

EMPIRICAL PERSPECTIVES ON INVESTMENT ARBITRATION: WHAT DO WE KNOW? DOES IT MATTER?

ISDS Academic Forum Working Group 7 Paper

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Introduction

The last decade has witnessed a burgeoning empirical research field on investment treaty arbitration (ITA). Probing its origins, functioning and effects – and even doctrinal questions, scholars have used a range of methods (quantitative, qualitative and computational) to analyze the regime. Such empirical research has been greatly facilitated by the rapid expansion and proliferation in the number of treaties, arbitrations and accompanying actors, which has facilitated the analysis of broader patterns and the development of generalizable findings. It is also a creature of the times. The new research agenda in field of international investment arbitration corresponds with the broader empirical turn in international law, which has supported and legitimated the application of social and computer sciences to law.¹

This Working Group paper seeks to 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 Working Group 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: (1) excessive costs; (2) excessive duration of proceedings; (3) lack of consistency in legal interpretation; (4) incorrectness of decisions; (5) lack of arbitral diversity; and (6) Lack of independence, impartiality, and neutrality of ISDS adjudicators. Interestingly, and as we shall see, empirical research has helped shaped the choice of issues by states in the UNCITRAL reform process– especially on questions on diversity, independence and, to some extent, costs.

In adopting an empirical perspective on each these issues, we ask two simple but difficult questions in this paper: (1) What do we know? and (2) Does it matter?

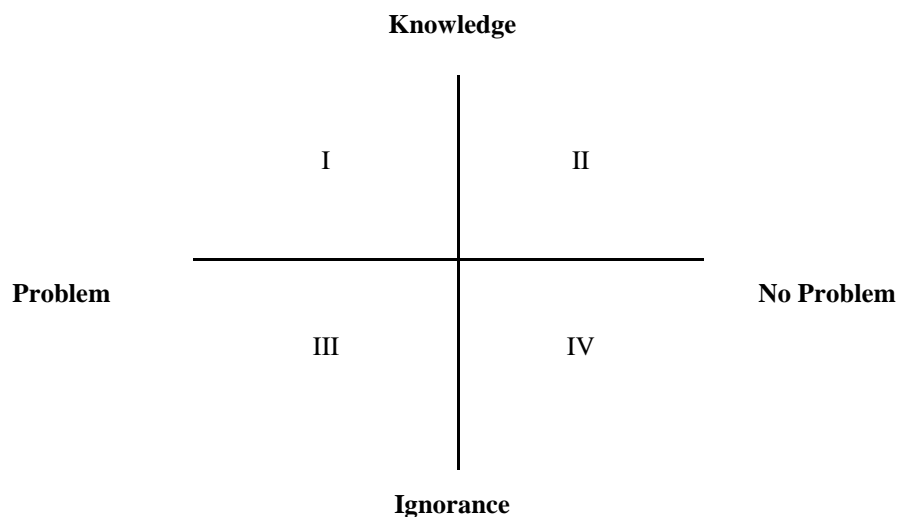
¹ See generally Susan Franck, ‘Empirical Modalities: Lessons for the Future of International Investment’ (2010) 104 ASILP 33; Greg Shaffer and Tom Ginsburg, ‘The Empirical Turn in International Legal Scholarship’ (2012) 106(1) AJIL 1; Sergio Puig, ‘Recasting ICSID’s Legitimacy Debate: Towards a Goal-Based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

In addressing both questions, there is a recurrent tension. The current knowledge about investment treaty arbitration suffers from a range of *epistemological* challenges: some issues are understudied, others issues are difficult to study, and results can be challenging to interpret or compare across time. For example, we now 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.

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 increasingly determine what causes delays. Yet, it is not clear whether delay is a real problem when the empirical evidence points to the 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 2*2 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 II) and poor knowledge but a likely problem (Quadrant III). In each section, we summarize the current position along this frame.

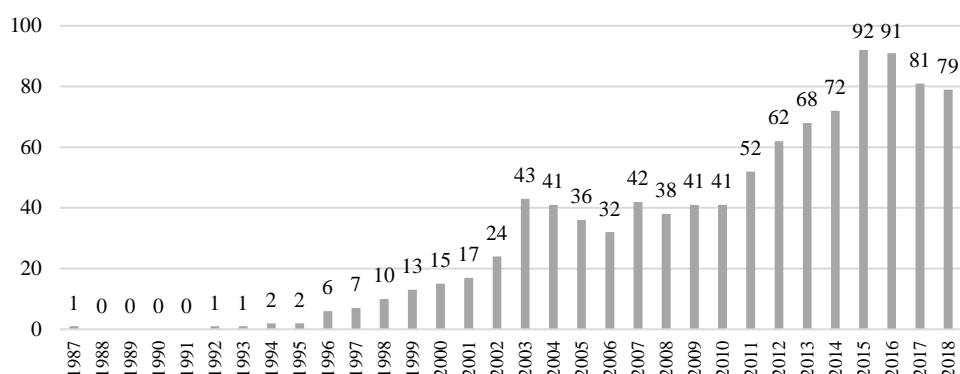
Figure 1.1: Empirical perspectives



Before turning to the six areas, we present the latest descriptive statistics on the investor-state dispute settlement (ISDS) caseload up through 1 November 2018 from the PITAD database. As at 1 November 2018, there were 991 cases based on substantive bilateral investment and free trade agreements: see Figure 1.2. This is complemented by a further 133 cases based on

ICSID arbitration based on contracts and domestic FDI law cases; and 124 annulments which were or are administered under the ICSID convention.

Figure 1.2: All ISDS cases by year (991 cases through 1 November 2018)²



As Table 1.1 shows, 645 of the 991 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.

Table 1.1: All ISDS cases by outcome (991 cases through 1 November 2018)³

Outcome Type	No	No	
Investor loses	231	<i>Investor loses on jurisdiction</i>	104
		<i>Investor loses on merits</i>	127
Investor wins	204	<i>Investor partial win</i>	105
		<i>Investor full win</i>	99
Case settled/discontinued	210	<i>Case settled</i>	133
		<i>Case discontinued</i>	77
Case pending	346		
Total	991		

There is a strong asymmetry for the types of parties that engage in investment treaty arbitration litigation. On one side, the home state of the claimant-investor is strongly represented by the United States, followed by the Netherlands, United Kingdom, Germany, Canada and Spain: see Figure 1.3. Likewise, host states in investment treaty arbitration are overwhelmingly middle-income states: see Figure 1.4. Of the 991 cases, low-income states are respondents in

² Data retrieved from the PluriCourts Investment Treaty and Arbitration Database (PITAD), available at: <https://pitad.org> (accessed 15 March 2019). The caseload of treaty-based investment arbitrations has been on an upward trajectory since the early 2000s but appears to be plateauing at around 80 cases registered per year in the past years.

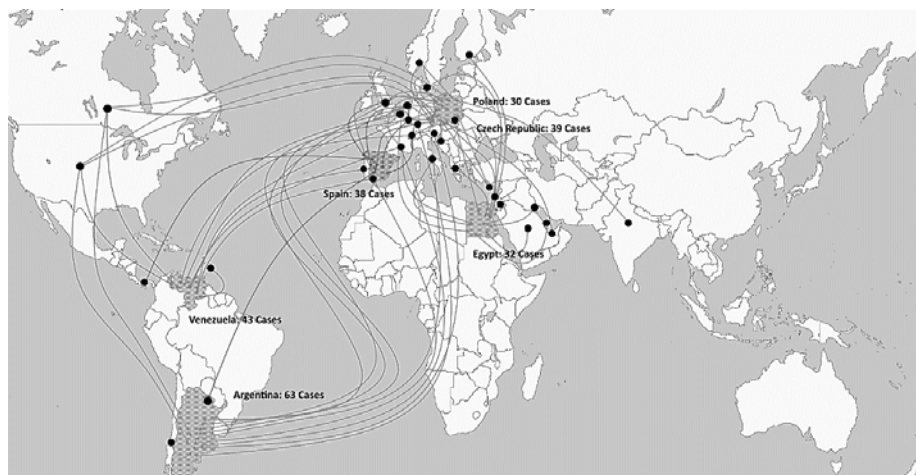
³ Ibid.

3%, lower middle-income 25%, upper-middle income 40% and high-income states 28%.⁴ The litigation is also unidirectional across development status. 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

Figure 1.3: Most frequent claimant home state in ISDS cases (up to December 2017)⁶



Figure 1.4: Most frequent respondent host state in ISDS cases (up to 31 December 2017)⁷



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 \$995 or less in 2017; lower middle-income economies are those with a GNI per capita between \$996 and \$3,895; upper middle-income economies are those with a GNI per capita between \$3,896 and \$12,055; high-income economies are those with a GNI per capita of \$12,056 or more.’ See World Bank Income Groups (WBIG), available at: <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (accessed 15 March 2019).

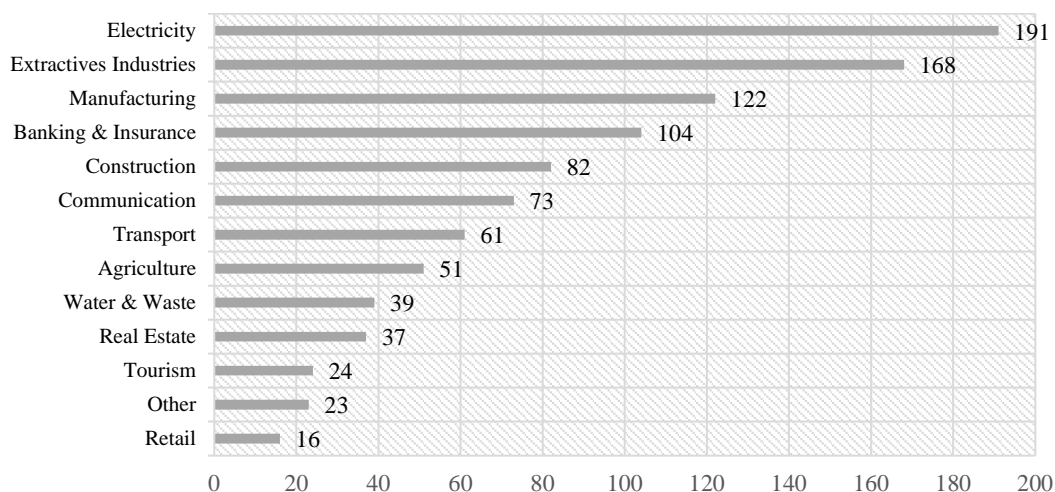
⁵ Daniel Behn, Malcolm Langford and Ole Kristian Fauchald, ‘Private or Public Good? An Empirical Perspective on International Investment Law and Arbitration’ (2019) ESIL Conference Proceedings, forthcoming.

⁶ Up to 31 December 2017. Figure taken from Behn, Fauchald and Langford, *ibid.*

⁷ *Ibid.*

In terms of the economic sectors subject to investment treaty arbitrations, Figure 1.5 shows the distribution. Historically, the extractive industries and other types of investments with high sunk costs were the most frequently sued sector in investment arbitration. Notably, cases arising from the extractive industry sector are the most likely to be won by investors.⁸ However, while the extractive industries and the 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.

Figure 1.5: All ISDS cases by economic sector (991 cases through 1 November 2018)⁹



The type of the arbitral institutions administering investment treaty arbitrations is also diversifying. ICSID has been losing market share annually over the past decade: see Table 2.1. If one were to add in the nearly 100 cases that are known to be completely confidential non-ICSID cases (about 50 at the PCA, about 25 at the 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.

Table 1.2: All ISDS cases by institution (991 cases through 1 November 2018)

Institution	No	%	Institution	No	%
ICSID	588	59.1	<i>ICSID</i>	588	59.1
Non-ICSID	403	41.9	<i>Ad hoc UNCITRAL</i>	190	19.1
			<i>PCA</i>	124	12.5
			<i>SCC</i>	57	5.2
			<i>ICC</i>	21	2.1
			<i>LCIA</i>	6	1.0
			<i>Other</i>	5	1.0
Total	991	100			

⁸ Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Arbitrator?' 29(2) EJIL 551.

⁹ According to PITAD data (n 2). The same applies to Table 1.2.

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 investment treaty arbitration is an exceptionally expensive form of adjudication to litigate. In terms of empirical studies relating to the costs related to investment treaty arbitration, there are a handful of data-driven projects that have sought to comprehensively map just how expensive this form of adjudication has been for parties. Before summarizing the most comprehensive studies to date, a bibliography on the theme is provided in the following footnote.¹⁰

¹⁰ 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) forthcoming (selected extracts available here: https://icsid.worldbank.org/en/amendments/Documents/Franck_Susan_12.24.18.pdf (accessed 15 March 2019)); Sergio Puig, ‘Contextualizing Cost-Shifting: A Multi-Method Approach’ (2019) 58 VJIL, forthcoming; Daniel Behn, ‘Performance of Investment Treaty Arbitration’ in Theresa Squatrito et al (eds), *The Performance of International Courts and Tribunals* (CUP 2018); 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; Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (OUP 2018); UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (UN 2018); William Park, Catherine Rogers and Stavros Brekoulakis, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (ICCA 2018); Malcolm Langford and Daniel Behn, ‘Managing Backlash: The Evolving Investment Treaty Arbitrator?’ (2018) 29(2) *EJIL* 551; Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill 2017); Miriam Harwood et al, ‘Third-Party Funding: Security for Costs and Other Key Issues’ in Barton Legum (ed), *The Investment Treaty Arbitration Review, 2d ed* (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 (2016). ‘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 Law Journal* 459; Arthur Rovine, ‘Allocation for Costs in Recent ICSID Awards’, in David Caron et al (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 658; 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); 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 Publishing 2012); Susan D. Franck, ‘Rationalizing Costs in Investment Treaty Arbitration’ (2011a) 88(4) *U Wash L Rev* 769; Susan D. Franck, ‘The ICSID Effect? Considering Potential Variations in Arbitration Awards’ (2011b) 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 Arbitration’ (2011) 51 *VJIL* 749; UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (UN 2010); Thomas Webster, ‘Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues’ (2009) 25(4) *Arb Intl*

1.1 Legal costs and tribunal fees

The costs of investment treaty arbitrations (i.e. (1) *legal costs*: counsel costs and experts costs; and (2) *tribunal fees*: arbitrator fees, and tribunal, arbitral institution and hearing venue) can be quite substantial. Already in 2010, UNCTAD reported that costs had recently ‘skyrocketed’¹¹ and, in 2012, an *OECD* survey showed that total legal costs and tribunal fees in ICSID cases averaged 8 million United States dollars (USD).¹²

Table 1.3 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 respondents legal costs were respectively 6,043,915 USD and 5,217,247 USD.¹³ Similarly, they find that the average respective party costs in UNCITRAL arbitrations between 2010 and 2017 were 6,077,585 USD and 4,596,807 USD.¹⁴ Of 19 of 57 annulment decisions with available data, they find that the average cost for an annulment applicant are 1.36 million USD and for the respondent, 1.45 million USD.

Table 1.3: Legal costs (USD)

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

Behn and Daza find similar results in a recent a comprehensive study using PITAD data up to 1 February 2019. For all known investment arbitration cases where cost data is available, claimant’s legal costs in 169 cases were 6,067,184 USD: respondent’s legal costs in 177 cases

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.

¹¹ UNCTAD 2010 (n 10) 16-18.

¹² Ibid; see also UNCTAD, *IIA Issues Note: Reform of Investor-State Dispute Settlement* (UN 2013); European Commission, *Investor-to-State Dispute Settlement (ISDS): Some Facts and Figures* (EU 2015).

¹³ Commission and Moloo (n 10) 187-188 (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).

¹⁴ 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).

were 5,223,974.¹⁵ *Franck*, with data up to 2011, reports that combined costs (claimant and respondent costs) average 10 to 11 million USD (a median of around 6 million USD).¹⁶

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%.¹⁷ Table 1.4 summarizes four studies of tribunal fees. In 2007, *Franck* found that tribunal fees averaged 581,332 USD.¹⁸ 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 922,087 USD for ICSID arbitrations and a similar figure for UNCITRAL arbitrations – although these average tribunal fees for an ICSID annulment is half that at 472,000 USD.¹⁹ The most recent and comprehensive study of tribunal fees, by *Behn and Daza*, uses PITAD data and arrives at a similar conclusion to *Commission and Moloo*.²⁰ Average tribunal costs are in the vicinity of 1 million USD.

Table 1.4: Tribunal fees (USD)

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

FY = financial year

Are the legal costs and tribunal fees a problem in investment treaty arbitration? In her most recent study, *Franck* highlights informational gaps and argues that the cost of investment arbitrations is relatively high and is rarely particularized by tribunals.²¹ She warns against limitations in access to justice and equality of treatment.

¹⁵ Behn and Daza (n 10).

¹⁶ Franck 2019 (n 10) (the dataset is not clearly stipulated from the extracts of chapter 9 available).

¹⁷ For the ratio up to 2010, see Gaukrodger and Gordon (n 10) 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 10).

¹⁸ Franck 2007 (n 10) 68-69 (dataset: out of the 102 awards, only 50 contained tribunal's costs and expenses (TCE) decisions and only 17 quantified TCE).

¹⁹ Commission and Moloo (n 10) 188, 190.

²⁰ Behn and Daza (n 10).

²¹ Franck 2019 (n 10) (finding that over 95% tribunals failed to address costs in a meaningful way before final awards and identifying regular gaps in basic costs).

1.2 Amounts awarded and claimed

Studies of earlier awards find relatively modest levels of compensation. Examining awards prior to 2007, *Franck* finds that the average amount awarded by tribunals was about 10.4 million USD.²² Extending the sample to 2011, *Franck and Wylie* find an increase to 16.6 million USD. However, this sample includes cases where the investors lost.²³ Focusing exclusively on the pool of cases where investors obtained damages, they find that investors up to 2011 received an average award of 45.6 million USD (median: 10.9 million USD) (in non-inflation adjusted dollars).

In a study covering all publicly available arbitral awards through 1 August 2017, *Behn* finds an increase to 149.1 million USD (in non-inflation adjusted dollars). However, this figure is partly affected by 6 extra-large awards. Taking out the six awards where over one billion USD was awarded and the five successful awards where no compensation was awarded, he finds that the average compensation (149 awards) amounts to approximately 72.8 million USD. This amounts to a grand total awarded that equals approximately 10.2 billion USD in total across the entire universe of ITAs (in non-inflation adjusted dollars).²⁴

Studies in the past few years show a further increase. The *2018 World Investment Report* finds that the average amount awarded was 504 million USD and the median 20 million USD (in non-adjusted dollars).²⁵ Excluding the three cases relating to the Yukos arbitrations, however, the average amount awarded falls to 125 million USD. 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 482.5 million USD (in 2018 inflation-adjusted dollars) and a median of 31 million USD (in 2018 inflation-adjusted dollars).²⁶

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.²⁷ Up to 2007, *Franck* found that the total amount of damages claimed in 44 cases (both wins and losses) averaged 343.4 million USD²⁸ (non-inflation adjusted dollars);

²² Franck 2007 (n 10) 57-58 (dataset: 102 awards from 82 cases of which 52 were concluded by the end of 2006).

²³ Franck and Wylie (n 10) 467-495 (dataset: 272 publicly available investment treaty arbitration awards as of 1 January 2012).

²⁴ Behn 2018 (n 10) 104.

²⁵ UNCTAD 2018 (n 10) 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). They find that, in cases decided in favour of the claimant-investor, the average amount claimed was 1.3 billion USD and the median 118 million USD.

²⁶ Behn and Daza (n 10).

²⁷ 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.

²⁸ Franck 2007 (n 10) 57-58 (dataset: 102 awards from 82 cases of which 52 were concluded by the end of 2006).

which had risen to approximately 660 million USD by end of 2011 (median: 100 million USD) (non-inflation adjusted dollars) – well above her figures for average compensation awarded.²⁹ With an expanded dataset of 676 international investment arbitrations filed from 1990 through 2014, *Wellhausen* finds that the average compensation claimed is now significantly higher, at 884 million USD (in non-inflation adjusted dollars).³⁰ *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.³¹

However, focusing on the compensation ratio over time, *Langford* and *Behn*, find stability.³² 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 *2018 World Investment Report*: 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.³³ However, these findings raise a normative concern if tribunals use the claimant's assertion as the standard envelope for assessing a claim and claimants have strategically increased the amount claimed over time. 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 overwhelmingly been companies with over 1 billion USD in annual revenue and investors with over 100 million USD 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.³⁴

²⁹ Franck and Wylie (n 10) (dataset: 272 publicly available investment treaty arbitration awards as of 1 January 2012).

³⁰ Wellhausen (n 10) 133 (dataset: 325 cases and noting that the mean compensation increased significantly by the 45 claims in which the investor sought 1 billion USD or more in compensation).

³¹ Franck 2011b (n 10) 914.

³² Langford and Behn (n 10).

³³ UNCTAD 2018 (n 10) 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). UNCTAD find that in cases decided in favour of the claimant investor, the average amount claimed was 1.3 billion USD and the median 118 million USD. The average amount awarded was 504 million USD and the median 20 million USD. See also Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (2018) 21(4) Int Arb L R.

³⁴ Van Harten and Malysheuski (n 10).

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.³⁵ Yet, the rule that each party should bear its *own costs* has been characterized as a ‘general principle of law for international tribunals.’³⁶ Under the 2010 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.³⁷ In comparison, ICSID tribunals are granted broad discretion in deciding costs apportionment between the parties.³⁸ Costs are generally allocated according to three normative rules: loser pays (English rule or costs follow the event (CFTE)); pay your own way (American rule) or allocation pro rata (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 However, the evidence shows that over time, the practice has shifted towards cost-shifting: the unsuccessful party pays the successful party’s costs. This is not consistent with the principle of international law but means the system is more coherent, complicating any evaluative assessment of practice. Nonetheless, there is some evidence that investors are slightly more successful than states in shifting costs when they are successful, raising questions over distributive fairness between parties.

Looking at cost-shifting in parties’ legal costs for decisions up to 2006, *Franck* finds that tribunals required investors to contribute twice as much as respondent states to the opposing party’s legal expenses.⁴¹ Reviewing awards pre-2007, *Franck* finds that there was no universal approach for costs allocations taken by tribunals but identified the ‘pay your own approach’ as the dominant one (32.6% of the decisions).⁴² *Franck* identifies some factors (i.e. proportion of

³⁵ Rubins (n 10).

³⁶ Bradfield and Verdirame (n 10) 418; see also Massicci Espósito, ‘Article 64’ in Andreas Zimmermann et al, (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 1395 (art 64 of the Statute of the ICJ reads: ‘Unless otherwise decided by the Court, each party shall bear its own costs’).

³⁷ United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as revised in 2010, GA Res 65/22 (adopted 6 December 2010) (UNCITRAL Arbitration Rules 2010) art 42.

³⁸ 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) (ICSID Convention) art 61(2) and ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006) 28(1); see also ICSID Additional Facility Rules (April 2006) art 58; for other similar arbitral rules conferring wide discretion to the tribunal, see e.g. Singapore International Arbitration Centre Rules (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).

³⁹ Reed (n 10) and Franck 2011a (n 10).

⁴⁰ Commission and Moolo (n 10) 199.

⁴¹ Franck 2007 (n 10) 69-70.

⁴² Franck 2011a (n 10) (dataset: pre-2007 awards and showed that there was no universal approach for how tribunals addressed costs); see also.; Smith (n 10) 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 10) 246.

success, the conduct of the parties, the novelty and complexity of the issues, as well as, equity considerations) influencing the approach taken by tribunals.⁴³

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.⁴⁴ In a review of cases rendered by ICSID tribunals between 2004 and 2010, *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.⁴⁵ 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).⁴⁶

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).⁴⁷ *Bradfield and Verdirame’s* study also shows that there is significantly more cost-shifting in UNICTRAL cases (cases within the sample were decided in accordance with the 1976 UNCITRAL Rules). *Bradfield and Verdirame* highlight that ‘[t]he only certainty surrounding the underlying principle regarding costs is that there is no certainty in the principles applied.’⁴⁸

A more recent study by *Commission and Moloo* examining 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.⁴⁹ *Commission and Moloo* also note that most tribunals render decisions on the allocation of costs at the award stage.⁵⁰ *Franck’s* most recent study on costs demonstrates that tribunals’ costs rationalization,

⁴³ *Franck* 2011a (n 10) 826; see also *Rubins* (n 10); *Bradfield and Verdirame* (n 10) 419-421; *Franck* 2007 (n 10) 67-71 (dataset: 102 awards, 54 contained parties’ legal costs (PLC)).

⁴⁴ *Webster* (n 10) 493-501.

⁴⁵ *Reed* (n 10) 79.

⁴⁶ *Rovine* (n 10) 667; See also *Bondar* (n 10) (drawing on the 2014 empirical study of 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 10).

⁴⁷ *Bradfield and Verdirame* (n 10) 425-426 (dataset: 67 claims of which 51 applied ICSID Rules and 16 applied the UNCITRAL Rules).

⁴⁸ *Ibid* 416.

⁴⁹ *Commission and Moloo* (n 10) 196.

⁵⁰ *Ibid* 196 (they also highlight a few instances where tribunals have rendered decisions on the allocation of costs at an earlier stage (i.e. *Pope & Talbot Inc. v. Canada*, UNCITRAL, Decision by Tribunal (27 September 2000) para 12; *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) para 532; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal for Disqualification of Arbitrator L. Yves Fortier, Q.C. (28 March 2016) para 58; *Vladislav Kim and*

although improving over time, remains weak justified by ‘equity and discretion’ but ignoring ‘precedential concerns, equality of arms, settlement efforts and public interest’;⁵¹ potentially limiting access to justice.⁵²

The only statistically reliable pattern found by *Franck* is the imbalance in cost-shifting, namely that winning investors benefit more than states from cost-shifting.⁵³ Finding the same pattern, a recent study by *Behn and Daza*, including all cases where information about cost shifting is known up through 1 February 2019, they arrive at two findings in investment 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%).⁵⁴

1.3.2 Third-party funding

An issue related to costs in investment arbitration is the increased reliance on third-party funding (TPF)⁵⁵ 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 a ‘remuneration dependent on the outcome of the dispute.’⁵⁶ *Commission* and *Moloo* report that TPF is known to have been used by claimants in at least 22 arbitrations.⁵⁷

others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017) paras 638-9).

⁵¹ *Franck* 2019 (n 10) 12.

⁵² *Ibid* 2-4 (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).

⁵³ *Ibid*.

⁵⁴ *Behn and Daza* (n 10).

⁵⁵ *Harwood* (n 10) (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); *Park, Rogers and Brekoulakis* (n 10) 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’).

⁵⁶ For a comprehensive discussion on the challenges in defining TPF, refer to *Park, Rogers and Brekoulakis* (n 10) 47-80; see also to *Commission and Moloo* (n 10) 201; *Frignati* (n 10) 508; *IBA Guidelines on Conflicts of Interest in International Arbitration* (23 October 2014) (*IBA Guidelines*) Explanation to General Standard 6(b).

⁵⁷ *Commission and Moloo* (n 10) 202.

While providing a number of benefits (e.g. access to justice), TPF is also regarded by some as problematic (e.g. conflicts of interest; incompatible with a system paid from public funds).⁵⁸ 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.⁵⁹ There is some evidence, although only anecdotal and pointing in the opposite direction, 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. More data on this topic is needed.

1.3.3 Security for costs

Security for costs are defined as a measure making 'the right of a claimant to proceed on his claim, conditional on provision of a partial security guarantee, in the case of an unsuccessful claim, any eventual award of legal costs assessed against the claimant by the arbitral tribunal.'⁶⁰ It is measure to address unmeritorious claims⁶¹ and situations where a claimant is insolvent and thus incapable of satisfying any adverse cost award. Security of costs issues have gained attention in recent years primarily in relation to third-party funded investment arbitration claims. Here it has been claimed that a claimant-investor should post a security guarantee to cover the respondent's costs in the event that the claimant is unsuccessful and the tribunal decides to shift costs onto the losing party.

Based on a survey of the relevant investor-state arbitration cases, the *ICCA-QM Report* points out that the power to order security for costs is rarely exercised by investment arbitration tribunals.⁶² 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; but at the same time notes that investment arbitral tribunals have yet to find a consistent approach to awarding security for costs.⁶³

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. What we can draw from the data at this point is that the costs relating to arbitrators and tribunals are only a fraction of the costs

⁵⁸ Park, Rogers and Brekoulakis (n 10) 200-202; refer also to Harwood (n 10); Gaukrodger and Gordon (n 10) 39-42; See also 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.

⁵⁹ Park, Rogers and Brekoulakis (n 10) 204.

⁶⁰ Ibid; see also Bradfield and Verdirame (n 10) 415.

⁶¹ Webster (n 10) 474.

⁶² Park, Rogers and Brekoulakis (n 10).

⁶³ Ibid.

that a party will experience in a typical investment arbitration. If a typical investment tribunal costs approximately 1 million USD, then each parties' contribution would be about 500,000 USD. Even if these numbers are substantial, compared with the costs of counsel they might not be viewed as excessive for sure, there may be individual cases where the costs relating to arbitrator fees or tribunal fees that are excessive, but they may well be outliers. Tribunal costs are thus in Quadrant II (clear knowledge, not a major problem).

Legal costs are higher. The average claimant's legal costs are around 6 million and the average respondent's costs are around 5 million USD. However, compared to international commercial arbitration or complex domestic court litigation, it is still unclear whether investment treaty arbitration is uniquely expensive. Although as states improve their ability to defend investment arbitration cases, the amount of time and costs spent by counsel in proving their case has increased. A typical investment 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.

In regard to cost-shifting, we see a clear trend towards shifting costs over time and that 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. As discussed, this is normatively problematic from the perspective of international law but the system has developed a certain consistency – although not always for the benefit of respondent states. Enhanced transparency on tribunals' rationale and objectives for cost allocations is however highly desirable. Moreover, we lack information and data on third-party funding, its extent and its effect on the investment treaty arbitration system. Here we are clearly in Quadrant III or IV.

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. The relevant literature on this issue is included in this footnote.⁶⁴

⁶⁴ The overview does not repeat literature already referred to in section 1 relating to costs, which often overlaps with issues of duration: Daniel Behn, Tarald Berge, Malcolm Langford and Maksim Usynin, 'What Causes Delays in International Investment Arbitration' (2019) PluriCourts Working Paper; 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: 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); Lucy Greenwood, 'Does Bifurcation

2.1 Average length of proceedings

In a recent study focusing on all investment arbitration cases up through 1 November 2018, *Behn, Berge and Langford* 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 cases⁶⁵

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

These findings comport with an earlier study by *Behn*⁶⁶ and *Commission and Moloo's* analysis of ICSID decisions.⁶⁷ 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).⁶⁸ Turning to ICSID annulments, the duration of proceedings are significantly shorter than for the underlying arbitration. According to *Behn, Berge, Langford and Usynin*, the average time from date of registration to ICSID ad hoc Committee Decision is 1.91 years.⁶⁹ See Table 2.2. This largely comports with an earlier study by *Behn*.⁷⁰

Really Promote Efficiency?’ (2011) 28 J Intl Arb 105; UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (UN 2010).

⁶⁵ Behn, Berge, Langford and Usynin (n 64).

⁶⁶ Behn 2018 (n 10); see also Raviv (n 64) 659-660; Bonnitca et al (n 64) 89.

⁶⁷ Commission and Moloo (n 10) 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): FY2010 (thirty-seven months); FY2011 (twenty-five months); FY2012 (‘between three to four years’); FY2013 (between three to four years); FY2014 (on average just over three and a half years); and FY2015 (on average, thirty-nine months).’

⁶⁸ See discussion in Behn 2018 (n 10).

⁶⁹ Ibid.

⁷⁰ Behn 2018 (n 10).

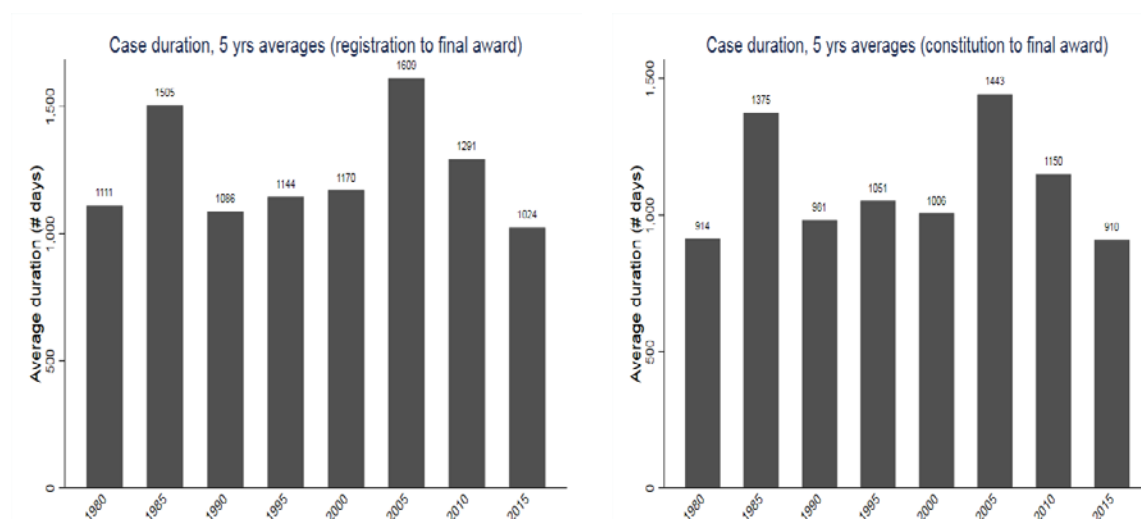
Table 2.2: Duration of proceedings for all ICSID annulments⁷¹

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

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 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 1000 days, which also covers the past few years. However, it is notable that in the period 2005 to 2014, the length increased significantly. The same trend is seen for the average period between constitution of the tribunal and the final award. In relation to annulments, *ICSID* has found that the length of ICSID annulments has fallen, from an overall average of 22 months to 19 months in the past five years.⁷²

Figure 2.1: Case duration from registration to award and tribunal constitution to award



⁷¹ Behn, Berge, Langford and Usynin (n 64).

⁷² ICSID 2016 (n 64) 22-23.

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.⁷³

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; or in a small number of cases: trifurcation – the separation of proceedings into a jurisdiction, merits and quantum phase.⁷⁴ *Raviv* and *Franck* find similar results with smaller samples.⁷⁵

With data up to 1 November 2018, *Behn, Berge and Langford* report 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 2.3⁷⁶ 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.

⁷³ *Greenwood* (n 64).

⁷⁴ *Behn* 2018 (n 10).

⁷⁵ *Raviv* (n 64) 688 (referring to *Greenwood* (n 64) 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* 2019 (n 10) 8 (finding that many (but not all) bifurcated were 'considerably longer').

⁷⁶ *Behn, Berge, Langford and Usynin* (n 64).

Table 2.3: Duration of proceedings for all bifurcated cases⁷⁷

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

Some have suggested that the cause of delays in investment 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 1643 days.⁷⁸ NAFTA proceedings were shorter at 1566 days, while non-ICSID arbitrations were a dramatically lower 1137 days. Using information from the arbitral institutions, *Commission and Moolo* report short periods from 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 award⁷⁹ and 16 to 17 months for LCIA cases in the period 2013 to 2017.⁸⁰ 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, Berge and Langford* 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 opinion 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 Table 2.4.

⁷⁷ Ibid.

⁷⁸ *Ballan* (n 64) 71.

⁷⁹ Ibid (noting that these are for all arbitrations – domestic and international, commercial and investment).

⁸⁰ Ibid.

Table 2.4: Hazard ratios for duration of proceedings⁸¹

	Model 1	Model 2	Model 3
Respondent WBIG (ref: Low Income)			
<i>Lower-middle</i>	1.237 (0.200)	1.427** (0.235)	1.388* (0.250)
<i>Upper-middle</i>	0.830 (0.136)	1.014 (0.168)	1.107 (0.201)
<i>High income</i>	1.052 (0.192)	1.169 (0.213)	1.140 (0.226)
Arbitration rules (ref: ICSID)			
<i>ICSID Additional Facility</i>	1.178 (0.200)	0.962 (0.166)	0.972 (0.173)
<i>UNCITRAL</i>	1.052 (0.116)	1.058 (0.119)	1.077 (0.125)
<i>SCC</i>	1.741*** (0.352)	1.513** (0.311)	1.769*** (0.392)
<i>Other</i>	2.878*** (0.889)	1.821* (0.572)	1.679 (0.547)
Treaty-based case	0.761** (0.0962)	0.872 (0.111)	0.776* (0.119)
Bifurcation		0.0206*** (0.0217)	0.0357*** (0.0386)
Arbitrator challenge		0.515*** (0.0791)	0.529*** (0.0821)
Arbitrator replaced		0.0256** (0.0364)	0.0270** (0.0402)
Economic sector (ref: Primary)			
<i>Secondary</i>		0.865 (0.157)	0.816 (0.159)
<i>Tertiary</i>		0.819 (0.144)	0.810 (0.155)
Dissenting opinion		0.00342*** (0.00549)	0.00520*** (0.00864)
<i>Observations</i>	635	635	635
<i>Pseudo R²</i>	0.006	0.021	0.037
<i>Time-fixed effects</i>	No	No	Yes

Behn, Berge and Langford make the following observations on these findings. The most significant delaying 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 main 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 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

⁸¹ Exponentiated coefficients. Standard errors in parentheses. Days from case registration to final award used as dependent variable in Models 1 to 3. Bifurcation, arbitrator replaced and dissenting opinion interacted with $\ln(\text{time})$ in Models 2 and 3 to correct for violation of proportional hazard assumption. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$.

reported registration to award, cases based on: (1) the SCC Arbitration Rules; and (2) other rules (such as the LCIA, ICC, etcetera) 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 or PCA UNCITRAL cases are associated with shorter times spans than ICSID cases. Importantly, these results hold when one controls for time and changes in procedural rules at different arbitral institutions (see time fixed effects model). Second, the development level of the respondent state by World Bank Income Group is inconsistently related to duration of cases, but case duration decreases 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 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 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*. The length of proceedings is much shorter than in many other international adjudicative proceedings.⁸² 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.⁸³ Moreover, our current analysis suggests that it is parties themselves, especially states, that are largely responsible for longer proceedings (e.g. 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

⁸² See Working Group III paper.

⁸³ Bonnitca, Poulsen and Waibel (n 64) 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).

take into account lessons learned from adjudicative systems elsewhere in international and national law.

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.’⁸⁴ Noting the diversity in the investment treaty regime itself, the UNCITRAL Working Group III explains that ‘predictability and correctness should be the objective rather than uniformity.’⁸⁵

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.⁸⁶ However, some evidence suggests a gradual decline in fragmentation.⁸⁷ 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.⁸⁸ 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.

An overview of the relevant empirical literature on the topic of this section is provided in this footnote.⁸⁹ This section explores the issues of divergent interpretations and the use of citations.

⁸⁴ OECD, *Government Perspectives on Investor-State Dispute Settlement: A Progress Report* (OECD 2012) 17.

⁸⁵ UNCITRAL Secretariat, ‘Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters’ Doc. No. A/CN.9/WG.III/WP.150 (28 August 2018) 3.

⁸⁶ Martti Koskeniemi and Paivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 LJIL 553.

⁸⁷ Mads Andenas, ‘Jurisdiction, Procedure and the Transformation of International Law’ (2012) 23 Eur J Bus L 127.

⁸⁸ Malcolm Langford, ‘The New Apologists: The International Court of Justice and Human Rights’ (2015) 48(1) *Retfærd* 49.

⁸⁹ The overview does not include references already included in sections 1 and 2: 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) forthcoming; Wolfgang Alschner and Kun Hui, ‘Missing in Action: General Public Policy Exceptions in Investment Treaties’ (2018) University of Ottawa Research Paper; 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 et al (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 221; José 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*

3.1 Inconsistency and (in)coherence – textual analysis

Medium-to-large-N doctrinal studies (textual analysis of many cases) on consistent investment 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.⁹⁰ Specific issues, such as counterclaims, amicus curia and bifurcation, are highlighted as lacking consistency.⁹¹ *Alschner*

International Commercial Arbitration (Juris 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); 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 Investment Law and Policy 2008/2009* (OUP 2009); 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’ (2005a) 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?’ (2005b) 12 *UC Davis J Intl L & Pol* 47.

⁹⁰ See Franck 2005a (n 89) 1554-1582; see also Franck 2005b (n 89) 49; Fauchald (n 89) 358-359 (dataset: 98 ICSID decisions from 1998 to 2006 and finding that tribunal contribute to a coherent development of international law); McArthur and Ormachea (n 89); Diel-Gligor (n 10) 457 (widespread jurisprudential inconsistency in investment treaty arbitration); Crawford (n 89) (dataset: ten arbitral awards with ‘conflicting lines of authority’)

⁹¹ Bjorklund (n 89) 473-474 (dataset: reviewing case law involving counterclaims); Hoffmann (n 89) (dataset: reviewing most decisions dealing with counterclaims); Rivas (n 89) (dataset: ICSID cases with counterclaims); Commission and Moloo (n 10) 78-85 (on the issue of bifurcation); Levine (n 89) 214 (reviewing recent trends in

and Hui find the same in the interpretation of new treaty language concerning general public policy exceptions.⁹² Studies examining more specifically investor standards of protection show that investment treaty arbitration tribunals have mostly adopted divergent interpretations leaving some to argue that more defined standards of protection should be included in international investment treaties.⁹³ Other scholars though have looked at the level of consistent application of interpretative approaches such as proportionality analysis – finding some move towards consistency.⁹⁴

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.’⁹⁵ Examining 49 cases concerning investor challenges to environmental regulation, *Behn* and *Langford* find some consistency in the patterns of outcomes although doctrinal outliers persist.⁹⁶ 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 arbitrators⁹⁷ whereas others highlight synergies between the regimes.⁹⁸

investment arbitration and finding that arbitral tribunals have taken a ‘discretionary and largely not formalized’ approach); Calamita and Sardinha (n 89) 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 89) 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 64) (discussing, inter alia, inconsistency in annulment proceedings– further discussed in section 4).

⁹² Alschner and Hui (n 89) (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).

⁹³ Dumberry (n 89); Crawford (n 89); Franck 2011b (n 10); and Kläger (n 89); Diel-Gligor (n 10) 294-316; Bonnitcha (n 89) chs. 4, 5, 7; Paporinkis (n 89).

⁹⁴ Henckels (n 89) 122-125; 194-197 (dataset: 97 investment tribunal decisions up to 2014 and identifying a gradual move towards a proportionality-based methodology; Stone Sweet and Grisel (n 89) 244-246; for a more critical view see Van Harten 2013 (n 89) (finding that arbitrators generally show no judicial restraint).

⁹⁵ Schneiderman (n 89) 413; see also Schneider (n 89) (using the Argentinean cases to explore the judicial theory of error connection); see also Alvarez and Khamsi (n 89).

⁹⁶ Behn and Langford 2017 (n 89) 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 89) (dataset: 114 investment arbitration cases finding ‘a jurisprudential line suggesting that environmental considerations are now normalized or ‘mainstreamed’ in the reasoning of investment tribunals’).

⁹⁷ Kube and Petersmann (n 89) (dataset: investment arbitration cases with references to human rights); see also Alvarez (n 89) (dataset: 64 awards with one or more European Convention on Human Rights references from 1990 through 1 June 2016).

⁹⁸ Steininger (n 89) (dataset: 46 awards with references to human rights in a broad sense between 1989 and 2015); Fry (n 89) (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 Malgosa

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).⁹⁹ 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 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 the ICJ and other international courts.¹⁰⁰ *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.’¹⁰¹

Reviewing citation practice in arbitration proceedings in three different institutional contexts (ICSID, NAFTA, New York Convention (NYC)), *Ballan*’s study demonstrates that ICSID and NAFTA refer to case law more frequently than other non-ICSID cases [what *Ballan* refers to as NYC institution cases] and therefore claims that ICSID and NAFTA are more judicialized than NYC cases.¹⁰² When looking at the variance between these three institutions on the issue of references, *Ballan* finds that NYC and ICSID cases include references to all types of investment treaty cases whereas NAFTA tribunals refer primarily to NAFTA case law.¹⁰³ Finally, drawing from an original data set of ‘external citations’ from and to investment awards and WTO decisions, *Charlotin*’s study indicates an ‘intriguing discrepancy’ between these two fora: the former rarely cite external sources whereas the second ‘indulge in it unashamedly.’¹⁰⁴ *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 and thereby in international decision-making.

Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention on Human Rights* (Brill 2012).

⁹⁹ Stone Sweet and Grisel (n 89) 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).

¹⁰⁰ Ibid 152 (dataset: all final investment treaty arbitration awards on the merits up to 2015); see also Commission (n 89) 149-151 (dataset: 207 publicly available decisions between 1972 and 2006 of which 37 are decisions and awards from non-ICISD tribunals).

¹⁰¹ Ibid 155; see also Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture’ (2007) 23(3) *Arb Intl* 357.

¹⁰² Ballan (n 89) 82 (dataset: cases concluded on the merits between 2001 and 2011).

¹⁰³ Ibid 89.

¹⁰⁴ Charlotin (n 89) 299.

The use of citation analysis has therefore illustrated a certain network of references between international tribunals and among arbitral tribunals, suggesting the possibility of greater consistency. But it remains unclear as to the reason 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. 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. Scholars have proposed various reforms to remedy the perceived lack of consistency¹⁰⁵ 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, reflection of changing interpretative consensus over time). Some emphasize that investment treaty arbitration depends upon the quality of the decisions and not upon consistency among decisions.¹⁰⁶ 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. An overview of the relevant literature on this issue is provided in the following footnote.¹⁰⁷ Noting that divergent interpretations have been

¹⁰⁵ See Working Group III Report; see also Franck 2005a (n 89) 1521, 1545-1546; Franck 2005b (n 89); Franck and Wylie (n 10) 524; See also Sergio Puig and Gregory Shaffer ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’ (2018) 112(3) AJIL 361.

¹⁰⁶ 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); see also Mark Feldman (2017). ‘Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power’ (2017) 32(3) ICSID Rev 528.

¹⁰⁷ The overview of this literature does not include references already mentioned in sections 1 to 3: 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 et al (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018); 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); Krzysztof Pelc, ‘What Explains the Low Success Rate of Investor-State Disputes?’ (2017) 71(3) Intl Org 559; Alec Stone Sweet,

discussed in the above section, this section will discuss alleged biases against developing countries, favoritism towards investors, and mechanisms to challenge awards.

4.1 Outcomes – developed versus developing respondent states

The bulk of investment arbitration is directed against non-developed states, which has prompted scrutiny of the reasons for this litigation and eventual outcomes for these states. In a study using data prior to 2007, *Franck* finds that ‘the lion’s share of the claims tended to be against “upper middle income” countries’¹⁰⁸ and she notes that there were only a small number of cases against least developed countries (LDCs).¹⁰⁹ Examining arbitrations between 1987 and 2007, *Freeman* finds that countries with greater institutional capacity experience fewer claims than those with lower capacity.¹¹⁰ Examining more specific factors leading to arbitral claims, *Dupont, Schultz and Angin* assess whether bad governance and economic crises are drivers of investment treaty arbitration, finding that bad governance (i.e. corruption and lack of rule of

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); Susan D. Franck, ‘Empirical Modalities: Lessons for the Future of International Investment’ (2010) 105 *ASILP* 33; Susan D. Franck, ‘Development and Outcomes of Investment Treaty Arbitration’ (2009) 50(2) *Harvard Intl L J* 435.

¹⁰⁸ Franck 2007 (n 10) 29-32 (dataset: using the World Bank Income Groups and data from 82 arbitral awards with 107 investors and 37 different respondent states).

¹⁰⁹ *Ibid.*

¹¹⁰ Freeman (n 107) 75.

law) has a statistically significant relation with investment arbitration claims, but economic crises do not.¹¹¹

Turning to investment treaty arbitration, evidence of a structural or even cognitive bias against lesser developed states 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 have a statistically significant relationship with outcomes,¹¹² and in 2014 she argued that this result held when controlling for the level of democracy within the respondent states.¹¹³

However, looking at all concluded cases known as of 1 January 2017, *Behn, Berge and Langford*, find differently. There is an overwhelming statistically significant relationship between a lower development status for 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 – a partly problematic measurement of property rights protections – cancelling out the effect. Their conclusion is that any bias in the system may be a favoritism towards developed states (they lose very infrequently) than a bias against developing states.¹¹⁴

Strezhnev, however, advances and tests an alternative theory for why developing countries lose frequently: developing countries are more likely to settle cases that would have been successful.¹¹⁵ He argues that this points against arbitral bias and instead points to the structural advantages of developed countries. Focusing on decisions on jurisdiction, *McArthur and Ormachea* find that ICSID tribunals are less likely to extend jurisdiction for claims brought against a country with a low institutional quality score.¹¹⁶ However, these outcomes are reversed at the merits stage.

Examining investment treaty law through 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 favours the vision of

¹¹¹ Dupont and others (n 107) (dataset: 775 investment awards from 1972 to 2014); see also Dupont and Schultz (n 107).

¹¹² Franck 2009 (n 89) 487; Franck 2011 (n 107) (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.

¹¹³ Franck 2014 (n 107); see also Schultz and Dupont (n 107) (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.'

¹¹⁴ Behn, Berge and Langford (n 107).

¹¹⁵ Strezhnev 2017 (n 107)

¹¹⁶ McArthur and Ormachea (n 89) 574, 579-581 (dataset: all publicly available ICSID decisions on jurisdiction up to February 2007).

investors as victims of corrupt governments and thus downplays their role in normalizing and entrenching weak governance in developing states.’¹¹⁷

Moving away from the developed versus developing states debate, *Pelc* shows that most disputes today do not relate to direct expropriations but to indirect expropriation resulting from regulatory measures implemented by democracies.¹¹⁸ In addition, *Pelc* reports that the rate of success of investors has declined dramatically for these types of claims. *Pelc* 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 countries.’¹¹⁹

4.2 Outcomes – claimant-investors versus respondent states

Another claim lodged against the investment treaty arbitration system is that there is a structural bias against states in general and a favoritism towards claimant-investors. If true, this could result in 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.¹²⁰ *Stone Sweet* and colleagues further suggest that in the vast majority of awards, tribunals take seriously the respondent state’s ‘right to regulate.’¹²¹ 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.’¹²² 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.’¹²³

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 to be justifiable.’¹²⁴ Likewise, 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

¹¹⁷ Sattorova (n 107) 138-140, 165.

¹¹⁸ *Pelc* (n 107) 560-573 (dataset: 1812 individual legal claims brought across 742 investment disputes from 1993 to 2015).

¹¹⁹ *Ibid* 561.

¹²⁰ *Stone Sweet and Grisel* (n 89).

¹²¹ *Stone Sweet et al* (n 107) 608; see also *Caddel and Jensen* (n 107) (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 107); *Stone Sweet and Grisel* (n 89) 247.

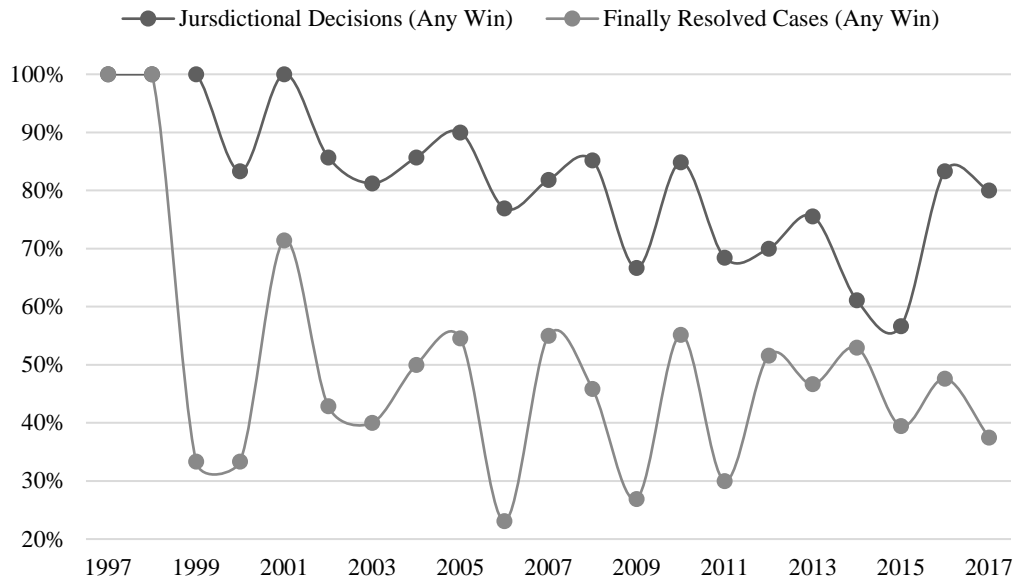
¹²² *Franck and Wylie* (n 10) 520.

¹²³ *Ibid*; see also *Franck* 2007 (n 10); *Langford and Behn* 2018 (n 10).

¹²⁴ *Behn* (n 10).

for investors: see Figure 4.1.¹²⁵ 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 decisions but more sociologically legitimate.

Figure 4.1: Investor success ratios (through 2017)¹²⁶



However, *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.¹²⁷ 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.¹²⁸ Partly due to this asymmetrical structure and the prospect of repeat appointments, *Van Harten* claims that a small group of repeatedly

¹²⁵ Langford and Behn 2018 (n 10).

¹²⁶ Figure taken from Langford and Behn 2018 (n 10). 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%.

¹²⁷ Franck and Wylie (n 10) 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 89) 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).

¹²⁸ Tucker (n 107) (dataset: 44 interviews with 44 individuals that served in over 90% of the over 260 cases from 1990 through mid-2015, finding eight types of arbitrator).

appointed arbitrators favour investors and those from major Western capital-exporting states,¹²⁹ a finding backed up by some other studies.¹³⁰

4.3 Annulment of decisions

Annulment process provides one safety valve for addressing incorrectness, albeit a narrow one. 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).¹³¹ Since January 2011, 158 ICSID awards were rendered, 80 annulment proceedings were instituted and 5 awards were partially annulled.¹³² 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.¹³³ They note that ‘in every annulment application leading to a final decision, applicants pleaded errors in law.’¹³⁴ *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.¹³⁵

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

¹²⁹ Van Harten 2012 (n 107) (dataset: all publicly available awards (i.e., decisions) dealing with jurisdictional matters in 140 known cases from 1990 to May 2010); Van Harten 2016 (n 107) (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 2018 (n 107) (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.

¹³⁰ Wellhausen (n 10) 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 10) 521 (finding that investment treaty arbitration provides better relief for larger investors); McArthur and Ormachea (n 89) 581.

¹³¹ ICISD 2018 (n 89) 36; see also ICISD 2016 (n 89).

¹³² Ibid.

¹³³ *Stone Sweet and Grisel* (n 89) 138.

¹³⁴ Ibid 138; see also 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); Christoph Schreuer, ‘Three Generations of ICSID Annulment Proceedings’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris 2004); David Caron, ‘Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal’ (1992) 7(2) ICSID Rev 21.

¹³⁵ *Commission and Moloo* (n 10) 223.

grounds of review in order to limit applications for annulment and to promote expeditious and economic settlement of disputes.¹³⁶

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’.¹³⁷ Review of some national courts’ decisions on the challenge of investment treaty awards confirm the exceptional character of annulment challenges and the general favour for the finality of arbitral awards.¹³⁸

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. The evidence is mixed suggesting that research in this field is yet to point towards any quadrant. We only know a little and we do not know yet whether it is a problem.

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.¹³⁹ For example, in one study on commercial and international arbitrators, *Franck and colleagues* map diversity according to six factors: gender, nationality; age; linguistic capacity; legal training; and professional experiences.¹⁴⁰ They conclude that 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.’¹⁴¹

¹³⁶ ICSID 2016 (n 64) 1-8; Friedland and Brumpton (n 107).

¹³⁷ Bernardini (n 107) 169.

¹³⁸ Ibid 170-177 (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)

¹³⁹ 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 2018 (n 10).

¹⁴⁰ Susan D. Franck et al, ‘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).

¹⁴¹ Ibid 466.

While the concern over diversity remains, *Greenwood*¹⁴² and the *2018 ICISD Annual Report* 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.’¹⁴³ Others are less enthusiastic, noting that the shift is primarily evident in institutional appointments – which form the minority of appointments.¹⁴⁴ *Greenwood* attributes the persisting lack of diversity in the number of appointments to tribunals ‘to the issue of information 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.’¹⁴⁵ *St. John, Behn, Langford and Lie* argue that the sluggishness, especially for party-based appointments, is better attributed to the dominance of the ‘prior experience norm.’¹⁴⁶

The next section surveys studies on the issues of gender, nationality and education; and a selection of the existing empirically-oriented research can be found here in this footnote.¹⁴⁷

¹⁴² 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).

¹⁴³ ICISD 2018 (n 107).

¹⁴⁴ Taylor St. John, Daniel Behn, Malcolm Langford, and Runar Lie. ‘Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration’ (2018) Pluricourts Working Paper; Malcolm Langford, Daniel Behn and Maxim Usynin, ‘Does Nationality Matter? Arbitral Background and the Universality of International Investment Regime’ (2018) PluriCourts Working Paper.

¹⁴⁵ Greenwood (n 142); see also Greenwood and Baker (n 142).

¹⁴⁶ St. John, Behn, Langford and Lie (n 144).

¹⁴⁷ The list of reference does not reiterate the references already mentioned under sections 1 to 4: Daniel Behn, Malcolm Langford and Ole Kristian Fauchald, ‘Private or Public Good? An Empirical Perspective on International Investment Law and Arbitration’ (2019) ESIL Conference Proceedings, forthcoming; Malcolm Langford, Daniel Behn and Maxim Usynin ‘Does Nationality Matter? Arbitral Background and the Universality of International Investment Regime’ (2018) PluriCourts Working Paper; Taylor St. John, Daniel Behn, Malcolm Langford and Runar Lie, ‘Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration’ (2018) Pluricourts Working Paper; 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; Malcolm Langford, Daniel Behn and Runar Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20(2) *JEIL* 301; Lucy Greenwood, ‘Tipping the Balance: Diversity and Inclusion in International Arbitration’ (2017) 33(1) *Arb Intl* 99; 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’ (2016) Working Paper; Susan D. Franck et al, ‘The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration’ (2015a) 53 *Colum J Transnatl L* 429; Susan D. Franck et al, ‘International Arbitration: Demographics, Precision and Justice’ (2015b) 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; Sergio Puig, ‘Social Capital in the Arbitration Market’ 25(2) *EJIL* 387; 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; Lucy Greenwood and C. Mark Baker, ‘Getting a Better Balance on International Arbitration Tribunals’ (2012) 28(4) *Arb Intl* 653; Gus Van Harten, ‘The (Lack of) Women Arbitrators in Investment Treaty Arbitration’ (2012) 59 *Columbia FDI Perspectives*; Jose Costa ‘Comparing WTO Panelists and ICSID Arbitrators:

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.¹⁴⁸ 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 to ‘dominate the arbitration profession.’¹⁴⁹ 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.¹⁵⁰

Over time, there has been a slight improvement. Earlier studies reported that between 3% and 7% of arbitrators appointed at ICSID are female.¹⁵¹ A recent and comprehensive study by *St. John, Behn, Langford and Lie*, which includes non-ICSID cases and a sample period up to 2017, finds that now 11% of arbitrators are female. Yet, the pattern largely remains and Kaufmann-Kohler and Stern account for 57% of all appointments given to female arbitrators: see Table 5.1.¹⁵² The top 25 women arbitrators in investment treaty arbitration also form an elite group. They have all arbitrated more than one case and account for 86% of all female appointments.¹⁵³ The remaining 32 female arbitrators have only received one appointment in an investment treaty arbitration case.¹⁵⁴

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 Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

¹⁴⁸ Dezalay and Garth (n 147) (according to these Dezalay and Garth, 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).

¹⁴⁹ Puig (n 147) 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 148); Franck 2007 (n 10); Franck and others 2015b (n 148); Schultz and Kovacs (n 147).

¹⁵⁰ Puig (n 147); see also UNCTAD 2018 (n 10) 95; Polonskaya (n 147) 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 147) 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’).

¹⁵¹ Franck 2007 (n 10) measured 3% in 2006, Greenwood and Baker 2012 (n 147) found 5.63% in 2012, Van Harten (n 147) measured 4% in 2012, Puig (n 147) found nearly 7% in 2014, Greenwood and Baker 2015 (n 142) found 5.61% 2014, and Waibel and Wu 2017 (n 147) find less than 10% in 2017.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

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.¹⁵⁵ 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 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.¹⁵⁶ Five of the 25 most active legal counsel in investment arbitration are women as were the majority of the 25 most active tribunal secretaries;¹⁵⁷ and female legal counsel make up approximately one-third of lawyers working on investment arbitration cases.¹⁵⁸ Thus despite the growing participation of women in the field, arbitration appears to be remarkably resilient in maintaining its gendered character.¹⁵⁹

Table 5.1: Female ISDS arbitrators – top 25 by appointments¹⁶⁰

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

As foreshadowed, *St. John, Behn, Langford and Lie* 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

¹⁵⁵ Nienke Grossman, ‘Achieving Sex-representative International Court Benches’ (2016) 110 AJIL 82.

¹⁵⁶ Meg Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2015).

¹⁵⁷ Langford, Behn and Lie (n 147).

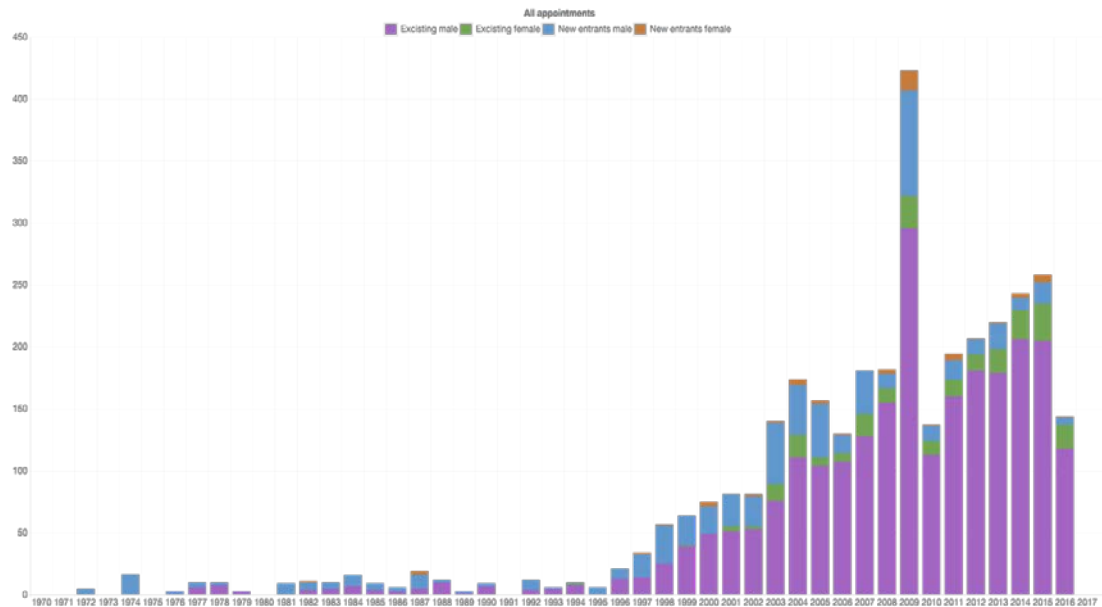
¹⁵⁸ *St. John, Behn, Langford and Lie* (n 147).

¹⁵⁹ *Ibid.*

¹⁶⁰ Data taken from PITAD (n 2) up through 1 February 2019.

investment treaty arbitration previously.¹⁶¹ Since only 11% of arbitrators each year are new appointments, the effective pool only expands gradually.¹⁶² This attests to the system of party appointment entrenching the existing arbitrators and raising barriers to entry, especially for women.

Figure 5.1: Proportion of new versus repeat appointments by year and by gender¹⁶³



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 arbitrators¹⁶⁴ and almost all of the top 25 ‘powerbrokers’ in the system hail from Western states.¹⁶⁵ Yet, as discussed above, the vast majority of international investment disputes target developing and non-Western states,¹⁶⁶ and these states disproportionately lose in investor-state arbitration.¹⁶⁷ This can be contrasted with WTO panelists, whereby 52% originate from developing states.¹⁶⁸ The result is that the lack of

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Figure taken from St. John, Behn, Langford and Lie (n 147).

¹⁶⁴ Langford, Behn and Lie (n 147) 301-332; see also UNCTAD 2018 (n 10) 95; ICSID 2018 (n 147); Polonskaya (n 147) 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).

¹⁶⁵ Ibid; Puig (n 147) 387; see also Cai (n 147) (examining nationality of ICSID arbitrators from 1996 to 2007).

¹⁶⁶ Schultz and Dupont (n 10); Behn, Fauchald and Langford (n 147).

¹⁶⁷ Behn, Berge and Langford (n 107) 333-389; ICSID 2018 (n 147).

¹⁶⁸ Pauwelyn (n 147) (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.

geographic diversity continues to contribute to legitimacy concerns over the international investment regime and its dispute settlement process.¹⁶⁹

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 United Nations).¹⁷⁰ 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).¹⁷¹ Asymmetry continues when we disaggregate the 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 the Caribbean and non-Western arbitrators are predominantly appointed by respondent states or institutions such as ICSID.¹⁷² Moreover, only three arbitrators from the South feature in the top 25 arbitrators by number of appointments:¹⁷³ see Table 6.1 in the next section.

Table 5.2: Non-western ISDS arbitrators by appointments and region¹⁷⁴

<i>Region</i>	<i>Claim</i>	<i>Resp</i>	<i>Chair</i>	<i>Annul</i>	<i>Total</i>	<i>%</i>
<i>South America</i>	111	83	69	35	298	9
<i>Central America & Caribbean</i>	10	68	41	28	147	4
<i>Eastern Europe & Central Asia</i>	61	52	16	11	140	4
<i>Middle East</i>	30	44	22	25	121	4
<i>South-East Asia</i>	3	11	20	24	58	2
<i>Sub-Saharan Africa</i>	5	25	3	13	46	1
<i>South Asia</i>	3	23	8	6	40	1
<i>East Asia</i>	0	2	7	16	25	1
<i>All Non-Western Regions</i>	223	308	186	158	875	26 %
<i>All Western Regions</i>	779	687	787	194	2452	74 %
<i>All Regions</i>	1002	995	973	352	3327	100 %
<i>Non-West %</i>	22 %	31 %	19 %	45 %		

But does the diversity of arbitrator nationality matter for outcomes in investment arbitration? In an early paper on a limited sample of 47 investment arbitration cases, *Franck* found that the economic development status of the presiding arbitrators (who often carry the key deciding vote) did not affect outcomes for states according to their economic development status.¹⁷⁵ However, in a more recent paper on 231 ICSID cases, *Waibel and Wu* found that developing

¹⁶⁹ 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.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Langford, Behn and Usynin (n 147).

¹⁷³ Behn, Berge and Langford (n 107).

¹⁷⁴ *Ibid.*

¹⁷⁵ Franck 2009 (n 107) 435.

state arbitrators were significantly more likely to favor respondent states (whether developed or developing) – although only on decisions concerning the jurisdiction of the tribunal.¹⁷⁶

Using the comprehensive PITAD database, *Langford, Behn and Usynin* analyse the effects of both nationality and dominant residence of arbitrators.¹⁷⁷ The results are mixed. The most significant findings are that the presence of a Western *presiding* arbitrator is correlated with a greater likelihood of an investor winning (39% more likely) but the relationship is not statistically significant.¹⁷⁸ However, and surprisingly, the mere presence of a non-Western arbitrator anywhere on the tribunal is positively correlated with investor success.¹⁷⁹ Notably, this is statistically significant for 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 an annulment claim.¹⁸⁰ Using a dataset of all ICSID decisions, they find that nationality partly matters, but in a different way: states that have lost an arbitration are less likely to seek annulment if a member of the arbitration panel hailed from the developing world.

5.3 Work experience and education

In the context of the WTO, *Pauwelyn* notes that a high proportion of dispute settlement 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.’¹⁸¹ Focusing on presiding arbitrators, *Waibel and Wu* find that 90% of them have received their higher education in OECD countries.¹⁸² They also show that 20% of them are from developing countries; 35% are specialists and public international law and 15% in public law. However, they note that many presiding arbitrators have spent time in the executive branch government and much smaller proportion have worked in corporations.¹⁸³ Similarly, *Langford, Behn and Lie* find that the majority of arbitrators have ‘elite educational backgrounds;’¹⁸⁴ and *Puig and Strezhnev* find that, among the number of ICSID arbitrators they surveyed, the majority of arbitrators have private sector backgrounds.¹⁸⁵ However, the effects of such background on arbitration outcomes is only an emergent field of research.

¹⁷⁶ Waibel and Wu (n 147).

¹⁷⁷ Langford, Behn and Usynin (n 147).

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Anton Strezhnev and Sergio Puig, ‘Diversity and Compliance in Investment Arbitration: Future Directions in Empirical Research on Investment Law and Arbitration’ (2019) LEGINVEST Conference, 31 January 2019, Oslo; see also Strezhnev 2016 (n 148) (finding a significant increase in claimants’ win when tribunal presidents are nationals of advanced economies and have worked in government).

¹⁸¹ Pauwelyn (n 148) 800; see also Costa (n 145) (dataset: nominees in ICSID tribunals and committees and WTO Panels from 1995 to 2009).

¹⁸² Waibel and Wu (n 148) 15.

¹⁸³ Ibid.

¹⁸⁴ Langford, Behn and Lie (n 148).

¹⁸⁵ Puig and Strezhnev (n 10) 392; see also Strezhnev (2016) (n 148).

5.4 Conclusions on diversity

The evidence on the absence of diversity in international investment arbitration is crystal clear: there is a striking absence across the vectors of gender, nationality, residence, work experience, nationality and also age. The discourse on diversity needs also to ensure that it truly encompasses multiple diversity characteristics altogether and not only asks whether enough women are appointed but which women are appointed.¹⁸⁶ Yet, change is sluggish across all features and 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 with – as they know their potential leanings – making the entry to new and more diversified candidates difficult.¹⁸⁷ Arbitral institutions also have a role to play in enhancing diversity on the bench. Whether the lack of diversity is a *problem* for investment arbitration depends on how it is measured. But it is clear that it creates a challenge to the system’s legitimacy (which also compliances compliance) and some studies suggest a more diverse group of arbitrators may decide differently. In this respect, diversity largely falls within Quadrant I: we know that there is 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 some questions over the correctness of arbitral jurisprudence. In many respects, this raises questions of neutrality. The second is whether there are *systemic features* of arbitration or arbitrators that might suggest the absence of independence, impartiality as well as neutrality. In this section, we focus on the latter, and specifically three features: party appointments, double hatting and cognitive biases.

There is relatively large field of research that covers questions relating to independence, impartiality and neutrality of arbitrators, although it is only partly empirical.¹⁸⁸

¹⁸⁶ Polonskaya (n 148).

¹⁸⁷ Kidane (n 148) (discussing the privileged elite class with ‘cosmopolitan good manners’ perpetuating the exclusion of the historical ‘others’).

¹⁸⁸ The list of reference does not reiterate the references already mentioned under sections 1 to 5: Malcolm Langford, Daniel Behn and Runar Lie, ‘Who Writes Arbitral Awards?’ (2018) PluriCourts Working Paper; James Crawford, ‘The Ideal Arbitrators: Does One Size Fit All?’ (2018) 32(5) Am U Intl L Rev 1003; Szilárd Gáspár-Szilágyi and Laura Létourneau-Tremblay, ‘Who Are the Dissenting Arbitrators in International Investment Treaty Arbitration?’ (2018) PluriCourts Working Paper; 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, Anne van Aaken, James Freda, Chris Guthrie, and Jeffrey Rachlinski, ‘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*

6.1 Party appointments

The presence 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*,¹⁸⁹ 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.¹⁹⁰ See Table 6.1.

Table 6.1: Repeat appointments – top 25 arbitrators in ISDS based on caseload¹⁹¹

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 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

Treaty Regime (CUP 2016); 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); 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); Anton Strezhnev, ‘You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration’ (2015) Research Note; Stavros Brekoulakis, ‘Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making’ 4(1) *JIDS* 553; Margaret L. Moses, ‘Reasoned Decisions in Arbitration Challenges’ (2013) 3 *Y 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 Blackaby, *Guide to ICSID Arbitration, 2nd ed* (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 et al (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill 2010); Rogério Bianco, ‘The International Centre for Settlement of Investment Dispute (ICSID): An Empirical Research on the Voting Behavior of Arbitrators’ (2009) Working Paper.

¹⁸⁹ Puig (n 147).

¹⁹⁰ Langford, Behn and Lie (n 147).

¹⁹¹ Table taken from Langford, Behn and Lie, *ibid*.

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

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.¹⁹² 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.’¹⁹³ Based on these results, *Puig* proposes blind appointment as an ‘effective debiasing policy alternative’¹⁹⁴ 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 author of the dissent has been traditionally constant.¹⁹⁵ 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.¹⁹⁶ Raising concerns about the neutrality and impartiality of arbitrators, he concludes that 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* shows that dissenting opinions in ICSID arbitrations reduce re-appointment chances of arbitrators.¹⁹⁷ This suggests that dissents may not be driven by a strong strategic bias – or at least that such a

¹⁹² Kapeliuk 2012 (n 188) 90; see also Kapeliuk 2010 (n 188).

¹⁹³ Puig and Strezhnev (n 10) 382; see also Puig and Strezhnev (n 188); Strezhnev 2016 (n 148) (discussing bias among arbitrators); Tucker (n 107) (discussing types of arbitrators and their tilt towards the litigating parties).

¹⁹⁴ Ibid 392-394; see also Puig (n 188).

¹⁹⁵ Puig (n 188) 676.

¹⁹⁶ van den Berg (n 188) 824; for a response to Van den Berg’s criticism refer, inter alia, to Charles Brower and Charles B. Rosenberg ‘The Death of the Two-Headed Nightingale: Why the Paulsson-Van der Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded’ (2013) 29(1) Arb Intl; Pedro Martinez-Fraga and Harout Samra, ‘A Defense of Dissents in Investment Arbitration’ (2012) 42(3) Inter-American L R.

¹⁹⁷ Strezhnev 2015 (n 188).

strategy is successful.¹⁹⁸ 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 winning party and 3% by the presiding arbitrator.¹⁹⁹ 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.’²⁰⁰ He argues that dissents have contributed to the development of international arbitration practice. Although finding that separate opinions might lead to higher legal fees, *Franck* also supports the practice of separate opinions.²⁰¹

6.2 Double-hatting

The participation of arbitrators as counsel in other arbitration or judges in other cases has come under increasing scrutiny on the grounds that it may compromise an arbitrator’s neutrality – actual or perceived.²⁰² *Bernasconi-Osterwalder and Brauch* found that judges from the International Court of Justice (ICJ) served in roughly 10% of all known investment treaty cases as of July 2017,²⁰³ and *Waibel and Wu* find that more than half of presiding arbitrators have provided legal advice or represented investors in other arbitrations, and that more than 60% of them work as private practitioners; and 38% as full-time academics.²⁰⁴

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.²⁰⁵ They find that up to 47% of cases (509 in total) involve at least one arbitrator simultaneously acting elsewhere at the time as legal counsel in another ISDS case.²⁰⁶ Within 190 of these cases, there are also participating legal counsel double-hatting elsewhere as arbitrators – a case of double-hatting squared.²⁰⁷ In addition, within another 11%

¹⁹⁸ This might also reflect though 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.’ *Waibel and Wu* (n 148) 15.

¹⁹⁹ *Gáspár-Szilágyi and Létourneau-Tremblay* (n 188).

²⁰⁰ *Breeze* (n 188) 410.

²⁰¹ *Franck* (n 10).

²⁰² For other critiques, see Judith Levine, ‘Dealing with Arbitrator “Issue Conflicts” in International Arbitration’ (2002) 61 *Dis Res J* 60; Joseph Brubaker, ‘The Judge Who Knew Too Much: Issue Conflicts in International Adjudication’ (2008) 26(1) *Berkeley J Intl L* 111.

²⁰³ *Bernasconi-Osterwalder and Brauch* (n 188).

²⁰⁴ *Waibel and Wu* (n 147) 15.

²⁰⁵ Malcolm Langford, Daniel Behn and Runar Lie, ‘The Ethics and Empirics of Double Hatting,’ *ESIL Reflection* (2018).

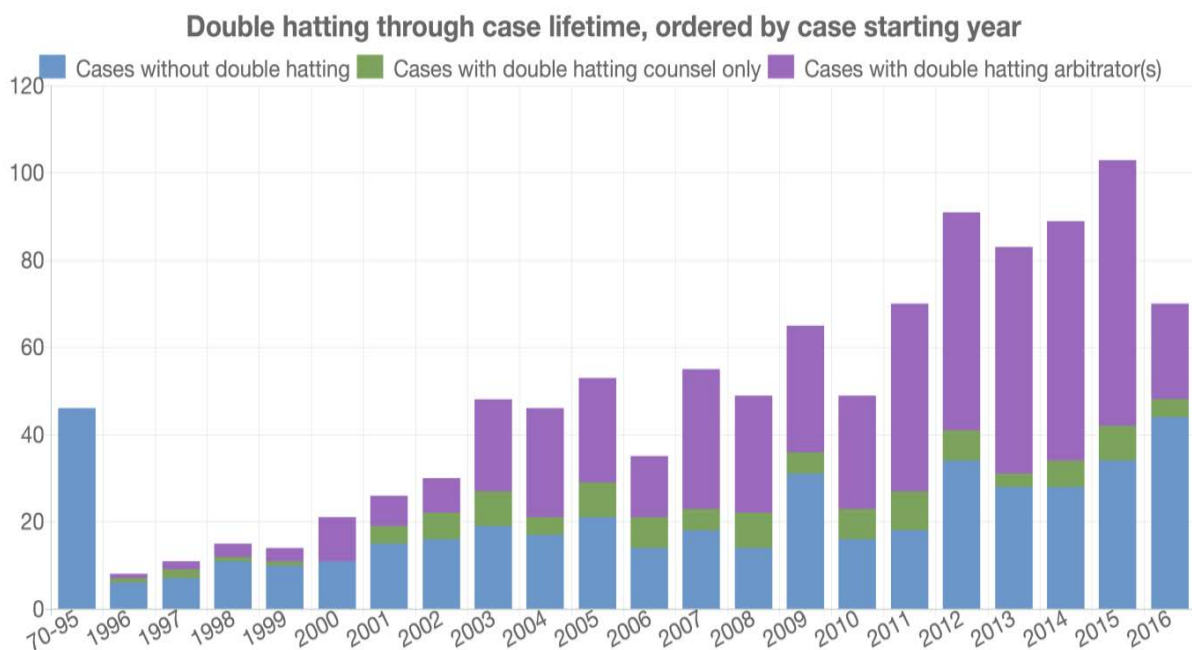
²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

of cases (118 in total) there are legal counsel (but no arbitrators) are 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 (319 in total) is three times that of legal counsel-only cases (118 in total).²⁰⁸ 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 arbitral appointments but a comparatively smaller amount of simultaneous legal counsel work.

Figure 6.1: Double-hatting over time²⁰⁹



In their study, *Langford, Behn and Lie* also examined whether the degree of double-hatting has *changed* over time. Figure 6.1 shows the proportion of cases affected each year by double hatting. The purple blocks show the proportion of arbitrator-focused double-hatting cases. It is notable that double-hatting continues to account for a high proportion of cases from 2003 to 2016, and some of the highest proportions are in the period 2011 to 2015.²¹⁰ The share of double-hatting cases is lower in 2016 but it is not yet clear whether this represents a new trend.

A final question is whether double-hatting matters.²¹¹ 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. Arbitrators are also often seasoned legal professionals. On the

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ See discussion of literature in Langford, Behn and Lie (n 147).

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. Others have raised concerns over potential exploitation by insiders of information asymmetries in order to dominate or allocate appointments²¹² or the existence of *quid pro quo* arrangements between counsel and arbitrators for future appointments.²¹³

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) interests but rather other different aspects of the arbitration process.

In an experimental study on how international arbitrators decide cases, *Franck and colleagues* find that international arbitrators tend to engage in intuitive and impressionistic decisions rather than fully deliberative decision-making.²¹⁴ 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.’²¹⁵

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.’²¹⁶ 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.’²¹⁷ 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.²¹⁸ *Van Harten’s* study identifies a small group of repeat players, playing a leading role in the legal expansiveness of the identified contested legal issues for the

²¹² See Catherine Rogers, ‘The Vocation of the International Arbitrator,’ (2004) 20 Am U Intl L Rev 968-9; Magdalene D’Silva, ‘Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration’ (2014) 5(1) JIDS 605.

²¹³ Thomas Buergenthal, ‘The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law’ (2006) 3(5) TDM.

²¹⁴ Franck et al 2017 (n 188) 1139.

²¹⁵ Ibid 1173; see also Brekoulakis (n 188) 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 with procedural design and institutional structure of arbitrations; Tucker (n 107).

²¹⁶ Puig and Strezhnev (n 188) 761.

²¹⁷ Ibid 733; see also Puig and Strezhnev (n 10).

²¹⁸ Van Harten 2018 (n 107) (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; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (CUP 2008).

period studied (1990-2010).²¹⁹ *Van Harten* demonstrates that the identity of ISDS arbitrators can be a crucial factor when identifying tendencies in the interpretation of investment treaty law. It further suggests that institutional (appointment process) and economic factors (business interests of arbitrators) play a role in adjudicative behavior in the context of ITA.

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 some evidence of an affiliation bias towards the appointing party and the modest presence of some other cognitive biases. 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 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 bias may be harder to pin down; and furthermore, it may be of less importance whether actual bias or conflict of interest arises in the context of double-hatting because it has certainly created a problem of perceived bias for the system.

To be sure, arbitrators' lack of independence and impartiality can be challenged within the existing system.²²⁰ Between 1982 and 2017, *Commission and Moloo* show that parties filed 121 disqualification proposals in ICSID arbitration proceedings and 35 proposals in UNCITRAL investment arbitral proceedings over the period 1999 to 2017.²²¹ In both types of proceedings, the majority of proposals was advanced by the respondent state.²²² For ICSID arbitrations, 95% of the challenges were rejected but a quarter of the proposals for disqualification resulted in a change in the composition of the tribunal.²²³ A review of ICSID disqualification decisions indicates that most arbitrator challenges are based on the arbitrator's familiarity with another participant in the proceeding.²²⁴ In UNCITRAL rules-based

²¹⁹ Ibid. 509-510, 538 (The individuals most credibly described as expansive leaders, using various measures, would be: Gabrielle Kaufmann-Kohler, Andrés Rigo Sureda, Francisco Orrego-Vicuna, Marc Lalonde, Yves Fortier, Stephen Schwebel, Charles Brower and Bernard Hanotiau. One arbitrator, V.V. 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).

²²⁰ See e.g. ICSID Convention art 14(1) and 57; UNCITRAL Arbitration Rules art 10.1; IBA Guidelines; see also Rogers and Tumer (n 188) (discussing the impact of the IBA Guidelines on the rates of challenges).

²²¹ *Commission and Moloo* (n 10) 52-65; refer also to Reed, Paulsson and Blackaby (n 188) 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 188) 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 188) 203-204.

²²² Ibid (64% by respondents in ICISD arbitration proceedings and 69% by respondents in UNCITRAL arbitration proceedings); see also Dimitropoulos (n 188) 403-404 (finding that between 2012-2014 most disqualification proposals were filed by claimants).

²²³ Ibid 56; see also Kinnear and Nitschke (n 188) (dataset: disqualifications proposals up to 1 September 2014).

²²⁴ Cleis (n 89) 82 (dataset: all disqualification decisions publicly available prior to 1 December 2016).

arbitrations, the rejection rate was lower at 74% of proposals together with a 34% change in the composition of the tribunal.²²⁵ In other words, practically all the disqualification requests are dismissed. Decision-makers in arbitrator challenges are extremely reluctant to disqualify other co-arbitrators. It is also argued that arbitrators consider the 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 repeat appointments are presumed to be harmless.²²⁶

Reviewing recent ICSID decision to assess whether the threshold for a successful challenge is higher than in under alternative regimes, *Crawford* finds that disqualification's threshold under ICSID is higher than in other forums and further suggests that disqualification in ICSID is 'in need of greater conceptual clarity.'²²⁷ Others conclude that 'ICSID system of arbitrator challenges simply does not work,'²²⁸ and arbitrators' reluctance to disqualify another arbitrator, the high disqualification threshold, as well as the abstract requirement for independence and impartiality may be some explanations for the low success rate of arbitrator challenges.²²⁹

Conclusions

The above survey of the empirical evidence reveals an emerging base of evidence for assessing various concerns around international investment treaty arbitration practice. In some cases, precise statistics can be given on the nature of the regime (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 awards, including on compensation), *modelling* challenges in explaining outcomes (e.g., capturing all determinants of arbitral behavior), and *scope* (the empirical research community is small in relation to the number and range of empirical questions being asked). Moreover, evaluative challenges remain – it was not always clear whether there was normatively or empirically a problem even when researchers overcome epistemological problems. On the bright side, access to data is improving and a broader range of researchers are experimenting with new methods and questions, some of which also seek to assist in better evaluation.

²²⁵ Commission and Moolo (n 10) 65.

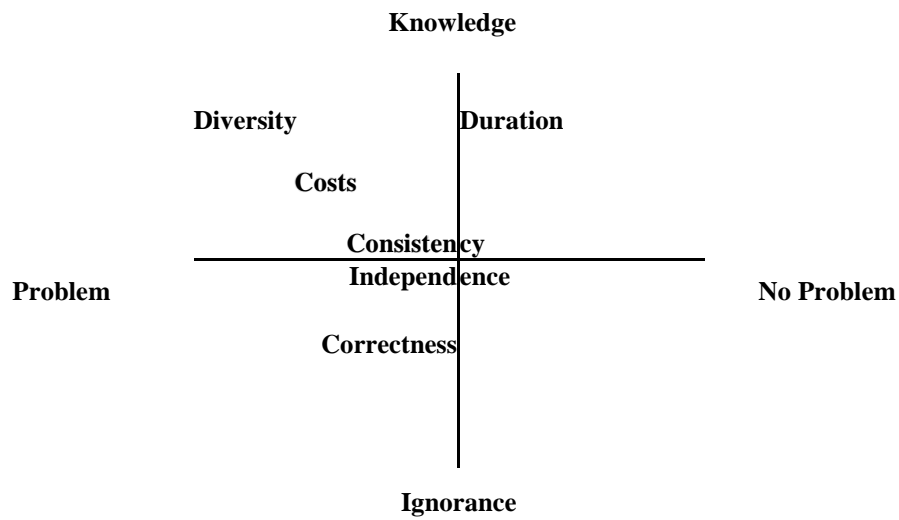
²²⁶ Cleis (n 89) 84; see also Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010).

²²⁷ Crawford (n 188) 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 89).

²²⁸ Moses (n 188) 204; Daele (n 189) 170-174.

²²⁹ Moses (n 188) 204-205; Daele (n 188) 174; Cleis (n 89) 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); see also Dimitropoulos (n 188) (discussing recent trends on disqualification in ICSID case law up to 2014 and suggesting alternatives to the current system).

Figure 7.1: Mapping empirical research



In Figure 7.1, we have mapped our conclusions for each of the six concerns on the *epistemological* and *evaluative* axes. 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.