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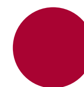

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DOES NATIONALITY MATTER?
ARBITRAL BACKGROUND AND THE UNIVERSALITY OF THE INTERNATIONAL INVESTMENT REGIME

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1. Introduction

It is often claimed that investor-state arbitration, the dominant mechanism used to enforce obligations under international investment treaties, is judged by a cadre of 'stale, male and pale' professional arbitrators. Honing in on the feature of paleness, 74 per cent of arbitrators[1] and almost all of the top 25 'powerbrokers' in the system hail from Western states.[2] Yet, the vast majority of international investment disputes target developing and non-Western states,[3] and these states disproportionately lose in investor-state arbitration.[4] The result is that the lack of geographic diversity among the arbitrators sitting in judgment in these disputes continues to contribute to legitimacy concerns over the international investment regime and its dispute settlement process.[5] A system dominated and designed by the West,[6] and producing pro-Western outcomes, has struggled, unsurprisingly, to maintain its mantle of universality.

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[1] See section 4 below.

[2] Malcolm Langford and Daniel Behn, 'The Revolving Door in International Investment Arbitration,' 20(2) *Journal of International Economic Law* (2017) 301-332; Sergio Puig, 'Social Capital in the Arbitration Market,' 25 *European Journal of International Law* (2014) 387.

[3] Thomas Schultz and Cedric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' 25 *European Journal of International Law* 1147 (2014); Daniel Behn, Malcolm Langford, and Ole Kristian Fauchald, 'Private or Public Good? An Empirical Perspective on International Investment Law and Arbitration,' in *ESIL Conference 2018* (under review at OUP).

[4] Daniel Behn, Tarald Berge and Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration', 38(3) *Northwestern Journal of International Law & Business*, (2018) 333-389.

[5] Gabrielle Kaufmann-Kohler and Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards,* CIDS Supplemental Report, 15 November 2017.

[6] Throughout the paper, we focus on the distinction between Western states and non-Western states according to the main UN groupings. The Western group is comprised of the following states: Andorra, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom and the United States of America. All other states are classified as non-Western.

While this critique of geographical homogeneity dates back more than a decade, it has gained traction in the past two years. Discussions about the future of the international investment regime have solidified and significant reform initiatives are currently underway, at both the European Union level and at the global level – through the recently launched UNCITRAL reform process. The design and future of the dispute settlement processes available to foreign investors is in a stage of eminent transition with various initiatives seeking to convert the current dispute settlement process from one of ad hoc party-nominated arbitration to a standing international court with tenured or quasi-tenured judges. A major feature of this shift will focus on the types of adjudicators suited to sit on such a court and it is highly likely that appointment requirements will destabilize the current balance of nationality, gender and professional background.[7] Indeed, the current UNICTRAL reform process has already put issues of geographic diversity of arbitrators centre stage.[8]

This paper asks whether differences in the nationality[9] or the location of dominant residence[10] of arbitrators is likely to matter for outcomes in investor-state arbitration to date. Would greater heterogeneity concretely matter for outcomes? Or would it simply boost the symbolic and perceived legitimacy of the system? In an early paper on a limited sample of 47 investor-state arbitration cases, Franck found that the economic development status of the presiding arbitrators (who often carry the key deciding vote) did not affect outcomes for states according to their economic development status.[11] However, in a more recent paper on 231 ICSID cases, Waibel and Wu found that developing state arbitrators were significantly more likely to favor respondent states (whether developed or developing) – although only on decisions concerning the jurisdiction of the tribunal.[12]

Drawing on our comprehensive PITAD database of all investment treaty arbitrations (including ICSID contract and foreign direct investment (FDI) law cases), this paper goes further in three respects. First, we analyze all investment arbitration cases, including those conducted on a non-institutional basis according to the UNCITRAL rules and those conducted according to arbitral institutions other than ICSID. Second, we introduce a dual approach to the definition of nationality-citizenship and dominant location of residence. In previous research, we identified that some of the most powerful and influential non-Western state nationals acting as arbitrators in investment arbitration have spent most of the professional career in the West (including education). We are thus interested in seeing whether *place* may be more important than

[7] James Crawford, 'The Ideal Arbitrator: Does One Size Fit All? 32(5) *American University International Law Review* (2018), 1003.

[8] Anthea Roberts, 'UNCITRAL and ISDS Reforms: Concerns about Arbitral Appointments, Incentives and Legitimacy,' *EJIL:Talk!* 6 June 2018.

[9] We define nationality-citizenship as the original citizenship of the arbitrator but we have also coded secondary citizenship (including where an arbitrator might hold dual nationality from birth).

[10] We define dominant location of residence as the primary place of domicile and work at the time the investment arbitration case was registered.

[11] Susan Franck, 'Development and Outcomes of Investment Treaty Arbitration,' 50(2) *Harvard International Law Journal*, (2009), 435.

[12] Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration,' *Working Paper*, January 2017.

passport in determining one's world view. Thus, are non-Western state nationals less likely to be skeptical to interests of the West when they are embedded in the West? Finally, we examine whether non-Western state nationals are more state-friendly in investment arbitration generally: are they more state-friendly only in cases against non-Western respondent states or non-Western corporate-claimants, or is there no or little indication that such a hypothesis would even be reasonable to assume? In the context of inter-state disputes, Posner and de Figueredo did find that International Court of Justice (ICJ) judges exhibit similar voting patterns when judging cases against states similar to that of their own nationality.[13] With these findings, we can provide some estimates of the likely consequences of future appointment models and strategies.

The paper is structured as follows. Section 2 introduces investor-state arbitration and some of the debates around its legitimacy with a particular focus on the issues of a non-Western/Western divide in the system. Section 3 theorizes about the likely effects of arbitrator nationality and Section 4 introduces the descriptive data on both the national identities of arbitrators (including their location of dominant residence). Using regression analysis with various controls, Section 5 analyses whether the nationality and the dominant residence of arbitrators affects outcomes, in this case – namely the success rates for all respondent states and for non-Western respondent states. Section 6 concludes.

2. The International Investment Treaty Regime

2.1 Investment Treaties and Arbitration

The modern international investment regime represents a remarkable extension of international law in the post-war period. The regime can be described in multiple ways, but generally includes the international institutions and rules governing the regulation of trans-border investments. Built on a network of more than 3,500 signed bilateral investment treaties (BITs), regional free trade agreements (FTAs),[14] and a handful of plurilateral investment treaties,[15] the international investment treaty regime gives a foreign investor a number of substantive protections and rights,[16] including most importantly, investor-state dispute settlement (ISDS) provisions. While this regime has its roots in the immediate post-Second World War period, it

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[13] Eric Posner and Miguel de Figueiredo, 'Is the International Court of Justice Biased?' 34 *Legal Studies* (2005) 599.

[14] UNCTAD provides an extensive database on IIAs, http://investmentpolicyhub.unctad.org/IIA (accessed 10 August 2018).

[15] See e.g., *Energy Charter Treaty* (ECT), *North American Free Trade Agreement* (NAFTA), *Association of South-East Asian Nations* (ASEAN) *Comprehensive Investment Agreement*, *Central American-Dominican Republic Free Trade Agreement* (DR-CAFTA), as well as, recently concluded or late-round negotiated treaties: *Trans-Pacific Partnership* (TPP) *Agreement, Canada-EU Comprehensive Economic and Trade Agreement* (CETA), *Singapore-EU Free Trade Agreement, Transatlantic Trade and Investment Partnership* (TTIP) *Agreement*, and the Pan-Asian *Regional Comprehensive Partnership Agreement* (RCEP).

[16] IIAs typically include: prohibitions against expropriation without adequate compensation, full protection and security, fair and equitable treatment (FET), most-favoured nation (MFN) treatment, and national treatment.

was not until the early 1990s that the annual number of these largely bilateral international investment agreements (IIAs) began to be signed.

The most distinct feature of this treaty-based regime is the explosion of litigation: see Figure 1 below. An investment treaty arbitration (ITA) case arises when a foreign investor alleges that the beneficiary rights they are granted under an IIA signed by their home state has been breached by the state hosting its investments. International investment arbitration – a slightly broader category – can also occur in cases between foreign investors and host states under arbitration agreements allowing for investor-state arbitration (as embedded in various forms of investment contracts or concessions) or national foreign direct investment (FDI) laws. These particular forms of arbitration are often administered under ICSID; but they can also arise under ad hoc procedures or the rules of international commercial arbitration centres. It is the meteoric rise in the instances of ITA over the past two decades that has led some to claim there is 'no other category of private individuals' that are 'given such expansive rights in international law as are private actors investing across borders.'[17] By the first decade of the 2000s, the use of ITA had become a global, prominent and lucrative area of international adjudication, while at the same time coming under increasing scrutiny from a growing number of states, scholars and civil society actors.

In our first-of-its-kind database (PITAD), we have tracked and coded all these cases (a total of 1228 cases as of 1 August 2018).[18] The database includes all known treaty-based arbitrations (976 cases), all ICSID contract and FDI law-based arbitrations (131 cases) and all ICISD annulment committee proceedings (121 cases). Each case is coded for up to 138 different variables. The dataset would ideally include all international commercial arbitrations and all non-ICSID contract-based investment arbitrations, but given the default confidentiality of such processes, the data available remains far from complete or accessible.[19] In any case, our dataset has a certain coherence. It covers all known cases whose legal claim is procedurally or substantively based on an international treaty: whether through the ICSID Convention and/or various IIAs.

Not all of the cases have been concluded and claimant-investor success rates vary. Of the 1107 international investment arbitration cases registered as of 1 August 2018 (976 treaty-based and 131 ICSID contract-based or FDI law-based), the outcomes are as follows:[20] 485 have reached a final conclusion (either on jurisdiction or the merits),[21] 367 cases remain pending, and an additional 255 were settled or discontinued. Of the finally concluded cases (428 treaty-based

[17] Beth Simmons, 'Bargaining over BITS, Arbitrating Awards: The Regime for Protection and Promotion of International Investment,' 66 *World Politics* (2014) 12, 42.

[18] PluriCourts Investment Treaty Arbitration Database (PITAD) as of 1 August 2018.

[19] Indeed, there is a significant overlap between individuals within the international commercial arbitration community and the international investment arbitration community.

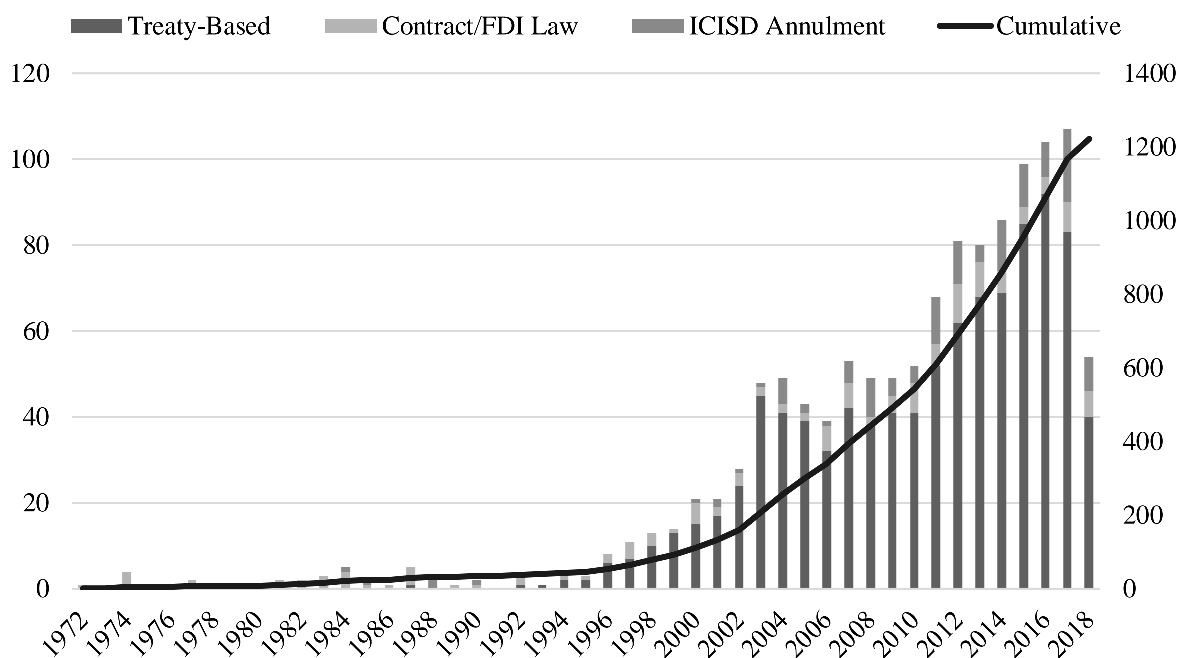
[20] PITAD, above n 18.

[21] A concluded case is one where the claimant-investor has either won on the merits or lost on jurisdiction or the merits. It does not include discontinued or settled cases.

and 57 ICSID contract or FDI law-based), claimant-investors have won on the merits in 47.2 per cent of the cases and lost on jurisdiction or the merits in 52.8 per cent of the cases.

In addition, there have been 122 ICSID annulment committee cases registered over the past two decades (see also Figure 1 below). Under Article 53(1) of the ICSID Convention, a party may seek an annulment of their award on one of five narrow grounds: the arbitral tribunal was not properly constituted, it exceeded its powers, it failed to give reasons, it was tainted by corruption, or there had been a serious departure from a rule or procedure. While these annulments concern existing ICSID cases, distinct arbitration panels are selected and therefore are included as separate cases in our analysis of arbitrator nationality and dominant location of residence. Of these cases, 61 have been concluded, 34 remain pending and an additional 26 have either been settled or discontinued. Of the concluded annulments, 22.9 per cent (14 cases) have resulted in a full or partial annulment of the underlying case and 77.1 per cent in rejection of the annulment request.

Figure 1. International Investment Arbitration Cases Registered by Year (1987-2018)[22]



2.2 Arbitrator Appointment

In international investment arbitration, as in most types of arbitration, arbitrations typically consist of three arbitrators and are appointed in a similar manner: each party to the dispute will appoint one of three arbitrators; and in many cases the parties (or the co-arbitrators) will jointly appoint the presiding arbitrator (or chair). However, there is a large degree of variation in the manner of appointment. While the default is that the parties will appoint the two wing arbitrators, the presiding arbitrator can be appointed by the parties, the two wing arbitrators, by the institution hosting the arbitration or even by a third-party. For ICSID annulment committee

[22] PITAD, above n 17; 1228 cases in total through 1 August 2018.

cases, all three annulment committee members are appointed by the Secretary-General of ICSID.

Of all the possible configurations for the appointment of arbitrators in international investment arbitration, however, there is an underlying constant: all arbitrators are selected for a particular dispute on an ad hoc basis. This structure means that for every arbitration, there are individuals (either the parties, legal counsel representing the parties, arbitral institutions or co-arbitrators) that are making selection decisions for each of the 1228 cases in our dataset.

3. Theorising Nationality

The fact that the nationality of arbitrators features prominently in debates on the legitimacy of international investment arbitration is not surprising when one considers three core features of the system in practice. The first is that developing – all are also non-Western – states (especially those considered low-income and middle-income according to the World Bank Income Groups (WBIGs)) are disproportionately being sued as respondent states in investment arbitration cases. Of the 1107 registered cases (not including ICSID annulment cases), developing states are respondents in 74.6 per cent of the cases. The divide is even further strengthened when looking at all 1107 cases according to whether the respondent state is non-Western. Here, the respondent state constitutes 90.6 per cent of all cases. The second is that the overwhelming majority of arbitrators appointed to decide these disputes are from Western and developed states (see further section 4).[23] The third is that developing states (according to GNI per capita) are two to three times more likely to lose than developed states – and this gap does not disappear when we control for most democratic governance indicators.[24]

Together, the first two features of the system naturally raise normative questions of *representativity*. Is it legitimate that Western, developed state arbitrators should dominate substantially in a system of adjudication that almost always sees a developing, non-Western state being sued? The latter two features, however, raise empirical questions of *bias*. Can the very low success rates of claimant-investors when suing developed, Western states be accounted for by the nationality of the arbitrators sitting in those disputes?[25] Or in the alternative, is it the comparably higher success rates of claimant-investors in cases against developing, non-Western states attributable to the largely Western nationality of arbitrators? We focus on these two questions in this paper. It is important, however, to consider first why nationality might (or might not) matter. we present a number of competing hypotheses.

3.1 Home 'Region' Bias

The general arguments for why the nationality of adjudicators might affect international courts and arbitrations are diverse.[26] In the case of international investment arbitration, three reasons

[23] Langford and Behn, above n 2.
[24] Behn, Berge and Langford, n 4.
[25] Ibid.
[26] For an overview, see Erik Voeten, 'International Judicial Behaviour', in Cesare Romano, Karen Alter and Yuval Shany, *Oxford Handbook on International Adjudication* (OUP, 2015), 550-568.

might be important. Firstly, and sociologically, arbitrators may possess a greater understanding of the challenges of their own state, region, income grouping or 'civilization' compared to others in complying with investment treaties; thus being 'more receptive to arguments for why a national legal system seemingly departs from international standard."[27] Huntingdon argues that civilizational culture divide between the West and the rest is particularly important, differentiating 'communities of states based on persistent and frequently opposing beliefs and values' – with the non-Western/Western divide being the most important.[28] Secondly, and attitudinally, arbitrators may unconsciously reflect the policy preferences of their part of the world. While political cleavages vary deeply within nation-states, they are also vary across them. Thirdly, and strategically, arbitrators may be more reliant on their home regions for appointment purposes. For example, developing or non-Western states (because they are the type of state most frequently sued) have the most influence over the appointment of respondent state wing arbitrators and so it may be strategic for aspiring arbitrators from these states (or other non-Western states) to signal their likely inclinations towards the positions of non-Western states in particular. Thus, we can hypothesize:

> **H1.1** *Arbitrators will be more favorably disposed to the position of respondent states that have a similar development status to their home state or the state where they reside, or share the same region or 'civilization.'*

This home 'region' bias hypothesis needs to be nuanced in a number of ways, however. The first is that many arbitrators from non-Western states reside and work in Western states (about 9 per cent); and this may affect their outlook or future appointment strategy. Indeed, a significant number of the leading arbitrators from non-Western states were educated in the West and have lived most of their adult lives there. The second is that the nationality theory may also affect how arbitrators view the cause or position of the claimant-investor in the case – a growing share of claimants include foreign investors that are themselves from non-Western states. In these cases, for both strategic and ideological reasons, we might expect arbitrators to be more sensitive to the problems of corporations from their part of the world. We can thus add two extra home 'region' hypotheses:

> **H1.2** *Arbitrators will be more favorably disposed to the position of respondent states that have a similar development status, regional affiliation or 'civilization' to the state in which they reside.*

> **H1.3** *Arbitrators will be more favorably disposed to the position of foreign investors that come from states with a similar development status, regional affiliation or 'civilization' to their home state.*

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[27] Ibid, 555.

[28] Wade Cole, 'When All Else Fails: International Adjudication of Human Rights Abuse Claims, 1976-1999,' 84 *Social Forces* (2006), 1909-1935, 1912.

3.2 No Bias

The principal alternative to the above hypothesis is that arbitrators are not swayed by their nationality or dominant location of residence. Drawing on *legal positivism*, we might therefore expect that arbitrators, according to their professional judgment, would seek to apply IIA provisions in good faith to the specific facts of the case. Accordingly, variation in arbitral behaviour could only be explained by differences between substantive rules in treaties or factual circumstances. However, legal positivism is not alone in predicting stable outcomes. An *attitudinalist* perspective of adjudicative behaviour would suggest the same static and trustee-based hypothesis. Here, adjudicators make decisions according to their sincere ideological attitudes and values (according to their 'personal judgment')[29] because they are relatively unconstrained by other actors, including states.[30] As investment arbitrators represent a small group, often with experience in commercial arbitration, their overall positions regarding the interpretation of IIA commitments may be fairly similar. This cadre of arbitrators may constitute a micro- civilization of their own. Moreover, the 'West/non-West' or 'Global North/South' divides are highly abstract geographical imaginaries that cover over deep ideological, political and military divisions between individual states, even when they are neighbours in the sub-region. Is a Colombian or Chilean arbitrator less likely or more likely than an American or Swiss arbitrator to evince empathy for Ecuador's politics towards foreign investors? Even a *strategic* perspective could suggest no bias if aspiring arbitrators from outside the West seek to gain acceptance, and thus follow the general norms of the investment arbitration community. Thus, we can hypothesise that:

> **H2.** *Arbitrators will not be more favorably disposed to respondent states or foreign investors that have a similar development status, regional affiliation or civilization to their home state or the state where they reside.*

3.3 Reverse Bias

A final but under-considered theory of nationality is that the 'bias' may work in the opposite direction than commonly expected. Arbitrators from developing, non-Western states may be biased against – or ideologically indifferent to – states from their own part of the world for both sociological and strategic reasons. Familiarity with states similar to their own may make them more sceptical of the government's treatment of foreign investors' rights. Moreover, arbitrators may possess or gain greater legitimacy when they are more critical of states similar to their own. Within the logic of 'only hawks can make peace,' arbitrators can avoid a critique of bias when they act against the affiliation expectation. Such an approach may also be strategic for future appointment. Developed, Western state arbitrators can signal their openness to the positions of non-Western respondent states, while non-Western arbitrators can signal the reverse. Indeed, the latter may be particularly important for emerging arbitrators from non-

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[29] See generally Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (CUP, 1993).

[30] Jeffrey Segal, 'Separation-of-Powers Games in the Positive Theory of Congress and Courts,' 91 *The American Political Science Review* (1997) 1, 28.

Western states seeking to break into the international arbitration market.[31] Building the symbolic capital of impartiality and professionalism may push younger non-Western state arbitrators to overcompensate (and favour foreign investors from Western states for example) and avoid open conflicts with other arbitrators (for example, preferring consensus decisions over dissent). Thus, we can hypothesize that:

> **H3.** *Arbitrators will be more favorably disposed to respondent states or foreign investor home states that have a different development status, regional affiliation or civilization to their home state or the state where they reside.*

4. Descriptive Data

4.1 Coding Nationality and Dominant Residence

The paper uses the following hierarchy of sources for the coding of nationality and dominant location of residence fields. The primary source is the specialized aggregators of arbitrators profiles (ICSID database of arbitrators,[32] IAI Paris[33] and ASA Arbitration[34]). In cases where the arbitrator was absent from the aggregators, her/his university or law firm profile served as secondary guidance. In a few rare cases, where the profile information was scarce, the coding referred to the nationality mentioned by arbitral tribunals or was deduced it from the postal address of arbitrators. When sources for the assessment of nationality was not available in English, automatic translation services such as Google Translate were utilized.

Both nationality and dominant residence can change over time. Arbitrators may acquire additional nationalities and shift between different offices and states. Therefore, the paper adopts two different approaches to the coding of both fields. The coding of nationality focuses on citizenship and does not specify the moment in time the arbitrator acquired any additional nationality. The reason is a problem of obtaining data: the information about newly acquired nationalities is usually absent from the public records of arbitrator profiles. Therefore, while arbitrators could have acquired additional nationalities during their active professional careers, the coding includes only the latest and fullest account.

At the same time, information about the changes in dominant residence is typically present in the public records. The paper takes account of the changes, assessing the dominant residence of arbitrators at the time of case registration. The primary reference for dominant residence is the known working location of arbitrators during a specified period (that is, when the case was registered), based on the assumption that dominant location of residence coincides with the main working location of the arbitrator. In situations where the working location of an arbitrator

[31] Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1998).

[32] ICSID's searchable database of arbitrators, conciliators and ad hoc Committee members, https://icsid.worldbank.org/en/Pages/arbitrators/CVSearch.aspx (accessed 10 August 2018).

[33] International Arbitration Institute, www.iaiparis.com/index.asp (accessed 10 August 2018).

[34] Swiss Arbitration Association, database of Swiss and international specialists, https://profiles.arbitration-ch.org/ search (accessed 10 August 2018).

is unknown, the coding used their publicly known postal address for work-related correspondence or their known domestic residence. If none of this information is available, the coding assumes that the primary nationality and citizenship of the arbitrator is also the same as the dominant residence of that particular individual.

Concerning the descriptive statistics, arbitrators typically had one nationality and one dominant location at the time of case registration (and in the majority of cases, these were the same). However, a number of arbitrators have two and more nationalities. A few also split time between two places of residence. In these cases, and given that they are a small minority, we have made every effort to determine the primary nationality and the most likely dominant residence at the time of case registration. However, for completeness, all known nationalities and dominant residences have been coded and will be made available in the raw data released with this paper; and a future iteration of the paper will draw on the indicator for dual nationality/residence.

4.2 Diversity of Arbitrators

Up through 1 August 2018, there have been at least 695 individual arbitrators that have sat in at least one investment arbitration case. These 695 arbitrators account for 3327 discrete appointments in 1109 cases. There remain 119 cases where either the arbitrators sitting the case are unknown or where the tribunal has yet to be constituted. Of these individual arbitrators and their appointments, a number of findings about the geographic diversity of this pool can be drawn.

Table 3. Non-Western Arbitrators (by Region)

Region	*1 Appt*	*More than 1 Appt*	*Total*	*%*
South America	29	36	65	9 %
Central America & Caribbean	31	14	45	6 %
Eastern Europe & Central Asia	19	20	39	6 %
Middle East	18	18	36	5 %
South-East Asia	5	6	11	2 %
Sub-Saharan Africa	14	12	26	4 %
South Asia	7	4	11	2 %
East Asia	4	4	8	1 %
All Non-Western Regions	127	114	241	35 %
All Western Regions	238	216	454	65 %
All Regions	365	330	695	100 %
Non-West %	35 %	35 %		

As can be seen from Table 3 above, the percentage of non-Western arbitrators that are – or have been – in the system at some point is 35 per cent. In other words, 241 of the 695 known arbitrators to have sat in at least one investment arbitration case have nationalities that are from states that are non-Western according to the UN groupings. Furthermore, one might hypothesise that while the number of individual non-Western arbitrators currently in the system is significant, they may be a class of arbitrators that are not obtaining repeat appointments. Yet, for the most part, this does not hold. The proportion of non-Western arbitrators with a single

appointment and the percentage of non-Western arbitrators with multiple appointments is roughly the same. There does not appear to be any deviation or abnormalities in the numbers either in the percentages of single versus multiple appointments among non-Western arbitrators or indeed in comparison with Western state arbitrators.

Table 4. Non-Western Arbitrator by Appointments (by Region)

	No of Appointments					
Region	***Claimant***	***Resp***	***Chair***	***Annul***	***Total***	***%***
South America	111	83	69	35	298	9
Central America & Caribbean	10	68	41	28	147	4
Eastern Europe & Central Asia	61	52	16	11	140	4
Middle East	30	44	22	25	121	4
South-East Asia	3	11	20	24	58	2
Sub-Saharan Africa	5	25	3	13	46	1
South Asia	3	23	8	6	40	1
East Asia	0	2	7	16	25	1
All Non-Western Regions	223	308	186	158	875	26 %
All Western Regions	779	687	787	194	2452	74 %
All Regions	1002	995	973	352	3327	100 %
Non-West %	22 %	31 %	19 %	45 %		

As Table 3 also shows, when non-Western state arbitrators are disaggregated into more specific regions, it is clear that the most dominant regional set of arbitrators are those coming from Latin America (either South America or Central American and the Caribbean). Combined, this group of non-Western arbitrators constitutes nearly half of all non-Western arbitrators in the system. The high percentage of non-Western arbitrators coming from Latin America provides important insight into the explanation for the overall distribution of non-Western arbitrators. It appears that there is a significantly higher percentage of non-Western arbitrators being appointed in cases involving respondent states from the same region as that of the non-Western arbitrator: see Table 4. There is a high percentage of investment arbitration cases against Latin American states (302 cases) as compared to East Asian, South Asian and Sub-Saharan African states (201 cases combined).

While non-Western arbitrators do make up about one-third of all arbitrators in the system, there appears to be interesting segregations when looking at the number of appointments that this sub-set of arbitrators have received. First of all, while non-Western arbitrators are receiving multiple appointments (see discussion above), they do not obtain the high number of repeat appointments that would put them (save three – Alexandrov, Vicuna and Oreamuno) on the list of top 25 arbitrator 'power brokers.'[35] The raw numbers also confirm this: 35 per cent of all arbitrators in the system are non-Western but they have received only about a quarter of all appointments to date (see Table 4). Further, non-Western arbitrators do tend to receive a disproportionately higher percentage of two types of appointments: as respondent state wing arbitrators and as ICSID annulment committee members. Indeed, the number of non-Western

[35] Behn, Berge and Langford, n 4.

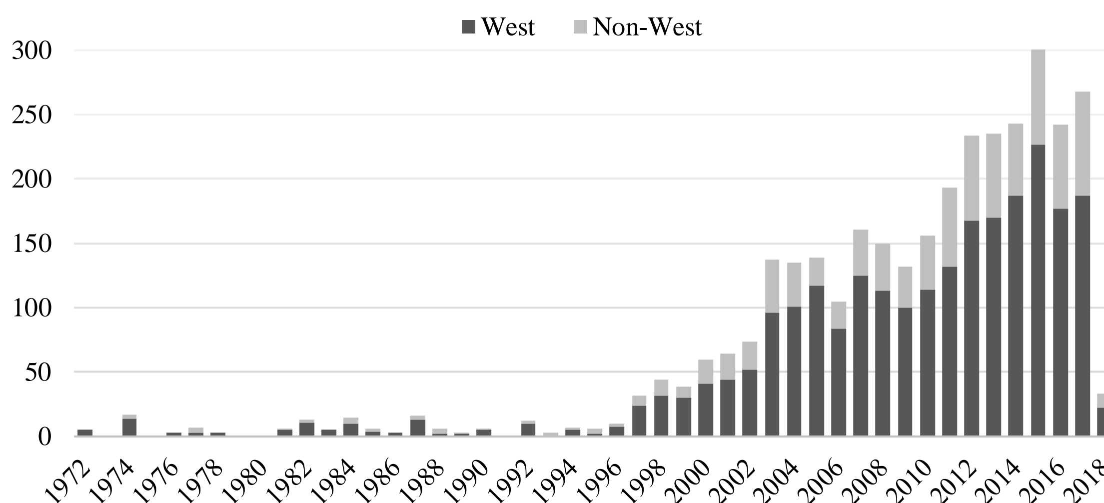
arbitrators chosen from ICSID annulment committees is nearly 50 per cent. The percentage of non-Western arbitrators appointed by respondent states is significantly higher than non-Western arbitrators receiving appointments as claimant-appointed or as presiding arbitrator.

4.3 Distribution and New Entrants over Time

Examining trends, we find that the percentage of annual appointments going to non-Western arbitrators has increased over time but that the rate of appointments has largely stabilized in the past five or six years. Looking at Figure 2 below, one can see that there were very few non-Western arbitrators in the system throughout the 1970s through the mid-1990s. However, there were not many appointments during this period going to either non-Western or Western arbitrators because of the very limited caseload.

From the mid-1990s there seem to be two periods where the proportion of non-Western arbitrators increases slightly: from about 1999 to 2012 with some yearly fluctuation, and from 2013 onwards. Overall, the proportion of non-Western arbitrator appointments to Western arbitrator appointments is surprisingly consistent across time. The overall average of about 26 percent of all appointments going to non-Western arbitrators breaks down to about the same percentage on a yearly basis as well. This means that there is little indication that there has been any significant increase in the proportion of non-Western arbitrator appointments in the period of its legitimacy crisis over the past eight to ten years.

Figure 2. Distribution of Non-Western Arbitrator Appointments (by Year)

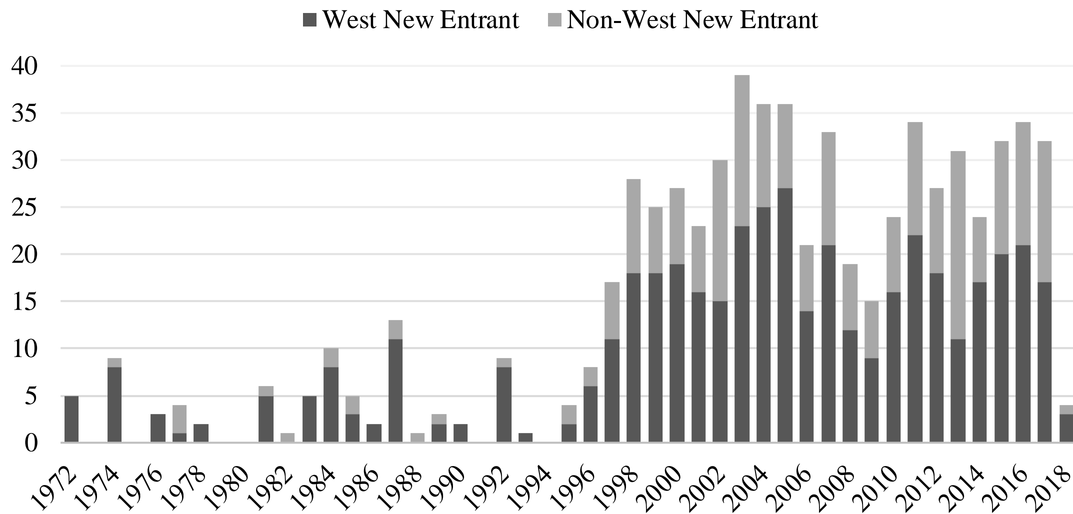


Part of the reason why the proportion of non-Western arbitrator appointments has remained fairly consistent across time is due to what we call the 'prior experience norm' in investment arbitration.[36] This is the same justification as to why the proportion of female arbitrators in the system has not increased over time. The theory is that because there were few female and non-Western arbitrators receiving appointments in the early days of the system, these sub-sets of arbitrators will not increase because the vast majority of new appointments goes to those

[36] Taylor St. John, Daniel Behn, Malcolm Langford, and Runar Lie, 'Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration,' *Pluricourts Working Paper*, January 2018.

arbitrators sitting in previous cases. However, looking Figure 3, the number of non-Western new entrants coming into the system each year does appear to be at a higher percentage than the overall percentage of non-Western arbitrators in the system (35 per cent). Over the past decade, there are approximately 30 new arbitrators coming into the system and while there is some yearly fluctuation, the number of non-Western new entrants is nearing 50 per cent annually. This provides a *small* window of optimism for geographic diversity.

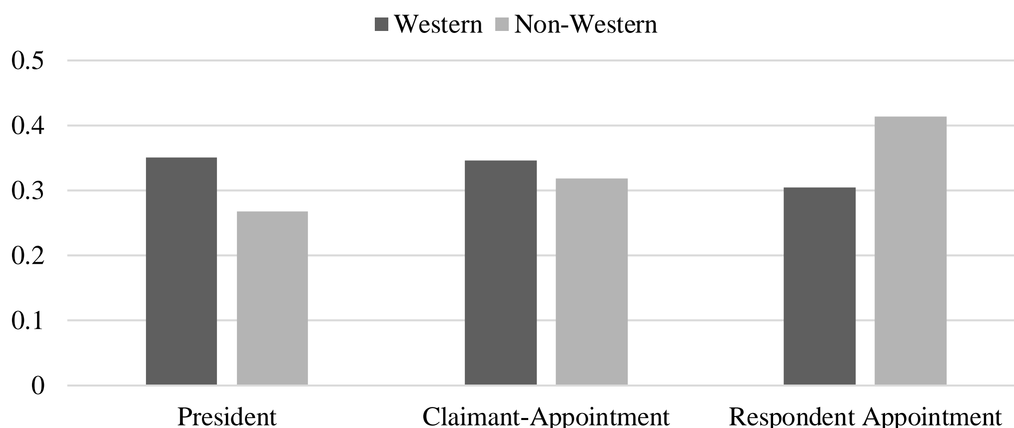
Figure 3. Distribution of Non-Western New Entrant Arbitrators (by Year)



4.4 Panel Role and Appointing Body

As stated in Section 4.1 above, the percentage of non-Western arbitrators is clearly differentiated by the role they play in a particular arbitration. Overall, about 31 per cent of all respondent-appointed arbitrators are non-Western, 22 per cent are claimant-appointed and only 19 per cent are appointed as the influential, prestigious presiding arbitrator. As can be seen from Figure 4 below, the proportion of non-Western arbitrators receiving appointments between the different arbitral roles is significantly higher for respondent-appointees than for the two other roles.

Figure 4. Type of Arbitrator Appointment



Another interesting consideration in regard to types of appointments is to look at the proportion of non-Western arbitrators being appointed when they are selected by the parties versus when they are selected by an appointing authority such as the institution administering the arbitration. Institutions are almost twice as likely to appoint a non-Western arbitrator than if one of the parties to the arbitration is tasked with appointing an arbitrator (see Table 5 below). However, the overall numbers of appointments made by institutions still go to Western arbitrators 72.2 per cent of the time.

Table 5. Nature of Appointing Authority: Party versus Institution

	Non-Western Arb				*Western Arb*			
	Party	*Inst*	*Unknown*	*Total*	*Party*	*Inst*	*Unknown*	*Total*
Chair	44	81	60	185	324	210	251	785
Claim-Appoint	220	0	0	220	775	0	0	775
Resp-Appoint	200	30	56	286	518	13	152	683
Total	486	111	116	691	1617	223	403	2243
% of Total	69.3 %	16.1 %	15.6 %	100 %	72.1 %	9.0 %	17.9 %	100 %

4.5 Personal Identity of Arbitrators

Finally, we will briefly look at the number of appointments of the top 25 individual non-Western arbitrators according to their nationality and their dominant location of residence. Looking at Table 6 below, it is obvious that there are a number of non-Western arbitrators with a significant number of appointments across time. The top 10 non-Western arbitrators account for 292 appointments or an average of 29 appointments per arbitrator. These 10 non-Western arbitrators alone account for nearly 10 per cent of all appointments in the system to date. Looking at the entire list however, the distribution by region is quite restrictive with no non-Western arbitrators from Sub-Saharan African and only one arbitrator from East Asia making the list. The most represented region is Latin America with 11 of the top 25 non-Western arbitrators.

Table 6. Non-Western Arbitrators (by Nationality)

No	*Name*	*Nationality*	*Region*	*Claim*	*Resp*	*Chair*	*Annul*	*Total*
1	Francisco Orrego Vicuña	Chile	South America	31	2	18	1	52
2	Stanimir Alexandrov	Bulgaria	Eastern Europe	1	43	4	3	51
3	Rodrigo Oreamuno	Costa Rica	Central America	0	16	14	6	36
4	Horacio Grigera Naón	Argentina	South America	30	2	2	0	34
5	Claus von Wobeser	Mexico	Central America	1	13	7	3	24
6	Eduardo Zuleta	Colombia	South America	4	2	12	6	24
7	Peter Tomka	Slovakia	Eastern Europe	0	6	8	6	20
8	Raúl Vinuesa	Argentina	South America	1	17	2	0	20
9	Guido Santiago Tawil	Argentina	South America	16	0	0	0	16
10	Ahmed El-Kosheri	Egypt	Middle East	1	5	5	4	15
11	Azzedine Kettani	Morocco	Middle East	0	0	4	9	13
12	Ibrahim Fadlallah	Lebanon	Middle East	8	4	1	0	13
13	Cecil Abraham	Malaysia	South-East Asia	0	0	3	9	12
14	Florentino Feliciano	Philippines	South-East Asia	0	4	3	5	12

15	Kamal Hossain	Bangladesh	South Asia	0	11	0	1	12
16	Michael Hwang	Singapore	South-East Asia	2	4	3	3	12
17	Eduardo Silva Romero	Colombia	South America	0	3	3	5	11
18	Teresa Cheng	Hong Kong	East Asia	0	0	4	7	11
19	Makhdoom Ali Khan	Pakistan	South Asia	0	2	3	5	10
20	Ricardo Ramírez Hernández	Mexico	Central America	1	2	2	4	9
21	Enrique Gómez Pinzón	Colombia	South America	6	0	2	0	8
22	Fali Nariman	India	South Asia	0	3	5	0	8
23	Georges Abi-Saab	Egypt	Middle East	0	9	0	0	8
24	Pedro Nikken	Argentina	South America	0	8	0	0	8
25	Yas Banifatemi	Iran	Middle East	2	3	3	0	8

Looking at the list of top 25 arbitrators according to their dominant location of residence (see Table 7 below), a number of shifts occur. Seven of the top 25 non-Western arbitrators by nationality are removed from the list due to the fact that these individuals actually reside in Western states. Interestingly, however, two prominent Western arbitrators (by nationality) get added to the list (Thomas and Kaplan) due to the fact that they reside in East or South-East Asia. Overall, the number of appointments going to the top 10 arbitrators on this list drops from 292 in the nationality-based list to 237 in the dominant residence-based list.

Table 7. Non-Western Arbitrators (by Dominant Residence)

No	***Name***	***Nationality***	***Region***	***Claim***	***Resp***	***Chair***	***Annul***	***Total***
1	Francisco Orrego Vicuña	Chile	South America	31	2	18	1	52
2	Rodrigo Oreamuno	Costa Rica	Central America	0	16	14	6	36
3	Christopher Thomas	Singapore	South-East Asia	1	24	0	0	25
4	Claus von Wobeser	Mexico	Central America	1	13	7	3	24
5	Eduardo Zuleta	Colombia	South America	4	2	12	6	24
6	Raúl Vinuesa	Argentina	South America	1	17	2	0	20
7	Guido Santiago Tawil	Argentina	South America	16	0	0	0	16
8	Ahmed El-Kosheri	Egypt	Middle East	1	5	5	4	15
9	Azzedine Kettani	Morocco	Middle East	0	0	4	9	13
10	Cecil Abraham	Malaysia	South-East Asia	0	0	3	9	12
11	Florentino Feliciano	Philippines	South-East Asia	0	4	3	5	12
12	Kamal Hossain	Bangladesh	South Asia	0	11	0	1	12
13	Michael Hwang	Singapore	South-East Asia	2	4	3	3	12
14	Teresa Cheng	Hong Kong	East Asia	0	0	4	7	11
15	Makhdoom Ali Khan	Pakistan	South Asia	0	2	3	5	10
16	Enrique Gómez Pinzón	Colombia	South America	6	0	2	0	8
17	Fali Nariman	India	South Asia	0	3	5	0	8
18	Pedro Nikken	Argentina	South America	0	8	0	0	8
19	Álvaro Castellanos Howell	Guatemala	Central America	0	0	0	8	8
20	Francisco Rezek	Brazil	South America	0	4	3	0	7
21	Hugo Perezcano Diaz	Mexico	Central America	0	5	2	0	7
22	Cavinder Bull	Singapore	South-East Asia	0	0	5	2	7
23	Neil Kaplan	Hong Kong	East Asia	2	0	5	0	7
24	Hi-Taek Shin	South Korea	South-East Asia	0	0	4	2	6
25	Bohuslav Klein	Czech Republic	Eastern Europe	0	3	3	0	6

5. Analysis

5.1 Research Design

How can we determine the influence of nationality on investment arbitration? Traditional doctrinal approaches may provide a fine-grained perspective but it is a demanding task. Given the aggregative nature of our research question, it would require a 'qualitative large-N' approach, synthesizing patterns over a massive volume of awards. Moreover, the disadvantage of a doctrinal lens is that one may be simply tracking a subterfuge of verbiage – doctrinal twists may only be loosely related to actual outcomes. Thus, analysing the influence of nationality and the dominant residence of arbitrators requires the full arsenal of empirical methods – qualitative, quantitative and computational. In this paper, we use quantitative methods and focus on the potential influence of arbitrator nationality and dominant residence on outcomes in investment arbitration. Its prime advantage is its focus on the concrete nature of decisions and remedies, which cannot be obscured by written reasoning or oral speech.

In this iteration of the paper, we focus on the final outcome at the merits stage (including jurisdictional decisions where jurisdiction is rejected). Compensation rates where claimant-investors win on the merits will be analysed in the final version. In order to ensure comparability across individual cases, we analyse only cases whose legal claim is treaty-based. Claims based exclusively on a contract or a host state's FDI law are excluded; discontinued or settled cases are also omitted, along with a further six cases where the identity of the arbitrators is unknown. With these conditions in place, and as at 1 August 2018, the dataset includes 422 *finally resolved* ITA cases. These include all known investment treaty arbitration cases where the claimant-investor wins on the merits or loses on jurisdiction or the merits. Of course, cases can also be sliced another way and Waibel and Wu analyse the discrete jurisdiction and merit decisions. While this increases the sample size, we are unsure as to whether it captures the potential influence of nationality – which may affect the case as a whole rather than particular legal determinations. In any event, our approach provides a useful complement.

Table 8. Panel Composition and Outcomes (by Nationality)

W=Western, O=Non-Western

Panel Composition (Nationality)				*Outcomes*			
Category	***Claimant***	***President***	***Resp***	***Investor Win***	***Investor Loss***	***Win %***	***No Cases***
1	W	W	W	113	93	54.9 %	206
2	W	O	W	11	23	32.4 %	34
3	O	W	W	24	23	51.1 %	47
4	W	W	O	51	40	56.0 %	91
5	W	O	O	2	6	25.0 %	8
6	O	W	O	9	8	52.9 %	17
7	O	O	W	3	4	42.9 %	7
8	O	O	O	6	7	46.6 %	13

One issue in coding outcomes in investment treaty arbitration is the measurement of how and to what degree a claimant-investor can be said to win at the jurisdiction or liability/merits stage

of the dispute. Our database provides some nuance and makes a distinction between full wins and partial wins. This results in two different indicators. The first is Any Win (at least a partial win) and the second is Full Win (only full wins counted).[37] In this paper, we conduct analysis for both outcome indicators although only results for the former are fully reported.[38] The Any Win indicator is the most reliable measure as distinguishing partial wins from full wins is not an exact science.[39] It is also a strong analytical measure: failing to award anything to a claimant-investor is a stark outcome given the costs involved in litigating this type of international investment dispute. Table 8 above shows the Any Win success ratios across time and divided by the right possible compositions of panel according arbitrator nationality. Thus, the fully Western panel is (WWW), a panel or tribunal with a non-Western chair and Western wings is (WOW) and so on. Eye-balling the trends, it is relatively clear that for many compositions there does not appear to be a difference in outcomes as compared with the overall win-loss rate in investment treaty arbitration – which hovers around 50 per cent. The overall outcome rate across all investment treaty arbitrations to date is 48.2 per cent in favour of claimant-investors. The most notable difference is in categories 2, 5, 7 and 8 in which there is a non-Western national as presiding arbitrator. Here foreign investor success rates vary between 25 and 46 per cent. Whether this is statistically significant and holds for dominant residence as well will be taken up in the next sub-section.

5.2 Operationalisation

In seeking to test the nationality hypotheses, we have operationalised the first two home 'region' bias hypotheses into three different models. Each model tests different ways in which nationality may be influential. The first, and following Franck, is the presence of a non-Western arbitrator in the most important role in arbitration – the presiding arbitrator. Given that the presiding arbitrator usually has the responsibility in drafting much of the award and presumably possess the crucial swing vote, it is likely any nationality effect will be substantially transmitted in this role. The second model seeks to examine the potential influence of a non-Western arbitrator on the arbitral tribunal, regardless of which role they have. This model picks up any potential benefits of mere geographic diversity, which may have some effect on intra-panel discussions, framing and deliberations. The third model looks at each possible panel combination – it is more complex but is in essence a combination of the first two. Thus, we examine the eight different panel composition possibilities along the non-Western/Western binary ranging from a panel with only Western arbitrators (WWW) to a panel with only non-Western arbitrators (OOO). Here, we can see if particular panel compositions may swing more in one direction than other. Thus, does the presence of two non-Western arbitrators make a

[37] For *Any Win* (full and partials wins are coded as (1) and losses as (0)); and for a *Full Win* (full win coded as (1) and partial wins and losses as (0)).

[38] Full results are available from the authors.

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

difference or is there a difference between having a non-Western arbitrator as a claimant-appointed wing rather than a respondent-appointed wing?

Table 9. Summary Statistics for Regression Analysis

Variable	*Mean*	*Std. Dev.*	*Min*	*Max*	*Observations*
Dependent					
Any Win	0.469	0.500	0	1	422
Full Win	0.225	0.418	0	1	422
Independent					
Chair (Nat-West)	0.832	0.375	0	1	422
Chair (Res-West)	0.867	0.340	0	1	422
Non-West Presence (Nat)	0.514	0.500	0	1	422
Non-West Presence (Res)	0.403	0.491	0	1	422
Panel Comp (Nat WWW-OOO)	1.543	1.874	1	8	422
Panel Comp (Res WWW-OOO)	1.244	1.825	1	8	422
Controls					
Extractive Case	0.171	0.377	0	1	422
NAFTA Case	0.088	0.283	0	1	422
ECT Case	0.095	0.293	0	1	422
ICSID Case	0.621	0.486	0	1	422
Law Firm Advantage	-0.081	0.584	-1	1	421
Case Learning	9.384	10.007	1	55	422
Case Cluster	0.142	0.350	0	1	422
WBIG	1.986	0.798	0	3	422
Trend	12723.3	6816.401	1	25000	422

In order to avoid potentially misleading bivariate results for the correlation between these three indicators and investment treaty arbitration outcomes, we include also a set of controls for each model. The basic attributes are summarized in Table 9 alongside the independent variables. First, we include a dummy variable for treaty-based arbitration type, specifically *NAFTA-based* cases, *Energy Charter Treaty-based (ECT)* cases and *ICSID-administered* cases.[40] Second, we apply an *Extractive Case* dummy measuring whether the investment leading to a claim is in the extractive industries economic sector. These cases often involve varying degrees of nationalization with the dispute centring on levels of compensation not liability (and thus claimant-investors will be more likely to win). Third, we add a measure of *Law Firm Advantage* to control for the effect of the quality (or at least the expense) of legal counsel as measured by whether claimant-investors and respondent states retained counsel from a Global 100 law

[40] We include this dummy because NAFTA-based and ECT-based arbitrations are the most frequently used IIAs in investment treaty arbitration, while ICSID-administered arbitrations are based on a specific treaty (the ICSID Convention) with some specific structural features.

firm.[41] Fourth, we include a dummy variable for *State Learning* to control for the effect of previous exposure to investment arbitration. Fifth, to control for situations where specific events or circumstances create an artificially large caseload against a respondent state in a short space of time, we use a *Case Cluster* dummy.[42] Sixth, we include a variable to capture GNI per capita (WBIGs) particularly since it has been found in previous work that respondent states with higher GNI per capita are less likely to lose.[43] Finally, we have included a cubic year trend variable in all models.

5.2 Regression Results

Table 10 below presents the logit regression results for the three different models by arbitrator nationality and dominant residence. The logit regression determines the probability that each variable contributes to a win for the claimant-investor. A positive coefficient means that the variable contributes to the likelihood of a claimant-investor winning something; a negative coefficient indicates an inverse relationship. Table 10 shows the results for Any Win for all claimant-investors, but we note that almost identical results are obtained when the dependent variable is a Full Win. The same occurs when we remove the 40 cases with Western states as respondents – in order to test whether Western arbitrators display different behavior towards Western states compared to non-Western states.

Viewing the first model, the presence of a Western presiding arbitrator is correlated with a greater likelihood of a claimant-investor winning (39 per cent more likely) but the relationship is not statistically significant – although it is close to the zone of significance with a p-score of 0.165. However, in Model 1A, where non-Western arbitrators residing in the West are classified as Western, this correlation drops dramatically. Here, the group of 'Western' arbitrators are only slightly more likely to vote for respondent states. These two sets of results lead to a surprising and unanticipated outcome. Non-Western presiding arbitrators living in the West are most likely to favour a non-Western respondent state.

Turning to the second model, we see that the mere presence of a non-Western arbitrator anywhere on the panel is positively correlated with claimant-investor success. Notably, this is statistically significant for arbitrators whose dominant residence is not in the West. This possibly suggests a reverse bias but may be a result of different panel compositions.

In the third model, we examine which type of panel composition is most likely to favour claimant-investors when compared with a panel of all Western arbitrators, and the results confirm and clarify the divergent directions of the first two models. A panel with a non-Western presiding arbitrator follows the same pattern as Model 1. They are less likely to support

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[41] See *American Lawyer,* www.law.com/americanlawyer/sites/americanlawyer/2017/09/25/the-2017-global-100 (accessed 10 August 2018). The dummy takes the value of (1) if only the claimant-investor counsel is from a Global 100 law firm; (-1) if only the respondent state retains a Global 100 law firm; or (0) if both the claimant-investor and the respondent state both have the same type of law firm representing them.

[42] This measure takes the value (1) if a respondent state has had five or more cases registered against it in a given year, and (0) otherwise.

[43] Behn, Berge, and Langford, n 4. In this version of the paper, we have used WBIGs, but the results with the continuous GNI per capita variable were not different.

claimant-investors as a whole, but non-Western arbitrators living in their home regions are more likely to side with claimant- investors. The remainder of the panel compositions generally follow expected voting with one exception. Panels with non-Western respondent wings are more likely to vote with claimant-investors.

Table 10. Regression Analysis

Any Win	*Controls*	*Model 1*	*Model 1A*	*Model 2*	*Model 2A*	*Model 3*	*Model 3A*
		West Chair by Nat	*West Chair by Res*	*Non-West Presence by Nat*	*Non-West Presence by Res*	*Panel Comp by Nat*	*Panel Comp by Res*
Western Chair		0.387	-0.045				
Non-West Presence				0.048	0.413*		
Panel Comp WWW as base							
WOW						0-.688	0.400
OWW						0.2015	0.515
WWO						0.258	0.655**
OWO						-0.626	-0.395
WOO						0.098	-0.243
OOW						-0.025	-0.211
OOO						0.0618	0.172
Controls							
ICSID Case	-0.224	-0.200	-0.221	-0.221	-0.217	-0.174	-0.207
NAFTA Case	-0.766*	-0.819*	-0.567	-0.587	-0.752	-0.755	-0.992
ECT Case	0.269	0.249	0.211	0.222	0.299	0.266	0.293
Extractive Case	0.495*	0.510*	0.397	0.396	0.374	0.424	0.372
Law Firm Adv	0.372**	0.366**	0.403**	0.399**	0.394*	0.367*	0.350*
Case Learning	0.012	0.013	0.011	0.012	0.011	0.0122	0.013
Case Cluster	0.413	0.422	0.274	0.270	0.300	0.307	0.265
WBIG	-.320**	-0.324**	-0.258*	-0.254*	-0.253*	-0.265*	-0.261*
Trend	-0.001	-0.001	-0.001	-0.001	-0.001	-.0000161	-.0000147
Constant	0.725	0.427	0.633	0.564	0.368	0.5424523	0.4000221
Sample Size	421	421	421	421	421	421	421

*p<0.1, **p<0,5, ***p<.01

Thus, we confirm a partly reverse bias result when there is a non-Western arbitrator presence on the panel and when the respondent wing arbitrator is non-Westerns; and this might be explained when looking at the presence of dissents. Non-Western arbitrators dissent at greater proportions than Western arbitrators: see Table 11 below. They account for 37 per cent of all dissents and 41 per cent of dissents that side with that of the losing party; yet they account for only 26 per cent of all arbitrator appointments. However, examining only unanimous decisions and using a multinomial logit regression model that distinguishes unanimous from majority decisions, the result still holds. Non-Western respondent-appointed arbitrators are more likely

to be on panels that favour claimant-investors. Our hypothesis for this finding is that it can be explained by their lack of experience. Their comparative lack of symbolic capital and practical knowledge of the system may affect their ability to influence the chair in comparison to well-established Western arbitrators – it is a hypothesis we are currently investigating.

Table 11. Dissents by Arbitrator and Outcome

	Dissent by Claim-Appointed Arb		*Dissent by Resp-Appointed Arb*		
	Losing Party Arbitrator	***Winning Party Arbitrator***	***Losing Party Arbitrator***	***Winning Party Arbitrator***	***Total***
Non-Western	13	1	13	1	28 (37%)
Western	20	9	17	2	48 (63%)
Total	33	10	30	3	76

5.3 Claimant Investor Bias and Regional Analysis

The final question concerning the relevance of nationality is whether it affects outcomes for claimant-investors if the arbitrator is if the party-appointed arbitrator is from the same state or the same part of the world as the nationality of the party that appointed her/him. The descriptive statistics below set out the correlation between a non-Western arbitrator's home state/region and the outcomes for investors/states from those home states/regions. The results are the reverse of what are expected. Claimant-investors with a claimant-appointed arbitrator that shares the same home state/region are likely to do worse than are investors who choose arbitrators that come from the outside – although these arbitrators do tend to dissent more frequently when their party loses. For respondent states, there is no correlation. Even this is interesting though; given that in other international courts there is a strong correlation between a judge's nationality and how she/he votes in regard to parties from their own states/regions. A multinomial logit regression of the eight possible combinations of Western and non-Western claimant-investor nationality, states and outcomes revealed similar correlations but none were statistically significant.

Table 12. Investor Success Rates by Nationality

	Claimant Home State				***Respondent Host State***				***All Cases***	
	Same State	***%***	***Same Region***	***%***	***Same State***	***%***	***Same Region***	***%***	***No***	***%***
All Finally Resolved Cases										
Investor Win	24	31 %	48	23 %	29	40 %	61	39 %	234	32 %
Investor Loss	40	51 %	79	37 %	31	42 %	59	38 %	251	34 %
Settled	8	10 %	62	29 %	9	12 %	23	15 %	163	22 %
Discontinued	6	8 %	22	11 %	4	6 %	12	8 %	92	12 %
Total	78		211		73		155		740	
All Cases Excluding Settled and Discontinued										
Investor Win	24	37 %	48	38 %	29	48 %	61	51 %	234	48 %
Investor Loss	40	63 %	79	62 %	31	52 %	59	49 %	251	52 %
Total	64		127		60		120		485	

6. Conclusion and Prospects

The lack of geographic diversity among arbitrators sitting on international investment arbitration tribunals is a common refrain in the critiques of the regime for the international regulation of foreign investment. Our analysis of 1,222 past and present cases show that arbitrators from outside the West represent a clear minority even though the overwhelming majority of cases concern respondent states that are non-Western. The appointment system has shown some signs of improvement on geographic diversity in recent years with high proportions of non-Western arbitrators coming into the system. A significant number of new entrants are non-Western and a few are gaining multiple appointments – both features which are key to ensuring regular repeat appointments. However, the system remains strongly marked by exclusiveness rather than inclusiveness. Non-Western arbitrators are mostly appointed by states as the respondent wing and much less likely to land the prestigious and influential role as presiding arbitrator. When they are nominated in this role, it is overwhelmingly by arbitral institutions and not by the parties or the co-arbitrators. Moreover, half of these non-Western arbitrators are from a single region: Latin America. The rest of the world is weakly represented, whether Eastern Europe, Asia, Africa or the Middle East.

Our statistical analysis shows, however, that nationality may not matter that much for actual outcomes. There is certainly one sign of home 'region' bias. Non-Western presiding arbitrators tend to favour non-Western respondent states more than their counterparts. The result, nonetheless, lies just outside the zone of statistical significance. Moreover, the presence of non-Western arbitrators on a tribunal tends to increase the chance of a claimant-investor succeeding; and they are more likely to be critical of claimant-investors from their own state/region. Thus, any change to the system that merely increases geographic diversity is unlikely to have material effects on outcomes. It may increase the regime's sociological legitimacy but is unlikely on current trends to dramatically change the nature of outcomes. However, this prediction only applies to the current system of international investment with its myriad of constraints, incentives and cultures. Should we move to a multilateral investment court, as proposed by the European Union, it would be an open question as to whether nationality might play this subdued or negligible role in a new juridical landscape. In that respect, experiences from the ICJ, WTO and ECHR may be more relevant in assessing future trajectories.