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Evidence-Guided Reform: Surveying the Empirical Research on Arbitrator Bias and Diversity in Investor–State Arbitration

DANIEL BEHN, MALCOLM LANGFORD, LAURA LÉTOURNEAU-TREMBLAY, AND RUNAR HILLEREN LIE

10.1 Introduction

A diffuse, sprawling, relatively opaque, and increasingly polarized legal order, the international investment regime, with its thousands of largely bilateral investment treaties, ad hoc system of investor–state dispute settlement (ISDS), and decades-long legitimacy crisis, is a challenging phenomenon to accurately describe and assess. It also makes the identification and prioritization of its most problematic and reform-worthy areas of concern difficult to pin down. Without empirical data, the international investment regime has been, and to some degree continues to be, very susceptible to heuristics based on limited information, anecdote, and surface-level policy prescription. The result can be that anecdotal evidence, one-off events or outlier cases come to represent systemic flaws: entering the discourse with ease and replicating themselves, spreading as accurate of the entire international investment regime and in turn either fueling its ongoing legitimacy crisis and backlash or eliciting vigorous defense of the system.

As the backlash peaked in the mid-2010s, a tipping point in the evolution of the international investment regime occurred, triggering efforts to reform: the most significant being the multilateral state-led forum created by the United Nations Commission on International Trade Law (UNCITRAL) in late 2017 through its Working Group III (WGIII) on ISDS Reform. Long-standing concerns that ISDS is pro-investor and anti-developing state – marked by jurisprudential inconsistency and excessive legal costs, arbitrated by a cadre of male arbitrators from the West – have now become the order of day in high-level

deliberations on the procedural reform of ISDS, which is aimed at bolstering its legitimacy. Coinciding with this transition from legitimacy crisis to reform has been a significant increase in the amount and quality of empirical data and information available about the regime and its practice (Behn, Fauchald and Langford 2021a; Alschner, Pauwelyn and Puig 2017). Assisted by the broader empirical turn in international legal scholarship (Schaffer and Ginsburg 2012), a critical mass of empirical legal scholars is now focused on investor–state arbitration, with data-driven and evidence-based empirical assessments about the regime becoming more common.

This new wave of empirical research on investor–state arbitration has been central to the UNCITRAL reform process (Langford, Potesta, Kaufmann-Kohler and Behn 2020) due in large part to the fact that the process did not start with a preordained set of problems (UNCITRAL 2017a); but rather, the process started with states being invited to identify concerns and only then turning to solutions and outputs (Puig and Schaffer 2018; Roberts 2018). Thus, empirical studies on investor–state arbitration have been surprisingly relevant and frequently invoked. Given that debates on investor–states arbitration are so often polarized and prone to entrenched views, the importance given to empirical research on ISDS reform at UNCITRAL is deliberate, requiring its work to "not be undertaken based on mere perceptions, but on facts" (UNCITRAL 2017b).

In this chapter, we survey and summarize the empirical scholarship used to identify, substantiate, verify, and to justify the underlying causes of two of the most salient areas of concern about ISDS identified by state parties to WGIII. Both areas relate to the role of arbitrators within the system of ISDS: (1) concerns about the independence and impartiality of arbitrators; and (2) concerns about the lack of diversity amongst arbitrators. These two areas of concern ultimately boil down to questions about who should be deciding ISDS cases: that is whether arbitrators should be deciding investment disputes at all; or even if they should, how future ISDS tribunals can better ensure independence and impartiality, and how the selection of arbitrators can be reformed to ensure more diversification in the pools of arbitrators considered for appointment.

Critique of the international investment regime generally, and ISDS in particular, can be divided broadly into two distinct camps: those that claim that the substantive rules in IIAs are the problem with ISDS; and those that claim that the bigger problem with ISDS is the arbitrators

themselves (Behn 2018). The *rule-based critique* states that the legitimacy crisis in investor–state arbitration is not about how these disputes are resolved; rather, the problem stems from the lopsided granting of rights – but not obligations – to foreign investors who benefit from substantive treaty rules that are biased, vague, and skewed in favor of individual property rights without adequate deference to a state's right to regulate in the public interest. According to this view, changes to the substantive rules in IIAs are the key to legitimating the international investment regime (Van Harten, Kelsey and Schneiderman 2019). Moreover, while, there have been some piecemeal unilateral and bilateral treaty renegotiations in the past decade, there is little evidence these efforts have done much to increase the legitimacy of the regime (Langford and Behn 2018).

The second view, which has been the main focus of the UNCITRAL process is the *arbitrator-based critique,* which does not focus on rule reform but on how the investor–state arbitration process – particularly its arbitrators – are inappropriate and ill-suited for resolving public law disputes with a state as litigant. Within this view, ISDS arbitrators are considered to be biased in favor of foreign investor property rights over a state's right to regulate, they largely consist and operate as a closed club of 'pale, male, and stale' individuals, they produce incorrect and inconsistent decisions, and they are improperly influenced by the prospect of reappointment (Arato, Brown and Ortino 2020; De Luca, Feldman, Paparinskis and Titi 2020; Van Harten 2018; Langford, Behn and Lie 2017; Puig 2014). Support for this view is common among many state delegates to the UNCITRAL process and claims about arbitrator bias and the lack of diversity among ISDS arbitrators is frequently expressed along with other key procedural areas of concern (Langford, Potesta, Kaufmann-Kohler and Behn 2020).

What can a survey of the empirical scholarship on ISDS arbitrator bias and diversity then say about the current practice of ISDS? Can it tell us whether the arbitrator-based critique is valid? And if it is a valid criticism determined by factual evidence, what are the proposed solutions? Will legitimacy only come to ISDS if arbitrators don robes and become judges; or is there still some room for arbitrators to remain as arbitrators, subject to substantial reform? In the following sections we survey the research on bias and diversity as an example of how data-driven and evidence-based approaches to reform can assist in both identifying and verifying problem areas within the status quo, but also how these approaches can be invaluable in targeting reform initiatives around specific empirically verifiable issues of concern in all types of international institutions.

10.2 The Investor–State Arbitration Regime in Numbers

Before turning to the issues of ISDS arbitrator bias and diversity, we present a brief description of investor–state arbitration. This is a complex regime based on networks of international investment agreements (IIAs) that are global in reach and diverse in content: proceedings that are one-off and ad hoc, with parties able to appoint an arbitrator each – and mutually agree on the appointment of a chairperson – in the standard three-member panel, that take place in multiple jurisdictions and constituted under different procedural rules; surrounded and populated by a global epistemic community with multiple actors and interests. Indeed, the regime is a distinct and unique universe that can only be understood by employing multiple methods across different disciplines, in order to bring together all the strands of its practice, identify its patterns, and give justice to its contemporary nature and character. The following thus provides a snapshot in time.

Using the PITAD[1] database, with caseload statistics up through the middle of October 2020, we can identify 1,177 treaty-based ISDS cases across thirty-three years (see Figure 10.1). The caseload for treaty-based investor–state arbitrations has been on an upward annual trajectory

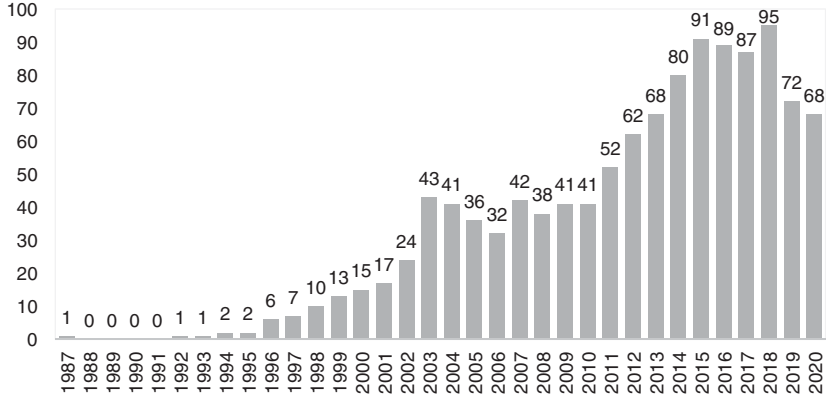

Figure 10.1 All ISDS Cases by Year (1,177 Cases to 15 October 2020)
Source: PITAD (2020)

[1] PluriCourts Investment Treaty and Arbitration Database (PITAD), pitad.org accessed 15 October 2020.

Table 10.1 *All ISDS Cases by Outcome (to 15 October 2020)*

Outcome Type	No.		No.
Foreign investor loss	307	Loss on jurisdiction Loss on merits	131 176
Foreign investor win	260	Partial win Full win[2]	122 138
Settled or discontinued	269	Case settled Case discontinued	147 122
Resolved cases Pending cases **Total**	836 341 **1177**		

Source: PITAD (2020)

since the early 2000s but appears to have been plateauing (and possibly even declining) since 2018. For completeness, there are also a further 157 ICSID[3] contract and domestic foreign direct investment (FDI) law cases; an unknown quantity of non-ICSID contract and domestic FDI law cases involving state parties; 150 ICSID annulment committee proceedings; and an unknown number of set-aside and enforcement proceedings relating to non-ICSID ISDS cases.

As Table 10.1 shows, 836 of the 1,177 cases have been finally resolved, whether decided, settled, or discontinued. The results, in the decided cases have been relatively even for a number of years with a slight growing gap as respondent states are increasingly succeeding in defending themselves against claims: in 54.1 percent of treaty-based ISDS cases a foreign investor's claims are dismissed either on jurisdiction or the merits, while in 45.9 percent of ISDS cases the foreign investor has succeeded partially or fully. However, we note that in 25.7 percent of

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

[3] International Centre for Settlement of Investment Disputes (ICSID).

the 836 resolved cases, the final award is not publicly available, and we are reliant on secondary information about outcomes.

There is also a strong asymmetry in the type of parties that engage in investor–state arbitration. On one side, the home state of the claimant-investor is strongly represented by the United States (193), followed by the Netherlands (136), the United Kingdom (131), Germany (80), Spain (72), and Canada (53) (PITAD 2020). Likewise, respondent host states in investor–state arbitration are overwhelmingly middle-income states (Behn, Berge and Langford 2018). Of the 1,177 cases, low-income states are respondents in 7.5 percent (88) of cases, lower-middle-income states in 24.8 percent (293) of cases, upper-middle-income states in 42.1 percent (495) of cases; and high-income states in 25.6 percent (301) of cases (PITAD 2020). The litigation also tends to be unidirectional across development status with claimant-investors typically bringing claims against respondent states with a development status equal to, or lower than, that of their home state. For example, there is no decided case where a claimant-investor from a low-income state has brought a claim against a high-income respondent state (Behn, Fauchald and Langford 2021b).

In terms of the economic sectors giving rise to investor–state arbitrations, Figure 10.2 shows the distribution. Historically, the extractive industries and other types of investments with high sunk costs (such as electricity generation) have been the most frequently litigated sector, with investors succeeding in extractive industries cases at a rate significantly higher than the average win rate for all ISDS cases (Langford

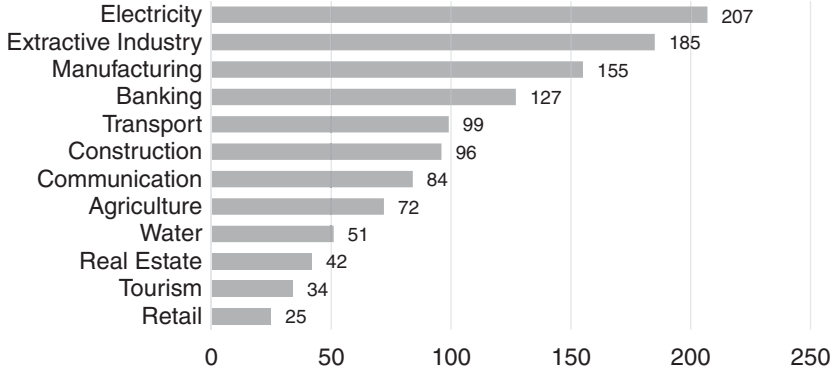

Figure 10.2 All ISDS Cases by Sector (1177 Cases up to 15 October 2020)
Source: PITAD (2020)

Table 10.2 *All ISDS Cases by Institution (to 15 October 2020)*

Institution	No.	%		No.	%
ICSID	668	56.6	ICSID	668	56.6
Non-ICSID	509	43.4	Ad hoc	181	15.3
			PCA	208	17.7
			SCC	70	6.7
			ICC	38	2.6
			Other	12	1.1
Total	**1177**	**100**			

Source: PITAD (2020)

and Behn 2018). The extractive industries and electricity sectors still hold the largest share of cases by economic sector, but there has been considerable diversification in the past decade with an increasingly high number of manufacturing, banking, transport, telecommunication, and construction disputes.

The type of the arbitral institutions administering investor–state arbitration cases also continues to diversify (Behn 2018). During the past decade, ICSID's dominance as the primary administrator of international investment disputes has been decreasing year-on-year (see Table 10.2). If one were to add in the approximately 100 treaty-based cases that are known unknowns,[4] then ICSID in 2020, for the first time, will have administered less than half of all known ISDS cases.

10.3 Independence and Impartiality Concerns

Independence and impartiality refer to two concepts – although more distinct in theory than practice. Independence refers generally to the institutional independence of adjudicators from other branches of government or parties to the case (Giorgetti et al 2020). Although others

[4] These are confidential ISDS cases that have been deduced as existing by deducting the number of known ISDS cases from published and unpublished lists of total caseload at the Permanent Court of Arbitration (PCA) (approximately 50 cases), Stockholm Chamber of Commerce (SCC) (approximately 15 cases), and the International Chamber of Commerce (ICC) (approximately 10 cases) plus an educated guess concerning noninstitutional ad hoc cases (approximately 25 cases).

argue that independence is not simply external and may be affected by the internal dynamics within an institution (Avbelj 2019). Impartiality is a state of mind and generally more internal in nature: it refers to the lack of prejudgment by an arbitrator together with an absence of interests in the case and the ability to treat each party equally.[5] Importantly, it is commonly expected that independence and impartiality must be both real and perceived (Giorgetti et al 2020).

As foreshadowed, it is important to note that the relationship in practice between impartiality and independence is complex (Trakman 2007). This is because external relationships can also affect impartiality. For example, constant reappointment by a single type of party in a dispute (e.g., a certain investor, state or law firm) can raise problems for *independence* – as has been claimed in a number of challenges to arbitrators (Giorgetti et al 2020). In ISDS disputes, such regular reappointment though can raise questions of *perceived impartiality* – there may be concerns that the arbitrator is likely to regularly favor parties that hail from the same side (i.e., claimants or respondents). This is because their ongoing role has influenced their view or their constant reappointment on one side could suggest a predisposition to that type of party and suggest a lack of impartiality. Thus, the key question is how particular concrete circumstances affect independence or impartiality or both.

We address empirical research on both elements, but largely in reverse order. One strand of research has focused on factors that may affect the general impartiality of *any* arbitrator on a ISDS tribunal – such as favoritism towards developed states and investors or case-specific heuristics that may consciously or subconsciously affect neutrality. A second strand has examined the different appointment dynamics which may affect the independence (and impartiality) of a *specific* arbitrator on a tribunal. We discuss party appointment, law firm roles in reappointments, and appointments in dual roles (i.e., 'double hatting'). In both types of research, the focus varies between establishing the existence of actual conflicts of interest and perceived conflicts of interest – with few studies arriving at definitive conclusions on the former.

[5] Impartiality 'seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law'); CJEU, Opinion of the Court 1/17, *EU–Canada Comprehensive Economic and Trade Agreement* (30 April 2019) ECLI:EU:C:2019:341, para. 203.

10.3.1 General Impartiality

As noted, impartiality refers to the ability of an arbitrator to treat a case objectively – and we examine potential biases in the form of favoritism to certain types of claimants and then consider a range of case-specific heuristics.

10.3.1.1 Anti-Developing State Bias?

There is some evidence that less-developed respondent states lose more frequently than developed states (proportionately); and due to the fact that the majority of respondent states in all known ISDS cases are developing states, claims of a structural, system-wide bias against developing states has existed for a long time (Dupont and Schultz 2013; Franck 2007).

Establishing whether there was an actual asymmetry in outcomes for developing states, let alone whether it is driven by arbitrator bias (as opposed to various institutional or structural factors), was unclear for many years. In an early study, Franck (2009) found that neither the development status of the respondent state nor the development status of the presiding arbitrator's country of origin had a statistically significant relationship with outcomes. In a later 2014 study, she argued further that this result held when controlling for the level of democracy within these less-developed respondent states (Franck 2014) – that is, any difference in outcomes could be attributed to the governance systems of developing countries which weakened their ability to protect investor rights.

However, Schultz and Dupont (2015) clearly find that since the mid-to-late 1990s investor–state arbitration is "harder on poorer countries than on richer countries." Looking at all resolved ISDS cases up to 2018, Behn, Berge, and Langford (2018) find likewise: identifying an overwhelming statistically significant relationship between a respondent state's lower development status and the likelihood that the claimant-investor would succeed in their claim.

Moreover, and relevant to the question of impartiality, this pattern held when controlling for a wide range of democratic governance indicators, with only one measure on a state's level of property rights protection being able to cancel out the effect. This raises the question as to whether it is arbitrator bias or broader structural features that explain why developing countries lose more often. The Behn, Berge, and Langford (2018) study does not answer this question but one interesting finding from the study

was that by looking closely at the models, the statistics appeared to be driven not by the fact that developing states lose more, but that developed states lose very infrequently, possibly showing a favoritism towards developed states as opposed to a bias against developing ones.

However, one further study suggests that the challenge may be structurally-based rather than arbitrator based. Strezhnev (2017) advances and tests an alternative theory for why developing state might be losing frequently: they are more likely to settle cases that the foreign investor would have lost if defended by the respondent state through to the merits. He argues that this points away from a bias among members of the arbitral tribunal, but instead points to the structural advantages (power differentials and capacity to litigate) that developed states have and that are sometimes lacking in developing states.

10.3.1.2 General Pro-Investor Bias?

Another systemic bias claim frequently lodged against the investor–state arbitration system is a bias against states in general and favoritism towards foreign investors (Giorgetti et al 2020). While the evidence of some type of structural or systemic bias against developing states in ISDS cases is relatively strong, a pro-investor bias is slightly more difficult to substantiate. For example, Stone Sweet and Grisel (2017) assert that there is no evidence of a pro-investor bias because claimant-investors lose as much as they win and that in the vast majority of awards, arbitral tribunals take seriously the respondent state's 'right to regulate' (Stone Sweet et al 2017). Franck and Wylie (2015) also argue that investor–state arbitration is "state-favorable" or provides a "rough balance in outcomes." Others have pointed out though that roughly equal outcomes tell us little about bias, especially when compared to other international courts and tribunals (Langford and Behn 2018). Less than 5 percent of claimants are successful in claims before the European Court of Human Rights while 95 percent of claimants before the World Trade Organization's (WTO) Dispute Settlement Mechanism (DSM) are successful on at least one point (Langford, Creamer and Behn 2019: 262).

Focusing on evidence of potential favoritism to investors, Van Harten (2012a, 2018) has long argued that arbitral tribunals embrace expansive interpretations of investment treaties, particularly in relation to their own jurisdiction, resulting in a system that entertains far more cases brought by foreign investors than more deferential and restrictive interpretations would permit. In a longitudinal study of outcomes in investor–state arbitration, Langford and Behn (2018) find that declining success rates for foreign investors over time suggests that the system may

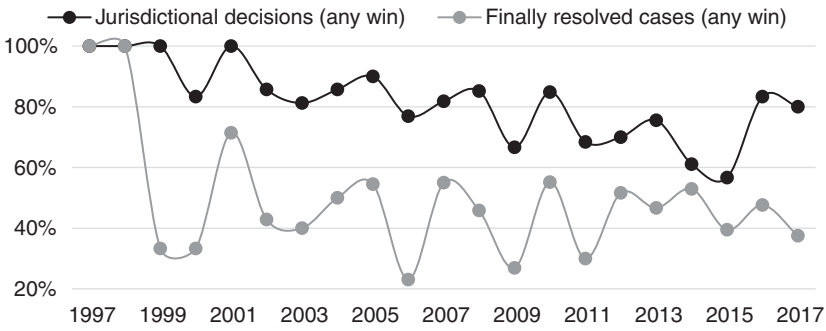

Figure 10.3 Foreign Investor Success Ratios in ISDS across Time (to 2017)
Source: Langford and Behn (2018)

have been less state-friendly in its initial phases and is correcting partly itself in recent years due to critique (see Figure 10.3). While not finding any indication of a general favoritism towards foreign investors in ISDS, Franck and Wylie (2015) do suggest that certain types of investors tend to do particularly well in investor–state arbitration. They argue that the variables most likely to predict positive outcomes for foreign investors are their type (individuals versus corporations) and whether the claimant-investor has retained experienced counsel, where an individual claimant-investor assisted by experienced lawyers generally led to more favorable results for foreign investors.

A recent study by Sattorova (2018) identifies also a general heuristic held by the international arbitration community that views investor-state arbitration as disputes whereby the foreign investor is portrayed as a victim, subject to the arbitrary behavior of a corrupt and recalcitrant government. If such a heuristic is widespread among the international arbitration community, it would be very likely that its framing affect would facilitate or strengthen any perceived pro-investor biases.

10.3.1.3 Case-Specific Heuristics

While there is general agreement that favoritism towards a particular type of party does not meet the requirements that an arbitrator be "impartial at all times," other types of general bias are considered less objectionable – including certain cognitive biases that may influence decision-making but carry with them no negative connotations at all. For example, Dimitropoulos (2018) and others have explained how anchoring and framing will influence how an arbitrator decides because the processing of initial and preexisting information available at the early

stages of an ISDS cases will always create heuristics that distort the way that all future information is understood.

Puig and Strezhnev (2017b) identify a possible bias that could influence arbitral decision-making – the relative strength of the parties. Based on an experimental study, 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." Their findings show that arbitrators pay attention to the resources and capacity of the parties and showing a preference for rectifying unequal litigation resources. This may dampen, to a certain degree, any favoritism towards large investors or bias against under-resourced developing states.

Another type of framing that is likely to have a significant influence over arbitral decision-making is what Brekoulakis (2013) terms 'institutional bias.' These are the biases that are generated from the institution of arbitration and its structures, norms, values, and processes; and that act as constraints on the way in which individual arbitrators process information. These institutional biases will also have an effect on the way that arbitrators come to favor or have predispositions in favor of a particular ideology or theory that in turn can influence or constrain how they decide in a particular case. Indirectly confirming the possibility that institutional structures can influence decision-making, Franck et al (2017) conducted an experiment finding that international arbitrators tend to individually engage in intuitive and impressionistic decisions rather than fully deliberative decision-making. Their research concludes by recommending that reform of dispute resolution systems should focus less on the qualities of individual arbitrators but rather on structural features and procedural safeguards securing high level of impartiality and independence in decision-making.

10.3.2 Appointment Dynamics and Independence and Impartiality

We turn now to consider the relationships of arbitrators with other actors, especially through the process of appointment, and the extent to which this may affect their independence and impartiality. This subsection looks at potential arbitrator biases by surveying two areas that raise independence questions (and partly by extension, issues of impartiality as well) that have historically been triggers for challenging arbitrators: (1) claims that party-appointed arbitrators are not independent from the party (or law firm) that appointed them and that reappointment patterns raise questions of impartiality; and (2) claims that an arbitrator's

independence and impartiality is compromised if acting simultaneously as arbitrator and counsel in ISDS cases.

10.3.2.1 Party Reappointment

The presence of a party appointment system in investor–state arbitration has long raised concerns over arbitrator independence. The principal concern over party appointments is how the prospect of reappointment in future cases may influence and bias decision-making. Reappointment in ISDS is the norm. As such, most empirical research on party appointment has focused on the presence of an affiliation bias that an individual arbitrator would have towards the party that appointed them. Mostly, the justification for an affiliation bias is based on an arbitrator's motivation to be reappointed in future ISDS cases by the party in question –raising a question of independence. It also raises an issue of impartiality more broadly as the positions they take in a case may affect reappointment by other parties. Less often, there is mention as to whether an affiliation bias might be motivated by some immediate type of loyalty or duty to the party that appointed them (but see Sands 2017).

This theoretical concern is strengthened by the actual regularity and nature of reappointment in the system. We know from Puig (2014) and Langford, Behn, and Lie (2017) that arbitrator reappointments dominate in investor–state arbitration and that many are appointed in a similar role – whether chair, claimant-appointed, or respondent-appointed (see Table 10.3). Here, we have calculated an *asymmetry score* for each arbitrator, based on the distribution of their cases across the three roles. A score of 0 means that an arbitrator has an equal number of cases in each role, whereas the maximum score of 1.33 means that they are only appointed in a single role. The score is calculated by adding the difference between the actual proportion of cases in each role and the balanced proportion in each role (i.e., one third).[6]

As can be seen, some arbitrators such as Brower (1.29), Thomas (1.29) and Stern (1.22) have almost perfect asymmetry scores as they are almost exclusively appointed in one role – Brower for the claimant, and Thomas and Stern for the respondent. Others have also almost perfect balanced scores – such as van den Berg (0.11) and Cremades (0.16). On average, the asymmetry scores are 0.72, indicating that fairly strong asymmetric

[6] For example, if an arbitrator is only appointed in a claimant role, the difference between the actual and balanced proportions for that role is 2/3 (i.e., the difference between 3/3 and 1/3) and the differences for the chair and respondent roles are 1/3 each (i.e., the difference between 0 and 1/3). This sums to 1 and 1/3 (1.33), which is also the maximum asymmetry.

Table 10.3 *Reappointments – Top 25 Arbitrators in ISDS Cases (to 2017)*

No	Arbitrator	Nationality	Chair	Claim	Resp	Asymmetry – Roles (0–1.33)	Asymmetry – Claim v Resp (0–1)	Annulment	Total
1	Stern	France	4	1	82	1.22	0.95	1	88
2	Kaufmann-Kohler	Switzerland	38	15	2	0.72	0.76	1	56
3	Fortier	Canada	24	25	2	0.59	0.85	2	53
4	Brower	US	1	50	0	1.29	1.00	1	52
5	Vicuña	Chile	18	27	3	0.54	0.80	1	49
6	van den Berg	Netherlands	15	16	12	0.11	0.14	1	44
7	Thomas	Canada	0	1	42	1.29	0.95	0	43
8	Hanotiau	Belgium	12	18	5	0.38	0.57	5	40
8	Böckstiegel	Germany	26	8	2	0.78	0.60	4	40
9	Veeder	UK	25	6	6	0.68	0.00	0	37
9	Cremades	Spain	14	10	10	0.16	0.00	3	37
10	Bernardini	Italy	11	13	3	0.44	0.63	9	36
11	Lalonde	Canada	8	20	7	0.48	0.48	0	35
12	Oreamuno	Costa Rica	15	0	14	0.67	1.00	5	34
13	Alexandrov	Bulgaria	3	25	1	1.06	0.92	3	32
14	Sands	UK	1	4	25	1.00	0.72	0	30
15	Fernández-Armesto	Spain	21	1	3	1.00	0.50	4	29

Table 10.3 (*cont.*)

No	Arbitrator	Nationality	Chair	Claim	Resp	Asymmetry – Roles (0–1.33)	Asymmetry – Claim v Resp (0–1)	Annulment	Total
16	Paulsson	France	13	12	2	0.52	0.71	1	28
16	Naón	Argentina	2	24	2	1.05	0.85	0	28
16	Williams	New Zealand	10	17	0	0.67	1.00	1	28
17	Crawford	Australia	12	2	10	0.50	0.67	3	27
18	Tercier	Switzerland	22	0	3	1.09	1.00	0	25
19	Landau	UK	3	1	20	1.00	0.90	0	24
19	Lowe	UK	13	2	9	0.50	0.64	0	24
19	Berman	UK	10	5	4	0.39	0.11	5	24

Source: Langford, Behn, and Lie (2017)

reappointment is the norm. It also means in effect that an arbitrator is appointed 67 percent of the time in one role (or and more exceptionally evenly in only two other roles). Examples of those close to the average asymmetry score include Kaufman-Kohler who is appointed 69 percent of the time as chair; and Böckstiegel who is appointed 72 percent as chair.

However, this score does not provide a complete picture as there are a few arbitrators (e.g., Berman) who are appointed in almost the same number of cases for the claimant and respondent but in a different ratio for chair (less or more), meaning they obtain moderate although certainly not high scores. In order to mitigate against this, we have included an asymmetry score that just compares claimant and respondent roles: 0 is a perfect balance while 1 means only appointment by one side. Thus, Berman scores 0.11 while Brower and Williams score 1; with an average of 0.70 – showing again high levels of appointment asymmetry.

Turning to the empirical research on the effects of role appointment, with the exception of an early study (Kapeliuk 2010), most empirical research does find evidence – albeit in varying degrees – of an affiliation bias specific to party-appointed arbitrators (i.e., not the presiding arbitrator) in ISDS cases. A controlled experiment on affiliation bias by Puig and Strezhnev (2017a) – in which participants were ask to determine which party should be awarded costs – found that the assigned arbitrator role for the participant correlated with a 20 percent greater likelihood that they would make a costs award in favor of the party that appointed them.

Some studies have looked to dissenting opinion patterns to show an affiliation bias. For example, Gáspár-Szilágyi and Létourneau-Tremblay (2020) find that about 73 percent of dissenting opinions are written by arbitrators appointed by the losing party, 24 percent by arbitrators appointed by the winning party and 3 percent by the presiding arbitrator. This high number of dissents by the losing party appointed arbitrator (which was even higher at 100 percent in an earlier study by van den Berg (2010)) might be a fairly good indication of an affiliation bias among party-appointed arbitrators in ISDS.

One particular type of bias that, to date, has not raised any red flags in practice is impartiality arising from an arbitrator's ideological orientation in favor of one class of litigant – either a state or an investor – based on their appointment patterns: that is whereby the dynamics of appointments raise broader impartiality concerns over time (i.e., a bias that favors state positions in general, not Venezuela, for example, in particular). In investor–state arbitration, every case involves one type of litigant (an investor) in a unidirectional suit against another type of litigant (a state).

The asymmetry scores in Table 10.3 shows that patterns of nearly exclusive reappointment by one type of litigant in ISDS are the norm, not the exception. Van Harten (2018; 2016; 2012a; 2012b) found in a number of studies that a small group of reappointed arbitrators favor foreign investors from major Western capital-exporting states, which is a finding that is also backed up a few other studies that importantly also find that it is not just certain arbitrators appointed by investors that favor investors but that certain arbitrators appointed by states favor states (Langford, Behn and Lie 2017; Wellhausen 2016; Franck and Wylie 2015). Given that such a high percentage of reappointed arbitrators are appointed by one type of litigant predominantly, the likelihood that this is a serious and significant affiliation bias is extremely high. Whether it will ever be considered an unacceptable form of impartiality by the investor–state arbitration system is another story.

10.3.2.2 Law Firms and Reappointment

In another study, Lie (2021) investigated another type of affiliation bias. He examines law firms, noting that several of the world's largest and most prestigious elite law firms have represented foreign investors and states in a high percentage of all known ISDS cases. Considering legal counsel's role in arbitrator appointment, this high degree of involvement in ISDS cases would seemingly allow elite law firms to take on a gatekeeper role regarding who gets appointed in ISDS cases. Lie also finds a connection to reappointment, demonstrating that elite law firms, when tasked with appointing an arbitrator in an ISDS case, will appoint one of the top twenty-five most reappointed arbitrators (Table 10.3) 40 percent of time. The connection between elite law firms and arbitrator reappointment may indeed show that arbitrators do have an affiliation bias towards the party that appointed them (a law firm) and that the bias is motivated by prospects of reappointment.

10.3.2.3 Double Hatting

ISDS arbitrators acting simultaneously as counsel or judges in other fora have come under increasing scrutiny in investor–state arbitration on the grounds that this practice presents conflict of interest issues and compromises an arbitrator's impartiality and independence – whether actual or perceived (Langford, Behn and Lie 2017; Levine 2012). For example, Bernasconi-Osterwalder, and Brauch (2017) found that judges from the International Court of Justice (ICJ) have served on approximately one in ten ISDS cases up to 2017, and Waibel and Wu (2017) found that more

than half of presiding arbitrators in ISDS cases up to 2016 have provided legal advice or represented foreign investors in other ISDS cases.

Focusing on arbitrators simultaneously acting as legal counsel in other ISDS cases, Langford, Behn, and Lie (2017) sought to provide a comprehensive metric for measuring the extent of double hatting in investor–state arbitration. Using the PITAD database up to 2017, they found that 47 percent of all known ISDS cases (509) involved at least one arbitrator that was simultaneously serving elsewhere as legal counsel; but that only 11 percent of all known ISDS cases (118) involved legal counsel that was simultaneously acting elsewhere as arbitrator. This description would indicate that the predominant profile of a double hatter is a full time or nearly full-time arbitrator that occasionally takes on legal counsel work; and they are not (as advocates of the practice argue) full-time legal counsel wanting to transition to that of an arbitrator. Most double hatting, at least up through 2017, was being practiced by a small number of high-profile and eminent arbitrators.

Questioning whether double hatting has changed over time, Langford, Behn, and Lie (2017) found that, while anticipating a decline in the practice in recent years, found a year-on-year increase up to 2016. However, recent updates to the data have found that the practice began to decline in late 2017 (Langford 2020), which is at least partly due to the practice garnering significant negative attention, and also suggests that the international arbitration community may have some capacity for reflexive self-correction in the face of mounting criticism: see the theory in Langford and Behn (2018).

Given that the practice may be in retreat, it is still also worth asking whether it matters at all. On the one hand, some say that double hatting is compatible with the ad hoc nature of arbitration and that some overlap of roles is not only permissible but preferable; and that regardless, it is a necessary practice for career transition at a minimum (see overview of arguments in Langford, Behn and Lie 2017). On the other hand, critics have raised concern over actual and perceived conflicts of interests, especially given that arbitrators may be able to develop a favorable precedent for a case in which they act as counsel (but would only be possible in the case of sequential, not simultaneous, double hatting) (Sands 2017); and others have raised concerns over potential exploitation of information asymmetries in order to dominate or allocate appointments through the existence of some kind of quid pro quo arrangements between counsel and arbitrators (Buergenthal 2006). However, systematic empirical research is yet to be done on the extent to which actual rather than perceived conflicts of interests arise with double hatting.

10.3.3 Conclusions on Independence and Impartiality

Summing up, empirical research has attempted to answer some questions concerning the impartiality and independence of arbitrators but has been better at assessing system-wide and structural concerns about the neutrality and impartiality of the institution of investor–state arbitration. There is mixed evidence of favoritism towards foreign investors and developed respondent states and there does appear to be some type of affiliation bias towards the appointing party, while the presence of double hatting at a minimum raises perception of bias concerns and may also limit an arbitrator's ability to be impartial. That said, empirical work on bias must be done and reviewed with caution as it is frequently difficult to demonstrate with precision the causal link between biases and the individuals and institutions purported to be biased. Nevertheless, such research can assist in providing evidence on the extent of a problem, even if a particular bias is unproven, and inform the strategies to adopt in reform processes (Giorgetti et al 2020; Puig 2019). For example, practices such as double hatting can be descriptively mapped even if issues of bias are harder to pin down; and that mapping can prove very valuable in terms of demonstrating the extent of the problem, but also how to target reforms that might best curtail the perceptions of bias that it attracts (Langford, Behn and Lie 2017).

10.4 Diversity Concerns

Central to the UNCITRAL reform process, and many other parallel initiatives, are questions about the continued lack of ISDS arbitrator diversity and how the pool of arbitrators in ISDS cases can be expanded. Diversity issues continue to be repeatedly raised by states delegates to the UNCITRAL process as a serious concern, but mainly in regard to gender and nationality-based diversity. Scholars have repeatedly pointed to other homogenous attributes of ISDS arbitrators that would benefit from diversification, such as, inter alia, age, language, legal training, education, background, and experience (Bjorklund et al 2020; Franck et al 2017; Langford, Behn and Lie 2017) – and have continually criticized the dominance of a small group of arbitrators receiving most of the available appointments in any given year, and thus preventing a new generation of potentially more diverse arbitrators entering the system (St John, Behn, Langford and Lie 2018; Langford, Behn and Lie 2017; Puig 2014).

While the concern over diversity remains, the situation might be improving (Greenwood 2017). The total of 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" (ICSID 2019). Others are less enthusiastic, noting that the shift is primarily evident in certain institutional appointments – which, with the exception of ICSID annulment committee appointments (which commendably are by far the most diverse tribunals being constituted currently), are only ever a tiny fraction of overall appointments in investor–state arbitration (primarily only required when parties or wing arbitrators cannot agree on a presiding arbitrator) (St John, Behn, Langford and Lie 2018). Greenwood attributes the persisting lack of diversity among ISDS arbitrators "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" (Greenwood and Baker 2012). St John, Behn, Langford, and Lie (2018) argue that the sluggishness, especially for party-based appointments, is better attributed to the dominance of a 'prior experience norm' whereby no diversity attribute would ever be able trump previous experience when parties are selecting 'their' arbitrator; and since the arbitrators with the most experience entered the investor–state arbitration system when it was a given that arbitrators would be men from countries in the West, it is somewhat unsurprising that the majority of appointments continue to go to Western men with plenty of previous appointments as arbitrator.

10.4.1 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 (Dezalay and Garth 1996). 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" (Puig 2014). Only 7 percent of ICSID arbitrators were women in this period and this participation of women also suffers from a paradox and double asymmetry: two 'formidable' women, Kaufmann-Kohler and Stern not only held 75 percent of all appointments to women arbitrators up to 2014, but were also the two most frequently appointed arbitrators regardless of gender (Puig 2014). Over time, there has been a slight

improvement in the number of appointments going to women: earlier studies reported that between 3 percent and 7 percent of arbitrators appointed at ICSID are women (Franck 2007; Greenwood and Baker 2015; Van Harten 2012b), while a recent study by St John, Behn, Langford, and Lie (2018), which includes non-ICSID cases and a sample period up to 2017, found that 11 percent of arbitrators are women. Yet, the pattern largely remains and Kaufmann-Kohler and Stern account for 57 percent of all appointments given to women (see Table 10.4).

The top twenty-five women arbitrators in investor–state arbitration also form an elite group. They have all arbitrated more than one case and account for 86 percent of all appointments to women. The remaining thirty-two women arbitrators have only received one appointment in an investor–state arbitration case (St John, Behn, Langford and Lie 2018).

To be sure, this lack of progress in addressing the gender gap is not limited to investor–state arbitration. International courts, state-to-state arbitral tribunals, and commercial arbitration tribunals continue to suffer from a similar lack of gender representativeness, although there is a significant variation between international courts (Grossman 2016). What is surprising is that the fragmented, ad hoc, and frequent nature of investor–state arbitration – which would suggest lower barriers of entry than those for tenured judges – has been unable to absorb the large pool of qualified women in the fields of international economic law, international trade and investment law, and international commercial arbitration (St John, Behn, Langford and Lie 2018).[7] Five of the 25 most active legal counsel in investor-state arbitration are women, as were the majority of the 25 most active tribunal secretaries (Langford, Behn and Lie 2017); and women legal counsel make up approximately one-third of all lawyers working on investor–state arbitration cases (St John, Behn, Langford and Lie 2018). Likewise, the number of women scholars and academics in relevant international law fields is substantial. Thus, despite there being no shortage of eligible women, ISDS tribunals have been remarkably resilient in maintaining their historically gendered character of maleness.

[7] For instance, a recent edited volume put together to celebrate the fiftieth anniversary of ICSID was edited by five women and 29 percent of the 73 contributors were women. Kinnear et al (2015).

Table 10.4 *Reappointments – Top 25 Female Arbitrators in All ISDS Cases (to 2019)*

No.	Arbitrator	Nationality	Chair	Claim	Resp	Annul	All
1	Stern	France	4	1	109	1	115
2	Kaufmann-Kohler	Switzerland	43	17	3	1	64
3	Kalicki	US	11	0	6	4	21
4	Boisson de Chazournes	Switzerland	0	2	13	0	15
5	Malintoppi	Italy	1	0	9	3	13
6	Cheng	Hong Kong	3	0	0	8	11
7	Banifatemi	France	3	3	2	0	8
7	Joubin-Bret	France	0	0	8	0	8
8	Reed	US	5	0	1	0	6
8	van Houtte	Belgium	3	1	0	2	6
8	Low	US	3	0	1	2	6
9	Donoghue	US	2	1	0	2	5
9	Hanefeld	Germany	2	0	1	2	5
10	Vilkova	Russia	2	1	1	0	4
10	Konrad	Germany	2	1	1	0	4
11	Comair-Obeid	Egypt	2	0	0	1	3
11	Stanivuković	Serbia	0	0	3	0	3
11	Ruiz Fabri	France	0	0	3	0	3
12	van Leeuwen	Netherlands	1	1	0	0	2
12	Smith	US	0	0	2	0	2
12	Dimolitsa	Greece	0	0	0	2	2
12	Giovannini	Switzerland	0	0	2	0	2
12	Lamm	US	0	1	1	0	2
12	Gill	UK	1	1	0	0	2
12	Pinto	Argentina	0	0	1	1	2

Source: St John, Behn, Langford, and Lie (2018)

As foreshadowed, St John, Behn, Langford, and Lie (2018) argue that the absence of women arbitrators is primarily attributable to the 'prior experience' norm. The lighter grey color in the bars in Figure 10.4 show how few new entrants obtain appointments in investor–state arbitration each year; the vast majority of all appointments made yearly are by those individuals that have acted in an investor–state arbitration case

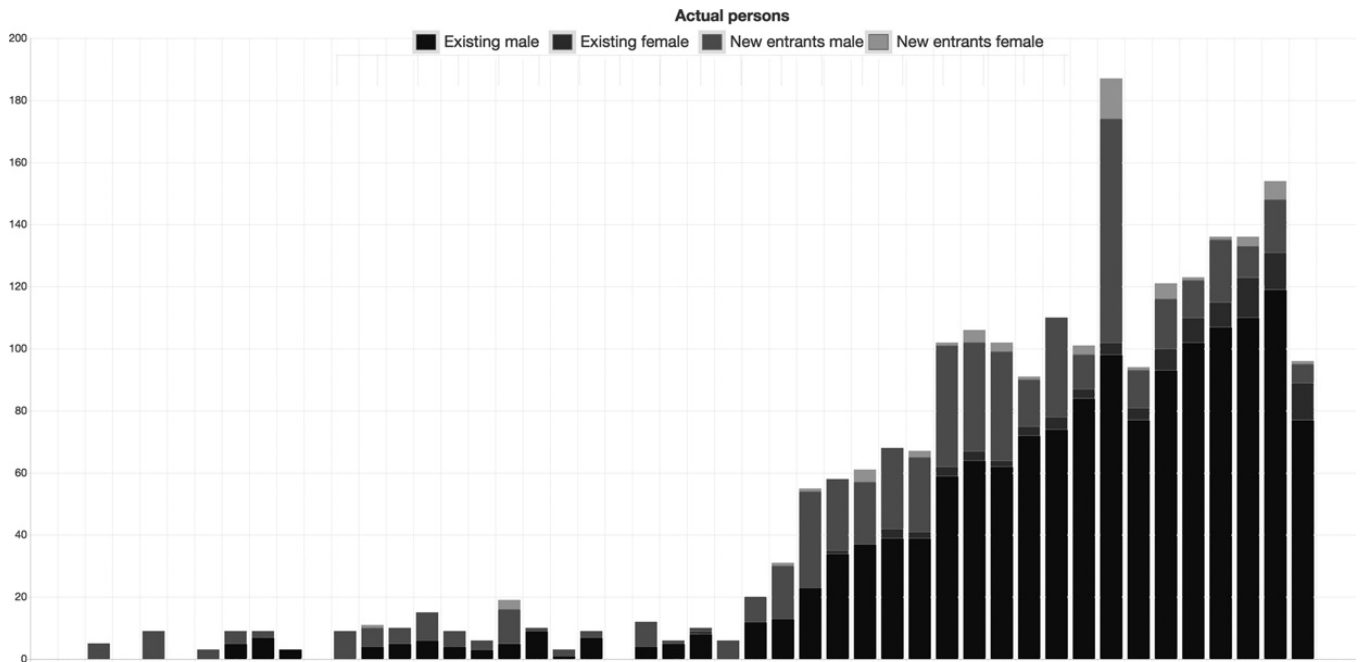

Figure 10.4 New Entrants by Year and Gender (All ISDS Cases to 2017)
Source: St John, Behn, Langford and Lie (2018)

previously. Since only 11 percent of appointments each year go to new entrants, the number of women arbitrators entering the field each year will be extremely slow (St John, Behn, Langford and Lie 2018). This attests to the system of party appointment entrenching existing arbitrators and limiting opportunities to new entrants – whether they be men or women (although women new entrants have only received a small share of the total new entrant appointments available in the past few years).

10.4.2 Nationality-Based Diversity

Turning to the 'pale' dimension in the cadre of 'stale, male and pale' professional arbitrators, studies with relatively large sample sizes show that 74 percent of arbitrators and all but three of the top 25 most frequently appointed arbitrators, labeled as 'powerbrokers' in the ISDS system, hail from Western states (Langford, Behn and Lie 2017). Yet, as discussed, the majority of investor–state arbitrations have developing and non-Western states as respondent; and these states lose disproportionately compared to developed respondent states (Behn, Berge and Langford 2018; Shultz and Dupont 2015). This can be contrasted with WTO DSM panels, whereby 52 percent of panelists come from developing states (Pauwelyn 2015). The result is that the lack of geographic diversity in investor–state arbitration continues to contribute to legitimacy concerns over the international investment regime and its dispute settlement process (Kaufmann-Kohler and Potesta 2017).

According to Langford, Behn, and Usynin (2021), up to August 2018 in all investor–state arbitration cases, 35 percent of the 695 individual arbitrators that have sat in at least one investor–state arbitration case were from a non-Western state (West and non-West as defined by the United Nations (UN)). However, as Table 10.5 shows, this number falls to 26 percent when the number is calculated by number of appointments (i.e., non-Western arbitrators are reappointed less frequently in comparison with their Western counterparts). Asymmetry continues when arbitrator nationality and the type of appointing actor (i.e., institution versus parties) are disaggregated for non-Western arbitrators. Half of non-Western arbitrators originate from a Latin American or Caribbean state and non-Western arbitrators are predominantly appointed by respondent state parties or through institutional appointments.

But does the diversity of arbitrator nationality matter for outcomes in investor–state arbitration? In an early study based on a limited sample of

Table 10.5 *Non-Western Arbitrators by Appointment and Region (to 2018)*

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

Source: Langford, Behn, and Usynin (2021)

47 investor–state arbitration cases, Franck (2009) found that the development status of the presiding arbitrator's country of origin did not have any statistically significant relationship with outcomes in ISDS cases as measured by the development status of the respondent state. However, in a more recent study based on 231 ICSID cases, Waibel and Wu (2017) found that tribunals with a presiding arbitrator from a developing state was much more likely to dismiss claims on jurisdiction (which favors respondent states) than to accept them, possibly indicating some kind of relationship between arbitrator nationality and outcomes.

Using the PITAD database, Langford, Behn, and Usynin (2021) analyze the effects of both an arbitrator's nationality and their country of dominant residence. The results are mixed. The most significant findings are that the presence of a Western presiding arbitrator is correlated with the greater likelihood of a foreign investor winning (39 percent more likely) but the relationship is not statistically significant. However, a recent study by Puig and Strezhnev (2019) focused on a different outcome: the likelihood that a losing party in a first instance ICSID arbitration will bring an ICSID annulment claim. Using a dataset of all ICSID annulment committee decisions up to 2018, they find that

nationality may matter: finding developing states that lost in their first instance ICSID arbitration were less likely to seek annulment if any arbitrator on the first instance tribunal was from a developing state.

10.4.3 Conclusions on Diversity

The evidence on the absence of diversity in investor–state arbitration is manifest: there is a striking absence across the vectors of gender and nationality. Moreover, the discourse on diversity lacks diversity: multiple diversity characteristics must be considered, not just gender and nationality (Bjorklund et al 2020; St John, Behn, Langford and Lie 2018). Yet, change is sluggish across all features and it is uncertain that the current system is amenable to significant change. Parties have strong incentives to reappoint experienced arbitrators with track records that provide insight into potential leanings (which is problematic for impartiality) – but it also makes entry for a new and more diversified group of arbitrators difficult (Greenwood 2017; Kidane 2017). Arbitral institutions also have a role to play and might actually be the most well situated to appoint a more diverse group of arbitrators, as when tasked with making institutional appointments in ISDS cases (Bjorklund et al 2020; Greenwood 2017); but institutional appointments are not the default and only ever constitute a small proportion of appointments made in a given year. Whether the lack of diversity is a problem for investor–state arbitration depends on how it is measured, but it clearly creates a challenge to the system's legitimacy (which also affects compliance) and some studies suggest a more diverse group of arbitrators may decide differently (Bjorklund et al 2020; Shultz 2020; Friedland and Brekoulakis 2018).

10.5 From Evidence to Reform

The survey reveals an emerging base of evidence for assessing various concerns about ISDS arbitrators and the institution of investor–state arbitration in terms of neutrality, independence, impartiality, and diversity. It is much easier to identify the existence of the latter rather than the former, with various types of bias being notoriously discrete and even subconscious. Many aspects of diversity can be studied through descriptive statistics while determining the independence and impartiality of individuals requires more subtle, often psychological, approaches. Moreover, determining the effects of a diversity deficit remains a fraught empirical

affair. The review does assist in improving knowledge about particular aspects of ISDS that have attracted attention and can provide some guidance, less on what reforms to particular problems might look like, but rather on the identification of problems; and on testing just how problematic or widespread a particular concern is. We can see even from this short survey piece, for example, that some concerns are larger than others; and that some are clear problems in need of systemic reform, while others might not be as widespread or problematic as is perceived.

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