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The Politics of International Investment Arbitrators

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The Politics of International Investment Arbitrators

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Arbitrators are the lightning rod for investment arbitration's most contentious political debates. Investment arbitration was originally conceived as a means to depoliticize international investment law. The regime was designed to extricate investment disputes from national courts and gunboat diplomacy, entrusting them instead to a neutral law-bound process.¹ According to its critics, however, investment arbitration is neither neutral, nor a legitimate law-bound process.² They lay most of the blame with international arbitrators.

Critics contend that, instead of law and appropriate policy considerations, investment arbitrators' decisions are often the product of extra-legal factors—from their own ideology, to the nature of disputants, to their personal self-interest.³ For every hypothesis about what extra-legal factors affect investment arbitrators' decisions, there seems to be an equal and opposite hypothesis.

Critics hypothesize that investment arbitrators favor their appointing party in a self-interested effort to increase the likelihood of future appointments;⁴ defenders counter

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1. See Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-state Arbitral Awards: The Re-politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211(2010) (purpose of investment arbitration is to depoliticize investment disputes); Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, in THE WORLD BANK IN A CHANGING WORLD 102-03 (Franziska Tschofen & Antonio R. Parra eds., 1st ed. 1991).
 2. These critiques are summarized in a highly publicized statement drafted by approximately fifty academics from various jurisdictions. Gus Van Harten et al., *Public Statement*, PUBLIC STATEMENT ON THE INTERNATIONAL INVESTMENT REGIME 1 (Aug. 31, 2010), available at <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%202011%29.pdf> (expressing concern that investment arbitration has harmed the public welfare, particularly by “hampering . . . the ability of governments to act for their people in response to the concerns of human development and environmental sustainability”). One sign of the collective effect of these criticisms is that it is now commonplace to speak of a “backlash against” and “legitimacy crisis in” investment arbitration. See generally THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel, et al. eds., 2010); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491 (2009).
 3. In this article, I use the term “extra-legal” to refer to a host of factors that are apart from legal texts, precedents and procedures. These include “ideology, judicial background, strategic reaction to other institutions, the nature of litigants, or the makeup of [tribunals].” Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 877 (2008); M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SINGAPORE YB INT'L L. 19, 30-31 nn.40-43 (2006) (referring to an “arbitration fraternity” that promotes its own interests at the expense of legitimate state interests). In addition to scholarly commentary, several advocacy groups have advanced this position. See, e.g., Pia Eberhardt & Cecilia Olivet, *Profiting from injustice: how law firms, arbitrators and financiers are fueling an investment arbitration boom*, CORPORATE EUROPE OBSERVATORY (Nov. 12, 2012), <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>.
 4. The propriety and potential effects of such “favoritism” is taken up *infra* notes 55-63, and accompanying text.

that arbitrators' strongest self-interest is in developing reputations for impartiality.⁵ Critics challenge arbitration rules that prohibit arbitrators from sharing nationality with the parties because they preclude States from appointing culturally sympathetic arbitrators;⁶ defenders call these same rules a "step in the right direction."⁷ Critics complain that investment arbitrators are a closed "club,"⁸ while defenders claim such critiques are exaggerated.⁹ Critics argue that arbitrators are inclined to render compromise awards so that neither party is dissatisfied;¹⁰ defenders counter that balancing methodologies are "perhaps something quite different than arbitrators traditionally conceived."¹¹

Perhaps the most damning hypothesis is that investment arbitrators systematically value investor interests over State interests, either to increase their own business opportunities¹² or because of their policy preferences favor investor claims over State interests.¹³ Defenders respond, quite vehemently, that partisan decision-making would

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5. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 492 (2009).
 6. William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307 (2007) (identifying as a weakness in investment arbitration tribunals the inability under ICSID rules of States to appoint their own nationals to ensure that arbitrators have sufficient understanding and sympathy for the context of States' decision making).
 7. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339 (2010) (arguing that rules that preclude appointing of an arbitrator who shares the nationality of one party as "a step in the right direction").
 8. David Schneiderman, *Judicial Politics and International Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L L. & BUS. 383 (2010).
 9. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 77-78 (2007).
 10. Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 34 (2008) (arguing that since "arbitrators are commonly chosen (directly or indirectly) and paid by the parties, giving the arbitrators an interest in rendering decisions that will maximize the chances that they will be chosen again in future disputes. The result is an incentive to render compromised judgments that do not badly offend either party.") (cited in Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 49 n.4 (2010)).
 11. Alec Stone Sweet, *Arbitration and Judicialization*, 1(9) ONATI SOCIO-LEGAL SERIES, at 75 (Jan. 20, 2012), available at <http://ssrn.com/abstract=1988923>.
 12. Cf. Andrew Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1282 (2000) (hypothesizing that in domestic arbitration, by ignoring applicable mandatory rules, arbitrators can "develop a reputation as a desirable arbitrator" and thus increase their chances at future selection).
 13. This concern is echoed by many scholars. See, e.g., Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 207 n.134 (2010) (noting that many investment arbitrators "have a background primarily in international commercial arbitration rather than public international law" and that background "may make [them] less familiar with or concerned about public international law interpretive approaches"); Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in APPEALS MECHANISM IN INVESTMENT DISPUTES 39, 41-42 (Karl P. Sauvant ed.,

be counterproductive¹⁴ if not “suicidal”¹⁵ for arbitrators. The allegations of systemic bias have, however, refused to be dispelled by these and related responses.

Most of these hypotheses and counter-hypotheses are based on anecdotal accounts of the system or more general dissatisfaction with, or support for, the substantive policy outcomes of particular cases. However, each hypothesis is predicated on certain often-unarticulated empirical assumptions. These empirical assumptions have remained untested and largely been taken for granted. Recently, an increasing number of scholars have begun testing these various empirical assumptions.

This new research has drawn inspiration from the extensive body of existing empirical literature on domestic and international judges,¹⁶ and (to a lesser extent) domestic U.S. arbitrators.¹⁷ The ostensible purpose of both bodies of research is to evaluate objectively various hypotheses about the potential influence of extra-legal factors in adjudicatory decision-making. Despite the similarities, there are important respects in which the two seemingly similar sets of inquiries differ.

Many distinctive features of investment arbitration affect the nature of empirical inquires. On the one hand, the study of investment arbitrators presents unique methodological challenges. Investment arbitration is a relatively new, rapidly expanding and evolving, and politically charged environment.¹⁸ Investment arbitration awards and related documentation are not systematically available. As a result of these features, data about investment arbitrators is more limited and fragmented than the most-often vast data sets that are relied on for research regarding either domestic judicial decision-making or international judicial decision-making.¹⁹

Another important distinction between research on investment arbitrators and similar research on judges is the potential effect of such research on the object of study. Judicial decision-making exists within relatively stable governmentally established institutions.

2008) (arguing that the fact that because most arbitrators come from commercial arbitration backgrounds, they may not be as sensitive to the public nature of the interests involved); David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L L. & BUS. 383, 411-12 (2010).

14. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 492 (2008-09).

15. Sweet, *supra* note 11, at 21 (“[I]t seems suicidal for arbitrators to proceed . . . with a heavy thumb pressed permanently down on the investors’ side in cases with very high political stakes.”).

16. *See infra* notes 24–80, and accompanying text.

17. *See infra* notes 24–80, and accompanying text.

18. Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L. J. 391, 393 (2012) (noting the explosion in the caseload and the fact that cases are require “complex and politically fraught value-balancing exercises”).

19. The International Court of Justice also has a very limited set of cases to study. In total, it has only “heard 124 contentious cases and has considered twenty-six requests for advisory opinions in its sixty-five-year history, resulting in an annual filing rate of slightly more than two cases—contentious or advisory—per year.” Born, *infra* note 136, at 805 (footnote omitted). Unlike investment arbitral awards, however, all judgments are public.

Empiricists approach judicial decision-making as an existing phenomenon, knowing it is largely structurally impervious to critiques by outside scholars. By contrast, empirical researchers studying the decision-making of investment arbitrators must have a degree of specialized knowledge in the field. Not surprisingly, therefore, scholars conducting empirical research in investment arbitration are rarely passive scholarly observers, but instead often have specific connections to particular actors within, or viewpoints about, the field.²⁰ Relatedly, researchers in investment arbitration often propose specific reforms to the field tied to their research findings.²¹ The stakes for empirical research about investment arbitration, in other words, are high because it specifically aims at and has the potential to promote specific reforms.

This paper examines the state of empirical research about investment arbitrators and related reform proposals. My aim is not to weigh in on specific proposed reforms, but instead to evaluate the potential for empirical research to contribute to development of a more comprehensive understanding of international adjudication. Through the lens of specific reform proposals that draw from empirical studies in the field, this Article analyzes the limitations and potential contributions of empirical research to the development of investment arbitration. This analysis suggests that purportedly neutral empirical inquiries about the potential bias of investment arbitrators may themselves at times be colored by particular policy preferences. The solution, I propose, is to situate and supplement empirical research about investment arbitration with qualitative research and comparative institutional analysis regarding other international tribunals. This approach will help control for the policy interests that can affect empirical inquiries about investment arbitrators. It will also help research about investment arbitration contribute to development of a comprehensive theory of international adjudication.

Part I of this paper begins with a brief sketch of some of the most significant methodological challenges raised generally by empirical research into adjudicatory decisionmaking. It also addresses more specifically how some of those methodological challenges affect empirical research regarding investment arbitrators. The assessment of empirical methodology provides a backdrop to the analysis of issues in the remainder of the paper.

Part II offers an evaluation of selected reforms that have been proposed for

20. It might be interesting to study empirically the profiles of those engaged in empirical research regarding investment arbitration. I would hypothesize that such research would reveal two major trends among the most prominent researchers—either some direct professional experience working in the field (in a firm, as an arbitrator or as a clerk for arbitrator) or active involvement in an international NGO that works on international investment law issues. I am not suggesting that these backgrounds in themselves undermine the credibility of researchers or are perfectly predictive of their views on investment arbitration. I do suggest, however, that they might provide an interesting contrast with the profiles of U.S. scholars who have studied judicial decision-making from a more detached position.

21. Two such proposed reforms are the subject of this article. *See infra* Part II.

investment arbitration based, in part, on some findings in empirical research. In Section A, I examine Albert van den Berg's study of dissenting opinions by party-appointed arbitrators and related proposals to dramatically reduce if not eliminate dissenting opinions.²² Section B examines Gus Van Harten's study of jurisdictional rulings, and related proposal for a permanent International Investment Court.²³ I use both studies to examine some of the methodological challenges identified in Part I, and to illustrate the risks of linking empirical research to specific reform proposals. Part II also analyzes, in comparison with other adjudicatory models, some questions about system design in investment arbitration that are raised by the two studies.

Based on the findings in Part II, Part III argues for integration of research about investment arbitration into a comprehensive theory of international adjudication. Public international adjudication, including investment arbitration, aims at the neutral imposition of legal limitations on the exercise of State power. While they are sometimes compared, they are rarely analyzed together in empirical research.

Part III argues for the broadening of empirical research regarding investment arbitrators to consider other features of system design. It nevertheless calls for caution in giving excessive weight to or predicating proposed reforms on limited findings. To that end, it argues that quantitative empirical findings should be cross-tested through comparative analysis with other international tribunals, and in the context of greater dialogue with other forms of qualitative scholarship.

I. Empirical Research Regarding Investment Arbitrators

Empirical research on adjudicatory decision-making by both judges and arbitrators has become a genre of its own, even within the larger body of empirical legal studies²⁴ and specifically empirical research in international legal scholarship.²⁵ This trend is

22. Albert van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 824 (Arsanjani et al. eds., 2010).

23. Although Van Harten's empirical research supports his call for an international investment court, it came much later than his original calls for the court. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 180-84 (2007); Gus Van Harten, *A Case for an International Investment Court*, Soc'y of Int'l Econ. Law (SIEL) Inaugural Conference 2008, Paper No. 22/08 (2008), available at <http://ssrn.com/abstract=1153424>.

24. Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006); Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713 (2011). Jason Yackee explores in his contribution to this volume a thoughtful, and related, assessment of the need for greater cooperation between legal scholars and social scientists in designing empirical research. See Jason Webb Yackee, *Do States Bargain over Investor-State Dispute Settlement? Or, Toward Greater Collaboration in the Study of Bilateral Investment Treaties*, 12 SANTA CLARA J. INT'L L. 277 (2013).

25. See Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 1 (2012) ("[A] new generation of empirical studies is elaborating on how international law works in different contexts."); Beth A. Simmons & Andrew B. Breidenbach,

evident not only from the sheer volume of published papers, but also the fact that there are now even entire symposia dedicated to the topic.²⁶ This Part examines in Section A the goals of such research, both with respect to domestic and international judges and also with respect to investment arbitrators. In Section B, I survey some of the most significant methodological challenges in all empirical studies of adjudicatory decision-making, and the unique ways that these challenges are manifest in the study of investment arbitrators.

A. Goals and Effects of Empirical Research

Empirical research regarding investment arbitrators derives both inspiration and methodological approaches from empirical research into judicial decision-making. But there are also important differences, both in terms of specific goals and in its impact. This Section examines those differences and their potential implications for empirical research about investment arbitrators.

1. The Draw to Empirics

In the context of national judicial decision-making, two schools of thought have inspired the growing body of empirical research. The first is the anti-formalist critique of legal decision-making.²⁷ The conventional, formalist view of adjudicatory decision-making is that outcomes depend on an almost mechanical application of law to the facts of the case. This view still has significant purchase in certain circles, particularly in civil law systems.²⁸ In U.S. academic and professional communities, legal realists, and later critical legal scholars, have challenged this view of judicial decision-making. They posit that other factors, most notably personal policy preferences of judges, determine outcomes.²⁹ Scholars have pursued empirical research to prove that the realists had the better view and that formalism was an obsolete model for understanding legal decision-making.³⁰

The Empirical Turn in International Economic Research, 20 MINN. J. INT'L L. 198, 200 (2011) (“In the specific area of international economic law, the trend is less noted, but is on the rise.”).

26. See, e.g., Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction to the Symposium*, 32 FLA. ST. U. L. REV. 1001 (2005).

27. See Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decision-making*, 58 DUKE L.J. 1895, 1924 (2009).

28. Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* (2012), <http://www.wipol.uni-bonn.de/lehreveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12>, at 32 (cited with permission).

29. This approach is sometimes characterized as an “attitudinal model” of judicial decision-making. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

30. Edwards & Livermore, *supra* note 27, at 1913 (arguing that “[r]ecent empirical studies . . . [rely on a] premise . . . that either law determines case outcomes, or judicial decision-making is

A second beacon for empiricists, which follows from the first, is concerns about systemic bias. If factors other than neutral application of law to facts affect case outcomes, systems of justice that are presumed to be law-bound and impartial could, instead, be systematically biased in favor of certain parties or outcomes.³¹ The effort to identify the factors that contribute to systemic bias, and to measure the extent to which that supposed bias affects outcomes, has lured even more empiricists to the field.³² Together these two postulates have generated an extensive body of research. The ostensibly neutral yardstick of empirics seems like a perfect tool to evaluate the supposed bias of adjudicatory decision-makers.

2. *Empirical Research in Investment Arbitration*

While empirical scholars have long focused on judges, they only recently trained their focus on investment arbitrators. One important reason is that investment arbitration itself is relatively new, and, consequently, a significant body of publicly available data has only recently become available.³³ Some of the same questions that inspire research into judicial decision-making have also inspired empirical research into investment arbitrators' decision-making. There are, however, some important differences.

In the judicial context, research agendas are generally framed by theoretical orientations, such as anti-formalism or social-choice theory.³⁴ Similar research regarding investment arbitrators, by contrast, is often inspired by, and necessarily feeds into, a much more particularized and driven debate about the legitimacy of investment arbitration.³⁵ Empirical research about judicial decision-making may affect academic discussion, but so far no significant procedural or constitutional reforms have been proposed based on that research. By contrast, empirical research about investment

impermissibly dominated by ideology and politics”).

31. One of the most prominent works in this vein is CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).
32. See Edwards & Livermore, *supra* note 27, at 190.
33. Information about international commercial arbitration is generally much less available. In response to critics and political pressure, investment arbitration has made significant steps to become more transparent. As a result, the body of publicly available information about investment arbitration has grown exponentially in recent years. See Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 KAN. L. REV. 1301 (2006).
34. See Edwards & Livermore, *supra* note 27, at 1915-16.
35. See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 13-23 (2007). A similar divide exists in domestic U.S. arbitration, where advocates for consumer and employee rights in particular regard what has been dubbed “mandatory arbitration” as depriving those claimants of important procedural rights they would have in U.S. courts. This divide has produced a vibrant political debate, and some substantial proposals for structural reform. Empirical research is now playing an increasingly important role in sorting out the nature and true extent of perceived problems with existing practices. See Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 10 CARDOZO J. CONFLICT RESOL. 579 (2009).

arbitration has a much broader audience that extends well beyond the academic community.³⁶ Research often expressly aims at particular factions within this larger audience, not all of whom are sophisticated consumers of empirical findings, seeking to bolster (or stave off) particular proposals for reform.

What is currently referred to as a “legitimacy crisis” in investment arbitration is driven in part by anecdotal impressions, which are sometimes sensationalized and sometimes naively optimistic. Empirical data could, at least theoretically, provide a firmer basis for systematically evaluating the functioning of investment arbitration.³⁷ But the highly politicized nature of the field also creates some risks for how empirical research may be used, or misused.³⁸ While “empirical studies [can] provide facts on which to base legal doctrine and public policy,”³⁹ there is also “a danger that policy makers will take up a study for purposes that the research does not support.”⁴⁰

The allure of the ostensible neutrality of empirical research should not overtake critical assessments of its value in light of the limitations of both particular empirical studies and empirical research as a methodology for measuring phenomenon as complex as legal decision-making. As valuable and important as empirical research can be, it must be read, interpreted, and relied on only with a full understanding of its limitations.

B. Methodological Challenges

Critiques of empirical research into judicial behavior are by now almost as extensive as the original empirical research itself. Systematic reflection has led to some sober assessment about the methodological limitations of such research, as well as the limited implications of its outcomes. At a more structural level, scholars generally acknowledge that definitively proving or disproving systemic bias in adjudication is, quite simply, impossible.⁴¹ That impossibility is inherent in empirical methodology, and in the peculiarities of legal decision-making.

This Part briefly reviews some of the most significant limitations with regard to

36. Empirical critiques of investment arbitration appear to have informed, for example, UNCTAD’s recent publication, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

37. Simmons & Breidenbach, *supra* note 25, at 214 (“First and foremost, empirical studies give researchers the ability to systematically evaluate legal institutions in light of their goals.”).

38. Gus Van Harten, *Fairness and Independence in Investment Arbitration: A Critique of Susan Franck’s “Development and Outcomes of Investment Treaty Arbitration*, SOCIAL SCIENCE RESEARCH NETWORK 1-2 (Dec. 1, 2011), <http://ssrn.com/abstract=1740031> (challenging empirical findings in another study as “inappropriate” in its conclusions that investment arbitration “as a whole, functions fairly” and is not in need of eradication or radical overhaul”).

39. Simmons & Breidenbach, *supra* note 25, at 216.

40. Van Harten, *supra* note 38, at 9 (objecting to the use of empirical research in support of policy positions regarding the U.S. Model BIT).

41. Van Harten’s calls for reform are premised on risk and perception of bias as he acknowledges the impossibility of proving actual bias. *See, e.g.*, Van Harten, *supra* note 38, at 5.

empirical study of judicial and arbitrator decision-making. A systematic survey of empirical methodology is beyond the scope of this article, but this brief perusal of some of the most significant limitations is helpful as a primer for understanding the growing body of empirical research in the area of investment arbitration and its relationship to proposed reforms. The point of this analysis is not to discourage empirical research, or to discount the contributions it can make to our understanding of this emerging field. It is instead an effort to rein in potentially exaggerated importance that may be attributed to specific findings, which at best only provide partial and provisional insights into the phenomena they study.

1. *The Elusive Control of the Most Essential Variable*

One of the most fundamental difficulties with empirical research regarding legal decision-making is that it seeks (often only implicitly) to measure whether and to what extent extra-legal factors have affected the outcome of adjudicatory decisions. It cannot, however, isolate what legal outcome would otherwise have resulted in the absence of any hypothesized influences. In other words, it is impossible to control for the most essential variable (implicitly or explicitly) being tested—the “correct” legal outcome in a particular case.

Absent control for the correct outcome, or at least the relative strength of a particular party’s case, the extent and even existence of deviations from it cannot be known for certain. Some methodological workarounds have been developed in an attempt to control for the strength of a case and the proper outcome.⁴² These workarounds provide proxies for the correct substantive outcome, which have in turn helped sharpen empirical inquiries.

One example of a workaround is in Gus Van Harten’s recent work, which uses a content-based analysis to compare outcomes regarding jurisdiction as either more “restrictive” or “expansive.”⁴³ To avoid comparison with the “correct outcome” he engages in a relative comparative analysis based on content analysis as between outcomes. He finds that arbitrators tend more often to adopt expansive interpretations on issues of jurisdiction, and reasons that such expansive findings tend to favor claimants because they “expand[] the authority of investment treaty tribunals and . . . allow[] more claims to proceed.”⁴⁴ Although Van Harten demonstrates a statistically significant propensity of

42. Notably, Waibel and Wu signal that their future research will seek to control for the relative strength of jurisdictional challenges by having those challenges assessed by a panel of reputable investment arbitration specialists. See Waibel & Wu, *supra* note 28, at 32. See also Van Harten, *supra* note 38, at 214.

43. Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211, 226 (2012).

44. Gus Van Harten, *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern*, INT’L INST. SUSTAINABLE DEVEL., (Apr. 13, 2012),

investment arbitrators to adopt expansive interpretations, all we know is that these decisions are “more expansive” than other alternatives.

These outcomes appear to be more expansive than those preferred by individuals whose policy preferences are for narrower investment arbitration jurisdiction. They do not, however, represent a finding that investment arbitrators’ “expansive” jurisdictional findings are somehow an improper deviation from the “correct” legal outcome. In fact, Van Harten is careful not to characterize these findings as deviating from a correct legal outcome,⁴⁵ but he does offer a hypothesis about a possible motivation for the expansive jurisdictional findings—that “a strong tendency toward expansive resolutions [on jurisdictional issues] enhanced the compensatory promise of the system for claimants[.]”⁴⁶ Despite the “strong tendency” in his data and how well it fits with existing narratives about arbitrator bias, Van Harten acknowledges that other hypotheses might explain the result. At least one possible alternative hypothesis is explored in greater detail below.⁴⁷

2. Correlation and Causation

In addition to an inability to control for correct outcomes, another important challenge for empirical research regarding adjudicatory decision-making is that researchers are hypothesizing about causal relationships, but empirical data can only prove correlation. Specifically, researchers design studies to test for the influence of particular extra-legal factors on legal decision-making and hypothesize which variables might be responsible for that influence. In analyzing the data, researchers often find a correlation between the variables that they have designed to test for. The problem is that observed correlations do not prove causation. Some examples will help illustrate.

In one well-publicized study outside the field of adjudication, researchers found a strong correlation between childhood myopia and infants who slept with the light on.⁴⁸ The correlation was—reasonably, but wrongly—reported as proof that sleeping with the light on as an infant *caused* myopia. A later study found no correlation between lighting and myopia, but instead found a strong correlation between parental myopia and the development of child myopia.⁴⁹ Researchers in the second study made a related inference

http://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/#_ftn10 (last visited Oct. 27, 2013).

45. For example, he states, “If states expected the relevant issues to be resolved restrictively, this has clearly not been the case in practice.” Van Harten, *supra* note 44, at 239. Of course, interpretations that differ from what States expected are not the same thing as an improper interpretation of “ambiguous language in investment treaties.” Van Harten, *supra* note 44, at 249.

46. Van Harten, *supra* note 44, at 214.

47. *See infra* notes 48-63 and accompanying text.

48. Graham E. Quinn et al., *Myopia and Ambient Lighting at Night*, NATURE, May 15, 1999, at 113.

49. Holly Wagner, *Night Lights Don't Lead To Nearsightedness*, THE OHIO STATE UNIVERSITY RESEARCH NEWS, <http://researchnews.osu.edu/archive/nitelite.htm> (last updated Mar. 3, 2000).

(to provide an alternative hypothesis for the correlation identified in the earlier study) that myopic parents were more likely to leave a light on in their children's bedroom.⁵⁰ Myopia, it seems, also interfered with the first researchers' ability to distinguish correlation from causation.⁵¹

Closer to the topic at hand, in the U.S. domestic arbitration context, some striking correlations have led commentators to hypothesize about the existence of causal relationships. For example, some scholars have observed that business claimants have exceptionally high win rates (in excess of over ninety percent!) in consumer debt arbitrations.⁵² Based on the observed correlation in this data, scholars, policymakers, and commentators concluded that consumer debt arbitration was biased or "heavily slanted" in favor of business parties.⁵³ As it turns out, however, creditors had "even higher win rates (ranging from 98.4 percent to 100 percent)" in debt collection cases in national courts.⁵⁴ Bias in the arbitration process, in other words, does not appear to have been the cause of high win rates for companies, or at least the strong correlation does not in itself prove that it was.

Another criticism of consumer debt collection arbitration, which echoes some complaints about investment arbitration, is that repeat-players enjoy beneficial treatment by arbitrators who are anxious to be reappointed and therefore seek to render

50. *See id.*

51. *See id.* Another amusingly optimistic assumption of causation based on a finding of mere correlation is the assertion that frequent sex makes men and women look at least seven years younger. Claire Carter, *Sex Is the Secret to Looking Younger, Claims Researcher*, THE TELEGRAPH (July 5, 2013, 7:30 AM), www.telegraph.co.uk/lifestyle/10161279/Sex-is-the-secret-to-looking-younger-claims-researcher.html. It is at least possible that men and women who look younger are better able and more inclined to attract more sexual partners than those who look much older than them. It is equally plausible, however, that people who are interested in having frequent sex are more attentive to their appearance and hence cultivating a younger look.

52. *See also* Letter from Professors of Consumer Law and Banking Law to Senators Dodd and Shelby and Congressmen Frank and Bachus, Statement in Support of Legislation Creating a Consumer Financial Protection Agency (Sept. 29, 2009) (on file with Hofstra University School of Law) ("Studies have found the arbitrators find for companies against consumers 94 to 96% of the time, suggesting that arbitration providers are responding to the incentive to find for those who select them: the companies that insert their names in their form contracts.") (citing John O'Donnell et al., *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, PUBLIC CITIZEN (Sept. 2007), <http://www.citizen.org/publications/release.cfm?ID=7545>; Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCIENCE MONITOR (July 16, 2007), <http://www.csmonitor.com/2007/0716/p13s01-wmgn.html>).

53. Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASINTGS BUS. L.J. 77, 79 (2010) (citing *Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?: Hearing Before the H. Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 148 (2009) (testimony of David Arkush stating that in success rates and award amounts, AAA arbitrations appear to be heavily slanted in favor of businesses)).

54. Christopher R. Drahozal, *Arbitration Innumeracy*, __ Y.B. ON ARB. & MEDIATION __ (forthcoming) (manuscript at 6), available at <http://ssrn.com/abstract=2101371>.

outcomes favorable to those most likely to reappoint them. This hypothesis seems compelling both because of its inherent logic⁵⁵ and because of its support from anecdotal evidence.⁵⁶ It also seems consistent with observed statistics indicating an exceptionally high correlation between corporate parties and favorable outcomes cited above.

Here, empirical research did find a modest statistical correlation between repeat-players and win rates (though no correlation with respect to percentage of recovery).⁵⁷ This correlation was consistent with the hypothesis of arbitrator bias. Researchers also found, however, that repeat businesses are more likely to settle or otherwise dispose of unmeritorious cases before an award than non-repeat businesses.⁵⁸ The screening out of cases would increase win rates and, the study concluded, was more likely to have produced a repeat-player effect than improper bias among arbitrators.⁵⁹

The lesson of these studies is that while correlation can provide support for a researcher's hypothesis about causation,⁶⁰ it does not prove it. For any reasonably complex phenomenon, such as adjudicatory decision-making, a range of possible hypotheses can explain observed correlations in data.⁶¹ This insight is a cornerstone of scientific methodology. Nevertheless, in discussing their findings, many studies, including studies in investment arbitration, elide discussion of their hypotheses about causation and the empirical correlations observed.⁶² In addition, even careful studies that

55. Numerous commentators have written presuming that, as rational actors, arbitrators necessarily decide cases with an eye to earning future appointments. Although this presumed influence of self-interest is often stated as a matter of fact, it is, in reality, only a hypothesis.

56. See Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051, 1052 (2009) (critiquing the 2007 Public Citizen report entitled, "The Arbitration Trap: How Credit Card Companies Ensnare Consumers" as relying on anecdotal evidence instead of statistical data).

57. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843, 913 (2010).

58. See *id.*

59. See *id.*

60. FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 4 (2007) ("[T]he reader [of empirical studies] should not place undue importance on a finding of statistical significance, because such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation.").

61. See Sisk, *supra* note 3, at 887 ("Statistical analysis simply cannot capture the full dimension of that unique and important human enterprise known as judging.").

62. For example, even if generally careful, Van Harten implies that a higher than expected rate of rulings in favor of investors suggests systemic bias: "If the system is meant to provide an impartial and independent adjudicative process based on principles of rationality, fairness, and neutrality, then the interpretation and application of the law should reflect a degree of evenness between claimants and respondent states in the resolution of contentious legal issues arising from ambiguous treaty texts[.]" Van Harten, *supra* note 44, at 216. Waibel and Wu, meanwhile, include in their stated hypothesis not only the testable aspects of their theories, but a causal explanation, hypothesizing that "Arbitrators from developing countries are less likely to hold the host country liable because they are more familiar with the economic and social conditions in developing countries and host countries the more likely source of future arbitral appointments." Waibel & Wu, *supra* note 28, at 23 (emphasis added). Several other

limit discussion of the actual empirical findings themselves often play down or ignore methodological limitations in stating more general conclusions that may be drawn from the studies.⁶³

3. *Ideology and Policy Preferences*

Another common problem with empirical research into adjudicatory decision-making is that it seeks to test the effect of decision-makers' political ideologies or policy preferences. Such ideologies and preferences are nearly impossible to measure directly. Instead, researchers use indirect sources and proxies for decision-makers' actual policy preferences. In research regarding the U.S. judiciary, for example, common sources for ascribing ideology are the political party of the appointing president,⁶⁴ social background and experience, newspaper evaluations of judges, and prior judicial decisions.⁶⁵ More recently, scholars have questioned whether reliance on ideology (even assuming that proxy measures were accurate gauges of ideology) adequately "distinguish[es] between values as a self-conscious motive for decision-making and values as a subconscious influence on cognition."⁶⁶ This is an important distinction when assessing adjudicatory decision-making because self-conscious imposition of policy preferences teeters close to bias or professional misconduct, whereas subconscious influence is simply part of what it means to be human.

This methodological hurdle has particularly important implications for research in investment arbitration. Critiques of investment arbitration often speak in terms of an over-simplified dichotomy between a "pro-investor" and a "pro-state" orientation.⁶⁷ In

possible hypotheses could explain an observed correlation. *See also* Waibel & Wu, *supra* note 28, at 20 (stating that they are inquiring into whether "the fact that many arbitrators wear another hat as advocates in concurrent ICSID cases for the investor or the host state colors their decision making" not simply whether there is a correlation between identified factors). *See also* Waibel & Wu, *supra* note 28, at 39 ("Our empirical analysis shows that arbitrators appear to be influenced, in some cases, by their policy views and do not simply apply the law as it stands when deciding investment cases.") (emphasis added).

63. *See* Van Harten, *supra* note 38, at 9 (arguing for greater caution on the part of the researcher in the statement of conclusions).
64. CASS R. SUNSTEIN, ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).
65. Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 366 (2005).
66. Dan M. Kahan, *'Ideology in' vs. 'Cultural Cognition of Law: What Difference Does it Make?*, Harvard Law Sch. Program on Risk Regulation, Research Paper No. 08-22, 2008, available at <http://ssrn.com/abstract=1111865>, at 1.
67. *See* Waibel & Wu, *supra* note 28, at 21 (using "pro-investor" to refer to a "worldview" that "attach[es] overriding importance to the protection of investment ("property rights"), over and above other societal goals"). Despite using this terminology, Waibel and Wu acknowledge that "even if an arbitrator is seen as being pro-investor or pro-state, these predispositions do not necessarily correspond to a coherent political philosophy." *Id.* at 36. Relatedly, they acknowledge that policy preferences are not "directly observable," see *id.* at 22, and hence they use as a proxy

contrast to the liberal/conservative dichotomy to describe ideologies that have been used in judicial contexts, this characterization aligns not simply with ideological preferences. Instead, it links presumed ideological preferences with particular parties (investors or States). While self-consciously allowing political ideology to influence legal decision-making may raise questions close to (and sometimes even over) the line of professional propriety, expressly preferring one party over another reaches far over on the wrong side of that line. For these reasons, characterizations of ideology in empirical studies of investment arbitrators raise not only the same methodological problems that arise in studies of judicial decision-making, but also seem to improperly impugn the professional conduct of arbitrators in the absence of actual proof of bias.

4. Over-Simplification of Outcomes

Empirical analysis of inputs and outcomes of an adjudicatory process must be translated into mathematical terms. There are several ways to translate outcomes into dependent variables, though the most common types are binary win-loss outcomes.⁶⁸ This approach has been criticized in the context of appellate cases because there are more than two possible dispositions, including affirmed in part and remanded, affirmed in part and reversed in part, etc.⁶⁹ The complexity of outcomes to legal disputes can lead to coding errors when reducing dispositions to binary outcomes.

A related, and “perhaps the most troubling,” critique regarding research in the U.S. court system is that researchers investigate only the outcomes of decisions, not their content. Thus, a disposition on procedural grounds is treated the same as a decision on the merits.⁷⁰ In addition, this approach is unable to take account of differences between “[o]pinions that reach broad conclusions of law and include significant dicta” versus “opinions that decide cases narrowly on only the arguments presented” and opinions that “hew closely to precedent” or decide cases “on first principles.”⁷¹ Scholars have been developing methodologies for engaging in systematic content-based analysis of legal decisions. To date, however, even newer theories cannot fully account for the role of legal reasoning and the role of precedent and doctrine.⁷²

In a field as new as investment arbitration, the legal texts are inherently ambiguous, and even legal methodologies are very much debated. In this setting in particular, it may well be that the content of decisions, rather than the outcomes, have more to tell us about

repeat appointments by one category of parties or another.

68. See Edwards & Livermore, *supra* note 27, at 1924.

69. *Id.* at 1924.

70. *Id.* at 1926-27.

71. *Id.*

72. Sisk, *supra* note 3, at 884 (“A fully specified legal model will prove eternally elusive because legal reasoning is not formulaic in nature: the reasonable parameters for debate on the determinate nature of text and doctrine cannot be described by number.”).

how the field is evolving.

G. Conclusion

Empirical studies of investment arbitration face all the same challenges as research into national judicial decision-making, as well as some additional challenges related to the nature of the field.⁷³ Investment arbitration is still in its “adolescence.”⁷⁴ It operates in a volatile and politically charged environment. At least some empirical research is formulated with the articulated aim of proving some of the field’s most controversial contentions, specifically that investment arbitrators are biased or are free from bias.⁷⁵ The problem is that, while these contentions cannot be *proven*, an audience eager for data may be too willing to (mis)interpret the research as definitive proof of the policies they seek to promote.⁷⁶

The inability to prove systemic bias in investment arbitration extends beyond the general methodological challenges described above. It is inherent in the nature of empirical research itself. Empirical research tests a hypothesis about the relationship between two or more variables. It can find tentative support for a hypothesis and disprove alternative hypotheses, thereby indirectly supporting the likelihood of the working hypothesis. It can never prove a hypothesis. In Karl Popper’s famous explanation, the hypothesis that “all swans are white” cannot be proven true by any number of observations of white swans, but the sighting of just one black swan may disprove it.⁷⁷ This important limitation is often lost on casual consumers of empirical research or overlooked by over-enthusiastic onlookers.

As noted above,⁷⁸ members of the wider investment arbitration community and its skeptics are avid, but not always sophisticated, consumers of empirical data that might support their policy interests. While a welcome contribution to the important debates of the day, empirical findings should be evaluated against the backdrop of a clear understanding of methodological limitations and without an expectation that any empirical data, no matter how titillating, can definitively resolve the critical questions

73. Yackee, *supra* note 18, at 403 (“[E]mpirically studying epistemic communities [like the international investment law community] poses certain difficulties.”).

74. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 49 (2013).

75. Compare Waibel & Wu, *supra* note 28, with SUNSTEIN ET AL., *supra* note 64, and Eric Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005).

76. Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L.J. 435, 488 (2009) (“While the general initial results are encouraging, one should contextualize them properly, given their limitations. The presence of the two statistically significant simple effects also suggests that there are areas ripe for targeted reform.”).

77. See Michael J. Saks & Jonathan J. Koehler, *The Individualization Fallacy in Forensic Science Evidence*, 61 VAND. L. REV. 199 (2008).

78. See *supra* Section I.A.

facing the investment arbitration regime. As a leading commentator has noted in the judicial context, “[e]mpirical study has yet to demonstrate that any extralegal factor—ideology, judicial background, strategic reaction to other institutions, the nature of litigants, or the makeup of appellate panels—explains more than a very small part of the variation in outcomes (when exploring large numbers of judicial decisions in diverse subject-matter areas).”⁷⁹

The next Part examines two empirical studies that have generated some significant debate in investment arbitration, in part because they have been over-read (at least by some) as suggesting, if not proving, the existence of bias among investment arbitrators.⁸⁰ Part III then draws on the observations in the first two Parts to suggest future directions for research in investment arbitration.

II. Empirical Research Tied to Reform Proposals

Reform proposals for investment arbitration have been proliferating.⁸¹ Some emanate from the most esteemed ranks of investment arbitrators and others from its most ardent critics. This Part assesses two such proposed reforms. Section A begins with proposals to eliminate, or at least greatly restrict, dissenting opinions. Section B takes up the most radical reform proposal of all—elimination of investment arbitration altogether in favor of an International Investment Court.

79. Sisk, *supra* note 3, at 877.

80. Other studies have been over-read as definitively disproving the existence of bias in investment arbitration. For example, Susan Franck’s work is often characterized as disproving bias in investment arbitration, even though she states clearly that “further research is necessary” and that her research provides a basis for “cautious[] optimis[m]” rather than definitive proof. See Franck, *supra* note 76; Kapeliuk, *supra* note 10, at 48 (finding that repeat arbitrators “display no biases and no tendencies to ‘split the difference’”); see also Gus Van Harten, *Reply*, 2010-2011 Y.B. INT’L INV. L. & POL’Y. (replying to Susan Franck, Calvin Garbin & Jenna Perkins, *Response: Through the Looking Glass: Understanding Social Science Norms for Analyzing International Investment Law*, in Y.B. INT’L INV. L. & POL’Y 883 (Karl P. Sauvant ed., 2010-11)).

81. Apart from proposals to eliminate entirely investment arbitration, most proposed reforms aim at procedures in investment arbitration that indirectly rein in investment arbitrators or increase their accountability. The most popular proposed reform is to develop an appellate body to increase consistency in awards. See Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT’L L. & FOREIGN AFF. 179 (2005); Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement: The OECD Governments’ Perspective*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 14 (Karl P. Sauvant & Michael Chiswick-Patterson, eds., 2008). The other important set of reform proposals aim at increasing transparency and third-party participation, a reform recently realized in an important set of UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. See U.N. Comm’n on Int’l Trade Law, UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (July 30, 2013), <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>. For a more general assessment of recent reforms, see Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 L. & BUS. REV. AM. 885 (2007).

A. *Dissents by Party-Appointed Arbitrators*

In a highly-publicized study, leading international arbitrator and scholar Albert van den Berg presented the “astonishing fact” that nearly all dissents written by party-appointed arbitrators are written in favor of the party who appointed them.⁸² This is a number that captures attention and, perhaps predictably, has been cited as a source of support for proposed reforms by Jan Paulsson, another leading arbitrator and scholar, that party-appointed arbitrators be abolished altogether.⁸³ In assessing the importance of van den Berg’s findings and their potential implications for reform proposals, it is essential first to locate them in a larger framework.⁸⁴

1. *Overall Frequency of Dissents*

As a starting point, it is helpful to first look at how frequently dissents are being issued by party-appointed arbitrators. Van den Berg identifies 34 dissenting opinions by party-appointed arbitrators out of a total of 150 decisions studied.⁸⁵ Although we can easily calculate that those numbers translate into an approximately 22% rate of occurrence of such dissents, that calculation does not tell us much. What we need to know is: Is 22% a “big” number?⁸⁶ To answer that question, we need to ask further: “big” compared to what?⁸⁷

Van den Berg appears to suggest that the appropriate baseline for comparison should

82. Albert van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 824 (2010).

83. See Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 FOREIGN INV. L.J. 339 (2010).

84. I do not in this paper undertake either to update van den Berg’s research, which examined awards only through December 31, 2008, or to independently reassess his classification of particular separate opinions as dissenting (as opposed to concurring).

85. In addition, although van den Berg limits his analysis to dissents authored by party-appointed arbitrators, his discussion sometimes may give the reader the misimpression that *only* party-appointed arbitrators draft dissenting opinions. In fact, van den Berg acknowledges that a small, but statistically significant number of dissents are authored by arbitrators who are not appointed by a party. Although van den Berg does not undertake to identify the total number of dissents, he incidentally references to at least seven dissenting opinions authored by arbitrators who were not appointed by a party. Given the small sample size, and the attempt to discern arbitrator incentives for authoring dissents, it is difficult to see how these other dissents can be considered statistically insignificant, at least in understanding overall rates of dissent in investment arbitration. Even if the seven additional dissents not by party-appointed arbitrators are a full accounting of that category of dissents, that would change the overall rate of dissents to 27% and mean that in van den Berg’s sample the rate of overall dissents that are written in favor of appointing parties is significantly lower than the near 100% that van den Berg cites.

86. See Drahozal, *Arbitration Innumeracy*, *supra* note 54, at 4 (quoting MICHAEL BLASTLAND & ANDREW DILNOT, *THE NUMBERS GAME: THE COMMONSENSE GUIDE TO UNDERSTANDING NUMBERS IN THE NEWS, IN POLITICS, AND IN LIFE* (2009)).

87. Drahozal, *Arbitration Innumeracy*, *supra* note 54, at 5.

be nearly zero. He argues against various justifications for dissenting opinions, and concludes that they are only appropriate in extraordinary circumstances, such as if “[s]omething went fundamentally wrong in the arbitral process” or the “arbitrator has been threatened” with physical danger.⁸⁸ This perspective about dissenting opinions may well be tied to van den Berg’s own legal background in the civil law tradition, which historically disfavors (or prohibits) dissenting opinions.⁸⁹ If the appropriate baseline for the number of dissents were near zero, the 22% level could be considered high.⁹⁰

A zero or near-zero baseline would be appropriate in some domestic contexts, particularly those civil law systems that prohibit dissenting opinions or do not have an existing practice of them. A zero baseline, however, does not seem appropriate in investment arbitration because the ICSID Convention expressly authorizes dissenting opinions.⁹¹ Moreover, the existing practice in investment arbitration is consistent with prevailing practices among a range of other international tribunals that incorporate both civil law and common law participants and procedures.⁹²

88. Van den Berg, *supra* note 82, at 831.

89. Van den Berg himself makes this point, quoting French Scholar and delegate to the 1899 Hague Peace Conference Chevillier Descamps, who reasoned that dissenting opinions improperly create “the appearance of there being two judgments.” Van den Berg, *supra* note 82, at 828.

90. A compelling argument could be made, and has been made by van den Berg in correspondence on this issue, that a 22% dissent rate is a “big” number in comparison with rates of dissent in international commercial arbitration. Email from Albert van den Berg to author, Oct. 4, 2013 (on file with author). According to one study, in ICC cases, there are dissents in less than 9% of cases and in LCIA cases in less than 3% of cases. Peter J. Rees and Patrick Rohn, *Dissenting Opinions: Can they Fulfil a Beneficial Role?*, 25(3) *ARB. INT’L* 329 (2009). While these numbers are considerably lower than investment arbitration, at least according to some commentators, lower rates of dissent in international commercial arbitration are appropriate if not expected. See C Mark Baker & Lucy Greenwood, *Dissent - But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances*, 7 *NO. 1 DISP. RESOL. INT’L* 31, 39-40 (2013). While international commercial arbitration is an interesting point of reference, public international tribunals may be a more appropriate baseline because most critiques of investment arbitration are based on its lack of resemblance to public international tribunals, not its commonalities with international commercial arbitration.

91. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Regulations and Rules art. 48(4) (Mar. 18, 1965), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (reprinted Apr. 2006) [hereinafter ICSID Convention].

92. See Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, *GLOBAL ARB. REV.* (2012), http://www.globalarbitrationreview.com/cdn/files/gar/articles/Charles_Brower_The_Death_of_the_Two-Headed_Nightingale_Speech_2.pdf (identifying a range of international tribunals that expressly permit dissenting opinions, including the Iran–United States Claims Tribunal, the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, the Inter-American Court of Human Rights, and the European Court of Human Rights).

Data is not available on the spectrum of dissent rates among international tribunals,⁹³ but the one available example is helpful. According to one study, the European Court of Human Rights (ECHR) included at least one dissenting opinion in 900 out of 6,749 judgments.⁹⁴ While this yields just over a 13% rate of dissents, the study found that in cases that were not routine, cases that made “a significant contribution to the development, clarification or modification of its caselaw,” the rate of dissenting opinions was approximately 42%.⁹⁵ Investment arbitration is still encountering a range of complex and novel issues, which may suggest that this 42% is a helpful baseline for understanding what might constitute a reasonable rate of dissenting opinions.

Judge Charles Brower and Charles Rosenberg, in an extensive review and critique of van den Berg’s findings, have argued that rates of dissent among Supreme Courts in several other countries are an appropriate baseline. Dissents in these courts range from a relatively unusual low of 25% through a high of 62% for the U.S. Supreme Court.⁹⁶ Against this baseline, the 22% rate of dissents among party-appointed arbitrators in investment arbitration seems quite appropriate if not even strikingly low. Statistics from national Supreme Courts are interesting touchstones, but may not be appropriate as a baseline for comparison since each of these courts is composed of more than three members, making unanimity more difficult and the potential for dissents more likely than with three-person tribunals.⁹⁷

If aiming for comparison with three-person tribunals, another potential baseline might be decisions by the three-judge panels on U.S. appellate courts. There, the percentage of dissenting opinions is only 10% for published decisions.⁹⁸ Although considerably lower than the 22% in van den Berg’s study, this difference might be expected given that appellate decisions involve a narrower range of issues and are made within a framework of bounded discretion and assumed facts. Moreover, national legal systems have well-developed bodies of precedent that guide judicial decision-making.⁹⁹

93. Adam Chilton & Dustin Tingley, *The Doctrinal Paradox and International Law*, 34 U. PA. J. INT’L L. 67, 99 (2012) (“[T]here have not yet been any articles or studies that have comprehensively examined dissent rates in international courts.”).

94. Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT’L ORG. 669, 684 (2007) (citing statistics from 1960 through June 30, 2006).

95. *See id.* (noting that many unanimous decisions by the ECHR are very routine, such as the 1,377 judgments considering Italian violations of protections against excessive delays in court proceedings).

96. Brower & Rosenberg, *supra* note 92, at 643 (citing rate of 62% dissents for the U.S. Supreme Court, 25% and 37% for the previous year for the Canadian Supreme Court, and 36% for the Australian High Court).

97. Unlike investment arbitral tribunals, supreme courts are also appellate courts, not courts of first instance. This point is discussed in more detail in the pages that follow.

98. Edwards & Livermore, *supra*, note 27, at 1943.

99. *Id.* at 1944. Some empirical research aims directly at investigating the extent to which precedent operates as a constraining force on judicial decision-making.

While interpreting and applying those sources may produce some disagreement, investment arbitration frequently involves novel legal questions, ambiguous treaty language, facts interpreted through cross-cultural and multi-national filters, and (if assumptions are correct) a deep ideological divide among parties and arbitrators. Previous awards are often cited, and arguably represent a form of soft precedent. But unlike in a system with formal *stare decisis*, the existence of a previous award directly on point does not necessarily provide an answer on the same issue for a subsequent panel.

Against the backdrop of these considerations, a 22% dissent rate arguably might suggest that party-appointed arbitrators are exercising a commendable degree of restraint in the frequency with which they issue dissents. At a minimum, even in absolute terms, the level of unanimous awards (in at least 78% of cases, party-appointed arbitrators do not dissent in favor of the party who appointed them) means that a unanimous tribunal decides the vast majority of cases. This 78% unanimity rate would, at the very least, undermine van den Berg's hypotheses about the emergence of "mandatory" dissents¹⁰⁰ (in which case we might expect dissents in all or almost all cases) or more general concerns that "politics and partisan ideological gamesmanship rule[] the day" for party-appointed arbitrators.¹⁰¹

2. Coding Opinions as Dissents

Brower and Rosenberg also suggest that the actual percentage of party-appointed arbitrator dissents favoring an appointing party is lower than 22%. According to Brower and Rosenberg, at least five opinions that van den Berg classifies as dissents in favor of an appointing party should instead be classified either as concurrences or as not "favoring" the appointing party. The classification of dissents is typical of the potential for selection bias in the coding process. Van den Berg's general skepticism about dissents may have contributed to his interpretation of any disagreement with a majority that ruled against a party-appointed arbitrator's appointing party as "favoring" that party, even if the apparent favor was of little or no value.

Brower and Rosenberg undertake a more substantive and qualitative approach to classifying the dissents. Those dissents that mostly agree with the majority (for example dissenting on only minor points) or that seek to clarify how the award should be understood for future cases, are not counted as dissents favoring the appointing party, even if the position asserted is one that might be, in itself, more aligned with the appointing party's position.

Given the small sample size (only 34 dissents overall), this disagreement over coding

100. Van den Berg, *supra* note 82, at 830.

101. *Cf.* Edwards & Livermore, *supra* note 27, at 1944 (discussing high level of consensus in published U.S. appellate court decisions).

methodology has potentially significant ramifications for van den Berg's final conclusion. Reassignment of five out of 34 cases along the lines suggested by Brower and Rosenberg would have a statistically significant effect on the overall number of dissents authored by party-appointed arbitrators. Even assuming there were no more than five cases that need to be reassigned,¹⁰² instead of nearly 100% of dissents being "in favor" of the appointing party, as van den Berg concluded, the rate would be closer to 85%. This is still a high rate, but not as staggering as the near-100% reported by van den Berg.

Even if the rate is closer to 85%, that rate would still indicate that, when they do dissent, party-appointed arbitrators usually (according to Brower and Rosenberg) or almost always (according to van den Berg) dissent in favor of the party who appointed them. They dissent, according to van den Berg, at a much higher rate in favor of their appointing party than can be explained by chance,¹⁰³ though arguably the sample size is too small for this conclusion to be statistically valid.

Even assuming that chance cannot explain the correlation, however, such a correlation does not in itself suggest misconduct by individual party-appointed arbitrators or systemic disregard of party-appointed arbitrators' professional obligations, including the duty of impartiality.¹⁰⁴ The high correlation could be a result of the fact that party-appointed arbitrators are, consistent with applicable rules, intentionally selected by parties. In selecting arbitrators, parties generally consider arbitrators' background, experience, existing decisional history, and legal and cultural background. They seek, subject to standards for challenge based on bias, to ensure that the arbitrator they appoint will represent on the tribunal their perspectives on the case.

Against this practice for selecting party-appointed arbitrators, it would be surprising if we observed many (any?) dissenting opinions authored by party-appointed arbitrators in favor of the opposing party. Certainly, we would not expect them to issue dissenting opinions for their appointing party at the same level as chance, as van den Berg suggests, because they are not randomly selected. They represent one party's preference for a decision-maker and are selected based on a careful assessment.¹⁰⁵ If party-appointed arbitrators were, with any degree of regularity, writing dissenting opinions in favor of an opposing party, it would mean that parties were doing an exceptionally poor job of identifying party-appointed arbitrators.¹⁰⁶

102. I do not explore here the potential implications of such reclassifications because the data relating to possible reclassification is neither systematic nor complete.

103. Van den Berg, *supra* note 82, at 824.

104. If party appointed arbitrators were "now expected to dissent if the party that appointed him or her has lost the case entirely or in part," we would expect that the rate of party-appointed arbitrators dissenting to be much higher than 22%. Van den Berg, *supra* note 82, at 824.

105. Martin Hunter, *Ethics of the International Arbitrator*, 4 ASA BULL. 173, 179 (1986).

106. This approach to selecting party-appointed arbitrators raises questions about their obligations of impartiality. Notably, Jan Paulsson finds these questions troubling enough to argue for elimination of the practice of so-called "unilateral appointments." See Paulsson, *supra* note 83. For

3. The Benefits of Dissenting Opinions

Dissenting opinions may facilitate structural refinement of decisional methodologies in investment arbitration. Scholars of judicial decision-making have identified the so-called “doctrinal paradox,” which posits that complex cases involving two or more independent issues may be capable of different outcomes by the same decision-makers depending on whether the tribunal decides the case on an issue-based analysis (deciding independent issues on an issue-by-issue basis) or a conclusion-based analysis (deciding cases based on agreement about a final outcome).¹⁰⁷ Given the rapid evolution of international investment law, and the already-profound challenges to inconsistent and indeterminate outcomes, focus is on the doctrinal paradox, and its potential effects may hold specific benefits for the development of investment law.¹⁰⁸

Issue-based decision-making would arguably increase transparency and enhance the legitimacy of arbitral awards by tying outcomes more closely to actual consensus on particular issues, rather than consensus about final outcomes. Proponents argue that issue-based analysis, and more generally clarity about which methodology is being applied, may reduce the potential for political decision-making.¹⁰⁹ Consideration of the effect of the doctrinal paradox, and the potential for introducing an issue-by-issue decisional methodology, is directly attributable to the emergence of dissenting opinions.¹¹⁰

Another way dissenting opinions may contribute to the legitimacy of investment arbitration is in promoting party acceptance of awards. For example, in *Wena Hotels Ltd. v. Egypt*, the arbitrator appointed by Egypt issued a two-sentence statement that he “concur[s] in the Tribunal’s entire award,” including the award of compound interest, but was “not persuaded that compounding should be quarterly.”¹¹¹ The separate opinion on a narrow, and seemingly insignificant issue, arguably underscores the arbitrator’s

an affirmative case in favor of party-appointed arbitrators and an analysis of their impartiality obligations, see CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* (2014) (forthcoming).

107. For a detailed explication of the doctrinal paradox, known to political scientists as “Ostrogorski’s paradox,” see Manuel Conthe, *Majority Decision in Complex Arbitration Cases: The Role of Issue-By-Issue Voting* (2010), http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/awards/Majority_decisions_and_issue-by-issue_voting.pdf.

108. Adam Chilton & Dustin Tingley, *The Doctrinal Paradox and International Law*, 34 U. PA. J. INT’L L. 67, 68 (2012). See also *id.* at 128 (reasoning that, to the extent outcome-based decision-making “creates less intelligible precedent, these concerns have particular force given that the corpus of international law is still in its infancy”).

109. *Id.* at 72-73, 82.

110. See *id.* at 98.

111. See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Statement of Professor Don Wallace, Jr. (Dec. 8, 2000), 6 ICSID Rep. 68, 128 (2004).

substantive agreement with the rest of the tribunal on the balance of the issues.¹¹² In the absence of the separate opinion, the appointing party would not know that the arbitrator affirmatively agreed with the tribunal's decision, and may well assume the award was effectively a 2-1 decision with acquiescence (not affirmative agreement) by its party-appointed arbitrator. Knowing that the arbitrator it selected affirmatively agreed with the substance of an award may contribute to that party's acceptance of the outcome as legitimate.

In sum, van den Berg's study of dissenting opinions raises important questions and has made a significant contribution to this debate. It also, however, demonstrates how starting policy preference can influence empirical analysis and how even striking empirical findings should not be a basis for proposed reforms without more holistic analysis of the substance and function of the phenomenon studied.

B. Proposals for an International Investment Court

Gus Van Harten has proposed the establishment of an international investment court to displace investment arbitration.¹¹³ Van Harten's view, shared by others,¹¹⁴ is that private arbitrators are not suited or appropriate to resolve public law issues.¹¹⁵ Arbitrators' lack of secure tenure and ensured compensation, he argues, undermine the administrative independence that protects independence and impartiality in national courts and public international law tribunals.¹¹⁶ Van Harten believes that a permanent investment arbitration court, in which judges share features with national court judges, could resolve perceptions of bias that derive from these features of investment arbitrators.¹¹⁷ This section challenges some of the assumptions underlying Van Harten's

112. Notably, because it is a relatively small sample, if this and the other cases Brower and Rosenberg argue are not treated as dissents and are subtracted from van den Berg's sample, the overall rate of dissents would be less than twenty percent. Moreover, the percentage of dissents favoring an appointing party would be closer to eighty-five percent not one hundred percent. This latter number still represents a strong correlation between party-appointed arbitrators and dissents favoring the appointing party. As explained below, however, this correlation may well be the result of factors other than rank partisanship.

113. VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 23, at 3.

114. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?* 41 VAND. J. TRANSNAT'L L. 775, 782 (2008) (arguing that "interference with these [national] regulations by unelected and unappointed arbitrators is not consistent with basic principles of democracy").

115. Gus Van Harten, *A Case for an International Investment Court*, Soc'y of Int'l Econ. Law (SIEL) Inaugural Conference 2008 Paper, No. 22/08 (2008), available at <http://ssrn.com/abstract=1153424>, at 16.

116. Some of Van Harten's and others' arguments relate to the lack of reciprocity in the current investment arbitration regime (only investors can bring claims), and the absence of an appellate mechanism to ensure consistency. VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 23, at 20. Those concerns, while not entirely unrelated to the arguments here, they are beyond the scope of this paper.

117. There are other objections that do not relate directly to international arbitrators, such as limited

proposal, particularly those tied to empirical research that he has more recently undertaken.

One of the primary advantages of a permanent international investment court under Van Harten's view is that it would eliminate ad hoc arbitrators in favor of permanent judges. Permanent appointment, it is presumed, structurally ensures independence because it avoids potential incentives that ad hoc arbitrators may have to skew their rulings in a way that will ensure future reappointment or more generally enlarge the body of arbitration cases.¹¹⁸ Although framed as a structural critique of investment arbitration, at least some aspects of Van Harten's proposal appear to be implicitly intertwined with policy preferences and a presumption that those preferences may be more likely to prevail in a more traditional court structure.

One such policy preference, for example, is Van Harten's apparent preference for a restrictive scope of jurisdiction to review States' actions regarding foreign investors. Van Harten hypothesizes that investment arbitrators are more likely to adopt an expansive approach to various contested issues of jurisdiction because of "apparent financial or career interests of arbitrators or by wider economic aims of the arbitration industry."¹¹⁹ The implied negative assumption appears to be that replacing arbitrators with permanent judges will reduce the tendency toward expansive interpretations of jurisdiction.

Van Harten's empirical research demonstrates a tendency of arbitrators to adopt what he has defined as an "expansive" approach to issues of jurisdiction. He concludes that his study offers "tentative support for expectations of systemic bias" in investment arbitration, but he also acknowledges its limitations.¹²⁰ Despite his robust findings on this particular issue, Van Harten acknowledges that "they do not establish all of the steps of logic that would be required to connect the observed tendency to the underlying

access by third parties, continued limits on transparency and the inability of States to bring claims. While important issues about system design, which are also related to Van Harten's proposal, these system features are beyond the scope of this paper.

118. Although Van Harten bolsters his arguments in recent works with empirical claims, his original calls for reform are based principally on perceptions of bias arising from the institutional structure of investment arbitration. *See generally* VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 23, at 175-84. Although Van Harten is careful not to make express empirical claims of bias, some of his arguments about perceptions of unfairness seem to be based on implicit empirical assumptions. *See* Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627, 627 (Stephan W. Schill ed., 2010) ("Investment treaty arbitration is often promoted as a fair, rules-based system This claim is undermined, however, by procedural and institutional aspects of the system that *suggest it will tend to favour* claimants and, more specifically, those states and other actors that wield power over appointing authorities or the system as a whole.") (emphasis added). It is nearly impossible to make characterizations about a legal system that do not implicate some empirical assumptions.

119. Van Harten, *supra* note 43, at 213.

120. *See id.* at 252.

rationales for the hypothesis.”¹²¹ There is, as Van Harten acknowledges, “a range of possible explanations for the results—some of which do not at all entail inappropriate bias.”¹²²

One potential alternative explanation for the expansive approach to jurisdiction observed in investment arbitration is that all adjudicators, both judges and arbitrators, have a proclivity toward expanding their own jurisdiction. That proclivity, in other words, may be tied not to arbitrators’ incentive to be appointed in future arbitrations, but to other more general explanations about the way adjudicators view their function. In fact, judges with permanent and fixed term appointments have, in various national legal systems, been observed as adopting positions and interpretations that expand their jurisdiction.¹²³ The pattern may arguably be even more exaggerated among permanent international tribunals, where there is a prevailing “assumption[] that judges share an interest in expanding the reach of their court and that governments seek to present such occurrences.”¹²⁴ In an ironic historical twist, traditional judicial hostility toward commercial arbitration was the result of national courts guarding their jurisdiction against arbitrator-interlopers.¹²⁵ At least with regard to policy preferences for more circumscribed jurisdiction, a permanent international court may not change the current situation.

Another concern that inspires Van Harten’s proposal for a permanent court is that ad hoc appointment of arbitrators “create[s] apparent incentives for arbitrators to favour the

121. *Id.* at 239.

122. *Id.* at 215.

123. Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT’L L.J. 175, 209-14 (2010) (documenting strategies for expanding judicial jurisdiction in public interest litigation in India, the United States and Israel). “[C]ourts act strategically in expanding their roles in governance and policymaking through the gradual and incremental process of case-by-case dispute resolution, by occasionally accommodating the political interests or agenda of political elites, and while simultaneously broadening jurisdiction and its own remedial powers.” *Id.* at 210.

124. Voeten, *supra* note 94, at 671 (“[S]cholars have argued that the rulings” of various courts including the ECJ and the WTO Appellate Body have “amounted to judicial policymaking” and criminal tribunals have “helped to establish a substantial new body of international law.”); *see also* Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247 (2004).

125. *See* H.R. REP. No. 68-96, at 1-2 (1924) (discussing the jurisdictional “jealousy” of the courts and the resulting refusal to enforce arbitration agreements) (*cited in* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 92-93 n.5 (2012)); *see also* John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 224 (1986) (analyzing courts’ centuries-long struggle by the early courts for jurisdiction and their consequent unwillingness to surrender it). In England, however, it may also have been related to English judges’ almost complete reliance on fees from cases for their income, which meant that arbitrators were unwelcome competitors. *See id.*

class of parties (here, investors) that is able to invoke the use of the system.”¹²⁶ His argument for a permanent court, echoed by others, appears to be informed by an assumption that members might be more likely to demonstrate deference to States and their legitimate State interests.¹²⁷ This hypothesis is, in turn, based on certain assumptions about both the nature of international courts and the composition of the judiciary of a potential permanent investment court.

Van Harten and others who advocate for a permanent investment court seem to assume that judges would be drawn from something other than the pool of existing investment arbitrators, or from among a group of professionals with markedly different professional profiles.¹²⁸ A sudden willingness by States to put forward an entirely new slate of investment judges who can replace investment arbitrators, and have a more State-sensitive outlook, may be overly optimistic.¹²⁹

At a more fundamental level, Van Harten’s and other critics’ calls for creation of a permanent international investment court are premised on a general gestalt that such courts would better serve the interests of States than ad hoc tribunals. Numerous commentators who have been examining the recent proliferation in international tribunals echo this confidence in permanent international courts.¹³⁰ The assumption about the efficacy and desirability of permanent international courts, however, is subject to debate and not entirely consistent with experience.

Instead, States have a long history of preferring international tribunals in which they

126. Van Harten, *supra* note 43, at 219.

127. *Id.*

128. For example, the vigorous critique of investment arbitration put out by the Corporate Europe Observatory, entitled, *Profiting from Injustice*, critiques investment arbitrators as not having public and government credentials that are necessary to understand States’ positions in adjudicating investment disputes. Of the top 15 arbitrators they identify, however, most do seem to have public international law experience. Stern is a professor of public international law; Schwebel and Brower are former international court judges; and Schwebel, Brower, Vicuna, Lalond, Fortier, and Price all have extensive government service experience. It seems difficult to imagine that these repeatedly appointed arbitrators are so different in temperament or profile than judges who may be appointed to a permanent investment court.

129. For example, many public law scholars express similar frustration that WTO judges fail to account for social concerns, including human rights. This propensity is arguably tied to the fact that judges were selected based on their knowledge of trade law.

130. See, e.g., Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 458 (2000) (“We define low independence, access, and embeddedness as the ideal type of interstate dispute resolution and high independence, access, and embeddedness as the ideal type of transnational dispute resolution.”); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 300-36 (1997) (establishing a multifactor checklist of what qualities are important in an international judicial body); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 904 (2005) (describing the benefits that States derive from “independent” tribunals).

can control, to some extent, the composition of the decision-maker panel.¹³¹ For example, the International Court of Justice (ICJ), which is a permanent court, allows States to determine the identity of the adjudicators (through the ad hoc procedures) and the overall composition of a panel that would hear an individual case.¹³² According to Stephen Schwebel, a former President of the ICJ and frequent arbitrator in investment arbitration cases, the reasoning behind the ICJ's statutory allowance of these "ad hoc chambers" is "to permit the parties to the case to influence both the size and the composition of the Chamber."¹³³ These mechanisms "provide States the comfort they seek . . . that an international court will not venture beyond its assigned mandate."¹³⁴ These control mechanisms are regarded as essential features to keep State parties continuing to use the ICJ for their disputes.¹³⁵

States' interest in controlling the composition of decisional panels has, together with other factors, led to what Gary Born refers to as a "second generation" of international adjudication.¹³⁶ This new generation of tribunals has eclipsed in both numbers and effect traditional so-called "independent" permanent international courts.¹³⁷ One reason for the rise of second generation tribunals, including for some State-to-State disputes that could otherwise go to the International Court of Justice, is that they allow States a degree of control over the adjudicatory decision-maker that eludes them with traditional, independent, permanent tribunals. Most notably, it permits them to control the composition of the tribunal.¹³⁸

While there is undoubtedly a mixed track record among States, those States with sophisticated in-house legal departments or outside legal counsel can be as exacting as investors in effectively managing the arbitrator selection process.¹³⁹ In one telling example, back in the 1980s, when international telephone rates were high, efforts by U.S.

131. Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 419 (2008) (arguing that mechanisms of control "provide States the comfort they seek . . . that an international court will not venture beyond its assigned mandate," and suggesting that when control mechanisms become perceived as inadequate, States will abandon their consent to the jurisdiction of international institutions).

132. Stephen M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT'L L. 831, 834 (1987).

133. *Id.*

134. Cogan, *supra* note 131, at 419.

135. *Id.*

136. Gary B. Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 775-76 (2012).

137. *See id.* at 819.

138. Jason Yackee has argued that party-appointed arbitrators are an imperfect control mechanism, though in arguing for other thoughtful and important potential reforms outside the arbitration process, he seems to discount the value of this control, in part by overstating ethical restrictions on States' ability to select arbitrators. Yackee, *supra* note 18, at 424 (arguing that "increasingly constrained by institutional rules and system norms that impose upon IIL arbitrators stringent standards of impartiality and independence").

139. Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 255 (2007).

counsel at the Iran-U.S. Claims Tribunal to identify and investigate potential judges earned them a call from Washington for racking up exorbitant phone bills!¹⁴⁰ The contrasting example is that, despite recurring pleas from ICSID, less than half of the parties to the ICSID Convention (and disproportionately few from among developing economies) avail themselves of the right to make nominations to the List of Arbitrators.¹⁴¹ One of the primary problems with representation of State interests among arbitrators, therefore, may be the inability of (or lack of interest among) developing States in effectively controlling the composition of investment arbitration panels. This is a serious problem with the investment arbitration regime, but not necessarily one that would be resolved by the creation of a permanent court.

C. Conclusion

While providing an important contribution, some of van den Berg's analysis may be traceable to pre-existing viewpoints that were not effectively separated from methodological choices made in constructing the survey. For example, assumptions about the appropriate baseline for comparing rates of dissenting opinions and the coding of decisions about whether certain dissents favor an appointing party seem to be predicated on assumptions tied to van den Berg's perceptions about the limited utility of dissents.

Van Harten's research is rigorously adherent to objective empirical methodologies, despite his vociferous and oft-articulated critiques of investment arbitration in other scholarship. Van Harten is also careful to disclaim having found proof of bias.¹⁴² Nevertheless, alternative hypotheses might explain some of the statistical correlations identified by Van Harten. While the possibility of alternative theories does not undermine the quality of Van Harten's research, it does suggest that even credible empirical results need to be tested and evaluated in light of other forms of research.

In final conclusion, while this analysis has focused on some aspects of Van Harten's empirical work that are critical of investment arbitration, the cautionary note expressed here is neither unique to his work specifically nor unique to empirical works whose findings support critiques of investment arbitration generally.

140. George H. Aldrich, *The Selection of Arbitrators*, in *THE IRAN-U.S. CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS TRIBUNALS* 65, 67 (David D. Caron & John R. Crook eds., 2000).

141. At present, 108 out of the 158 Member States have made some form of arbitrator nomination. See ICSID, *Members of the Panels of Conciliators and of Arbitrators*, ICSID/10, at 4-6 (Jan. 2013), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&reqFrom=ICSIDPanels&language=English>.

142. See Van Harten, *A Case for an International Investment Court*, *supra* note 23, at 5.

III. The Role of Future Empirical Research in Investment Arbitration

Empirical research has the potential to make meaningful contributions to existing debates about investment arbitration.¹⁴³ Particularly with respect to a regime whose caseload is exploding, whose doctrine is expanding at a breakneck pace, but whose primary objectives and fundamental functions are still hotly contested, empirical research can have an important role. It can test the assumptions that animate the most serious critiques and ardent defenses of investment arbitration. In other areas of international law, empirical research has also proven to be a useful tool for refining “institutional design and practice to enhance international legal institutions’ effectiveness.”¹⁴⁴ The potential contributions regarding arbitrators, however, should not be overstated. Empirical research can neither identify the extent to which extra-legal factors affect arbitral decision-making, nor disprove definitively the effect of those factors. It cannot, in other words, prove or disprove systemic bias in arbitral decision-making.¹⁴⁵

Part I identified some of the most significant methodological challenges faced in doing empirical research about investment arbitrators. These limitations mean that researchers would be well advised to be “less expansive . . . in drawing conclusions from their findings” and more careful in tying specific proposed reforms to empirical findings.¹⁴⁶ Moreover, the limited explanatory power of quantitative models has in other areas prompted even committed empiricists to refocus on qualitative forms of legal scholarship, meaning both theoretical and doctrinal analysis of legal issues.¹⁴⁷ In a similar vein, this Part proposes that future research about the efficacy and system design of investment arbitration expand beyond inquiries into alleged arbitrator bias, integrate other forms of scholarship to cross-test some of the hypotheses that inspire such empirical research, and engage in trans-institutional analysis of international tribunals.

A. Broadening the Scope of Inquiry

Investment arbitrators have been a primary focus of empirical research into investment arbitration for many understandable and legitimate reasons.¹⁴⁸ Arbitrators

143. Franck, *supra* note 9, at 4-5 (“Empirical legal scholarship can and should aid the examination of the current system to test conventional wisdom, dispel myths, and provide data that can promote efficient conflict management.”).

144. Shaffer & Ginsburg, *supra* note 25, at 9.

145. This is a point Van Harten makes repeatedly. For this reason, he predicates his calls for reform not on findings of alleged bias, but rather the perception of bias. Van Harten, *A Case for an International Investment Court*, *supra* note 23, at 1-3.

146. Edwards & Livermore, *supra* note 27, at 1907 (quoting Sisk, *supra* note 3, at 886 n.72).

147. See generally Sisk, *supra* note 3, at 891.

148. Other research into investment law more generally addresses questions about whether or to what

are the most obvious determinants of outcomes, and their professional milieu makes an intriguing target for study. Given this focus, it is perhaps not surprising that when empirical research identifies correlations between particular features of disputes and particular outcomes, the tendency is to attribute observed correlations to systemic bias of arbitrators. While arbitrator bias may be the most obvious hypothesis, it is by no means the only one. Myriad factors other than the arbitrators themselves can and inevitably do affect case outcomes and therefore should be the object of more systematic and sustained empirical study.

Take for example, again, Van Harten's findings that there is a statistically significant correlation between jurisdictional findings in favor of claimants generally, and even more interestingly, in favor of several capital-exporting countries, particularly the United States and the United Kingdom. Van Harten hypothesizes that arbitrators would be "more responsive to the interests of [these claimants]."¹⁴⁹ Although he begins with a working hypothesis of arbitrator bias, upon finding a correlation, Van Harten also notes that several alternative hypotheses may explain the correlation, including:

factual or contextual variations that encourage arbitrators to bend the law in order to assume or decline jurisdiction depending on claimant nationality; ideological preferences that cause arbitrators to be more dubious of the legal arguments of non-Western or capital-importing states and their nationals; variations in the quality of legal representation or the wisdom of appointment decisions among different claimant nationalities; variations in the degree to which specific cases influence interpretations adopted in subsequent cases; disproportionate influence by a small cohort of frequently appointed arbitrators who are represented on many tribunals; structural factors such as the role of appointing authorities in choosing arbitrators; or a complex and varying mix of these and other possible explanations.¹⁵⁰

In the final phrase of this list, Van Harten leaves open the possibility of still other possible explanations.

One possible alternative explanation might be that more exacting fact-finding techniques may be more likely to be pressed by parties or counsel from common law jurisdictions, such as the U.S. and the UK.¹⁵¹ Such techniques may also be used more

extent BITs actually increase levels of foreign investment, and why States enter into BITs. See Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011) (summarizing research into effect of BITs); Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Settlement Provisions*, 54 INT'L STUD. Q. 1 (2010).

149. Van Harten, *supra* note 43, at 224 ("These hypotheses [about jurisdictional interpretations favorable to capital-exporting States] were based on expectations that arbitrators would be more responsive to the interests of major Western capital-exporting states than those of other states due to the relative influence of the former.")

150. *Id.* at 249-250.

151. Conversely, fact-finding techniques may be less of a focus for German parties or less likely to be pressed by civil law trained counsel, which may be a more likely choice for investors from

often and more systematically by private firms, which are attuned to such techniques from commercial arbitration and operating with more extensive budgets, than by States' attorney generals.¹⁵² More exacting fact-finding may help establish stronger factual predicates for jurisdictional findings, and might be an alternative explanation for the correlation observed.¹⁵³

The role of counsel and strength of parties' cases to date have not been important focuses of empirical research. These omissions are particularly striking given some very compelling anecdotal evidence about deficiencies in legal representation among smaller and developing States.¹⁵⁴ With the rise of third-party funding, the effect of counsel and litigation resources is bound to become an even more important variable that warrants more careful investigation.¹⁵⁵ If counsel and legal resources were identified as contributing to disparate outcomes in cases, that finding would suggest very different prescriptions for reform than if the disparate outcomes were attributable solely to arbitrator bias. For this reason, they are important areas for future empirical study.

Relatedly, substantive differences in relevant BITs or other applicable law have not been independently tested or effectively factored into studies testing for arbitrator bias.¹⁵⁶ Moreover, even if there is no formal system of *stare decisis*, awards in earlier cases are often relied on as persuasive authority when similar issues arise in later cases. For this reason, timing and the existence of earlier cases on point may explain some trends in outcomes that are otherwise attributed to arbitrators. Particularly given the

Germany or France. *See, e.g.*, Richard H. Kreindler, Amy C. Kläsener & Christina Cathey Schuetz, *International Arbitration*, in BUSINESS LAWS OF GERMANY § 17:37 (2012) (describing a more cautious and restrained approach by German attorneys and arbitrators regarding evidentiary matters in international arbitration).

152. John R. Crook, *Fact-Finding in the Fog: Determining the Facts of Upheaval and Wars in Inter-State Disputes*, in THE FUTURE OF INVESTMENT ARBITRATION 313, 315-20 (Catherine A. Rogers & Roger P. Alford eds., 2009) (discussing with approval fact-finding techniques in investor-State arbitration in comparison to other public international tribunals).
153. *See* Frédéric G. Sourgens, *Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations*, 38 N.C. J. INT'L L. & COM. REG. 875, 895-97 (2013) (analyzing the importance of methods and standards for proving jurisdictional facts).
154. Gottwald, *supra* note 139, at 255 (documenting based on interview research severe resource and experience deficits faced by counsel for Argentina and Seychelles).
155. Notably, ICCA and Queen Mary are jointly launching a Task Force to study and make recommendations about the rise of third-party funding in international arbitration. *See* International Council for Commercial Arbitration, *Latest News* (last visited Oct. 5, 2013), <http://www.arbitration-icca.org/news.html> (*Joint Taskforce on Third-Party Funding Launched*, July 3, 2013).
156. *See* Sourgens, *supra* note 153, at 879 ("As current scholarship demonstrates, the interpretation of consent instruments can and does lead to facially inconsistent results. This inconsistency is not a result of incompetent arbitrators, nor an inherent and insurmountable arbitrariness of investment law. Rather, it results from the open-ended, "indeterminate" nature of advanced consents to arbitration by participating states.") (footnotes omitted). In his study, for example, Van Harten distinguishes among different types of treaties, but does not consider the differing texts of such treaties. *See* Van Harten, *supra* note 43.

small sample of investment arbitration cases, the existence of a few high-profile cases on particular issues may have a significant impact on outcomes in subsequent cases.¹⁵⁷ To date, the role of precedent and legal doctrine has not been meaningfully accounted for in empirical research in investment arbitration. Finally, as analyzed in Part I, there are significant methodological challenges to assessing empirically these qualitative variables.

Critics may still maintain that broad jurisdictional rulings are undesirable. Cross-testing of empirical findings regarding arbitrator bias with other possible explanations will confirm whether the primary source of their complaint is more likely arbitrator bias, or may instead be tied to provisions in particular BITs or national law,¹⁵⁸ or other features of the system. Refinements in research considering these other variables could lead to more relevant reform proposals and avoid those proposals that would not necessarily resolve the underlying concerns.¹⁵⁹

B. Toward a Theory of International Adjudication

The rise of international courts and tribunals is routinely acknowledged as one of the single most important recent developments in international law.¹⁶⁰ International courts and tribunals are described as “the lynchpin of a new, rule-based international order, which increasingly displaces or purports to displace the previous power-based international order.”¹⁶¹ As a consequence, international adjudication has produced an enormous body of scholarship—doctrinal, normative, and empirical.¹⁶² The robust body of

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157. The heavy criticism that inconsistent awards have drawn may provide added incentives for arbitrators to give weight to prior awards rather than engaging in a completely independent analysis or reaching a different conclusion.
 158. As noted in Part I, similar critiques have been raised regarding empirical research into judicial decision making. See Edwards & Livermore, *supra* note 27, at 1926-27.
 159. For similar research on the effects of advocacy before the U.S. Supreme Court, see Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).
 160. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 709 (1999) (“When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post-Cold War age.”); Bruno Simma, *International Adjudication and U.S. Policy – Past, Present, and Future*, in DEMOCRACY AND THE RULE OF LAW 39, 39 (Norman Dorsen & Prosser Gifford eds., 2001) (“International courts and tribunals are proliferating, and the caseload of some of these institutions appears to explode.”).
 161. Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 226 (2012) (citing Karen Alter, *Private Litigants and the New International Courts*, 39 COMP. POL. STUD. 22 (2006)); see also Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).
 162. Laurence R. Helfer, Karen J. Alter & M. Florencia Guertzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103

empirical research on international courts and tribunals has helped sharpen debates over their nature, function, and effectiveness.

Some empirical research into investment arbitration mimics the inquiries of these studies about other tribunals, most notably empirical studies about alleged bias among international judges.¹⁶³ Few scholars if any, however, have attempted to compare or integrate empirical findings from other international tribunals—including findings related to alleged decisional bias—with similar findings regarding investment arbitration.

To the contrary, there appears to be a sharp and even ironic divergence in the nature of inquiries about investment arbitration in comparison to other international tribunals. In the debate over system design in international tribunals, analysis in other areas of public international law, human rights, and international criminal law, appears focused on ensuring strong adjudicatory mechanisms that subject State decision-making and actions to international courts' jurisdiction and judgments. Empirical research, as a consequence, focuses on the strength and effectiveness of tribunals in enforcing international law limits on State activities.¹⁶⁴ When the category of international law being enforced is the rights of foreign investors, however, many commentators seem intent instead on prioritizing States' ability to have their policy decisions and activities unhampered by international investment law.¹⁶⁵

To be sure, human rights violations, which often implicate *jus cogens* norms, and violations of the rights of foreign investors are not moral equivalents. No plausible

AM. J. INT'L L. 1, 4 (2009) ("The growing number of international courts and their increasing activity have attracted the interest of scholars of international law, international relations, and comparative politics, leading to the launch of new empirical projects, a university press series, and a specialized journal."); Shaffer & Ginsburg, *supra* note 25 (surveying empirical research in international law and tribunals, including investment law and investment arbitration).

163. See, e.g., Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005).

164. See, e.g., Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383 (2009); Helfer, Alter & Guertzovich, *supra* note 162; Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1 (2008); Mike Burstein, *The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights*, 24 BERKELEY J. INT'L L. 423 (2006); Leah Granger, *Explaining the Broad-Based Support for WTO Adjudication*, 24 BERKELEY J. INT'L L. 521 (2006); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006); William Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002).

165. See, e.g., William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 326-27 (2007) (identifying as a weakness in investment arbitration tribunals the inability under ICSID rules of States to appoint their own nationals to ensure that arbitrators have sufficient understanding and sympathy for the context of States' decision-making).

explanation has been offered, however, about why a differential in the relative moral value of those categories of rights justifies radically different objectives in system design for the international tribunals. The more general claim of both public international law and international investment law is that they impose international law limits on States' decision-making and actions. International tribunals impose both categories of international law limitations.

The apparent shift in scholarly enthusiasm about the efficacy and function of international tribunals when investment law instead of human rights law is being enforced seems to suggest that policy preferences are affecting system design prescriptions in the different contexts. If the real objection to investment arbitration outcomes is a substantive one (i.e., that the line protecting investor rights should be drawn in a different place), then optimal reform proposals may not involve systemic reforms to investment arbitration, but instead changes to substantive investment law.¹⁶⁶ Moreover, a comprehensive theory of international adjudication, particularly one premised on the notion that adjudication must be a neutral and law-bound process, cannot develop if such policy preferences distort system design in international tribunals.

Comparative analysis between investment arbitration and other international tribunals could help cut through some of these apparent inconsistencies. Such comparative analysis could lead the way to a more comprehensive theory of international adjudication and help strengthen assessments of some features of investment arbitration. For example, one critique of investment arbitration is that it allows only for claims by investors, but not by States. At first blush, inequality between parties seems contrary to the nature of adjudication.¹⁶⁷ Comparative analysis reveals, however, that other adjudicatory regimes contemplate disputes in which one category of parties will necessarily always be in a defensive posture and another category will have an exclusive opportunity to assert affirmative claims. This unilateralism is true, for example, with human rights claims before the ECHR, which can only be against States,¹⁶⁸ and claims in U.S. courts under the Alien Tort Statute, which are exclusively brought by "alien"

166. One obvious link between substance and system design is that the vague and indeterminate nature of BIT and treaty provisions effectively delegates to arbitral tribunals substantial interpretive power. While other areas of international law are arguably similarly indeterminate, a reasonable argument can be made for greater delineation by States of the extent and limits of investor rights. While greater definition would have the effect of reducing interpretive delegation to investment arbitrators, it is a reform in the substance of investment law, not the system design of investment arbitration.

167. V.S. MANI, *INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS* 16-17 (Martinus Nijhoff publishers 1980) (describing the history of *audi alteram partem*, or equality of the parties, in the context of adjudication).

168. The ECHR's jurisdiction extends to allegations brought against Member States for alleged breaches of the Convention, but may be brought by either individuals or other member states. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 32, 33 & 34, Sept. 3, 1953, ETS No. 5, 213 U.N.T.S. 222.

individuals against either State actors or corporations.¹⁶⁹

The asymmetry of legal proceedings reflects the fact that both substantive investment law and human rights law address “the asymmetric legal relationship between sovereign States and private actors operating within their boundaries.”¹⁷⁰ In this sense, [b]oth international human rights law and international investment law seek to compensate for the inferior legal position of individuals and investors under the domestic law of the State in which they operate by enhancing legal protection at the international level.¹⁷¹ Private enforcement of these rights is a natural consequence of the rise of the individual in international law that is reflected in these procedural structures. Comparative institutional analysis reveals that procedural asymmetry is neither unique nor necessarily, in and of itself, a design defect that indicts the entire investment arbitration regime.

Comparative analysis may also help either refine or dilute other criticisms of investment arbitration. For example, critics such as Van Harten often make generalized critiques that investment disputes are resolved by “arbitrators” not “judges.”¹⁷² Comparative analysis may challenge this explanation because, in the international arena, the distinction between these two categories is not always clear or important. For example, although often referred to as “judges,” those serving on the Iran-United States Claims Tribunal are technically “arbitrators.”¹⁷³ On various international tribunals, such as the ICJ and the International Tribunal for the Law of the Sea, State parties are permitted to appoint “ad hoc judges” to panels hearing their cases.¹⁷⁴ The nature and function of such ad hoc judges is not so different from ad hoc arbitrators. Finally, arbitrators have presided in numerous important State-to-State disputes that might otherwise have been submitted to classic public international law courts.¹⁷⁵

Many proposed reforms for investment arbitration cited in the introduction are predicated on skepticism about investment arbitrators and other design features that

169. Alien’s Action for Tort, 28 U.S.C. § 1350 (1993).

170. Paula F. Henin, *The Jurisdiction of Investment Treaty Tribunals Over Investors’ Human Rights Claims: The Case Against Roussalis v. Romania*, 51 COLUM. J. TRANSNAT’L L. 224, 226 (2012).

171. *See id.*

172. Van Harten, *A Case for an International Investment Court*, *supra* note 23, at 21-32.

173. Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT’L & COMP. L. 499, 515 n.67 (2006) (citing news reports that refer to members of the Iran-U.S. Claims Tribunals as both “arbitrators” and “judges”).

174. *See* Schwebel, *supra* note 132.

175. Examples include arbitrations between Eritrea and Ethiopia, Sudan and the Sudan People’s Liberation Movement/Army, the Eritrea-Ethiopia Claims Commission, the Eritrea-Ethiopia Boundary Commission, and arbitrations under the United Nations Convention on the Law of the Sea (“UNCLOS”) between Guyana and Suriname and between Barbados and Trinidad and Tobago. Gary Born, *State-to-State Arbitration at the Permanent Court of Arbitration*, KLUWER ARB. BLOG (July 20, 2012), <http://kluwerarbitrationblog.com/blog/2012/07/20/state-to-state-arbitration-at-the-permanent-court-of-arbitration/>.

critics treat as unique to the investment arbitration regime. Comparative analysis with other international tribunals can help reveal the true strengths or shortcomings of these critiques. Comparative institutional analysis would also force scholars to locate their assessment of investment arbitration in a more comprehensive theory of international adjudication.

To date the only real effort to engage in systematic comparative analysis of the system design of international tribunals that includes investment tribunals has been Gary Born's work identifying a "New Generation" of international tribunals.¹⁷⁶ Born argues that these "Second Generation" tribunals, which include investment arbitration tribunals, are more frequently used by States, and more likely to render enforceable outcomes. As a result, he argues, this new generation of tribunals has "important implications for analysis of international adjudication."¹⁷⁷ They signal that international adjudication cannot be dismissed (as some critics have posited) as ineffectual, "marginal and unimportant in contemporary international affairs."¹⁷⁸

The success and effectiveness of this second generation of tribunals, Born claims, has important implications for system design of future international tribunals.¹⁷⁹ The success of investment arbitration, he argues, challenges what had been settled assumptions about what makes international tribunals effective. To the extent supportable, this line of argument suggests that perhaps instead of reforming investment arbitration to look more like public international tribunals, public international law tribunals have something to learn from investment arbitration.

C. Integrating Empirical Research with Other Methodologies

One final observation, tied to the prescriptions in Sections III.A. and III.B., is that empirical research into investment arbitration should be complemented by and tied into other forms of research.¹⁸⁰ In an articulate statement of the obvious, Beth Simmons explains, "when we are evaluating our world and the legal institutions that create it, empirical studies are undeniably important, but they can never tell the whole story."¹⁸¹

Despite the fact that they cannot tell the whole story, for the reasons described in Part I, empirical research has the potential to have a profound impact on investment arbitration, including bolstering or undermining support for proposed reforms. Empirical research pertaining to national judiciaries or even other international tribunals does not carry with it the same potential for affecting significant structural reforms. The potential effect of empirical

176. See Born, *supra* note 136, at 775-76.

177. *Id.* at 877.

178. *Id.*

179. *Id.* at 878.

180. See Shaffer & Ginsburg, *supra* note 25.

181. Simmons & Breidenbach, *supra* note 25, at 219.

research regarding investment arbitration increases the importance of supplementing such research with qualitative assessment of institutional features that affect decision-making in investment arbitration so that any reforms adopted are based on the whole story.

IV. Conclusion

Critics of international investment arbitration focus on the role of investment arbitrators for good reason. Investment treaties establish skeletal frameworks for the substance of international investment law and for investment arbitration procedures. But international arbitrators are the ones putting meat on those bones. That is an awesome responsibility and exercise of power. That power, in turn, is exercised in a high-stakes environment where every issue exists in a tangle of policy disagreement – cases like *Chevron v. Ecuador* and *Phillip Morris v. Uruguay* illustrate that graphically.¹⁸² In this politically charged environment, the power that investment arbitrators exercise could never be perceived as “a-political.” When critics accuse investment arbitrators of being political, however, that is not what they mean.

Instead, they are expressing skepticism about whether investment arbitrators can and do provide neutral, law-bound decisions on investment law disputes. According to some critics, they do not, but instead make political decisions based on their own policy preferences or personal interests. The means of appointing investment arbitrators—on an ad hoc basis and through procedures that involve intentional selection by parties—provides the intuition for these assumptions. Despite this intuition, however, individualized selection has some features to commend it in international settings. Most notably, it is a control function that States have exercised in various other international adjudicatory contexts.

In the debate over the legitimacy of investment arbitration, both sides of the debate have invoked empirical research in support of their assessment of its procedures and its outcomes. Empirical research has an important role to play in training focus on particular questions and providing support for and against particular claims about the system. As Van Harten acknowledges, however, “there is not, and probably never will be, conclusive empirical evidence of the presence or absence of systemic bias in investment arbitration.”¹⁸³ While this conclusion should not undermine the importance of empirical research into such possible bias, it should caution against overstating the implications of any particular study and encourage examining empirical findings in light of research about other tribunals and other features of international adjudication.

182. *Chevron Corp. & Texaco Petroleum Co. v. The Republic of Ecuador*, Case No. 2009-23 (Perm. Ct. Arb. 2009), available at <http://www.italaw.com/cases/257>; *Philip Morris Brand Sarl (Switz.), Philip Morris Products S.A. (Switz.) and Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, *Objections to Jurisdiction*, available at <https://icsid.worldbank.org/ICSID/FrontServlet>; <http://www.italaw.com/cases/460>.

183. Van Harten, *supra* note 43, at 215.