approach' in Anthea Roberts and others (eds), *Comparative International Law* (OUP 2018) 527–45; Krzysztof Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?' (2017) 71(3) Intl Org 559; Alec Stone Sweet, Michael Yunsuck Chung and Adam Zaltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration' (2017) 8(4) JIDS 579; Anton Strezhnev, 'Why Rich Countries Win Investment Disputes: Taking Selection Seriously' (2017) Working Paper; Cédric Dupont, Thomas Schultz and Merih Angin, 'Political Risk and Investment Arbitration: An Empirical Study' (2016) 7(1) JIDS 136; Todd Tucker, 'Inside the Black Box: Collegial Patterns on Investment Tribunals' (2016) 7(1) JIDS 183; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53(2) Osgoode Hall L J 540; Daniel Behn 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-The-Art' (2015) 46(2) Geo J Intl L 363; Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Study' (2015) 25(4) EJIL 1147; Jeremy Caddel and Nathan Jensen 'Which Host Country Government Actors Are Most Involved in Disputes with Foreign Investors?' (2014) 120 Columbia FDI Perspectives; Susan D Franck, 'Conflating Politics and Development: Examining Investment Treaty Outcomes' (2014) 55 VJIL 13; Nathan Freeman, 'Domestic Institutions, Capacity Limitations, and Compliance Costs: Host Country Determinants of Investment Treaty Arbitrations 1987–2007' (2013) 39(1) Intl Interactions 54; Rowan Platt, 'Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality' (2013) 30 J Intl Arb 531; Cédric Dupont and Thomas Schultz, 'Do Hard Economic Times Lead to International Legal Disputes? The Case of Investment Arbitration' 19(2) Swiss Pol Sci Rev 564; Julien Chaisse, 'Investment Claims Against Asian States: A Legal Analysis of the Statistics, Trends and Prospects' (2013) 14 Chinese University of Hong Kong Working Paper; Christian Campbell, Sophie Nappert and Luke Nottage, 'Assessing Treaty-Based Investor-State Dispute Settlement: Abandon, Retain or Reform?' (2013) 13/40 Sydney Law School Research Paper; Paul Friedland and Paul Brumpton, 'Rabid Redux: The Second Wave of Abusive ICSID Annulments' (2012) 27(4) Am U Intl L Rev 727; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50(1) Osgoode Hall L J 211; Susan D Franck, 'Considering Recalibration of International Investment Agreements: Empirical Insights' in José Alvarez and Karl Sauvant (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP 2011) 73–94; Susan D Franck, 'Empirical Modalities: Lessons for the Future of International Investment' (2010) 105 ASIL Proceedings 33; Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50(2) Harvard Intl L J 435; Irmgard Marboe, 'ICSID Annulment Decisions: Three Generations Revisited' in Christina Binder and others (eds),

favoritism towards investors – as an indirect means of identifying 'incorrect' decision-making since it may involve consideration of extraneous factors – together with mechanisms to challenge awards.

4.1 *Outcomes – Developed versus Developing Respondent States*

The differences in outcomes in investment treaty arbitration according to development status have raised questions about the correctness of outcomes. By way of background, the bulk of investment treaty arbitration involves developing states, which has always attracted suspicion and scrutiny. In a study using data prior to 2007, Franck finds that 'the lion's share of the claims tend to be against "upper middle income" countries' and she notes that were only a small number of cases against least developed countries (LDCs).[121] Examining investment arbitrations between 1987 and 2007, Freeman finds that states with greater institutional capacity experience fewer claims than those with lower capacity.[122] Examining more specific factors leading to investment treaty arbitration claims, Dupont, Schultz and Angin assess whether poor governance or economic crises drives claims, finding that poor governance (i.e. corruption and lack of rule of law) has a statistically significant relation with investment arbitration claims, but economic crises do not.[123]

Turning to potential bias, the evidence is mixed. In 2009, Franck found that neither the development status of the respondent state nor the development status of the presiding arbitrator's country of origin had a statistically significant relationship with outcomes,[124] and in 2014 she argued that this result held when controlling for the level of democracy within the respondent state.[125]

International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (OUP 2009) 200–20.

121 Franck, 'Empirically Evaluating Claims' (n 7) 29–32 (dataset: using the World Bank Income Groups and data from 82 arbitral awards with 107 investors and 37 different respondent states).

122 Freeman (n 120) 75.

123 Dupont and others (n 120) (dataset: 775 investment awards from 1972 to 2014); see also Dupont and Schultz (n 120).

124 Franck, 'Development and Outcomes of ITA' (n 97) 487; Franck, 'Considering Recalibration of IIAs' (n 120) (pre 2007 dataset); for a critical view of these findings, see Gus Van Harten, 'Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's Development and Outcomes of Investment Treaty Arbitration' (2011) Osgoode Hall Law School of York University Research Paper.

125 Franck, 'Conflating Politics and Development' (n 120); see also Schultz and Dupont (n 120) (dataset: 541 ITA claims between 1972 and 2010; finding that since the mid-to-late 1990s investment treaty arbitration is 'harder on poorer countries than on richer countries').

However, looking at all concluded cases known as of 1 January 2017, Behn, Berge and Langford find differently. According to them, there is an overwhelming statistically significant relationship between a lower development status of a respondent state and the likelihood of a claimant-investor succeeding on a claim. Equally, this pattern persists when controlling for a wide range of democratic governance indicators, with only one indicator – relating to property rights protections – reducing the effect. However, the authors ultimately conclude that any bias in the system may be a favoritism towards developed respondent states (they lose very infrequently) than a bias against developing respondent states.[126]

Strezhnev, however, advances and tests an alternative theory for why developing states lose frequently: developing states are more likely to prematurely settle cases where the investor would not have been successful if the case proceeded to conclusion.[127] He argues that this points against arbitral bias and instead points to the structural advantages of developed states. Focusing on decisions on jurisdiction, McArthur and Ormachea find that ICSID tribunals are less likely to extend jurisdiction for claims brought against a state with a low institutional quality score.[128]

Examining investment treaty law though a governance lens, Sattorova unpacks qualitatively the effects of the international investment regime on host states, more particularly on developing states (i.e. Kazakhstan, Nigeria, Turkey, Ukraine, and Uzbekistan). Sattorova's empirical case studies and analysis of investment arbitration practice show that 'there is a significant current within the international arbitration community that favors the vision of investors as victims of corrupt governments and thus downplays their role in normalizing and entrenching weak governance in developing states.'[129] This could suggest the existence of cognitive frames among arbitrators that could create the background conditions for bias.

Moving away from the focus on development status to the degree of democracy, Pelc shows that most disputes today do not relate to direct expropriations but to indirect expropriations resulting from regulatory measures

126 Behn, Berge and Langford (n 120).

127 Strezhnev, 'Why Rich Countries Win Investment Disputes' (n 120).

128 McArthur and Ormachea (n 97) 574, 579–81 (dataset: all publicly available ICSID decisions on jurisdiction up to February 2007).

129 Sattorova (n 120) 138–40, 165.

implemented by democracies.[130] In addition, Pelc reports that the rate of success of investors has declined dramatically for these types of claims. He claims that '[f]irms are litigating more and more, and they are winning less and less: to wit, investors succeed in less than 10% of the indirect expropriation claims they bring against democratic states.'[131] This suggests that in particular fields, that the extent of democratic governance may be important. However, the above studies on development find that rarely can indicators of democratic governance explain outcomes at a general level.

4.2 *Outcomes – Claimant-Investors versus Respondent States*

Another claim lodged against the investment treaty arbitration system is that there is a bias against states in general and a favoritism towards investors. If true, this could indicate, indirectly, the presence of incorrect decisions.

Stone Sweet and Grisel assert there is no evidence of such bias. They conclude that claimant-investors lose as much as they win.[132] Stone Sweet and others further suggest that in the vast majority of awards, tribunals take seriously the respondent state's 'right to regulate.'[133] Similarly, Franck and Wylie question the claim that investment treaty arbitration outcomes are pro-investor and find that investment treaty arbitration actually presents state-favorable outcomes, stating that results of their study reflect 'a state-favorable or rough balance in outcomes.'[134] In an earlier study, Franck found that 'while both states and investors won at roughly equivalent levels perhaps some states – particularly high income and lower-middle income states – obtained particularly "pro-state" outcomes'.[135] Assessing the overall performance of investment treaty arbitration, Behn finds that '[i]n terms of outcomes, the most problematic issue in regard to its performance is that, while the win-loss ratios overall appear fairly balanced, there seems to be a bias against developing states that is unlikely

130 Pelc (n 120) 560–73 (dataset: 1812 individual legal claims brought across 742 investment disputes from 1993 to 2015).

131 ibid 561.

132 Stone Sweet and Grisel (n 97).

133 Stone Sweet and others (n 120) 608; see also Caddel and Jensen (n 120) (dataset: 163 ICSID cases up to September 2013 focusing on the host state government actors and finding that the majority of government decisions leading to investors' claims were associated with actions taken by the executive branch of government); Broude, Haftel and Thompson (n 120); Stone Sweet and Grisel (n 97) 247.

134 Franck and Wylie (n 7) 520; see also Franck, *Arbitration Costs* (n 7) 145–49.

135 ibid; see also Franck, 'Empirically Evaluating Claims' (n 7); Langford and Behn, 'Managing Backlash' (n 6).

to be justifiable.'[136] However, the evenness of outcomes raises an evaluative dilemma. There is no normative reason for thinking that a 50–50 chance of success is balanced or reasonable, especially given different rates in other but similar international tribunals.

Other studies nuance the balanced narrative. First, there are changes over time. In a recent longitudinal study of outcomes in investment treaty arbitration, Langford and Behn find a relatively high degree of predictability in the win-loss ratios for claimant-investors in investment treaty arbitration, but with a downwards trend for investors through time (see Figure 4.1).[137] Controlling for various factors, they argue that there is some evidence that this trend is driven by a concern by arbitrators to maintain the legitimacy of the system. This leads to a potentially interesting conclusion. Outcomes may be less correct, but more sociologically legitimate.

Second, Franck and Wylie suggest that certain types of claimant-investors tend to do particularly well in investment treaty arbitration. They argue that the variables most likely to predict outcomes are investor identity (a human being versus a corporation) and the presence of experienced counsel, where a human-investor and experienced lawyers generally led to more favorable results for claimants.[138] Third, examining collegial dynamics within investment tribunals, Tucker argues that collegial interactions contribute to making awards more investor-friendly or fact specific. One explanation is that investors have asymmetric control over the caseload and thereby indirectly control reappointments.[139] Fourth, partly due to this asymmetrical structure and the prospect of repeat appointments, Van Harten claims that a small group of repeatedly appointed arbitrators favor investors from major Western

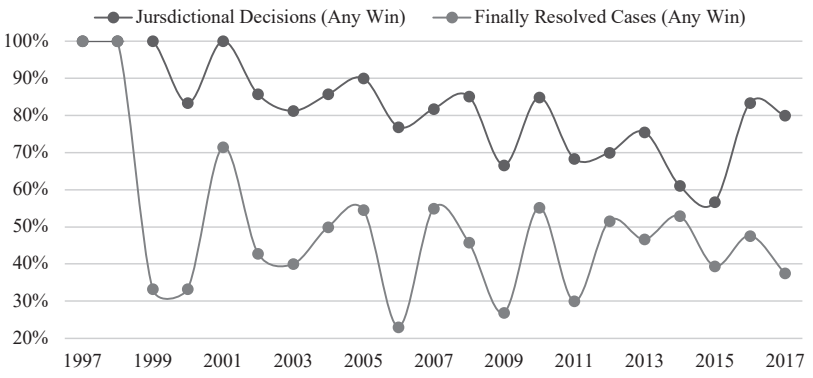
136 Behn (n 7).

137 Langford and Behn, 'Managing Backlash' (n 6).

138 Franck and Wylie (n 7) 521 (for investors, experienced lawyers may be key in identifying 'winning' cases or cases that might generate large awards, whereas for states, experienced counsel was associated with outcomes where investors did relatively poorly); see also McArthur and Ormachea (n 97) 563 (finding that ICSID tribunals have rarely declined investors' claims at the jurisdictional stage and further argue that investors from the richest countries have experienced the greatest success in securing ICSID).

139 Tucker (n 120) (dataset: interviews with 44 individuals that served in over 90% of the over 260 cases from 1990 through mid-2015, finding eight types of arbitrator).

FIGURE 4.1 Investor success ratios (through 2017)



SOURCE: Langford and Behn (n 6).
NOTE: The chances that an investor will succeed on jurisdiction in an investment arbitration has drifted downwards from near 100% in the late 1990s to around 70% to 75% in the late 2010s. Decisions on the merits, however, have held relatively steady over the past two decades. There is some annual fluctuation and a slight uptick in investor success rates in the past few years, but overall the success rate has hovered around 50%.

capital-exporting states,[140] a finding backed up by some other studies.[141] Fifth, drawing on diverse sources – from annulment awards through to critiques by

140 Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication' (n 120) (dataset: all publicly available awards (ie decisions) dealing with jurisdictional matters in 140 known cases from 1990 to May 2010); Van Harten, 'Arbitrator Behaviour (Part Two)' (n 120) (dataset: content analysis of arbitrators' resolutions of the 14 contested legal issues in a sample of 130 publicly available awards raising one or more of the relevant issues in the period of 1990 to May 2010); Van Harten, 'Leaders in Expansive and Restrictive Interpretation of Investment Treaties' (n 120) (dataset: content analysis of arbitrators' resolutions of the 14 contested legal issues in a sample of 130 publicly available awards raising one or more of the relevant issues in the period of 1990 to May 2010); for a discussion on the limitations of these findings, see inter alia, Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4(1) JIDS 553.

141 Wellhausen (n 7) 8 (finding that the number of investors and their diversity is steadily increasing and in addition she argues that: '[i]n 86 instances in which the investor won, we know both the award sought and the award won. Of these, in 50% of rulings, the investor won less than 33% of its original claim. In the mean ruling, the investor won 40% of its claim. In only 6 instances did the investor win the full amount demanded or greater'); Franck and Wylie (n 7) 521 (finding that investment treaty arbitration provides better relief for larger investors); McArthur and Ormachea (n 97) 581; Puig and Strezhnev, 'Affiliation Bias in Arbitration' (n 7) (finding arbitrators more likely to favor the party appointing them).

states – Álvarez Zárate and others find a range of indications that specific decisions may have been decided incorrectly.[142] Finally, questions have been raised about the correctness of damages calculations given the strong divergence of international investment law from other branches of international law and the remarkable internal inconsistency within investment law.[143]

4.3 *Annulment of Decisions*

Arbitral awards are final. There are nonetheless two possible avenues to address incorrectness: set-aside applications or enforcement procedures in domestic courts (for non-ICSID arbitral decisions), and annulment proceedings for ICSID awards. These possibilities offer however a limited standard of review, thus a limited potential to address incorrectness fully.

According to the 2018 ICSID Annual Report, the annulment rate remains low (about 3% since January 2011, about 13% between 1971 to 2000 and 8% between 2001 to 2010).[144] Since January 2011, 158 ICSID awards were rendered, 80 annulment proceedings were instituted and 5 awards were partially annulled. Examining the 44 ICSID annulment committee decisions rendered though 2015, Stone Sweet and Grisel find that 32 rejected requests; 6 annulled an award in full; and 6 annulled in part.[145] They note that 'in every annulment application leading to a final decision, applicants pleaded errors in law.'[146] Commission and Moloo highlight that the grounds most frequently invoked by parties are manifest excess of powers, serious departure from a fundamental rule of procedure and failure to state reasons.[147]

142 Anna De Luca and others, 'Responding to Incorrect Decision-Making: Policy Options' (2020) 21(2–3) JWIT 374–409.

143 Jonathan Bonnitcha and Sarah Brewin, 'Compensation Under Investment Treaties' (October 2019) IISD Best Practices Series.

144 ICISD 2018 (n 70) 36; see also ICISD 2016 (n 70).

145 Stone Sweet and Grisel (n 97) 138.

146 ibid 138; see also De Luca and others (n 142) 374–409; Benjamin Aronson, 'A New Framework for ICSID Annulment Jurisprudence: Rethinking the "Three Generations"' (2012) 6(3) Vienna J Intl Const L 3 (describing three approaches taken by Annulment Committees); Marboe (n 120); Christoph Schreuer, 'Three Generations of ICSID Annulment Proceedings' in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (IAI Series No 1 2004) 17–42; David Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal' (1992) 7(2) ICSID Rev 21.

147 Commission and Moloo (n 7) 223; Marboe (n 120) 202 (reviewing annulment decisions after 2002).

What we can conclude from the annulment process is that it is likely to be a successful means for redressing grievous errors of law, but given the very low chances of having an ICISD award annulled, it is unlikely that it is a suitable mechanism for remedying incorrectness. In fact, ICSID annulment regime was purposely designed to serve finality and offer only limited grounds of review in order to limit applications for annulment and to promote expeditious and economic settlement of disputes.[148] Furthermore, Alschner demonstrates that, in some instances, annulled decisions continue to be cited by later tribunals indicating that 'incorrect' decisions can be repeated.[149]

In contrast with ICSID awards, 'non-ICSID awards are subject to annulment based on the grounds available under the law of the place of arbitration, the proceeding is governed by the law of this place and the annulment request decided by the competent national court.'[150] Review of some national courts' decisions on the challenge of investment treaty awards confirm the exceptional character of annulment challenges and the general favor for the finality of arbitral awards.[151]

4.4 *Conclusions on Incorrectness*

To empirically study incorrectness or perceived incorrectness is challenging. It is a difficult concept to define, it can be analyzed from different angles by different actors, and it not always clear that it is desirable – for example when it clashes with the need for sociological legitimacy or development of jurisprudence across time. This section has mainly reviewed studies investigating whether extra-legal factors have impacted outcomes – especially leading to a bias against developing states and favoritism towards investors – and thereby led to potential incorrect outcomes. The evidence is mixed suggesting that research in this field is yet to point definitively towards any Quadrant, although there are emerging signs of incorrectness in certain types of cases and issues. We only know a little and we do not know yet conclusively whether it is a systemic problem.

148 ICSID 2016 (n 70) 1–8; Friedland and Brumpton (n 120); see also De Luca and others (n 142).

149 Alschner (n 120).

150 Bernardini (n 120) 169.

151 ibid 170–77 (reviewing courts' decisions in Sweden, Switzerland, USA, France and England, all countries that have not adopted the 1985 UNCITRAL Model Law on International Commercial Arbitration and 84 annulments requests under ICSID by 24 December 2015).

5 Lack of Diversity Among ISDS Adjudicators

The lack of diversity amongst arbitrators has been a central bone of contention in the UNCITRAL reform process. States and delegates have consistently raised concerns about gender and nationality; and scholars have also pointed to other homogenous such as education and location and queried the dominance of a small group of arbitrators.[152] For example, in one study on commercial and international arbitrators, Franck and others map diversity according to six factors: gender, nationality; age; linguistic capacity; legal training; and professional experiences.[153] They conclude that of those completing their survey the 'median international arbitrator was a fifty-three year-old man who was a national of a developed state and had served as arbitrator in ten arbitration cases.'[154]

While the concern over diversity remains, Greenwood[155] as well as the 2018 and 2019 ICISD Annual Reports highlight that the situation might be improving. The 263 appointments made to ICSID tribunals and ad hoc Annulment Committees in 2018 'were the most diverse to date in terms of nationality, gender, and first-time appointees.'[156] Others are less enthusiastic, noting that the shift is primarily evident in institutional appointments – which form the minority of appointments.[157] Greenwood attributes the persisting lack of diversity in the number of appointments to tribunals 'to the issue of information

152 See discussion in Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) EJIL 387; Malcolm Langford, Daniel Behn and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) JIEL 301; Behn, 'Performance of Investment Treaty Arbitration' (n 7); Andrea K Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) 21(2–3) JWIT 410–40.

153 Susan D Franck and others, 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 Colum J Transnatl L 429 (dataset: 413 subjects who served as counsel and 262 who acted as arbitrators, including 67 investment treaty arbitrators).

154 ibid 466.

155 Lucy Greenwood, 'Tipping the Balance: Diversity and Inclusion in International Arbitration' (2017) 33(1) Arb Intl 99; see also Lucy Greenwood and C Mark Baker, 'Is the Balance Getting Better? An Update on the Issue of Gender Diversity' (2015) 31(3) Arb Intl 413 (dataset: 267 concluded ICSID cases, from 13 January 1972 to 29 August 2014, 785 appointments).

156 ICISD 2018 (n 70); see also ICSID, 'Annual Report 2019' (2019) 25.

157 Taylor St John and others, 'Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration' (2018) Pluricourts Working Paper; Malcolm Langford, Daniel Behn and Maxim Usynin, 'The West and the Rest: Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration' in Behn, Fauchald and Langford (n 97).

asymmetry and the problem of the "solicited feedback loop" and believes that increased transparency and greater access to information is the only way to secure significant change.'[158] St John and others argue that the sluggishness, especially for party-based appointments, is better attributed to the dominance of the 'prior experience' norm.[159]

The next section surveys studies on the issues of gender, nationality and education; and a selection of the existing empirically-oriented research.[160]

5.1 *Gender Diversity*

In the field of international commercial and investment arbitration, it has been long observed that a coterie of Western 'grand old men' dwarf the field.[161] Puig's social network analysis of arbitral appointments at ICSID between 1972 and 2014 found that, grand old men from Europe and North America, continue

158 Greenwood, 'Tipping the Balance' (n 155); see also Greenwood and Baker, 'Is the Balance Getting Better?' (n 155).

159 St John and others (n 157).

160 For an overview, that does not reiterate the references already mentioned under sections 1 to 4, see: Ksenia Polonskaya, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation' (2018) 9 Melb J Intl L 259; ICSID, 'ICSID Caseload-Statistics' (2018) Issue 2018–2; Won Kidane, *The Culture of International Arbitration* (OUP 2017); Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) Working Paper; Anton Strezhnev, 'Detecting Bias in International Investment Arbitration' (presented at the 57th Annual Convention of the International Studies Association – Atlanta, Georgia, 16–19 March 2016) Working Paper; Susan D Franck and others, 'International Arbitration: Demographics, Precision and Justice' (2015) ICCA Congress Series No 18: Legitimacy: Myths, Realities, Challenges; Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus?' (2015) 109(4) AJIL 761; Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years After Dezalay and Garth' (2012) 28(2) Arb Intl 161; Gus Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (2012) 59 Columbia FDI Perspectives; Lucy Greenwood and C Mark Baker, 'Getting a better Balance on International Arbitration Tribunals' (2012) 28 (4) Arb Intl 653; Jose Costa, 'Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields' (2011) 1(4) Oñati Socio-Legal Series 1; Cai Congyan, 'The Structure of Arbitrators and Its Implications Towards ICSID Mechanism: An Empirical Analysis' (2009) 9 JWIT 333; Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercia Arbitrtion and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

161 Dezalay and Garth (n 160) (according to them, the group was small in number, linked closely, and mostly European, even referring to themselves as a 'club' or a 'mafia.' After a period of 'generational warfare,' these figures were joined and complemented by Anglo-American arbitration technocrats and law firms in the 1990s.).

to 'dominate the arbitration profession.'[162] Only 7% of ICSID arbitrators were female in this period and this participation of women also suffers from a double asymmetry. Two 'formidable' women, Stern and Kaufmann-Kohler held 75% of all female appointments.[163]

Over time, there has been a slight improvement. Earlier studies reported that between 3% and 7% of arbitrators appointed at ICSID are female.[164] A recent and comprehensive study by St John and others which includes non-ICSID cases and a sample period up to 2018, finds that now 11% of arbitrators are female.[165] Yet, the pattern largely remains and Kaufmann-Kohler and Stern account for 57% of all appointments given to female arbitrators (see Table 5.1). The top 25 women arbitrators in investment treaty arbitration also form an elite group. They account for 86% of all female appointments.[166] The remaining 32 female arbitrators have only received one appointment in an investment treaty arbitration case.[167]

To be sure, this lack of progress in addressing the gender gap is not limited to arbitration. The international judiciary suffers from a similar lack of gender representativeness, although there is a significant variation between international courts.[168] What is surprising is that the fragmented, ad hoc and frequent nature of arbitration – suggesting low barriers of entry – has been unable to absorb the large pool of qualified women in international economic law and

162 Puig (n 152) 387 (recent medium-N surveys of commercial arbitration have confirmed the elite educational backgrounds and male and Western identities of arbitrators, but also the possible rise of a third generation of managerial arbitrators within commercial, but not necessarily investment, arbitration); see also Paul Friedland and Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (2013) 8 Const L Intl 39; Waibel and Wu (n 160); Franck, 'Empirically Evaluating Claims' (n 7); Franck and others (n 160); Schultz and Kovacs (n 160).

163 Puig (n 152); see also UNCTAD 2018 (n 7) 95; Polonskaya (n 160) 267 (dataset: 21 ICSID cases involving Canada as a respondent state; finding that out of the 21 appointments Canada was responsible for, only 3 went to female arbitrators (Brigitte Stern and Céline Lévesque); Waibel and Wu (n 160) 21 (reporting that respondent states have a 'usual preference' for one well-known female arbitrator (Brigitte Stern) which they regard as a 'systemic gender preference').

164 Franck, 'Empirically Evaluating Claims' (n 7) measured 3% in 2006, Greenwood and Baker 2012 (n 160) found 5.63% in 2012, Van Harten , 'The (Lack of) Women Arbitrators' (n 160) measured 4% in 2012, Puig (n 152) found nearly 7% in 2014, Greenwood and Baker, 'Is the Balance Getting Better?' (n 155) found 5.61% 2014, and Waibel and Wu (n 160) found less than 10% in 2017.

165 St John and others (n 157); see also ICSID 2019 (n 156) 25.

166 St John and others (n 157).

167 ibid.

168 Nienke Grossman, 'Achieving Sex-Representative International Court Benches' (2016) 110 AJIL 82.

TABLE 5.1 Female ISDS Arbitrators – Top 25 by Appointments (up to 1 January 2018)

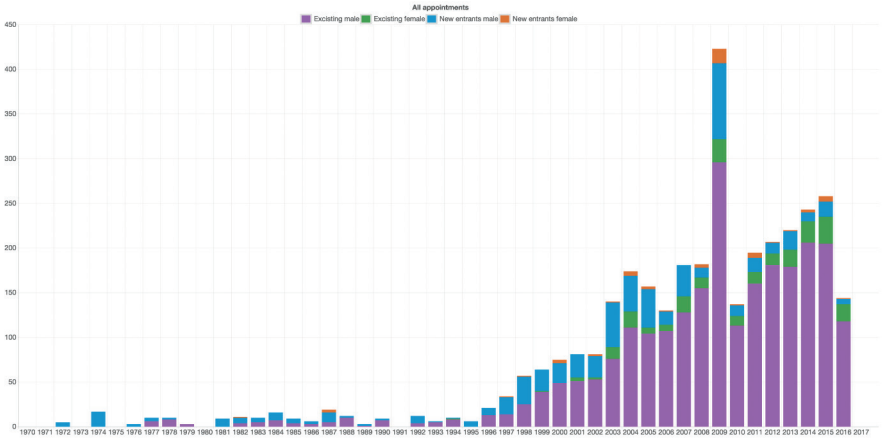
No	Arbitrator	Nationality	Chair	Claim	Resp	Annul	All
1	Brigitte Stern	France	4	1	109	1	115
2	Gabrielle Kaufmann-Kohler	Switzerland	43	17	3	1	64
3	Jean Kalicki	US	11	0	6	4	21
4	Laurence Boisson de Chazournes	Switzerland	0	2	13	0	15
5	Loretta Malintoppi	Italy	1	0	9	3	13
6	Teresa Cheng	Hong Kong	3	0	0	8	11
7	Yas Banifatemi	France	3	3	2	0	8
7	Anna Joubin-Bret	France	0	0	8	0	8
8	Lucy Reed	US	5	0	1	0	6
8	Vera van Houtte	Belgium	3	1	0	2	6
8	Lucinda Low	US	3	0	1	2	6
9	Joan Donoghue	US	2	1	0	2	5
9	Inka Hanefeld	Germany	2	0	1	2	5
10	Nina Vilkova	Russia	2	1	1	0	4
10	Sabine Konrad	Germany	2	1	1	0	4
11	Nayla Comair-Obeid	Egypt	2	0	0	1	3
11	Maja Stanivuković	Serbia	0	0	3	0	3
11	Hélène Ruiz Fabri	France	0	0	3	0	3
12	Melanie van Leeuwen	Netherlands	1	1	0	0	2
12	Fern Smith	US	0	0	2	0	2
12	Antonias Dimolitsa	Greece	0	0	0	2	2
12	Teresa Giovannini	Switzerland	0	0	2	0	2
12	Carolyn Lamm	US	0	1	1	0	2
12	Judith Gill	UK	1	1	0	0	2
12	Mónica Pinto	Argentina	0	0	1	1	2

SOURCE: PITAD.

commercial arbitration. For instance, a recent edited volume put together to celebrate the fiftieth anniversary of ICSID was edited by five women and 29% of the 73 contributors were women.[169] Five of the 25 most active legal counsel in investment arbitration are women as were the majority of the 25 most

169 Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2015).

FIGURE 5.1 Proportion of New Versus Repeat Appointments by Year and by Gender (up to 1 January 2017)



SOURCE: Taylor St John and others (n 157).

active tribunal secretaries;[170] and female legal counsel make up approximately one-third of lawyers working on investment arbitration cases.[171] Thus despite the growing participation of women in the field, arbitration appears to be remarkably resilient in maintaining its gendered character.[172]

As foreshadowed, St John and others argue that the absence of female arbitrators is primarily attributable to the 'prior experience' norm. The blue and brown bars in Figure 5.1 show how few new entrants get appointments in investment treaty arbitration each year; the vast majority of all appointments made yearly are by those individuals that have acted in an investment treaty arbitration previously.[173] Since only 11% of arbitrators each year are new appointments, the effective pool only expands gradually.[174] This attests to the system of party appointment entrenching the existing arbitrators and raising barriers to entry, especially for women.

170 Langford, Behn and Lie (n 152).
171 St John and others (n 157).
172 ibid.
173 ibid.
174 ibid.

5.2 *Nationality-Based Diversity*

It is also claimed that investment treaty arbitration is populated by a cadre of 'stale, male and pale' professional arbitrators. Honing in on the feature of paleness, studies with relatively large sample sizes show that 74% of arbitrators[175] and almost all of the top 25 'powerbrokers' in the system hail from Western states.[176] Yet, as discussed above, the vast majority of international investment disputes target developing and non-Western states,[177] and these states disproportionately lose in investor-State arbitration.[178] This can be contrasted with WTO panelists, whereby 52% originate from developing states.[179] The result is that the lack of geographic diversity continues to contribute to legitimacy concerns over the international investment regime and its dispute settlement process.[180]

According to Langford, Behn and Usynin, up through 1 August 2018 in all investment arbitration cases, only 35% of 695 individual arbitrators that have sat in at least one investment arbitration case were from non-Western states (as defined by the UN).[181] However, as Table 5.2 shows, this number falls to 26% when the number is calculated by number of appointments (i.e. non-Western arbitrators have a lower proportion of appointments per capita in comparison with Western arbitrators).[182] Asymmetry continues when we disaggregate the geographic region origins and the type of appointing actor (i.e. institution versus party) for non-Western state arbitrators. Half of non-Western arbitrators originate from Latin America and non-Western arbitrators are more frequently appointed by institutions than by parties.[183] Moreover, only three non-Western

175 Langford, Behn and Lie (n 152) 301–32; see also UNCTAD 2018 (n 7) 95; ICSID 2018 (n 160); Polonskaya (n 160) 296 (dataset: 21 ICSID cases involving Canada as a respondent state; finding that the majority of female arbitrators appointed by Canada are Caucasian and from developed states).

176 ibid; Puig (n 152) 387; see also Congyan (n 160) (examining nationality of ICSID arbitrators from 1996 to 2007).

177 Schultz and Dupont (n 7); Behn, Fauchald and Langford (n 97).

178 Behn, Berge and Langford (n 120) 333–89; ICSID 2018 (n 70).

179 Pauwelyn (n 160) (dataset: WTO panelists appointed between 1995 until the end of 2014 and ICSID appointments from 1972 until 2014); see also Catherine Rogers, 'Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn' (2015) 109 AJILU 294.

180 Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (2017) CIDS Supplemental Report.

181 Langford, Behn and Usynin (n 157).

182 ibid.

183 ibid.

arbitrators feature in the top 25 arbitrators by number of appointments (see Table 6.1).[184]

TABLE 5.2 Non-Western ISDS Arbitrators by Appointments and Region (up to 1 January 2018)

Non-Western Region	Claim	Resp	Chair	Annul	Total	%
South America	111	83	69	35	298	
Central America & Caribbean	10	68	41	28	147	
Eastern Europe & Central Asia	61	52	16	11	140	
Middle East	30	44	22	25	121	
South-East Asia	3	11	20	24	58	
Sub-Saharan Africa	5	25	3	13	46	
South Asia	3	23	8	6	40	
East Asia	0	2	7	16	25	
All Non-Western Regions	223	308	186	158	875	26 %
All Western Regions	779	687	787	194	2452	74 %
All Regions	1002	995	973	352	3327	
Non-West %	22 %	31 %	19 %	45 %		

SOURCE: Langford and Behn (n 157).

But does the diversity of arbitrator nationality matter for outcomes in investment treaty arbitration? In an early study on a limited sample of 47 investment arbitration cases, Franck found that the development status of the state where the presiding arbitrator came from (who often carry the key deciding vote) did not correlate with outcomes for respondent states having a similar development status to that of the presiding arbitrator.[185] However, in a more recent paper based on 231 ICSID cases, Waibel and Wu found that presiding arbitrators from developing states were significantly more likely to favor respondent states (whether developed or developing) – although only on decisions concerning the jurisdiction of the tribunal.[186]

Using the PITAD database, Langford, Behn and Usynin analyze the effects of both nationality and dominant residence of arbitrators.[187] The results are

184 Behn, Berge and Langford (n 120).
185 Franck 'Development and Outcomes' (n 120) 435.
186 Waibel and Wu (n 160).
187 Langford, Behn and Usynin (n 157).

mixed. The most significant findings are that the presence of a presiding arbitrator from a Western state is correlated with a greater likelihood of an investor (whether from a developed or developing state) winning (39% more likely) but the relationship is not statistically significant.[188] However, and surprisingly, the mere presence of a non-Western arbitrator anywhere on the tribunal is positively correlated with investor success.[189] Notably, this is statistically significant for non-Western arbitrators whose dominant residence is not in the West. This possibly suggests a reverse bias. However, a recent study by Puig and Strezhnev focused on a different outcome: the likelihood of bringing an ICSID annulment claim.[190] Using a dataset of all ICSID awards, they find that nationality partly matters, but in a different way: states (whether developed or developing) that have lost in the first instance ICSID arbitration are less likely to seek annulment if a member of the first instance tribunal hailed from the developing world.

5.3 *Work Experience and Education*

In the context of the WTO, Pauwelyn notes that a high proportion of panel members have a background in government. The reverse is true for investment arbitration. He describes investment treaty arbitrators as 'elite private lawyers or legal academics from western Europe or the United States.'[191] Focusing on presiding arbitrators, Waibel and Wu find that 90% of them have received their higher education in OECD member states.[192] They also show that 20% of them are from developing states; 35% are specialists in public international law and 15% in public law. However, they note that many presiding arbitrators have spent time in the executive branch of government and a much smaller proportion have worked in the private sector.[193] Similarly, Langford, Behn and Lie find that the majority of arbitrators have 'elite educational backgrounds;'[194]and Puig and Strezhnev find that, among the number of ICSID arbitrators they

188 ibid.

189 ibid.

190 Anton Strezhnev and Sergio Puig, 'Diversity and Compliance in Investment Arbitration: Future Directions in Empirical Research on Investment Law and Arbitration' (Oslo LEGINVEST Conference, 31 January 2019); see also Strezhnev, 'Detecting Bias in International Investment Arbitration' (n 160) (finding a significant increase in claimants' win when tribunal presidents are nationals of advanced economies and have worked in government).

191 Pauwelyn (n 160) 800; see also Costa (n 160) (dataset: nominees in ICSID tribunals and committees and WTO Panels from 1995 to 2009).

192 Waibel and Wu (n 160) 15.

193 ibid.

194 Langford, Behn and Lie (n 152).

surveyed, the majority of arbitrators have private sector backgrounds.[195] However, the effects of such background on arbitration outcomes is only an emergent field of research.

5.4 *Conclusions on Diversity*

The evidence on the absence of diversity in investment arbitration is crystal clear: there is a striking absence across the vectors of gender, nationality, work experience and age. The discourse on diversity needs also to ensure that it truly encompasses multiple diversity characteristics and that it does not become overly focused on merely increasing numbers of women or individuals of ceratin nationalities with nothing more.[196] Despite a number of initiatives, change remains sluggish across all measures of diversity and it is uncertain that the current system is amenable to significant change, particularly given the dominance of the 'prior experience' norm. Parties have strong incentives to (re)appoint experienced arbitrators making entry to new and more diversified candidates difficult.[197] Arbitral institutions also have a role to play, and might even be the best placed in enhancing diversity on tribunals. Whether the lack of diversity is a problem for investment treaty arbitration depends on how it is measured. But it is clear that it creates a challenge to the system's legitimacy (which also affects compliance) and some studies suggest a more diverse group of arbitrators may decide differently.[198] In this respect, diversity largely falls within Quadrant I: we know quite a bit and there is definitely a problem.

6 Independence, Impartiality and Neutrality of ISDS Arbitrators

Empirical research on independence, impartiality and neutrality of arbitrators has been concerned with two questions. The first is whether non-legal factors are present in arbitral decision-making. Much of this literature has been already discussed in section 4 given that some studies raise questions over the

195 Puig and Strezhnev, 'Affiliation Bias in Arbitration' (n 7) 392; see also Strezhnev, 'Detecting Bias in International Investment Arbitration' (n 160).

196 Polonskaya (n 160).

197 Kidane (n 160) (discussing the privileged elite class with 'cosmopolitan good manners' perpetuating the exclusion of the historical 'others').

198 Thomas Schultz, 'The Ethos of Arbitration' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) ch 10 (suggesting that a group that is too homogenous loses out in decision-making quality); see also Paul Friedland and Stavros Brekoulakis, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) White & Case 16–17.

correctness of arbitral awards as a function of a lack of arbitrator independence and impartiality. The second is whether there are systemic features of arbitration or arbitrators that might suggest the absence of independence, impartiality and neutrality. In this section, we focus on the latter, and specifically three features: party appointments, double hatting and cognitive biases – the first two concerned with independence and the latter with impartiality.

There is relatively large field of research that covers questions relating to independence, impartiality and neutrality of arbitrators, although it is only partly empirical.[199]

199 For an overview, without reiterating the references already mentioned under sections 1 to 5, see Runar H Lie, 'The Influence of Law Firms in ISDS' in Daniel Behn and others (eds), *The Legitimacy of International Investment Arbitration: Empirical Perspectives* (CUP, forthcoming); Malcolm Langford, Runar Lie and Daniel Behn, 'Machine Learning and Stylometry: The Case of Investment Treaty Arbitration' in Ryan Whalen (ed), *Computational Legal Studies* (Edward Elgar, forthcoming); Szilárd Gáspár-Szilágyi and Laura Létourneau-Tremblay, 'Question of Impartiality: Who Are the Dissenting Arbitrators in International Investment Treaty Arbitration?' (2019) PluriCourts Working Paper; James Crawford, 'The Ideal Arbitrators: Does One Size Fit All?' (2018) 32(5) Am U Intl L Rev 1003; Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Is "Moonlighting" a Problem? The Role of ICJ Judges in ISDS' (2017) IISD Commentary; Julian Donaubauer, Eric Neumayer and Peter Nunnenkamp, 'Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience' (2017) 2074 Kiel Working Paper; Susan D Franck and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory L J 1115; Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28(3) EJIL 731; Michael Waibel, 'Arbitrator Selection: Towards Greater State Control' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 333; Sergio Puig, 'Blinding International Justice' 56(3) VJIL 647; Georgios Dimitropoulos, 'Constructing the Independence of International Investment Arbitrators: Past, Present and Future' (2016) 36(2) Northwestern J Intl L & Bus 371; Thomas Schultz, 'Celebrating 20 Years of "Dealing in Virtue"' (2016) 7(3) JIDS 531; James Crawford, 'Challenges to Arbitrators in ICSID Arbitration' in David Caron and others (eds), *Practicing Virtue: Inside International Arbitration* (OUP 2015) 596; Meg Kinnear and Frauke Nitschke, 'Disqualification of Arbitrators Under the ICISD Convention and Rules' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill 2015) 34; Catherine Rogers and Idil Tumer, 'Arbitrators Challenges: Too Many or Not Enough?' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Brill 2015) 128; Anton Strezhnev, 'You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration' (2015) Research Note; Margaret L Moses, 'Reasoned Decisions in Arbitration Challenges' (2013) 3 YB Intl Arb 199; Ruth Breeze, 'Dissenting and Concurring Opinions in International Investment Arbitration: How the Arbitrators Frame Their Need to Differ' (2012) 25 Intl J Sem L 393; Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer 2012); Gus Van Harten, 'Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration' (2011) 1(4) Oñati Socio-Legal Series 1; Lucy Reed, Jan Paulsson and Nigel

6.1 *Party Appointments*

The system of party appointments has regularly raised concerns over the impartiality of arbitrators; and in some cases, their actual independence from litigating parties. The principal concern is that arbitrators are either directly influenced by their parties (interference); unconsciously or consciously seek to play an institutionally-defined role (affiliation bias); or strategically play a role in order to obtain future appointments (strategic bias). Indeed, Puig,[200] and Langford, Behn and Lie find that repeat appointments are the norm and that the top 25 arbitrators in the system constitute nearly 50% of all appointments made in investment arbitration (see Table 6.1).[201]

Most empirical research has focused on the presence of an affiliation bias. Some authors argue that there is little evidence that arbitrators are influenced by the knowledge of their appointing party. Analyzing descriptively the outcomes 56 awards by 19 repeat arbitrators, Kapeliuk found that arbitrators do not side with their appointing party.[202] However, using a survey conducted on 257 international arbitrators, Puig and Strezhnev find that 'while arbitrators do not completely advance their appointing party's interests, when room for discretion arises, they appear to be more likely to choose outcomes that are more favorable to the side that appointed them.'[203] Based on these results, Puig proposes blind appointment as an 'effective debiasing policy alternative'[204] to the party-appointed system.

These findings have been strengthened by the pattern of dissents. While the incidence of dissent is low – Puig identifies that in ICSID cases between 1972 and 2015 only about 14.5% of decisions carried a dissenting opinion – the

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Blackaby, *Guide to ICSID Arbitration* (2nd edn, Kluwer 2011); Daphna Kapeliuk, 'Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' (2010) 96 Cornell L Rev 47; Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Brill 2010) 821; Rogério Bianco, 'The International Centre for Settlement of Investment Dispute (ICSID): An Empirical Research on the Voting Behavior of Arbitrators' (2009) Working Paper <https://ssrn.com/abstract=1514882> accessed 12 June 2020.

200 Puig (n 152).

201 Langford, Behn and Lie (n 152); see also Lie (n 199).

202 Kapeliuk, 'Repeat Appointment Factor' (n 199).

203 Puig and Strezhnev, 'Affiliation Bias in Arbitration' (n 7) 382; see also Puig and Strezhnev, 'The David Effect and ISDS' (n 199); Strezhnev, 'Detecting Bias in International Investment Arbitration' (n 160) (discussing bias among arbitrators); Tucker (n 120) (discussing types of arbitrators and their tilt towards the litigating parties).

204 Puig (n 199).

TABLE 6.1 Repeat Appointments – Top 25 Arbitrators (up to 1 January 2017)

No	Arbitrator	Nationality	Chair	Claim	Resp	Annul	Total
1	Brigitte Stern	France	4	1	82	1	88
2	Gabrielle Kaufmann-Kohler	Switzerland	38	15	2	1	56
3	L. Yves Fortier	Canada	24	25	2	2	53
4	Charles N. Brower	US	1	50	0	1	52
5	Francisco Orrego Vicuña	Chile	18	27	3	1	49
6	Albert Jan van den Berg	Netherlands	15	16	12	1	44
7	J. Christopher Thomas	Canada	0	1	42	0	43
8	Bernard Hanotiau	Belgium	12	18	5	5	40
8	Karl-Heinz Böckstiegel	Germany	26	8	2	4	40
9	V.V. Veeder	UK	25	6	6	0	37
9	Bernardo Cremades	Spain	14	10	10	3	37
10	Piero Bernardini	Italy	11	13	3	9	36
11	Marc Lalonde	Canada	8	20	7	0	35
12	Rodrigo Oreamuno	Costa Rica	15	0	14	5	34
13	Stanimir Alexandrov	Bulgaria	3	25	1	3	32
14	Phillipe Sands	UK	1	4	25	0	30
15	Juan Fernández-Armesto	Spain	21	1	3	4	29
16	Jan Paulsson	France	13	12	2	1	28
16	Horacio Grigera Naón	Argentina	2	24	2	0	28
16	David Williams	New Zealand	10	17	0	1	28
17	James Crawford	Australia	12	2	10	3	27
18	Pierre Tercier	Switzerland	22	0	3	0	25
19	Toby Landau	UK	3	1	20	0	24
19	Vaughan Lowe	UK	13	2	9	0	24
19	Franklin Berman	UK	10	5	4	5	24

SOURCE: Langford, Behn and Lie (n 152).

author of the dissent has been traditionally constant.[205] In a survey of 150 cases through 2008, van den Berg finds that nearly all of the 34 dissenting opinions were issued by the arbitrator appointed by the party losing the case.[206] Raising concerns about the neutrality and impartiality of arbitrators, he concludes that party-appointed arbitrators should observe the principle of *nemine dissentiente*.

However, van den Berg's conclusions can be tempered in three respects. First, Strezhnev finds some evidence that dissenting opinions in ICSID arbitrations might reduce re-appointment chances as presiding arbitrators.[207] This suggests that dissents may not be driven by a strong strategic bias – or at least that such a strategy is successful.[208] Second, the pattern of dissent has partly changed. Gáspár-Szilágyi and Létourneau-Tremblay find that about 73% of dissenting opinions are written by arbitrators appointed by the losing party, 24% by arbitrators appointed by the wining party and 3% by the presiding arbitrator.[209] The incidence of dissenting opinions by arbitrators appointed by the winning party suggests that the party appointment does not lead to uniform results. Third, reviewing the reasons for dissenting in 14 opinions, Breeze finds the grounds to be:

> the lack of an adequate, well-reasoned account of the majority decision; the majority's failure to pursue the ultimate purpose of ICSID and BITs, understood as being to encourage and protect foreign investment; and the need to put the record straight as far as future cases are concerned.[210]

205 Puig (n 199) 676.

206 van den Berg (n 199) 824; for a response to van den Berg's criticism see, inter alia, to Charles N Brower and Charles B Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-Van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded' (2013) 29(1) Arb Intl 7; Pedro Martinez-Fraga and Harout Samra, 'A Defense of Dissents in Investment Arbitration' (2012) 42(3) U Miami Inter-Am L Rev 445.

207 Strezhnev, 'You Only Dissent Once' (n 199) 5 (examining re-appointment rates to arbitrations under ICSID).

208 See Waibel and Wu (n 160) 15 (arguing that this might also reflect the fact that presiding arbitrators are likely to be repeatedly hired: '[o]n average, these 101 [presiding] arbitrators are appointed as presidents nearly 7 times, nearly 4 times as claimant arbitrators, and slightly more than twice as respondent arbitrators.').

209 Gáspár-Szilágyi and Létourneau-Tremblay (n 199).

210 Breeze (n 199) 410.

She argues that dissents have contributed to the development of investment arbitration practice. Although finding that separate opinions might lead to higher tribunal fees, Franck also supports the practice of separate opinions.[211]

6.2 *Double Hatting*

The participation of arbitrators as counsel in other arbitrations or judges in other cases has come under increasing scrutiny on the grounds that it may compromise an arbitrator's independence – actual or perceived.[212] Bernasconi-Osterwalder and Brauch found that judges from the ICJ served in roughly 10% of all known investment treaty arbitraion cases as of July 2017,[213] and Waibel and Wu find that more than half of presiding arbitrators have provided legal advice or acted as counsel in other arbitrations, and that more than 60% of them are legal practitioners; and almost 40% of them are academics.[214]

Focusing on arbitrators acting as legal counsel, Langford, Behn and Lie sought to provide a comprehensive measurement of the extent of double hatting within investment arbitration using the PITAD database.[215] They found that about in 47% of ISDS cases (509 out of 1075) at least one arbitrator on the tribunal is simultaneously acting elsewhere as legal counsel in a different ISDS case.[216] In 190 of those 509 ISDS cases shows there is also legal counsel simultaneously acting elsewhere as an arbitrator in these cases – a case of simultaneously acting elsewhere squared.[217] In addition, in double hatting a further 11% of cases (118 out of 1075) involve legal counsel (but no arbitrators) double hatting elsewhere as arbitrators.

The difference between these categories sheds an important light on the nature of double hatting. The number of arbitrator-only double hatting cases is three times that of legal counsel-only cases.[218] This is largely attributable to the fact that the pool of double hatting legal counsel is much more diverse and fragmented than the pool of double hatting arbitrators. Double hatting is a practice that is dominated by a small group of arbitrators with numerous

211 Franck, *Arbitration Costs* (n 7).

212 For other critiques, see Judith Levine, 'Dealing with Arbitrator "Issue Conflicts" in International Arbitration' (2002) 61 Disp Resol J 60; Joseph Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' (2008) 26(1) Berkeley J Intl L 111.

213 Bernasconi-Osterwalder and Brauch (n 199).

214 Waibel and Wu (n 160) 15.

215 Malcolm Langford, Daniel Behn and Runar Lie, 'The Ethics and Empirics of Double Hatting' (2018) 6:7 ESIL Reflection.

216 ibid.

217 ibid.

218 ibid.

arbitral appointments but a comparatively smaller amount of simultaneous legal counsel work.

In their study, Langford, Behn and Lie also examined whether the degree of double hatting has changed over time. They found that double hatting continues to account for a high proportion of cases from 2003 to 2016, and some of the highest proportions coming in the period of 2011 to 2015.[219]

A final question is whether double hatting matters.[220] On one hand, some argue that double hatting is compatible with the ad hoc nature of arbitration and that some overlap of roles is necessary for career transition.[221] Arbitrators are also often seasoned legal professionals. On the other hand, critics have raised concern over actual and perceived conflicts of interests, especially given that arbitrators may be able to develop a favorable precedent for a case in which they act as counsel.[222] Others have raised concerns over potential exploitation by insiders of information asymmetries in order to dominate or allocate appointments[223] or the existence of quid pro quo arrangements between counsel and arbitrators for future appointments.[224]

6.3 *Cognitive Biases*

An emerging frontier of research focuses on arbitrator biases that are not connected with appointing parties (section 6.1) or general outcomes (section 3) but rather other aspects of the arbitration process. In an experimental study on how international arbitrators decide cases, Franck and others find that international arbitrators tend to engage in intuitive and impressionistic decisions rather than fully deliberative decision-making.[225] They argue that those:

> designing dispute resolution systems should focus less on who decides [knowing that they might commit errors] and more on structural features and procedural safeguards that increase the likelihood that the decision maker, whomever or whatever she is, provides justice.[226]

219 ibid.

220 See discussion of literature in Langford, Behn and Lie (n 152).

221 ibid.

222 ibid.

223 See Catherine Rogers, 'The Vocation of the International Arbitrator' (2004) 20 Am U Intl L Rev 968–69; Magdalene D'Silva, 'Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration' (2014) 5(1) JIDS 605.

224 Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 3(5) TDM.

225 Franck and others (n 199) 1139.

226 ibid 1173; see also Brekoulakis (n 140) (arguing that when examining the issue of bias in arbitral decision-making, focus should shift from the individual conduct of arbitrators (apparent bias) to include all types of bias within the system of arbitration associated

Another potential cognitive bias is identified by Puig and Strezhnev. They find that, on the issue of compensation, 'arbitrators may be prone to the "David effect" – biased towards the perceived underdog or "weaker" party when this party wins.'[227] Their findings show that arbitrators pay attention to the resources and capacity of the parties and 'behave in a way that is consistent with a preference for rectifying inequalities in litigation resources.'[228] In contrast, drawing from adjudicative behavior theories, Van Harten undertakes a content analysis of arbitrators' resolutions of 14 contested legal issues to assess the extent of arbitrators' interpretative discretion.[229] He identifies a small group of repeat players, playing a leading role in the legal expansiveness of the identified contested legal issues for the period studied (1990 to 2010),[230] and concludes that the identity of ISDS arbitrators can be a crucial factor in identifying variations in the interpretation of investment treaties. The study further suggests that institutional (appointment process) and economic factors (business interests of arbitrators) play a role in adjudicative behavior in the context of investment treaty arbitration.

6.4 *Conclusions on Independence, Impartiality and Neutrality*

Empirical research raises some questions over the impartiality, neutrality and, to some extent, independence of arbitrators. There is mixed evidence of potential affiliation bias towards the appointing party, the modest presence of some other cognitive biases, and double hatting raises concerns. However, empirical work on bias must be done with caution as it is frequently difficult to demonstrate with precision the causal link between the alleged bias and the actions

with procedural design and institutional structure of arbitrations); Tucker (n 120); Schultz (n 198).

227 Puig and Strezhnev, 'The David Effect and ISDS' (n 199) 761.

228 ibid 733; see also Puig and Strezhnev, 'Affiliation Bias in Arbitration' (n 7).

229 Van Harten, 'Leaders in Expansive and Restrictive Interpretation of Investment Treaties' (n 120) (dataset: content analysis of arbitrators' resolutions of the 14 contested legal issues in a sample of 130 awards raising one or more of the relevant issues in the period of 1990 to May 2010); see also Catharine Titi, 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration' (2013) 14(5) JWIT 829–51; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP 2008).

230 Van Harten, 'Leaders in Expansive and Restrictive Interpretation of Investment Treaties' (n 120) 509–10, 538 (The individuals most credibly described as expansive leaders, using various measures, would be: Gabrielle Kaufmann-Kohler, Andrés Rigo Sureda, Francisco Orrego Vicuña, Marc Lalonde, Yves Fortier, Stephen Schwebel, Charles N Brower and Bernard Hanotiau. One arbitrator, VV Veeder, would credibly be described as a restrictive leader. But Van Harten warns that the findings do not support conclusions beyond May 2010, and should not be extrapolated beyond the cut-off date or used for prediction).

that individuals take. Nevertheless, such research can provide a valuable perspective on decision-making processes. For example, practices such as double hatting can be descriptively mapped even if issues of actual bias may be hard to pin down: certainly the research on double-hatting has created a problem of perceived bias that needs to be addressed.

To be sure, arbitrators' lack of independence and impartiality can be challenged within the existing system.[231] Commission and Moloo show that parties have lodged 121 arbitrator challenges in ICSID proceedings between 1982 and 2017; and 35 arbitrator challenges in ad hoc UNCITRAL proceedings between 1999 and 2017.[232] In both types of proceedings, the majority of proposals were advanced by the respondent state.[233] For ICSID arbitrations, 95% of the challenges were rejected, but 25% of the challenge proposals resulted in a change in the composition of the tribunal.[234] A review of arbitrator challenge decisions in ICSID arbitrations indicate that most challenges are based on the arbitrator's familiarity with another participant in the proceeding.[235] In ad hoc UNCITRAL arbitrations, the rejection rate was lower with 74% of challenges rejected and 34% of challenge proposals resulted in a change in the composition of the tribunal.[236] In other words, practically all the arbitrator disqualification requests are dismissed. Those deciding on arbitrator challenges are extremely reluctant to do so. It is also argued that arbitrators consider the

231 See eg ICSID Convention, arts 14(1) and 57; UNCITRAL Arbitration Rules, art 10.1; IBA Guidelines on Conflicts of Interest in International Arbitration; see also Rogers and Tumer (n 199) (discussing the impact of the IBA Guidelines on the rates of challenges); Chiara Giorgetti and others, 'Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options' (2020) 21(2–3) JWIT 441–74 (discussing the divergence in the standards guiding decisions on challenge).

232 Commission and Moloo (n 7) 52–65; see also to Reed, Paulsson and Blackaby (n 199) 134 (dataset: reviewing ICSID cases up to 2010 and find that parties have challenged arbitrators in 26 registered ICSID cases on the basis of three grounds – (1) relationships with parties; (2) relationships with parties' counsel or law firms; and/or (3) involvement in other arbitrations raising similar issues); Daele (n 199) 204 (dataset: all ICISD cases though 2011 and finding 42 challenges: three challenges did not go though, only one challenge succeeded, in nine instances the arbitrator resigned voluntarily and the rest were rejected); Moses (n 199) 203–04.

233 Commission and Moloo (n 7) (64% by respondents in ICISD arbitration proceedings and 69% by respondents in UNCITRAL arbitration proceedings); see also Dimitropoulos (n 199) 403–04 (finding that between 2012–2014 most disqualification proposals were filed by claimants).

234 Commission and Moloo (n 7) 56; see also Kinnear and Nitschke (n 199) (dataset: disqualifications proposals up to 1 September 2014).

235 Cleis (n 97) 82 (dataset: all disqualification decisions publicly available prior to 1 December 2016).

236 Commission and Moloo (n 7) 65.

tight network and the centrality of certain arbitrators as inherent to the system and therefore double hatting, previous contacts of an arbitrator with a party, and/or multiple repeat appointments are presumed to be harmless.[237]

Reviewing recent ICSID decision to assess whether the threshold for a successful challenge is higher than it is under alternative regimes, Crawford finds that the disqualification threshold under ICSID is higher than in other forums and further suggests that disqualification in ICSID is 'in need of greater conceptual clarity.'[238] Others conclude that the ICSID system of arbitrator challenges does not work,[239] and imply that arbitrators' reluctance to disqualify one of their co-arbitrators, the high disqualification threshold, as well as the abstract requirement for independence and impartiality may provide some explanation for the low success rate of arbitrator challenges.[240]

In this respect, concerns over impartiality, independence and neutrality fall between Quadrant III and IV (there might be a problem, but more knowledge is needed).

Conclusions

The above survey of the empirical evidence reveals an emerging base of evidence for assessing various concerns around investment treaty arbitration practice. In some areas, precise statistics can be given on the nature of the investment treaty arbitration regime (e.g. legal costs, duration, diversity) and increasingly on the casual factors behind its outcomes (e.g. causes of delay, presence of bias effects of diversity on outcomes).

However, the above review also indicates the limitations of an empirical perspective. The main challenges are access to all relevant data (e.g. all final

237 Cleis (n 97) 84; see also Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 627–57; Giorgetti and others (n 231).

238 Crawford (n 199) 606 (ICSID Convention, art 57 requires an arbitrator to 'manifest lack the qualities required,' Crawford examines the meaning of 'manifest' in recent ICSID annulment decisions); Cleis (n 97).

239 Moses (n 199) 204; Daele (n 199) 170–74.

240 Moses (n 199) 204–05; Daele (n 199) 174; Cleis (n 97) 87 (suggesting a clarification of the challenge threshold, a reassignment of the authority to decide challenges, and a clearer definition of the requirement of independence and impartiality as means to improve this process); Dimitropoulos (n 199) (discussing recent trends on disqualification in ICSID case law up to 2014 and suggesting alternatives to the current system); see also ICSID (n 65) 138–46 (discussing amendments to ICSID Rules on the disqualification of arbitrators).

awards, including on compliance challenges in explaining outcomes (e.g. capturing all determinants of arbitral behavior), and capacity (the empirical research community is small in relation to the number and range of empirical questions being asked). Moreover, evaluative challenges remain – it is not always clear whether a normative problem exists even when epistemological and empirical problems have been overcome. Thus, while access to data is improving and a broader range of researchers are experimenting with new methods and questions, one should avoid jumping too quickly from empirical findings to normative conclusions.

Our conclusions for each of the six concerns about ISDS can be mapped on to the epistemological and evaluative axes of Figure 7.1. In some instances, there is clear evidence of a problem (diversity, costs) or clear evidence that raises questions as to whether there is a significant problem (duration of proceedings). In other areas we know less (consistency, independence, and correctness) and what we do know so far only points partly towards a problem.

FIGURE 7.1 Mapping Empirical Research