4

The Influence of Law Firms in Investment Arbitration

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4.1 Introduction

'Grand old men'[1] is a common description in scholarly research on the actors in the investor–state dispute settlement (ISDS) system.[2] The term[3] was coined by Dezalay and Garth in their comprehensive empirical study of the international arbitration community.[4] Their pioneering work, based on a large number of interviews with arbitrators and counsel, generated valuable insights into the social and professional networks that constitute the international arbitration system. The study applied Bourdieu's concept of social capital[5] to the arbitration market, revealing how certain groups established and maintained their standing within the system through means of informal networks. The book revealed that these networks were primarily formed by highly educated, mature men, who had received their appointments based on reputation and social

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[1] Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnnational Legal Order* (University of Chicago Press, 1996), p. 34.

[2] See e.g. Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (2013) me>35(2) *University of Pennsylvania Journal of International Law* 431; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) *European Journal of International Law* 387; Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) *Journal of International Economic Law* 301; Catherine A. Rogers, 'The Vocation of the International Arbitrator' (2005) 20(5) *American University International Law Review* 957.

[3] Dezalay and Garth (n. 1), 34.

[4] Ibid.

[5] Pierre Bourdieu, 'The Forms of Capital', in John Richardson, *Handbook of Theory and Research for the Sociology of Education* (Greenwood, 1986), p. 241.

networks built over long, distinguished careers. The network was indeed made up of 'grand', 'old', and, at the time, exclusively 'men'.[6] It is one where appointments are traded between the members of the 'club',[7] and where education, previous experience and status within the network determines who is assigned to the most favourable arbitral positions.

Although Dezalay and Garth's work addressed the arbitration community as a whole, rather than the ISDS system specifically, they described many of the critical elements of what would in the latter decades be components of the legitimacy crisis. In the two decades since it was published, their work has prompted further scholarly debate on the intricate institutional mechanisms of the ISDS system. Some scholars have stressed the lack of geographical, educational and socio-economic diversity among the arbitrators,[8] others have scrutinised the significant male bias in ISDS.[9] The networks and entanglements between individual arbitrators has been mapped,[10] while recent work has investigated the practice of 'double hatting', that is individuals acting as both arbitrators and counsel within the system.[11]

This chapter will likewise investigate the networks and social capital of the ISDS system, building on the studies cited above. However, there is a vital difference to previous work: the present study considers not the individual arbitrators, but the networks and relationships between *individual arbitrators and law firms* that they work with and against, with the goal of illuminating what relevance such relationships have for questions of conflicts of interest, and, as an extension, the perceived legitimacy of the system. By building on the PluriCourts Investment Treaty and

[6] According to the PluriCourts Investment Treaty and Arbitration Database (PITAD), <pitad.org/index#welcome>, the first female arbitrator was appointed in 1999.

[7] Dezalay and Garth (n. 1), 10.

[8] Susan D. Franck et al., 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53(3) *Columbia Journal of Transnational Law* 429.

[9] Taylor St John et al., 'Glass Ceilings and Arbitral Dealings: Explaining the Gender Gap in Investment Arbitration', (2018) *PluriCourts Working Paper*; Giorgetti (n. 2).

[10] Puig (n. 2); Langford, Behn and Lie (n. 2).

[11] Nassib G. Ziadé, 'How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?' (2009) 24(1) *ICSID Review* 49; Philippe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in Chester Brown and Kate (eds.), *Contemporary Issues in International Arbitration and Mediation* (Cambridge University Press, 2012), 19, 28; Behn, Langford and Lie (n. 2).

Arbitration Database (PITAD),[12] which details the involvement of 996 law firms and over 4,000 individuals in the ISDS system, the aim of this chapter is to increase the current insight into the influence and power of law firms in ISDS networks.

The overarching aim of this study is thus: first, to analyse the extent to which law firms can influence and come into potential conflicts of interest with arbitrators in the ISDS system, especially through arbitrator selection processes; second, to analyse how effectively the current conflict of interest rules protect against conflicts between arbitrators and law firms; and, finally, to consider what can be done to reform these rules to protect the ISDS system against such influence.

Specifically the chapter will address the following research questions: What are the actual relationships between the most influential arbitrators and the top law firms, and how might these relationships create real or perceived conflict of interest issues for the ISDS system? To further illuminate these relationships, how can the significance and influence of law firms in the ISDS be identified, mapped and measured, and to what effect?

This chapter seeks to answer these research questions through integrated network, statistical and doctrinal analyses. By utilising this combination of doctrinal and data-driven approaches, this chapter will provide insights into how the law firms influence the ISDS system, particularly in relation to arbitrators, their selection, and the possible impacts on conflicts of interest.

4.2 Conflict of Interest in ISDS

From the outset, it is important to note that this chapter does not seek to evaluate how the law firms *themselves* are subject to conflict of interest rules;[13] rather I discuss whether a conflict of interest can arise through the *arbitrators' relationships with law firms*. In this section, I will primarily discuss general conflict of interest issues, as the current rules and cases do not consider law firms specifically. However, a general discussion is relevant as the challenges raised against arbitrators may be comparable to the potential conflicts of interest embedded in the relationship between arbitrators and law firms.

[12] PITAD (n. 6).

[13] Examples from case law include: *Hrvatska Elektroprivreda, d.d.* v. *Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008; *Rompetrol Group N.V.* v. *Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010.

4.2.1 The Challenge of Law Firms in ISDS

Before delving in to the legal regulations governing conflict of interest, I will briefly outline the role of law firms in the ISDS system. The perceived primary actors in the system are the parties and the arbitrators. The parties will normally consist of a private individual or company on the claimant side, and a sovereign state on the other. The arbitrators, which usually vary from one to three, decide the dispute with binding effect. Beyond these primary actors, we find supporting groups that have become important actors in the increasingly complex system. The most important actors, beyond the aforementioned, are the legal counsel and their adherent law firms. Legal counsel is in practice a prerequisite of the system and litigating a case without counsel is almost unheard of.

Because of the increase in caseloads over the last twenty years, the role of specialised law firms in providing legal counsel has become increasingly important. Law firms largely fall into seven categories: firms consisting of a sole counsel; boutique firms; barrister chambers; local specialised firms (or in many cases local representatives); international Global 100 legal firms; and, finally, specialised legal teams from governments' interior departments.[14] The increased complexity and size of the system requires expert knowledge both of case matter and procedural routines.[15]

The law firms' involvement in ISDS may be briefly summarised through the following timeline:

1. Evaluating the potential of a case, either after being approached by a client, or by approaching a potential client.
2. Preparing briefs and documents for the case.
3. Presenting clients with a choice of potential arbitrators.
4. Litigating the case.
5. Advising on annulment and enforcement proceedings.

This chapter will focus on step 3 – the choice of arbitrator. The arbitrator's views on substantive law, jurisdiction, procedural matters, as well as the arbitrator's relative standing and influence over the other arbitrators on the tribunal, may tilt the outcome of a case in one direction or the

[14] Rodrigo P. Lazo, 'Systems of Legal Defence Used by Latin American Countries in Investment Disputes' (2016) 17(4) *Journal of World Investment and Trade* 562.

[15] Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2014), 2847.

other.[16] We can see from the PITAD database that 629 arbitrators have been appointed within the ISDS system at the time of the data extraction for this study.[17] Choosing the right arbitrator from this pool is part of the law firm's value proposition. However, law firms' influence on arbitral selection arguably constitutes a potential source of conflict of interest: by selecting the right arbitrator, the firm may potentially influence the outcome of the case. Furthermore, it is up to any given arbitrator to accept or decline an appointment, thus a counsel's relationship with an arbitrator may facilitate a client in acquiring the arbitrator that they desire.[18]

This chapter assumes a fundamental premise in all its further argumentation: that arbitrators when conducting arbitrations are to *some* degree influenced by factors other than the black letter of the law. In the general discourse on legal bodies, researchers have argued that legal practitioners are indeed human, and that factors other than law and jurisprudence may have an impact on their decisions.[19] In his 2012 article, Sands, himself a participator in the ISDS system, agreed with the premise that arbitrators may be affected by external circumstances; and as an example presented a compelling argument that when mixing roles, particularly switching between being an arbitrator and a counsel ('double hatting'), a certain bias ensues, even if it is unconscious and un-reflected.

As described in the introduction, Dezalay and Garth introduced the idea of informal networks and social capital as key factors in the arbitral selection process. In 2003, Ginsburg critiqued the focus on social capital in the arbitration market. He argued that a greater emphasis should be placed on how arbitrators utilise network effects to create both insiders and outsiders through the creation of informal networks that share certain key properties.[20] Puig expanded on this idea by applying social network analysis on the currently available data of arbitrators in the ICSID system.[21] In his paper, he illustrates how Ginsburg's networks

[16] Claudia T. Salomon, 'Selecting an International Arbitrator: Five Factors to Consider' (2002) 17(10) *Mealey's International Arbitration Report*.

[17] This chapter is based on case law until the end of 2016.

[18] Born (n. 15), 1680.

[19] Sands (n. 11); Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108(17) *Proceedings of the National Academy of Sciences of the United States of America* 6889; Adam N. Glynn and Maya Sen, 'Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?' (2015) 59(1) *American Journal of Political Science* 37.

[20] Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 *Vanderbilt Journal of Transnational Law* 1335.

[21] Puig (n. 2).

may be expressed and quantified using social network mapping. Specifically, Puig shows how social capital is distributed in a network of arbitrators. This capital may influence both arbitrator selection, and perhaps the choices arbitrators make.[22] While social capital is difficult to quantify, *network capital*, that is the aggregate of social capital embedded in the ties and relations between actors in the system, can to some extent be quantified through various network analyses. As Puig's study was restricted to arbitrators in ICSID cases, it did not address other actors that affect the system. As part of a study to quantify the extent of 'double hatting', Langford, Behn and Lie, applying data from PITAD, expanded on Puig's work to include a more comprehensive list of cases, as well as including expert witnesses, secretaries, and, perhaps most importantly for this study – legal counsel.[23] To capture the relative imoportance of each role and relationship they developed a weighting matrix that factors in both the perceived social capital of the actor and distance of each relationship, and utilising this with analytical algorithms, we could rank every member of the system in terms of network capital.[24]

It is worth noting that both the Puig and Langford, Behn and Lie studies focused exclusively on the individuals of the arbitration system, whether in their roles as arbitrators, counsel, witnesses or secretaries. Simultaneously, Segal-Horn and Dean have argued the rise of what they categorise as *super-elite law firms*.[25] According to the authors, a small selection of Anglo-American firms has through a mixture of international mergers and strategic expansions established themselves as a new category of elite law firms. By expanding on these previous analyses of ISDS actors, this chapter will attempt to identify how law firms in general, and the super-elite law firms in particular, are gaining influence in the ISDS by continuingly increasing their aggregated network capital.

This network capital may provide preferential access to the ISDS community. In a working paper, St John et al. express how the system's preference for network capital, or, in their words, 'preference for historical experience' creates an effect where the inflow of new arbitrators is very limited.[26] While the focus of the paper is on the gender balance of

[22] Ibid.
[23] Behn, Langford and Lie (n. 2).
[24] Ibid.
[25] Susan Segal-Horn and Alison Dean, 'The Rise of Super-Elite Law Firms: Towards Global Strategies' (2011) 31(2) *The Service Industries Journal* 195.
[26] St John et al. (n. 9).

ISDS, their argument that these preferences cement existing structures is highly relevant for the present study.

Moreover, in 2012 Schultz and Kovacs reproduced Dezalay and Garth's study, 15 years later.[27] They claim that the social capital of the arbitrator was a lesser driver for arbitrator selection, and suggested that their perceived skills and experience have become the most important factors in arbitrator selection. It could be argued that this reflects a shift away from the personalised value of social capital, to the more distributed network capital. Highly pertinent to the focus in this chapter, the authors make an interesting finding in the paper: 'Non-association with a law firm' was identified as one of the weakest selection criteria when counsel was selecting an arbitrator to nominate.[28] This indicates that counsel do not appear to be concerned whether arbitrators are associated with a law firm, indicating a potential lack of awareness of conflict of interest issues related to law firms.

An illustration of the conflict of interest issue is the double hatting phenomenon. Langford, Behn and Lie quantified the phenomenon and found double hatting to be frequent and accepted throughout the ISDS system.[29] The actors of the system are, in other words, possibly so used to the tight-knit structure of ISDS that they do not see it as a significant problem. This might further explain the empirical analysis conducted by Giorgetti in her chapter,[30] where she identifies that there have been only 84 challenges out of a total of 1,620 appointments in the ICSID system.[31] Of these 84, only four resulted in the forced dismissal of the arbitrator. While other institutions/rules have higher dismissal rates,[32] this is still a remarkably low number. It should be noted that the count of four may not reflect the reality of the system, as, according to Giorgetti, 30% of challenges resulted in some sort of alteration to a tribunal's composition. One could speculate whether arbitrators, either by accepting that a conflict existed, or by wanting to avoid any perception of conflict, resigned voluntarily.[33] Nonetheless, if we consider that either four (0.2% of all appointments) or 25 (30% of 84 challenges, or 1.5% of all appointments) resulted in changes caused by conflict of interest, this number is still low.

[27] Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth' (2012) 28(2) *Arbitration International* 161.
[28] Ibid.
[29] Behn, Langford and Lie (n. 2).
[30] Chiara Giorgetti, 'Arbitrator Challenges in International Investment Tribunals', Chapter 5 of the present volume; Puig (n. 2), 405.
[31] Includes ICSID cases and ICSID annulments up to 2015.
[32] Giorgetti (n. 30) points out that 22% of challenges under UNCITRAL rules succeed.
[33] Ibid.

Rogers argues that in the eyes of the system's participants, ethics have moved from a peripheral issue to being one of the most prominent subjects of discussion within the arbitral institutions. She contends that the community has recognised that self-regulation is necessary in maintaining the legitimacy of the system.[34]

4.2.2 The Legal Frameworks of ISDS Cases

The system of ISDS is a beast of many heads. It lacks formal coherence, and its mechanisms of conflict resolution are regulated by a myriad of international conventions, municipal laws and formal and informal principles.[35] While the agreements vary based on their signatories, as well as the time of signing, they exhibit many of the same qualities and provisions.

The bilateral investment treaty (BIT) – the dominant underlying legal instrument – does not directly specify the applicable rules. Rather it will list different types of arbitration that are available to the claimant. In a large number of BITs, the party is offered a choice between submitting their arbitration to the International Centre for Settlement of Investment Disputes (ICSID), and participating in ad-hoc arbitration according to the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. If the party chooses the ICSID path, the applicable rules will be those of the ICSID Convention, and the ICSID Arbitration Rules in most cases. If a party chooses the ad-hoc path, the UNCITRAL arbitration rules will apply. In addition, parties may by agreement apply further legal or ethical frameworks such as the International Bar Association's (IBA) Guidelines on Conflicts of Interest.[36]

If one is to summarise the rules on conflict of interest, the most appropriate word would perhaps be 'sparse'. Each set of rules (e.g. ICSID,[37] UNCITRAL,[38] ICC[39]) have their own regulations that address

[34] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014), p. 5.

[35] Born (n. 15), 124.

[36] IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by Resolution of the IBA Council on Thursday 23 October 2014 (IBA Guidelines).

[37] The ICSID Rules have operative and substantive regulations with equal wording to the Convention, hence I have chosen to discuss only the Convention. Please note that several cases discussed below refer to the rules.

[38] The UNCITRAL Arbitration Rules have been subject to multiple revisions. In the jurisprudence below both the 2010 and the 1976 rules have been applied.

[39] International Chamber of Commerce (ICC) Arbitration Rules (2017), Article 14(1); see also Stockholm Chamber of Commerce (SCC) Arbitration Rules (2017), Article 15(1).

how and under what circumstances a party may challenge an arbitrator, and how the remaining arbitrators should handle this challenge.

While the regulations vary slightly in their wording, including at what threshold violation is likely to result in dismissal, they are uniformly brief and clearly leave substantive discretion to the tribunal or institution applying the rules. In addition to the regulations mentioned above, there are several procedural variations between the different sets of rules that will not be discussed further here.[40]

In recent years, several newer BITs and model agreements have introduced innovations within the regulations on conflict of interests. These include clauses that restrict double hatting, increase transparency, and introduce enhanced requirements of disclosure on the part of arbitrators.[41] The ongoing UNCITRAL Working Group III is further discussing these issues in their ongoing reform efforts.[42]

4.2.3 Case Law

While the legal frameworks regulating conflicts of interest are rather sparse and broadly worded, interpretations made by various tribunals may offer some insight into the depth of the rules. It should be noted that each tribunal in ISDS is independent of all others: there are no binding precedents,[43] and no clear and binding hierarchy of authority. As the tribunals are composed of skilled legal practitioners, it is however common for them to seek coherence in the interpretation of law.[44] Tribunals tend to cite and reference other tribunals when they make decisions, so, while there is no formal rule of precedence, there appears to be an informal drive for convergence.

While the last decade has shown a significant increase in arbitrator challenge requests,[45] only a handful of challenges have resulted in the

[40] Giorgetti (n. 30).
[41] See e.g. the Netherlands model BIT (2018) and the Indian model BIT (2016).
[42] See e.g. UNCITRAL working papers A/CN.9/WG.III/WP.151 and A/CN.9/WG.III/WP.152.
[43] Born (n. 15), 3822; Rogers (n. 34), 317.
[44] Rogers (n. 34).
[45] For a general overview, see Catherine A. Rogers and Idil Tumer, 'Arbitrator Challenges: Too Many or Not Enough?' in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Brill: 2015); Born (n. 15), 1895; Baiju S. Vasani and Shaun A. Palmer, 'Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?' (2015) 30(1) *ICSID Review* 194.

removal of an arbitrator.[46] This should not lead to the conclusion that failed challenges indicate the absence of conflicts; rather this may be the result of a relatively high threshold set forth in the current legal frameworks.[47] Certain types of conflict are repeatedly raised by the parties and dismissed by the tribunals. This suggests that the concerns should at minimum be taken into consideration when formulating future rules.

The tribunals in *AWG* v. *Argentina* and *National Grid* v. *Argentina* agree that the term 'justifiable doubt' in UNCITRAL Article 10(1) maintains that the standard must be based on an objective stance.[48] Under the ICSID Convention, the standard is again objective.[49] In addition, these facts must satisfy the 'manifestly' standard – a requirement of clarity set forth in Article 14(1).[50] However, there is variation in the tribunals' stance on whether the rules require alleged facts proven by objective evidence. While the tribunal in *ConocoPhillips* v. *Venezuela*[51] argues that objective evidence must be provided, a later challenge in the same case argues that the ICSID Convention does not require actual proof.[52]

The IBA Guidelines can serve as a voluntary agreement, which the parties may choose to incorporate. No BIT agreements nor any of the major institutional legal frameworks currently incorporate the IBA Guidelines. The IBA Guidelines assign a set of general principles determining when a relationship or action constitutes a conflict of interest, and what types of relationship require disclosure. There is currently little empirical information on the extent of the IBA Guidelines being applied

[46] Giorgetti (n. 30); Rogers and Tumer (n. 45); Born (n. 15).

[47] Giorgetti (n. 30).

[48] *AWG Group Ltd* v. *Argentine Republic*, UNCITRAL Case, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007; *National Grid plc* v. *Argentine Republic*, LCIA Case No. UN 7949, Decision on the Challenge to Mr Judd L. Kessler, 3 December 2007.

[49] For example, *Repsol, S.A. and Repsol Butano, S.A.* v. *Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser, 13 December 2013; *Abaclat and Others* v. *Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014.

[50] *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator, 19 December 2002; *Alpha Projektholding GmbH* v. *Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr Yoram Turbowicz, 19 March 2010.

[51] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, QC, Arbitrator, 27 February 2012.

[52] Ibid; Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014.

in the ISDS system. However, parties in practice never incorporate these into their agreements. [53]

While not directly incorporated, tribunals have made statements on the applicability of the IBA Guidelines.[54] In an arbitral challenge on the case of *SARL* v. *Gabon*, the tribunal indicated that the guidelines have an indicative value,[55] while the tribunal in *Alpha Projektholding* v. *Ukraine* attain that they have a certain value in light of their frequent arbitral use and their relation to the UNCITRAL and ICSID rules.[56] Yet, in *Urbaser* v. *Argentina* the tribunal explicitly points out that while the IBA Guidelines may provide inspiration, they may not be considered part of the legal basis for any decisions (unless agreed upon by the parties), as they are not part of the ICSID Convention.[57] Several other tribunals appear to recognise this duality,[58] that while the IBA Guidelines may provide valuable inspiration, they are not an authoritative legal source.[59]

There are several decisions that deal with the relationship between arbitrators and firms. The issue that perhaps comes closest to this question arose in the cases involving the London-based barrister chambers, Essex Court Chambers. In *Hrvatska* v. *Slovenia*, the tribunal considered a challenge in which the chair arbitrator (Williams) and one party's counsel (Mildon) had 'door tenancy' in the same chambers (Essex Court Chambers). The tribunal concluded that no 'hard-and-fast' rule bars the phenomenon, however it argued that there is 'no absolute rule to the opposite effect'. The tribunal is therefore critical of the lack of disclosure and argues that this is an 'error of judgement'.[60] It should be noted that barrister chambers are not analogous to law firms. The members of a chamber are sole practitioners who share certain facilities

[53] Born (n. 15), 1840; Rogers (n. 34); Rogers and Tumer (n. 45).
[54] Born (n. 15); Rogers and Tumer (n. 45).
[55] *Participaciones Inversiones Portuarias SARL* v. *Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009.
[56] *Alpha* v. *Ukraine* (n. 50).
[57] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator.
[58] For example, *Universal Compression International Holdings, S.L.U.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators.
[59] For example, *Abaclat* v. *Argentina* (n. 49); *ConocoPhillips* v. *Venezuela* (n. 51); *Blue Bank International Trust (Barbados) Ltd* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal.
[60] *Hrvatska* v. *Slovenia* (n. 13). The challenge in this case was actually against the counsel.

and are not financially dependent on each other. Regardless, the tribunal argues that such a relationship may be susceptible to accusations of favouritism, and that this may compromise the integrity and legitimacy of the process and final award.[61] We can observe that the tribunal urges an 'abundance of caution', where full disclosure is presented as an ideal. The tribunal's identification that the integrity and legitimacy of the ruling may be compromised, or at least be questioned, goes to the core of this chapter's key questions. Even though the relationship here in question is *prima facie* rather innocuous, it may prompt a reasonable observer's 'justifiable doubt' as to the legitimacy of the process.

In another challenge, the tribunal in *Saint-Gobain* v. *Venezuela*[62] discusses the potential dismissal of an arbitrator (Bottini), as he has had previous employment in Argentina's legal team. The tribunal argues that as long as the relationship is disclosed, no manifest conflict ensues; but the case raises relevant points. The challenge was raised on the basis that the arbitrator was previously employed by another state. This implies that parties have an impression that all states have certain shared interests, and that to work for one state can potentially bias an arbitrator in favour of all states. This impression may likewise be applicable for law firms when they work for both states and claimants at the same time. While they may not have direct conflicts, as they do not represent the same states, an impression that all states somehow have shared interests persists. As with the previous example, states, as barrister chambers, are not law firms, and would not have the same instructional authorities, nor the potential for information sharing or direct financial interests as individuals in a law firm may have. With this still in mind, I argue that if we accept the argumentation from the previous example, the mere appearance of bias may limit the legitimacy of the tribunal's decision.

The issue of close relationships between arbitrators and parties/parties' counsel has been subject to multiple (albeit unsuccessful) challenges. In *Tidewater* v. *Venezuela*, Stern, one of the most central arbitrators, and one of two 'formidable women'[63] in the ISDS system, was challenged on

[61] Ibid., paras. 20ff.

[62] *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, 27 February 2013.

[63] Puig (n. 2), 410.

the basis that she had received three appointments by the same party in other cases.[64] The tribunal found no grounds for dismissal, pointing out Stern's partaking in several unanimous decisions against the party that appointed her, and thereby indicating her independence. Stern has been the subject of challenges based on similar circumstances – in *Electrabel* v. *Hungary* the claimant remarked upon Stern's continuing relationship with both Hungary and the law firm Arnold & Porter. The tribunal specifically claims that these issues are not sufficient to demonstrate a conflict of interest either by themselves or together.[65] Additionally, the tribunal remarks that the complaining party required 30 pages of descriptions to make their case – hence, in the tribunal's opinion, not fulfilling the 'manifest' requirement in the ICSID rules.

In the context of this chapter, the last comment raises an interesting observation – the tribunal appears to argue that the 'manifest' threshold requires a relation to be clear, easily described and distinguishable.[66] However, such relations are frequently entangled and convoluted. Yet, the tribunal in this example, as well as several others dealing with parallel issues,[67] seem to agree that the mere existence of relationships is not sufficient to put an arbitrator in a state of conflict to establish a conflict.

I would, however, argue that the current rules fail to account for the questions of general legitimacy. While the tribunal's observation of Stern's independence in the above case may be accurate,[68] the case illustrates the question of whether the current rules are sufficient to safeguard the system's perceived legitimacy. The complex web of relations that exist within the ISDS system warrants, in my opinion, a broader discussion on how to untangle and evaluate entwined relationships between law firms and arbitrators.

[64] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010.

[65] *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, 25 February 2008.

[66] Ibid.

[67] For example, *İçkale İnşaat Ltd Şirketi* v. *Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014; *Universal Compression* v. *Venezuela* (n. 58).

[68] *Electrabel* v. *Hungary* (n. 65).

4.2.4 *Concluding Remarks*

The point most relevant to the objective of this chapter is that the legal frameworks regulating conflict of interest address the relationship between law firms and arbitrators only indirectly. In several cases, repeat appointments by the same law firms have been one of the underlying reasons why arbitrators were challenged. In most instances, the concern is related to arbitrators being repeatedly appointed by the same party. In the following analysis, I will investigate whether law firms form increasingly close relationships with certain arbitrators by repeatedly selecting the same individuals to arbitrate their clients' cases.

In this chapter, I argue that neither the underlying rules, nor the current jurisprudence, sufficiently reflect the potential scope of this issue. In the following section, I illustrate that the relationships between leading arbitrators and law firms are more comprehensive than a doctrinal analysis may project. While there are several legitimate and well-founded reasons for law firms reusing known arbitrators, including knowing the arbitrators' quality of work, their position on issues, personal chemistry, work ethic and so forth, a concern remains that frequent interactions may create the potential for conscious and unconscious allegiances, arbitrator bias, increased leniency and sympathy, or antipathies against other actors or opinions, or at the very least the perceptions that such issues are present.

4.3 Empirical Methods

As the current case law and regulations provide only a cursory glance into potential areas of conflict of interest, I utilise various analytical strategies to illuminate the research questions from an empirical perspective: quantitative studies of law firms' choice of arbitrators; and network analysis to determine the interconnections between the firms and arbitrators in the network. While each method provides a complementary perspective on the overarching objective, each method also poses some challenges that must be addressed. In the following, I explain the methods as well as the scope and caveats of this chapter. The empirical basis of the study is data from PITAD.[69]

[69] PITAD (n. 6). This article is based on data validated up to the end of 2016. While newer data is available, I have chosen to utilise the same dataset as Behn, Langford and Lie

4.3.1 Calculating Relations – Statistical and Network Analysis

The empirical analysis contains two integrated studies. The primary study is a computational empirical analysis of the frequency of arbitral reappointment by the leading law firms. In this empirical analysis, I investigate how often the top 25 law firms appoint the top 25 arbitrators, compared to a baseline of a simulated random assignment process. To establish this baseline, I have implemented an algorithm that takes all arbitrators who have two cases or more (and as such could be considered 'qualified'), and assigned them randomly to available arbitral positions. This exercise is repeated 100,000 times for each year between 2000 and 2016. For selecting the top 25 arbitrators Langford, Behn and Lie's ranking is applied, while to establish the top 25 law firms a network analysis of the law firms, based on the same framework as these authors, is developed.[70]

Network analysis has proved to be a useful tool in legal studies, providing new and quantifiable insights into otherwise complex and convoluted data.[71] In network analysis, all data is represented in one of two core elements: nodes and ties. Nodes represent entities such as people, firms, countries or cases. Ties represent and describe the relationship between the nodes.[72] Examples of ties may be working relationships between individuals (nodes), or a law firm's (node) involvement in a case (node). Ties may be uni- or bi-directional – indicating a one-way or reciprocal relationship.

Graphs are usually analysed through visual mapping tools, a computational method called graph traversal, and various index generating algorithms such as PageRank, centrality, HITS rating, etcetera.[73] By using various algorithms on the networked data, it is through rankings

(n. 2), to provide the reader with a comparable set of data. Preliminary review of data available after 2016 does not appear to significantly change the results of this analysis.

[70] Behn, Langford and Lie (n. 2).

[71] Ibid.; Puig (n. 2); Katherine J. Strandburg et al., 'Law and the Science of Networks: An Overview and an Application to the "Patent Explosion"' (2007) 21 *Berkeley Technology Law Journal* 1293.

[72] Brian v. Carolan, *Social Network Analysis and Education: Theory, Methods and Applications* (Sage Publications, 2013), p. 43.

[73] Ibid; Stefan Dobrev, Rastislav Královič and Euripides Markou, 'Online Graph Exploration with Advice', in Even G. Halldórsson et al. (eds.), *Structural Information and Communication Complexity* (SIROCCO, 2012); Lecture Notes in *Computer Science*, vol. 7355 (Springer, 2012), p. 267; Sergey Brin and Lawrence Page, 'The Anatomy of a Large-scale Hypertextual Web Search Engine' (1998) 30(1–7) *Computer Networks and ISDN Systems* 107; Jon M. Kleinberg, 'Hubs, Authorities, and Communities' (1999) 31 (4es) *ACM Computing Surveys*; Heyong Wang et al., 'Estimating the Relative Importance of Nodes in Social Networks' (2013) 21 *Journal of Information Processing* 414.

and relative scores still possible to interpret patterns and information from the processed graphs. One such algorithm is graph traversal, which forms the basis for the network analysis. This is a computational method of 'walking' the graph: visiting each node; recording and correlating its data and then using its ties to determine the nodes relationships. In most cases, the traversal will compute the graph from every possible entry point.[74] A second method of network analysis is applying index-generating algorithms. By counting and compounding the ties between nodes, key metrics are made available. These include PageRank, centrality, and various other eigenvector algorithms.[75] To enhance the comparability with Langford, Behn and Lie's article, I likewise use the HITS (hub) score for the rankings.[76]

It should be noted that most graph-related scoring is relative rather than absolute. Any comparison should as such not be based on the absolute numbers presented, but rather it should use the ranked positions to compare the variations between this chapter and other rankings.[77]

An important differentiation between simple descriptive statistics and the utilisation of graphs is the way data is regressively processed. Most of the scoring[78] presented in section 4.6 does not calculate scores based only on a single dimension for a single entity (e.g. ranks by the number of cases per firm), but regressively counts every possible pathway, from every possible perspective, in relation to every other node in the system.[79] This way of scoring captures in other words not merely the node itself, but its place and importance in relation to every other node.

4.3.2 Scope and Caveats

Four caveats deserve comment. Firstly, the methods and analyses I utilise in this chapter should be seen in the context of its overarching goal; to examine how law firms potentially influence the ISDS system through arbitrator selection; and how effectively the conflict of interest rules protect

[74] Dobrev, Královič and Markou (n. 73); Wang et al. (n. 73).
[75] Dobrev, Královič and Markou (n. 73); Wang et al. (n. 73); Brin and Page (n. 73); Kleinberg (n. 73).
[76] Christian Collberg et al., 'A System for Graph-Based Visualization of the Evolution of Software', in Stephan Diehl (ed.), *Proceedings of ACM Symposium on Software Visualization* (SoftVis, 2003), p. 77; Behn, Langford and Lie (n. 2).
[77] Wang et al. (n. 73).
[78] See Section 4.1 on ranking the law firms. Examples of such algorithms are HITS, centrality, etc.
[79] Wang et al. (n. 73).

the integrity of the ISDS system against such influence. The purpose is therefore not to provide a comprehensive understanding of conflict of interest in general, nor how the rules would apply in specific situations. For a general overview of the rules for conflict of interest I will refer to other scholars' work on the subject.[80]

Secondly, in the present study, I do not consider chronological changes in the dataset. As ISDS is more than 40 years old, analysing it as synchronous may generate some unfortunate inaccuracies, yet preliminary analysis of limited timeframes do not make significant impact to the results.

Thirdly, the use of data-driven analyses, especially when based on non-exhaustive data, also raises source-critical concerns.

Finally, due to the system's confidential nature,[81] this chapter is based on a non-exhaustive dataset. It is beyond the scope of this chapter to evaluate each case in detail, and, even if this was achievable, most of the internal deliberations and actions are not found in official documents, and would thus still create gaps in our understanding of the cases.

However, with these caveats in mind, the use of quantitative data analysis in legal studies is still of significant value. As I seek to demonstrate throughout this chapter, data-driven approaches offer new perspectives and methods, advancing our understanding of the complex, entangled networks in the world of international arbitration.

4.4 Expanding the Perception of Law Firms' and Arbitrators' Relationships through Network and Statistical Analysis

To address the research questions, I will now turn to empirical and network analysis to create a clearer picture of the relationships between arbitrators and law firms. The first analysis investigates the network capital of law firms in relation to the leading arbitrators. By establishing the relative influence of each law firm in the network as whole, I create a top-list for firms.[82] This data is applied in the second analysis to quantify the relations between the top firms and leading arbitrators.

[80] For example, Rogers (n. 34); Giorgetti (n. 30); Born (n. 15), ch. 12.

[81] Cecily Rose, 'Questioning the Role of International Arbitration in the Fight against Corruption' (2014) 31(2) *Journal of International Arbitration* 183, 185; Christoph Schreuer, 'The Future of Investment Arbitration', in Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill, 2011), p. 787.

[82] Mirroring the approach of Langford, Behn and Lie (n. 2).

4.4.1 *Network Ranking of Law Firms and Individuals*

Building on studies from the last two decades that offer a sociological perspective on ISDS,[83] I will in this analysis explicitly challenge the assumption that arbitrators alone have agency in decision-making within the ISDS system. Most of the cited studies have focused on the arbitrators, based on an underlying assumption that these are the main actors in the structure.[84]

In the current enquiry, I have reproduced Behn, Langford and Lie's analysis with one modification: I have collated individual counsel into collective nodes representing their associated law firms, to create a top 25 list not only of individuals, but of the *most influential actors, regardless of the actors being individuals or firms.*

4.4.1.1 Adapting Behn, Langford and Lie's Approach

Ranking law firms based on their influence is a tricky matter. As Langford, Behn and Lie argue, it is necessary to differentiate forms of relationships within the system. I build on the assumption that a certain hierarchy is embedded in the ISDS system.[85] As I am collating multiple individuals into a single abstract entity (i.e. the law firm), a question is how the individuals' scores should be calculated. A particular challenge is the fact that there are large discrepancies in how official documents record the counsel on a given case. While some cases record scores of counsel, others only list lead counsel. To address this bias, I apply a conservative stance where only the most influential counsel, based on the individual scoring from Langford, Behn and Lie's study, in each case from each firm is counted. Additionally, it can be argued that by collating individual counsel into collective nodes, we can better consider the aggregated influence and information within the node.

As with the list of top 25 arbitrators from Langford, Behn and Lie, I use multiple metrics to rank the law firms, namely the HITS hub score, PageRank and a weighted number of outgoing ties. Each of the three variables measure the network influence in slightly different ways. The weighted number of outgoing ties is the most conservative measure, including only the first-degree interactions weighted by importance.

[83] See e.g. Puig (n. 2); St John et al. (n. 9); Langford, Behn and Lie (n. 2); Dezalay and Garth (n. 1).
[84] Puig (n. 2); Langford, Behn and Lie (n. 2).
[85] Langford, Behn and Lie (n. 2).

There is a direct correlation between the number of ties and the number of cases a law firm has been involved in. The two former scores, however, take the whole network into account, estimating the importance of the nodes' relations not only to their closest neighbour, but to the network as a whole.

Crafting such a ranking encompasses some trade-offs regarding accuracy at the individual level. Nonetheless, I argue that this is offset by an improved overall perception of the system, observing law firms as an aggregate, rather than unrelated individuals.

After analysing both arbitrators and the collated law firms in the ISDS system, Table 4.1 presents an alternate ranking for the most influential actors in the system. The list includes six firms, two government ministries and seventeen individuals. Sixteen of the individuals are arbitrators, while one works primarily as a tribunal secretary. The law firms/government ministries are highlighted in table 4.1.

Several results prompt further comment. The influence, that is, the network capital, of the top law firms is comparable to the top arbitrators. While the firms and government ministries do not rank at the very top of the list, their continued presence throughout indicates that their influence is on par with the leading arbitrators. The firms are based, or have significant presence in London, New York or Washington, DC, they work for both claimants and respondents, and all have litigated a significant number of ISDS-cases. Furthermore, all the top-ranked firms are on the Global Arbitration Review (GAR) 100 or Global 100 lists, indicating that the super-elite firms are procuring significant influence in the ISDS system. The two government ministries, Argentina and Venezuela, are both frequent litigants. Consequently, these states have arguably been able to acquire network influence by internalising large parts of their litigation teams.

Finally, while arbitrators populate the top of the list, when we compare the results to Langford, Behn and Lie's list, there are internal shifts in the ranking of the arbitrators' influence. Stern is in my calculation the most influential actor in the system, improving her rank from third to first place. Kaufmann-Kohler's influence is slightly reduced from first to second. In general, arbitrators who frequently work with the most influential firms tend to improve their rankings compared to other arbitrators, a point I will develop further below.

Summing up, the results presented here constitute a useful alternate perspective to counting individual counsel. First, it considers the aggregate of the internal relationships within a firm, where internal

Table 4.1 *Top 25 actors in the ISDS network ranked by HITS (hub)*[1]

Rank	Langford, Behn and Lie (all individuals)	Langford, Behn and Lie (arbitrators only)	
1	3	2	Brigitte Stern
2	1	1	Gabrielle Kaufmann-Kohler
3	–	–	**Freshfields Bruckhaus Deringer**
4	2	4	Yves Fortier
5	5	6	Francisco Orrego Vicuña
6	4	3	V. V. Veeder
7	–	–	**King & Spalding**
8	–	–	**White & Case**
9	–	–	**Government Ministry Argentina**
10	7	5	Charles Brower
11	13	7	Albert Jan van den Berg
12	19	14	Piero Bernardini
13	–	–	**Arnold & Porter**
14	16	12	Marc Lalonde
15	11	8	Bernard Hanotiau
16	14	13	J. Christopher Thomas
17	22	15	Juan Fernández-Armesto
18	15	9	Karl Heinz Böckstiegel
19	–	–	**Government Ministry Venezuela**
20	–	21	Rodrigo Oreamuno
21	–	–	**Foley Hoag**
22	24	10	Vaughan Lowe
23	–	11	David Williams
24	20	–	Gonzalo Flores
25	–	–	**Shearman & Sterling**

[1] The table including HITS (hub), PageRank and Degrees out (weighted) can be downloaded from <pitad.org/assets/LIE_The_Influence_of_Law_Firms_in_ISDS_Tables_and_Illustrations.pdf>.

https://doi.org/10.1017/9781108946636.005 Published online by Cambridge University Press

redistribution of influence must be expected to be relatively accessible. Second, it challenges a tribunal's perception that relationships should merely be considered on an individual-to-individual basis, rather than recognising that firms can to some extent have inherent agency beyond the sum of the individuals that form them.

This analysis should, however, be considered as an addition to, rather than a replacement of, earlier work. By observing the rankings together, we can see how the inclusion of law firms as separate entities shifts and nuances the results. Seeing the ISDS system from both an individual and an institutional perspective allows us to observe a more complex network of influence, which is not being sufficiently addressed in the current legal discourse.

4.4.2 The Relationships between the Law Firms and Arbitrators

Having in the previous section established the firms' and arbitrators' general ranks of influence in the network of actors, I will in this section analyse how often the top law firms appoint the leading arbitrators for cases litigated by the firms. Table 4.2 shows all *direct reappointments* (i.e. the party-appointed arbitrators, also known as 'wing' arbitrators by the top 25 law firms in terms of number of cases. The table is sorted by the number of cases per law firm, and provides the average number of reappointments for the firm.

Two results from this analysis deserve further discussion. First, the average number of reappointments, while not insignificant, is still fairly low. At an average of 1.38 appointments and with a max of 2.15, firms are to an extent varying their selection of arbitrators. Yet, when we consider the most frequent reappointments (see online version of Table 4.2), a different picture emerges. Some of the top firms reappoint the same arbitrators in up to six different cases. While six reappointments of the same arbitrator by the same firm may not necessarily constitute an inappropriately close relationship, given the duration, scale and financial benefits such appointments entail, further discussion is warranted.

Moreover, the number of repeat appointments described above should be seen in relation to the baseline of random selection of arbitrators. Between the years 2000 and 2016 any given arbitrator has on average 0.28 reappointments with the highest random chance at 0.38. Comparing this to the figures for law firm-realted appointments of an average of 1.38, maximum of 2.15 and over six reappointments we can observe a large discrepancy between a random sample and the actual choices of the

Table 4.2 *Direct and indirect reappointments sorted by firms' total number of cases*[1]

Name of firm	Type of firm	No. of cases	Avg no. of *direct* reappointments	Avg no. of *indirect* reappointments
Freshfields	GLOBAL 100	85	1.57	1.45
White & Case	GLOBAL 100	71	1.48	1.39
King & Spalding	GLOBAL 100	66	1.68	**1.54**
Allen & Overy	GLOBAL 100	46	1.32	1.44
Arnold & Porter	GLOBAL 100	43	1.55	1.27
Curtis Mallet	GLOBAL 100	43	1.62	1.27
Shearman & Sterling	GLOBAL 100	41	1.46	1.42
Foley Hoag	GAR 100	35	**2.15**	1.21
Sidley Austin	GLOBAL 100	35	1.73	1.26
Matrix Chambers	Barrister Chambers	35	1.38	1.26
Debevoise & Plimpton	GLOBAL 100	28	1.14	1.16
Essex Court Chambers	Barrister Chambers	26	1.18	1.25
Derains & Gharavi	GAR 100	24	1.29	1.21
Covington & Burling	GLOBAL 100	23	1.23	1.24
Cleary Gottlieb	GLOBAL 100	23	1.40	1.30
Weil Gotshal & Manges	GLOBAL 100	22	1.62	1.24
Dechert	GLOBAL 100	21	1.14	1.32
Clifford Chance	GLOBAL 100	21	1.12	1.08
Todd Weiler	Sole – OECD	20	1.00	1.00
Latham & Watkins	GLOBAL 100	19	1.17	1.17
Baker McKenzie	GLOBAL 100	19	1.31	1.27
Squire Patton Boggs	GLOBAL 100	18	1.88	1.25
DLA Piper	GLOBAL 100	18	1.07	1.17
Winston & Strawn	GLOBAL 100	17	1.09	1.13
Quinn Emanuel	GLOBAL 100	16	1.07	1.06
Volterra Fietta	GAR 100	16	1.20	1.05

[1] Extended versions of the table, including names of the three most frequently reappointed arbitrators, can be downloaded from <pitad.org/assets/LIE_The_Influence_of_Law_Firms_in_ISDS_Tables_and_Illustrations.pdf> (see table 2 for direct appointments and table 3 for indirect appointments).

https://doi.org/10.1017/9781108946636.005 Published online by Cambridge University Press

parties. Certain arbitrators from the top of Behn, Langford and Lie's top 25 list occur frequently in this analysis. The most frequently used and reappointed arbitrator appears to be Stern. Other frequent appearances include Thomas, Fortier and Kaufmann-Kohler.

The analysis in table 4.2 also details the reappointment of tribunal chairs. This category is primarily made up of appointments where the parties agree on chair selection, but also includes a limited number of appointments where the institutions or wing arbitrators have made or suggested a choice for chair. As the individual party only has limited influence and right of refusal, rather than full control over the appointment, I refer to this as *indirect reappointments*.

The selection of arbitrators is slightly more varied for this group, with a result of 1.25 (i.e. each arbitrator is indirectly reappointed 1.25 times by the same law firm on average). The maximum number of repeat appointments is also lower than in the direct appointments, reaching a ceiling at four. As with the previous analysis we see many actors from the top 25 list, including Fortier, Veeder, Crawford and Kaufmann-Kohler.

In table 4.3, I present similar data for the top ten government ministries in terms of number of cases. Government ministries are slightly more prone to reappointments with an average of 1.49 (with a maximum of two) for direct and 1.29 (with a maximum of 1.67) for chair appointments. Similar to the private firms, governments reappoint the same arbitrator six times when appointing directly, but surpass private firms with six chair reappointments (compared to four). This result is slightly surprising, as one might expect private law firms to be more aggressive when it comes to creating and maintaining close relationships.

Finally, I have explored what happens when we consider the relationship between the top 25 law firms and the top 25 arbitrators (Table 4.4). As these two groups of actors account for a significant share of appointments, their continuing interactions are of particular interest when evaluating the impact such engagements have on conflicts of interest, and the perception of system-wide legitimacy. Given their significant network capital, and broad involvement, any perception of conflicts of interest would have impact on a large number of cases, and as such on the legitimacy of the system as a whole.

First, I have examined the *share of appointments* assigned by the firms to the arbitrators. The top 25 law firms assign on average 41% of their direct arbitral appointments (i.e. wing arbitrators) to top 25 arbitrators. A similar pattern is present with indirect appointments, where 40% of arbitral appointments on average is assigned to the top 25 arbitrators.

Table 4.3 *Direct and indirect reappointments sorted by countries' total number of cases*

Country	No. of cases	Avg no. of *direct* reappointments	Avg no. of *indirect* reappointments
Argentina	69	**2.00**	**1.67**
Venezuela	42	1.85	1.47
Spain	32	1.37	1.21
Egypt	28	1.77	1.19
Ecuador	22	1.60	1.41
United States	22	1.00	1.08
Canada	21	1.21	1.08
Mexico	17	1.13	1.17
Ukraine	13	1.50	1.31
Czech Rep.	12	1.50	1.33

[1] Extended versions of the table, including names of the three most frequently reappointed arbitrators, can be downloaded from <pitad.org/assets/LIE_The_Influence_of_Law_Firms_in_ISDS_Tables_and_Illustrations.pdf> (see table 4 for direct appointments and table 5 for indirect appointments).

Thus, there seems to be a trend of law firms preferring top 25 arbitrators for their tribunals.

Second, I have considered the *number of arbitrators* that have received appointments by each of the top 25 firms. On average, the firms either directly or indirectly appointed or approved 14 of the top 25 most influential arbitrators. The top five firms have worked with 20 of the 25 arbitrators; while the leading firm on the list, *Freshfields Bruckaus Deringer* alone has been involved in appointing 22 of the top 25 arbitrators. While this number must be seen in the context of the number of cases these firms are involved in – having more cases naturally leads to a greater use of arbitrators in general – it is clear from the data above that the larger firms maintain close and active relationships with elite arbitrators.

4.4.3 Conclusions

With these analyses in mind, three clear patterns emerge. First, the network analyses indicate strong and consistent relationships between the leading law firms/states and the top 25 arbitrators in the ISDS system.

Table 4.4 *Top 25 law firms' appointment of top 25 arbitrators sorted by number of firms' cases*

Name of firm	No. of cases	% of *direct* reapp. of top 25 arbs. (%)	% of *indirect* reapp. of top 25 arbs. (%)	Avg no. of *indirect* reapps.
Freshfields	**85**	41	33	**22**
White & Case	71	34	37	21
King & Spalding	66	46	34	19
Allen & Overy	46	42	43	18
Arnold & Porter	43	38	42	20
Curtis Mallet	43	24	30	15
Shearman & Sterling	41	37	45	17
Foley Hoag	35	38	29	14
Sidley Austin	35	62	44	17
Matrix Chambers	35	32	41	15
Debevoise & Plimpton	28	40	39	15
Essex Court Chambers	26	54	43	15
Derains & Gharavi	24	39	41	13
Covington & Burling	23	50	39	12
Cleary Gottlieb	23	43	50	14
Weil Gotshal & Manges	22	38	48	13
Dechert	21	47	22	11
Clifford Chance	21	38	48	9
Todd Weiler	20	27	29	6
Latham & Watkins	19	43	52	14
Baker McKenzie	19	29	42	9
Squire Patton Boggs	18	38	**57**	13
DLA Piper	18	53	35	8
Winston & Strawn	17	42	33	11
Quinn Emanuel	16	53	44	12
Volterra Fietta	**15**	41	33	**10**

Second, state employed lawyers and private firms seem to be operating under the same pattern. Third, each of the leading law firms has contributed to the appointment – and hence contributed to the professional interest – of up to 80% of the top 25 arbitrators.

When I identified the top 25 influential agents in section 4.1, I noted that arbitrators who frequently work with the most influential law firms tend to improve their rankings compared to other arbitrators. The cause for this is in part the model itself, as arbitrators obtain fewer connections when all counsel are collated into single law firm entities. However, actors working with influential firms may also benefit from the firms' collective network capital. This observation can be transferred to the present discussion: the top 25 firms and the top 25 arbitrators to some extent form close relationships; the benefits of which I will now explore.

4.5 Discussion – Grand Old Women and Men and Their Friends at the Firm?

The aim of this chapter is to discuss and expand on the suggested hegemony of the 'grand old women and men' of the ISDS system. Through empirical and network analyses, I have throughout this chapter implicitly questioned whether the correct phrase should be 'grand old women and men and their friends at the firm'.

In the doctrinal analysis, I explored the brevity of regulations and case law on law firms and the relationships they cultivate with arbitrators. I highlighted the substantial threshold that such relationships must meet to be perceived as conflicts of interest, and how tribunals address individual connections while regulation on firms–arbitrator relations are nearly absent.

In the network and statistical analysis, I illustrated how law firms have gained a central position in the ISDS network, and that through frequent reappointments they build in theory and most likely in practice strong relationships with the leading arbitrators.

I will now address two larger issues that will be the subject of in-depth discussion. First, I explore how network capital may elevate law firms to a position of de facto gatekeepers, which potentially exposes them to situations where conflicts of interest may intrude. Second, I apply the results from the network and empirical analyses to shed light on how the influential actors appear to reproduce and even cement their influence in the system, and how such cementation may cause conflicts of interest and issues of perceived legitimacy unaddressed by the current legal regulations.

4.5.1 Access to Gatekeepers

Previous studies of social and network capital in the arbitration world argue that individuals with a higher capital may have greater influence on tribunals.[86] This presumes that an arbitrator with higher social capital can draw on this capital in the arbitration, as one of several factors influencing the proceedings. Building on this premise, it would be strategic for a party to select a wing arbitrator with higher social capital than the chair and opposite wing arbitrator. If we accept the premise that arbitrator selection is a key component of success in arbitration, does this shape how clients are able to access certain arbitrators; and, if so, does this make law firms the gatekeepers of the ISDS system?

In practice, achieving an advantage through arbitrator selection requires two things: first, the party needs sufficient knowledge of each arbitrator's network and social capital; and, second, it requires access to a wing arbitrator with these characteristics. For both issues, the party's best strategy would arguably be to go through a top 25 law firm. Consequently, I argue that the top law firms have uniquely positioned themselves as gatekeepers in the ISDS system.

The basic trait that allows the top firms to become gatekeepers is their knowledge of the arbitrators and the system. Previous research provides insight into arbitrator selection,[87] but the academic discourse is likely to be less accessible to infrequent users of the system. Therefore, the ability to pick the 'right' arbitrator is a key asset of top law firms. The empirical and network analyses demonstrate how top firms are uniquely situated to provide such guidance. The analysis shows how the top firms have first-hand experience with the vast majority of top arbitrators. I additionally found that the top law firms selected top 25 arbitrators for almost 40% of their appointments (out of an available pool of at least 629 possible arbitrators). Furthermore, the anlaysis showed how several arbitrators are awarded multiple appointments by the same law firm.

The absence of successful challenges indicates that these relationships, at least as perceived by the tribunals in considering these challenges, do not cross the threshold for impropriety. From the firms' perspective, the

[86] Dezalay and Garth (n. 1); Puig (n. 2).

[87] Dezalay and Garth (n. 1); Schultz and Kovacs (n. 27); Puig (n. 2); St John et al. (n. 9); Behn, Langford and Lie (n. 2).

relationships between firms and arbitrators may be motivated by innocuous reasons such as shared experience; a certain level of trust; and strong working relationships. Given the arbitrators' time constraints as well as their existing relationships with firms, arbitrators may choose to almost exclusively work with firms they have experience with, thus cementing these firms as the arbitrators' gatekeepers.[88]

When changing the perspective from the law firms and clients to that of the arbitrators, the recognition of a small number of law firms as key gatekeepers may create incentives for arbitrators to maintain stable relationships with the firms, perhaps even at the expense of perceived independence. Such perceptions, whether perceived or real, may, when unaddressed, create challenges to the legitimacy of ISDS. In the following section, I continue this discussion, with a focus on how these firms appear to participate in, and benefit from, the closed loop-nature of the ISDS system.

4.5.2 Closed Loops

In their working paper, St John et al. illustrate that the selection of arbitrators is significantly limited by historical selection bias. Each year only 11% of arbitral appointments are awarded to new entrants, while the remaining 89% are awarded to individuals who have had at least one previous arbitral appointment.[89] They see this as a hurdle for gender equality within the system. The paper underlines that, unless the system undergoes fundamental structural changes, gender equality will not be achieved this century. The 'closed loop', that is, self-electing and self-reproducing nature of the system, is a frequent item for criticism and is reflected by descriptions of the system as 'an old boys club' or 'club for rich white men'. When considering St John et al.'s argument in light of the findings of this chapter, I argue that the self-reproducing phenomenon does not apply solely to arbitrators but describes the system in general.

This closed loop phenomenon is further reflected in the distribution of cases between law firms. As a human services business, law firms

[88] There is no data available on how often or why a top 25 arbitrator rejects appointments. A study of such rejections could be a promising avenue of future research that may increase our understanding of the extent of law firms' influence.

[89] St John et al. (n. 9).

typically market themselves on expertise, experience, network and reputation, the latter being largely analogous to network capital. As law firms make gains in these areas, clients have stronger incentives to select these firms. This again gives the firm more ties into the network, making them more frequent selectors of arbitrators. This phenomenon is well illustrated in fgures 4.1–4.3 where we can see that the top firms form a core at the centre of the network together with the leading arbitrators.

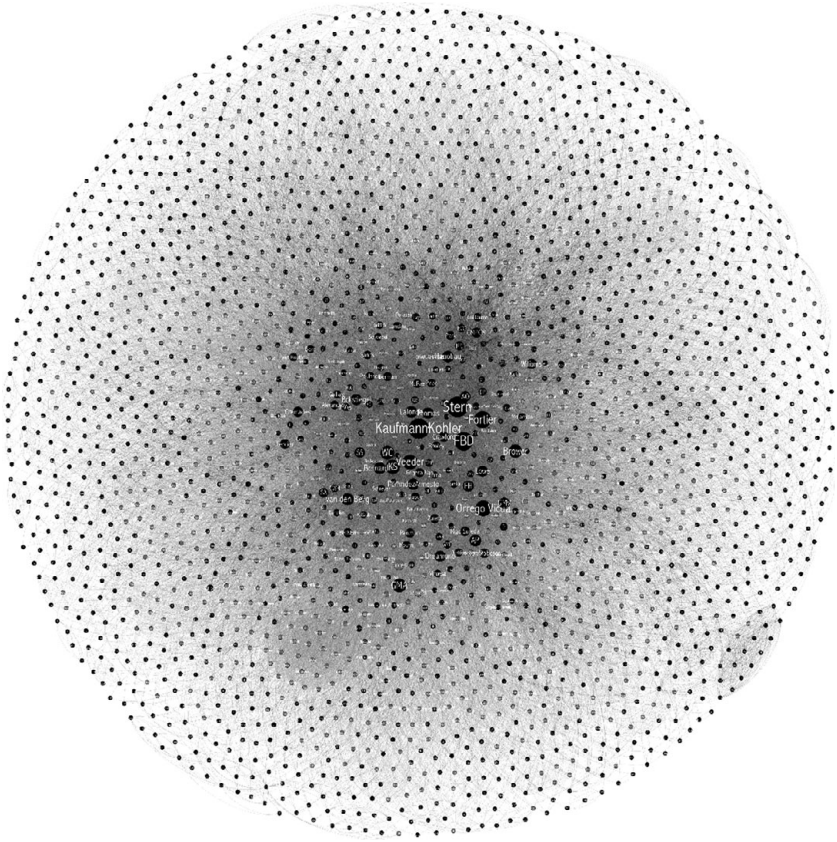

Figure 4.1 The full network between arbitrators and law firms[1]

[1] Electronic versions of figures that can be enlarged can be downloaded from <pitad.org/assets/LIE_The_Influence_of_Law_Firms_in_ISDS_Tables_and_Illustrations.pdf>.

https://doi.org/10.1017/9781108946636.005 Published online by Cambridge University Press

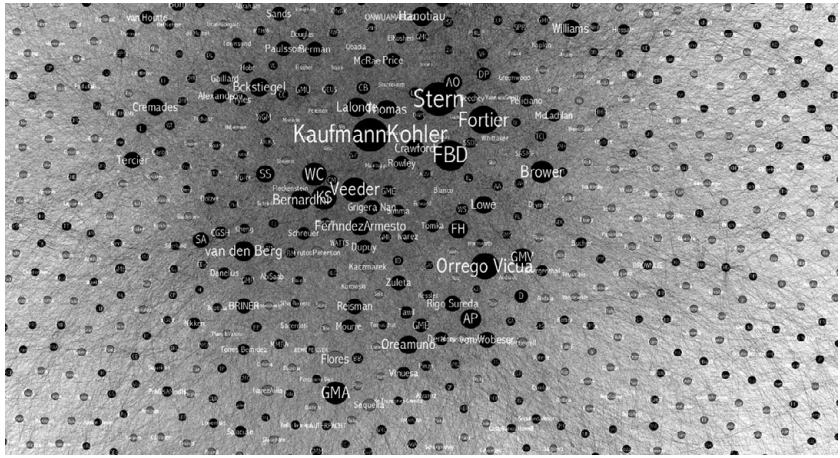

Figure 4.2 A partition of the network of arbitrators and law firms

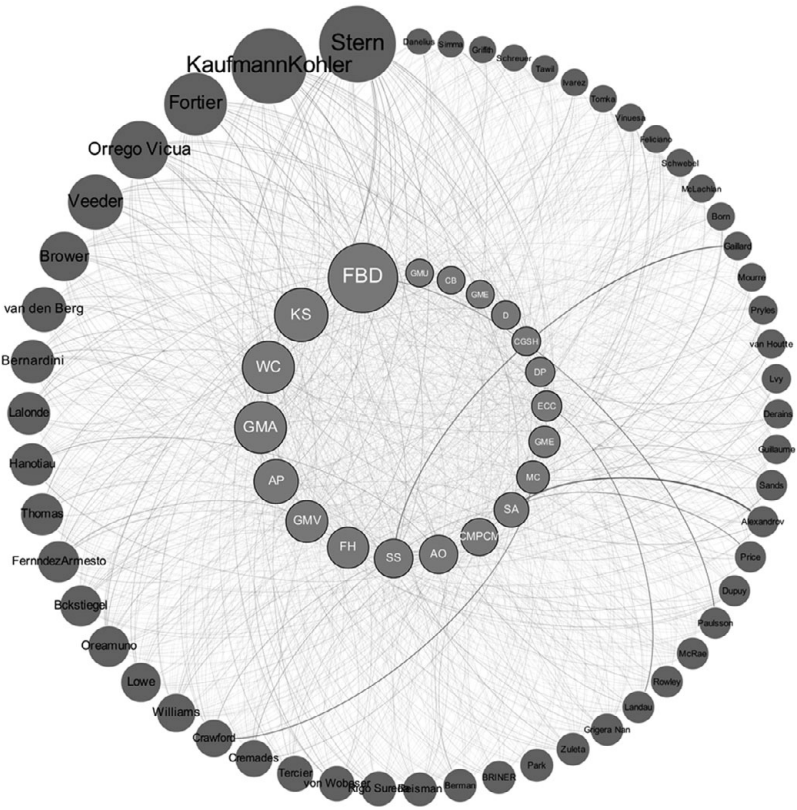

Figure 4.3 Network between top arbitrators and law firms

https://doi.org/10.1017/9781108946636.005 Published online by Cambridge University Press

To summarise, we can describe the trajectory of the closed loop in the following manner:

1. top law firms appoint top 25 arbitrators, thereby strengthening these arbitrators' network influence;
2. in turn, making these arbitrators more attractive to clients and/or law firms;
3. this again exponentially increases the ties of a certain arbitrator, allowing the arbitrator further network capital; and
4. the arbitrators' increased network capital aggregates back into the law firm, making them more desirable for clients compared to firms with less network capital.

In other words, the closed loop is continually increasing the influence of the most influential law firms in the ISDS system.

4.5.3 *Implications for Conflicts of Interest and Perceived Legitimacy*

The objective of this chapter was stated in the introduction: first, to analyse the extent to which law firms can influence and come into potential conflict with arbitrators in the ISDS system, especially through arbitrator selection processes; and, second, to analyse how effectively the current conflict of interest rules protect against conflicts between arbitrators and law firms and what can be done to reform these rules to protect the ISDS system against such influence.

This has proved to be a challenging task, partly due to the vague formulation of the rules and partly because challenges due to law firm influence seem largely absent from case law. I have argued that this absence is not a result of an absence of conflicts, but rather a result of a high and narrowly defined threshold of impropriety, and a system of rules that were not designed to address the influence of law firms. As I have argued throughout the analysis, law firms' influence within the system is significant and widespread. I have further argued that this influence appears to have structural causes and consequences.

By combining the effects of an ever-strengthening mechanism of closed loops and increasing influence of the leading law firms, we can surmise that the frequency of reappointment of leading arbitrators by the leading law firms is likely to increase. From a legitimacy standpoint this

may be perceived as a hindrance to arbitrators' independence and create a fertile ground for situations that could be perceived as conflicts of interest.

While I do not contend that the close-knitted relationships between law firms and arbitrators is necessarily unethical in nature, I do claim that it is problematic that the issue is sparsely addressed in current discourse. Additionally, the fact that parties challenge arbitrators on the grounds of their close relationships with counsel reveals a dissonance between current legislation and the perception among the actors in the ISDS system. In many cases, the number of connections that directly or indirectly entangle law firms and arbitrators may appear incidental on the level of the individual arbitrator, but, nonetheless, for the system as a whole it may create impediments to the perceived independence and legitimacy.

4.6 Concluding Remarks

In a personal statement made to a faculty member at the University of Oslo, a senior arbitrator expressed dissatisfaction with a recent interview. During the last decade, ISDS has received a vast amount of of criticism by the media, academia and states. The impression of a system with 'grand old men' and backroom dealings has been prevailing. While the system's critics are often vocal, the system itself has many defenders, and the ISDS mechanism is incorporated in many newer trade agreements. The findings in this chapter may prove to support some of the critical viewpoints. In many ways, the ISDS system functions like a closed-loop system; there are many entanglements between its key actors; and there is a blurring of lines between the actors. The data presented in this chapter indicate that law firms are significant contributors to this closed-loop system. By empirically mapping the extent of law firms' involvement, we can more accurately assess the extent of their influence, and the potential consequences this has for arbitrators' independence. Extending this through network analysis and an alternate ranking for the most influential actors in the system, including law firms, may make a future debate on these issues more informed. While these issues are likely going to be the subject of broad debate in the coming years, I find that the analysis showing that the top arbitrators and elite law firms form strong entwinements and relationships to be of most concern. This may very well lead to a system

where the law firms become the gatekeepers of the top arbitrators, creating a 'closed loop' that continually increases the influence of law firms in the ISDS system. The lack of legal consideration of less transparent forms for networks and allegiances within the system poses a true challenge to the legitimacy and future of the ISDS mechanism.