Moonlighting Revisited: International Court of Justice Judges as Adjudicators in Investment Arbitration

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Abstract:
This article presents a quantitative analysis of the involvement of judges of the International Court of Justice (ICJ) as adjudicators in investor-state dispute settlement (ISDS). As ICJ judges participated in more than 10% of known investment arbitrations and almost one third of ICSID annulment proceedings, the 2018 decision to prohibit active ICJ members to decide investment disputes bear relevant implications for both the ICJ and ISDS. The article discusses the reasons for and implications of ICJ judges adjudicating investment disputes. The quantitative analysis shows that ICJ status is a relevant factor in arbitral appointment process, ICJ judges are often appointed presidents or arbitrators for the respondent and the overall dynamic of appointments follows patterns of general ISDS developments. At the same time, the outcomes of investment disputes decided by ICJ judges are balanced and do not confirm the assumed pro-state bias of the judges.

1. Introduction

In 2017, the International Institute for Sustainable Development (IISD) published a commentary on the involvement of the judges of the International Court of Justice (ICJ) in investor-state dispute settlement (ISDS) as arbitrators or members of committees deciding on annulments of awards issued under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) of 1966.[1] The IISD is a non-governmental organization concerned with, among others, investment policies and sustainable development. It is known for its critical stance towards ISDS.[2] Its report brought to the public attention the practice of former and sitting full-time ICJ members working as arbitrators or annulment committee members (for the purposes of this article defined collectively as 'adjudicators') in ISDS despite the express stipulation in the ICJ Statute that they were not to 'engage in any other occupation of a professional nature'.[3] The IISD raised several concerns arising from that practice, labelled as 'moonlighting', including significant remuneration of ICJ judges for arbitral work, their workload, independence

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1 Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, Is *"Moonlighting" a Problem? The role of ICJ judges in ISDS,* International Institute for Sustainable Development (Nov. 23, 2017), https://www.iisd.org/articles/policy-analysis/moonlighting-problem-role-icj-judges-isds.

2 Nathalie Bernasconi-Osterwalder, *Rethinking Investment Policy to Support Sustainable Development,* IISD (Sept. 17, 2020) https://www.iisd.org/articles/success-story/rethinking-investment-policy-support-sustainable-development.

and impartiality.[4] At the same time, it noted that ICJ members have been involved as adjudicators in roughly 10% of all known investment treaty cases,[5] showing the scale of the issue.

The IISD commentary has raised some concerns about the ICJ members' work outside the Court.[6] In response to these concerns, in October 2018, in his annual speech before the United Nations General Assembly, the ICJ President Yusuf has announced a joint decision of the ICJ members not to participate in investment or commercial arbitration.[7] While Judge Yusuf did not mention ICSID annulment committees, when he became the ICJ President in February 2018 he resigned from sitting on an annulment committee.[8] Despite this example, other ICJ members did not, however, resign from their respective arbitral or annulment appointments, but continued their work in at least 11 investment cases.[9]

In 2020, the ICJ issued guidelines on the external activities of its members. The guidelines begin with arbitration activity and stipulate that sitting ICJ members 'may only participate in inter-state arbitration cases,' and only one case at a time.[10] One may ask why only this particular type of moonlighting, apart from the fact that ICJ judges often serve as arbitrators between states, was allowed. The case limit suggests that the workload increase at the ICJ has been taken into account. While it is still unclear whether the prohibition applies to ICSID annulment proceedings as these are not arbitrations *per se,* what is clear is that it does apply to active ICJ judges serving as arbitrators in ISDS.

This article discusses how the role of ICJ judges in deciding investment disputes which became a legitimacy concern both for the Court and ISDS. As that engagement has since been substantially limited, it is a good moment to assess this phenomenon and revisit the data and observations

3 Statute of the International Court of Justice, Art. 16 (1946), https://www.icj-cij.org/en/statute (describing how vacancies shall be filled).

4 Bernasconi-Osterwalder & Brauch, *supra* note 1, at 2–5.

5 *Id.* at 1.

6 Jack Ballantyne & Alison Ross, *Past and present ICJ judges welcome curb on moonlighting,* Global Arbitration Review (Apr. 9, 2021), http://globalarbitrationreview.com/past-and-present-icj-judges-welcome-curb-moonlighting; Ashira Vantress, *A Review of "Moonlighting" ICJ Judges and the International Call for Impartiality in Investor-State Dispute Resolution,* 12 World Arb. & Mediation Rev. (2020).

7 Abdulqawi A. Yusuf, President of the International Court of Justice at the Seventy-Third Session of the United Nations General Assembly 11–12 (Oct. 25, 2018), https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf.

8 Joel Dahlquist, *ICJ President reveals that ICJ judges will not participate in investor-state arbitration in the future,* Investment Arbitration Reporter (Oct. 27, 2018), http://www.iareporter.com/articles/icj-president-declares-that-judges-will-not-participate-in-international-arbitration-in-the-future/.

9 The three other ICJ judges involved in ISDS at the time did not resign from their appointments: Judge Crawford – four cases, Judge Donoghue – one case, and Judge Tomka – six cases.

10 International Court of Justice, Compilation of decisions adopted by the Court concerning the external activities of its Members 3 (last visited May 22, 2022), https://icj-cij.org/public/files/basic-documents/compilation-of-decisions-en.pdf.

made by the IISD commentary. While it appears that ICJ judges have substantially reduced their involvement in investment disputes given the abovementioned developments, it is useful to explore their past relevance and the implications of that relevance for the future of ISDS. The multifaceted role of the ICJ and its judges in ISDS makes the limitation of their involvement relevant for the developments in the field. A quantitative analysis will demonstrate which ICJ judges were involved in ISDS in what role and how often, thus making it possible to delineate the actual size of that involvement. These observations are relevant as it appears to be increasingly visible how important, both in terms of legitimacy and practice, is who decides international disputes.[11]

The involvement of ICJ judges as adjudicators in ISDS bears some normative considerations. Does the participation of an ICJ judge in investment arbitration the affect legal reasoning applied therein and its outcome? Does that participation affect the perception of the proceedings, its outcome or the ISDS as a whole? Empirical evidence suggests that the tribunals and committees including ICJ judges rely more often on ICJ references in their legal reasoning than those without ICJ judges.[12] Arguably, because of their provenance, ICJ judges lent their authority and legitimacy to the tribunals they sat in, their decisions and the ISDS as a whole. They might also have fostered consistency and coherence of international investment law, both internally (within the regime) and externally (with other fields of international law), even if only unintentionally due to their profession. All in all, besides resolving international disputes and developing international law, the concern with consistency and coherence is a part of their function as ICJ judges. Although their role within ISDS was slightly different than that at the Court, that function had similar significance in their arbitral work.

The structure of the piece is as follows. Firstly, it describes the role of the ICJ and its judges in international dispute settlement, the explanations for and implications of their involvement in ISDS (Section 2). Secondly, it presents the quantitative analysis of appointments of ICJ members (leaving aside *ad hoc* judges)[13] as adjudicators in known investment disputes (Section 3).[14] Finally, it concludes with the implications of limiting the ICJ members' involvement in ISDS (Section 4).

2. Involvement of the ICJ in ISDS – explanations and implications

The International Court of Justice appears in international investment law and arbitration in numerous ways as, among others, institution, example to follow or source of jurisprudence and adjudicators. This section presents, first, the ways in which the Court appears in ISDS, second, the explanations for it, and third, implications of these appearances.

11 David Collins, *ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?,* 30 J. Int'l Arb. 335 (2013); Sergio Puig, *Social Capital in the Arbitration Market,* 25 European J. Int'l L. 387, 388–90 (2014).

12 Damien Charlotin, "Authorities" in International Dispute Settlement: a Data Analysis, 213–214 (Oct. 31, 2020) (Ph.D. thesis, University of Cambridge), available at https://www.repository.cam.ac.uk/handle/1810/312324.

2.1. The Court in ISDS

From all standing international courts, the ICJ has the broadest scope of jurisdiction. It applies the broadest range of international legal norms from different sources. Moreover, the Court makes pronouncements on a wide variety of issues, from establishing the existence of a customary international legal norm or a general principle of law, through treaty interpretation to using secondary rules on state responsibility. As a result, the ICJ has made numerous important pronouncements on general international law which are often cited in international jurisprudence and scholarship. It is the richest source of general principles of law[15] which are indispensable for gap-filling in arbitral law-making.[16] ICJ judges thus develop international law by identifying, clarifying and establishing its rules.[17] Due to this role and experience, they are perceived as authoritative adjudicators in international legal disputes.

ICJ judges professionally solve international legal disputes involving states, interpreting international treaties. Their expertise in public international law and its application in international disputes is not to be underestimated among investment arbitrators. The latter are criticized, also by some insiders,[18] for their lack knowledge of international law or incorrect application of treaty interpretation rules

13 At every contentious case decided by the ICJ, each of the parties may appoint an *ad hoc* judge if no judge of the party's nationality is at the bench. While often respected international lawyers take *ad hoc* judge position, they are not taken into consideration as they do not benefit from that position to get ISDS appointments. Rather, it is the other way around. Nevertheless, among the ICJ judges *ad hoc* one can also find numerous individuals important in investment arbitration, just to mention Georges Abi-Saab, Franklin Berman, Charles N. Brower, David Caron, Ahmed Sadek El-Kosheri, Yves Fortier, Marc Lalonde or Donald McRae.

14 The dataset includes all publicly known (as of May 1, 2022) investment disputes regardless their legal basis – an investment treaty, an investment contract and/or a domestic law. Involvement of ICJ members in ISDS other than directly deciding the case, e.g. appointing arbitrators, deciding on arbitrator challenges, as counsels or expert witnesses, was not taken into account.

15 Charlotin, *supra* note 12, at 216–21.

16 Alec Stone Sweet & Florian Grisel, The Evolution of International Arbitration: Judicialization, Governance, Legitimacy 107, 240–47 (Oxford University Press, 2017); *see also* The Renco Group Inc. v. Republic of Peru II, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections ¶¶ 212-14 (June 30, 2020); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award ¶ 72 (Oct. 31, 2005).

17 Lyndel V. Prott, The latent power of culture and the international judge 77–78 (1979).

18 Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis,* 19 European J. Int'l L. 301, 315 (2008); William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System, in* The backlash against investment arbitration: perceptions and reality 407, 409 (Michael Waibel et al. eds., 2010); Julie A. Maupin, *Differentiating Among International Investment Disputes, in* The Foundations of International Investment Law 466, 488 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014); Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?,* 29 European J. Int'l L. 551, 552 (2018); Niccolò Ridi, *'Mirages of an Intellectual Dreamland'? Ratio, Obiter and the Textualization of International Precedent,* 10 J. Int'l Disp. Settlement 361, 372–75 (2019).

19 Thomas Waelde, *Interpreting Investment Treaties: Experiences and Examples, in* International Investment Law for the 21st Century 724, 724–27 (Christina Binder et al. eds., 2009); Michael Waibel, *International Investment Law and Treaty Interpretation, in* International Investment Law and General International Law 29 (Rainer Hofmann & Christian J. Tams eds., 2011); Jürgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law, in* The Foundations of International Investment Law 257, 269–80 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014).

stipulated in the Vienna Convention on the Law of Treaties.[19] Many times, ICJ judges collectively have made decisions related to international arbitral awards[20] while individually they have been deciding on appointing or challenging arbitrators in ISDS. Thus, besides the role of 'direct' decision makers, the ICJ judges appear in the field of international arbitration as power brokers, capable of playing numerous roles. They are able to act as such thanks to the general prestige of the Court and its judges. That prestige is a foundation of particular trust in the ICJ of virtually all the actors and stakeholders in ISDS: parties, other arbitrators, arbitral institutions and scholars.

When solving investment treaty disputes, the adjudicators often face various general international law issues, including, for example, treaty interpretation, identification and interpretation of other sources of international law, matters of territorial sovereignty, nationality, state succession, attribution of a conduct to a state, remedies for violations or circumstances precluding wrongfulness of state conduct.[21] They often seek references to these matters in the ICJ jurisprudence.

In addition to its jurisprudence as a source of law, which might go beyond its secondary role provided for in Article 38 of its own Statute (an influential legal source in itself), the ICJ is a source of practices (e.g., in procedure or taking evidence) and, as argued in this article, adjudicators. Thus, there are normative, institutional and personal connections between the Court as proxy for general international law and the ISDS tribunals as emanations of investment lex specialis.

The Court also played a role in the emergence of investment law as we know it today. Both the Permanent Court of International Justice (PCIJ) and the ICJ as its successor have decided several cases which would currently qualify as investment disputes.[22] The dissatisfaction with inherent limitations of customary law on diplomatic protection of aliens and foreign property and the challenge to these practices made by the recently independent, post-colonial countries in the 1970s led several states to turn to investment treaties providing for international arbitration in which investors have direct standing against host states. Thus, the ICJ had a role in the development of investment treaty regime as a distinct field of practice and research in international law.[23]

Coming back to its legal function, the Court is by far the most popular external source of precedents in investment arbitration.[24] Moreover, empirical evidence shows that the presence of a sitting or former ICJ judge in the bench is correlated with more citations of the ICJ by both the parties

20 *See e.g., Arbitral Award made by the King of Spain on 23 December 1906* [1960] ICJ Rep 192; *Arbitral Award of 31 July 1989* [1991] ICJ Rep 53. *See also* Michail Risvas, *Review and enforcement of arbitral awards in international investment law and general public international law, in* International Investment Law and General International Law 368 (Christian Tams et al. eds., 2023).

21 Damien Charlotin, *The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis,* 20 J. Int'l Econ. L. 279, 288 (2017).

22 *See e.g.,* The Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12); Barcelona Traction, Light and Power Company, Limited, 1970 I.C.J. Rep. 3; Elettronica Sicula SpA, 1989 I.C.J. Rep. 15. All these cases are often cited in investment arbitration cases; Stone Sweet & Grisel, *supra* note 16, at 156–57.

23 Mārtiņš Paparinskis, *Barcelona Traction: A Friend of Investment Protection Law,* 8 Baltic Y.B. Int'l L. 105 (2008).

24 Charlotin, *supra* note 21.

and the tribunal.[25] This suggests that the personal composition of the bench influences the legal reasoning, that is which legal arguments are put forward by the parties. However, law is not the only factor possibly influencing the ICJ/PCIJ citations in arbitral decisions. The involvement of the Court, its judges and jurisprudence may play a particular role in strengthening the authority and legitimacy of the tribunal and, in turn, whole investment arbitration. Below, several theoretical explanations for that versatile involvement of the ICJ/PCIJ in investment arbitration are presented.

2.2. Explanations for ICJ involvement in ISDS

Historically, arbitration was a less legalized, more informal method of dispute settlement. The authority an arbitral tribunal's decision depended heavily on the social capital of its members.[26] When modern international arbitration emerged, the first generation of arbitrators were European international law professors[27] or the experienced and respected members of 'international bar' or 'judiciary'. For example, the famous arbitration case concerning *Island of Palmas*[28] was decided by a former President of the PCIJ. Arguably, his PCIJ status was a currency of social capital needed to become a respectable arbitrator.[29] A continuity can be noted between the PCIJ and the ICJ also in the involvement of their judges in international arbitration.

The ICJ (and previously, the PCIJ) is one of the most prestigious courts of international law. The Court and its judges are highly esteemed, at least superficially, in international jurisprudence and scholarship.[30] The ICJ is the closest equivalent to the non-existent Supreme Court of international law. Moreover, various proposals on introducing appellate instance in international adjudication involve the ICJ or its judges.[31] The Court's prestige is one of the reasons its decisions are extensively cited by itself, other courts, and scholars. Its prestige also explains why ICJ judges are involved in other fields of international dispute settlement, including ISDS, as members of 'international judiciary' alongside members of other international courts and judges of domestic supreme courts. The standing international court character and fixed terms of appointment for its judges increase the ICJ's appearance as a stable institution. The institutional framework of the Court and the selection process of its judges reinforce its prestige as a neutral, diverse, professional and respectable

25 Charlotin, *supra* note 12, at 213–14; Fuad Zarbiyev, *Saying Credibly What the Law Is: On Marks of Authority in International Law,* 9 J. Int'l Disp. Settlement 291, 303 (2018).

26 Yves Dezalay & Bryant G. Garth, Dealing in virtue: international commercial arbitration and the construction of a transnational legal order 18–19, 52–60 (1996); Stone Sweet & Grisel, *supra* note 16, at 72–75.

27 Dezalay & Garth, *supra* note 26, at 34–42.

28 Island of Palmas Case (Netherlands v. U.S.), 2 R.I.A.A. 839 (Perm. Ct. Arb. 1928).

29 Daniel-Erasmus Khan, *Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations,* 18 European J. Int'l L. 145 (2007); Antoine Vauchez, *The International Way of Expertise. The first World Court and the Genesis of Transnational Expert Fields* (EUI, Working Paper RSCAS 2014/80, 2014).

30 Chester Brown, A common law of international adjudication 232 (2007); Sara Dezalay & Yves Dezalay, *Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration, in* International Law as a Profession 311, 315–23 (Jean d'Aspremont et al. eds., 2017).

31 Mohamed Sameh M. Amr, The role of the International Court of Justice as the principal judicial organ of the United Nations 374–76 (2003); Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration,* 73 Fordham L. Rev. 1521, 1602–03, 1609–10 (2005).

institution. The Statute and the Rules of the Court have ceased to be of internal importance only, having become points of reference for other international adjudication bodies. This concerns not only the indication of the sources of international law in the Article 38 of the Statute but also practical matters.[32]

The ICJ, mindful of its prestige, actively promotes its own status. At the annual speeches to the General Assembly, ICJ Presidents emphasize the need for peaceful dispute settlement and thus for the Court. They also draw attention to the consistency and coherence of international decisions, deploring the fact that the Court is not consulted or cited as often as it should be.[33] At the same time, the Court is known to being reluctant to employ external citations so as not to dilute its prestige.[34] Even before the moonlighting controversy sparked by the IISD commentary, the Court was mindful of the risks of potential issue conflicts arising. In the ICJ Practice Directions, judges *ad hoc* were prohibited from serving in various roles in different cases before the Court, e.g., as a counsel in one and as a judge in another, at the same time (so-called 'double hatting').[35] Moonlighting by the ICJ judges had already been discussed internally in the 1990s. After the UN Advisory Committee on Administrative and Budgetary Questions raised an issue of the judges being remunerated for, among others, 'acting as arbitrators in inter-State and private international arbitrations', the Court in its report asserted the legality of this practice dating back to the origins of the PCIJ. In addition, it emphasized that the issue concerned 'a very limited number of judges for very limited periods' and that it had 'no adverse effect on the pace of the work of the Court'.[36] While the limited involvement, without effect on the Court's workload, might have been the case in the 1990s, the matter has resurfaced with the IISD commentary when the ICJ, ISDS and involvement of ICJ judges therein were much more active. In the meantime, the ISDS started facing the legitimacy crisis and thus the judges' involvement in it became problematic for the public perception of the Court.

The relative popularity of ICJ judges as arbitrators can, on the one hand, be explained by the formal presumption of both moral quality and legal expertise, required also in international arbitration. According to the Statute of the ICJ, its judges must be 'of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.'[37] In practice, most ICJ judges are indeed recognized experts of international law, as the appointment to the ICJ is often considered the apex of an international legal career. The appointment formally confirms this status, adding to the appearance of impartiality.[38] The 'ICJ aura' is not, however, absolute: Judge Bedjaoui, for

32 Brown, *supra* note 30, at 226–34.

33 Erik Voeten, *Borrowing and Nonborrowing among International Courts,* 39 J. Legal Stud. 547, 548 (2010).

34 *Id.* at 569.

35 Philippe Sands, *Judicialization and its Challenges, in* The judicialization of international law: a mixed blessing? 245, 253 (Andreas Føllesdal & Geir Ulfstein eds., 2018).

36 International Court of Justice, *Report of the International Court of Justice. 1 August 1995 - 31 July 1996,* 43, ¶ 199, https://www.icj-cij.org/public/files/annual-reports/1995-1996-en.pdf.

37 ICJ, Statute of the International Court of Justice, Article 2 (describing the organization of the ICJ).

38 Callum Musto, *New Restrictions on Arbitral Appointments for Sitting ICJ Judges,* EJIL:Talk! (Nov. 5, 2018), https://www.ejiltalk.org/new-restrictions-on-arbitral-appointments-for-sitting-icj-judges/.

example, despite his eminence in international arbitration and former ICJ President status, was disqualified from an ICSID dispute, which rarely happens.[39]

Another potential explanation of the reference to general public international law through the ICJ judges and jurisprudence is the strengthening connection between the regimes and thus perception of ISDS. The legitimacy crisis of investment arbitration is related to its alleged alienation from the mainstream international law.[40] Thus, public international law as a more 'state-friendly' paradigm could be assumed to be strengthened in investment arbitration to 're-balance' the latter towards the interests of the states. This 'state-friendly' paradigm would be construed as such due to the foundation of public international law on respect for states' sovereignty and equality, providing some deference to their rights and interests in their mutual relations. Similar reasoning may stand behind the involvement in ISDS of ICJ judges, who often have a background as public international law scholars or even civil servants.[41] If 'the enemy of the state'[42] takes more of a 'friend of the state' perspective, the outcome may appear to be more acceptable for the states. In addition, due to the vague wording and numerous gaps in the applicable law, in particular investment treaties, embedding legal interpretation of these in the general international framework may be perceived as attempting to ensure coherence between the investment *lex specialis* and the public international *lex generalis,* thus also increasing legitimacy through a convincing justification.[43]

Engaging ICJ judges in investment disputes may indeed have been aimed at both the legitimacy crisis itself and its sources. ICJ judges might lend their own prestige and legitimacy to ISDS where they appear in as adjudicators from another, more prestigious dispute settlement mechanism. As argued above, the legitimacy crisis of investment arbitration is at least partially related to the unclear relationship between international investment law and general public international law. ICJ judges might have been willing to authoritatively clarify that relationship.

The involvement of ICJ judges might also have aimed at increasing consistency of investment tribunals' decisions. Although an arbitrator has slightly different function to a judge when it comes to

39 Puig, *supra* note 11, at 406.

40 Andrea K Bjorklund, *The Legitimacy of the International Centre for Settlement of Investment Disputes, in* Legitimacy and International Courts 234, 244–45 (Nienke Grossman et al. eds., 2018); Thomas Dietz et al., *The legitimacy crisis of investor-state arbitration and the new EU investment court system,* 26 Rev. Int'l Pol. Econ. 749, 756–61 (2019); Michael Waibel et al., The backlash against investment arbitration: perceptions and reality, 1–4 (London: Kluwer law International, 2010).

41 Freya Baetens, *The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators are Under Fire and Trade Adjudicators are Not: A Response to Joost Pauwelyn,* 109 AJIL Unbound 302, 306 (2015); Ernst-Ulrich Petersmann, *Fragmentation and judicialization of international law as dialectic strategies for reforming international economic law,* 5 Trade, L. & Dev. 209, 236 (2013).

42 José E Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases,* 6 World Arb. & Mediation Rev. 491, 494 (2012).

43 With regard to the WTO Appellate Body, it is suggested that the quality of its "jurisprudence in cases involving competing public values . . . may in part be attributable to a broader public international law outlook of a number of its members"; R. Howse & E. Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jurgen Kurtz,* 20 European J. Int'l L. 1087, 1094 (2009).

resolving a dispute, the concerns of consistency and coherence are significant also in ISDS.[44] Judges of permanent courts, in comparison to arbitrators appointed *ad hoc* to decide a particular dispute, are expected to be more mindful of systemic implications of their decision and its consistency with previous decisions.[45] The consistency is particularly relevant for annulment proceedings to which, reportedly, the ICSID was appointing committee members from 'a small cohort of individuals', apparently including several ICJ judges, 'in the hopes of some greater continuity and cohesiveness of approach' in the procedure closest to an appeal in international arbitration.[46] Thus, having a judge as an adjudicator may foster the consistency of reasoning, if not of the outcomes, in ISDS. As we will see further below, ICJ judges appeared particularly often in the annulment proceedings.

Besides institutional and systemic motivations, the potential personal motivations of ICJ judges to accept appointments should be discussed. The IISD commentary emphasized the financial aspect, i.e. the substantial remuneration some ICJ judges received for their arbitral work.[47] Indeed, while an ICJ judge's yearly remuneration is around USD 170,000,[48] the financial incentives of international arbitrators, including hourly rates between USD 375 and 700 (depending on the arbitral institution) are often indicated as reasons for entering this lucrative profession.[49] ICSID annulment committee members are also satisfactorily remunerated for their work, earning on average USD 95,000 per proceeding as remuneration, fees and expenses.[50] This is not to suggest that ICJ judges were moonlighting just for additional money. Nevertheless, the staggering remuneration they received does not necessarily improves the perception of the practice. It is worth noting that for most of the Court's existence, its docket was rather empty and, as argued by the Court in its exchange with the UN agency mentioned above, its judges had plenty of free time. It is no surprising that, given the opportunity, they might dedicate that free time to judging other international disputes. Recent decades, however, have brought an increase of cases before the ICJ, thus reducing ICJ judges free time.[51]

Another factor, arguably, is the prestige of an international arbitrator.[52]Although the ICJ status itself appears to be a significant prestige token, social capital in the field of international dispute settlement can be increased further. Thus, ICJ judges may accept their appointments as a sign

44 The Legitimacy of Investment Arbitration: Empirical Perspectives 1 (Daniel Behn et al. eds., 2022); Kurtz, *supra* note 19; Andrés Rigo Sureda, Investment Treaty Arbitration: Judging Under Uncertainty 97–141 (2012); Thomas Schultz, *Against Consistency in Investment Arbitration, in* The foundations of international investment law: bringing theory into practice 297 (Zachary Douglas et al. eds., 2014); Irene M Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration,* 51 Columbia J. Transnat'l L. 418 (2013).

45 Wolfgang Alschner & Damien Charlotin, *The Growing Complexity of the International Court of Justice's Self-Citation Network,* 29 European J. Int'l L. 83, 99–101 (2018).

46 Luke Eric Peterson, ICSID *committee confirms Egypt's lack of treaty breaches in hotel dispute, but takes issue with tribunal's comment on recourse to local courts,* Investment Arbitration Reporter (2010), http://www.iareporter.com/articles/icsid-committee-confirms-egypts-lack-of-treaty-breaches-in-hotel-dispute-but-takes-issue-with-tribunals-comment-on-recourse-to-local-courts/.

47 Bernasconi-Osterwalder & Brauch, *supra* note 1, at 2–3.

48 Robert Kolb, The Elgar Companion to the International Court of Justice 51 (Edward Elgar Publishing, 2014).

49 Susan D Franck, *Rationalizing Costs in Investment Treaty Arbitration,* 88 Wash. U. L. Rev. 769, 839–41 (2011); Puig, *supra* note 11, at 398; ICSID, *Schedule of Fees* (2020), https://icsid.worldbank.org/services/content/schedule-fees.

of recognition for their skills, knowledge and prestige as well as an expression of trust. There is a noticeable feedback loop between the legitimacy and prestige of investment arbitration and its adjudicators, where the adjudicators lend their own social capital to ISDS and thus doing they also receive a 'prestige boost'. It is thus understandable why ICJ judges tended to accept such lucrative and prestigious appointments until they became problematic and prohibited.

2.3. Implications of ICJ involvement in ISDS

The implications of the involvement of ICJ judges in ISDS appear from the explanations discussed above. The status of an ICJ judge seems to be a formal seal of approval of high standards, legal expertise and thus social capital of the appointee. The process of appointing an ICJ judge is much more complex and thorough than arbitral appointment. As a result, ICJ judges appear to be more impartial and professional than an average international adjudicator. ICJ judge appointments can be construed as an attempt to influence the ISDS' perception, practice and outcomes by appointing arbitrators outside of international commercial arbitration.[53] Thus, the involvement of ICJ judges may be read as a more or less deliberate attempt to infuse more of the 'state-friendly' paradigm into ISDS. Whether these appointments indeed lead to increased consistency, coherence and legitimacy of investment tribunals' decisions, is beyond the scope of this article. However, the outcomes of the disputes involving ICJ judges as adjudicators, that is, whether they are biased in favor of the state, will be quantitatively inspected.

The involvement of ICJ judges visibly marks the judicialization of ISDS. Just as other fields of international law and international dispute settlement,[54] even less formalized methods follow the example of more permanent judicial institutions and their procedures, with the ICJ experience in the lead.[55] Whether judicialization of ISDS is a positive trend in itself is debatable.[56] Nevertheless, arguably it fosters coherence and consistency and thus, systemic development of the field.

While the involvement of ICJ judges arguably produces a legitimacy benefit to a given tribunal or committee, its decision and even ISDS as a whole, it also might cause, on the other hand, a legitimacy cost on the part of these judges or the Court itself. As noted above, the IISD drew attention to several problems of the ICJ judges' perception due to their involvement in ISDS,

50 International Centre for Settlement of Investment Disputes, *Background Report on Annulment for the Administrative Council of ICSID,* 19 (Aug. 10, 2012), https://icsid.worldbank.org/sites/default/files/Background%20Report%20on%20Annulment_English.pdf.

51 Ballantyne & Ross, *supra* note 6.

52 Susan D Franck et al., *International Arbitration: Demographics, Precision and Justice, in* ICCA Congress Series No. 18: Legitimacy: Myths, Realities, Challenges 33, 78–81 (2015); Malcolm Langford et al., *The Revolving Door in International Investment Arbitration,* 20 J. Int'l Econ. L. 301, 232 (2017).

53 Florian Grisel, *Marginals and Elites in International Arbitration, in* The Oxford Handbook of International Arbitration 259, 265–66 (Thomas Schultz & Federico Ortino eds., 2020).

54 Sands, *supra* note 35.

55 Brown, *supra* note 30, at 232; Kolb, *supra* note 48, at 14; Stone Sweet & Grisel, *supra* note 16, at 218–22.

56 Leon Trakman & Hugh Montgomery, *The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?,* 30 Leiden J. Int'l L. 405 (2017); The judicialization of international law: a mixed blessing?, (1st ed., Andreas Føllesdal & Geir Ulfstein eds., 2018); Sands, *supra* note 35.

opening a discussion on the topic.[57] First, by engaging in remunerated work outside the Court, ICJ judges apparently behave in direct violation of the ICJ Statute. Second, they earned staggering amounts of money for their additional work which might have incentivized them to prioritize it over their commitments at the Court. Third, the workload at the ICJ has increased in the recent decades. Fourth, the perception of independence and impartiality of the judges may be questioned if some of them are hired – often by states – to decide disputes at another forum. Even if overall the esteem around the ICJ and its judges remained high, these problems were legitimacy liabilities. To conclude, the involvement of the ICJ and its judges in ISDS has been visible in numerous ways. They also have several functions. Thus, appointing ICJ judges as adjudicators in ISDS was a purposeful process with significant normative implications. Also the legitimacy of both ISDS and the ICJ were at stake. The following section presents the quantitative analysis of ICJ judges' appointments in ISDS as adjudicators.

3. ICJ members as adjudicators in ISDS – data analysis

The 21st century international legal research, especially in the last decade, has seen an 'empirical turn'.[58] This concerned international dispute settlement in general[59] and ISDS in particular.[60] In the latter, the behavior of various actors, including adjudicators,[61] as well as outcomes[62] are analyzed. Empirical methods are employed to describe and explain social and legal phenomena and to challenge related assumptions. Network analysis has been employed to delineate relations between international arbitrators, to identify significant 'power brokers' and to assess the position of certain individuals (including several ICJ judges) in the field.[63] This article employs quantitative analysis of basic information on the appointments of ICJ judges as adjudicators in ISDS cases.

As of 31 July 2017, the IISD identified seven sitting and 13 former ICJ judges who have been working or worked in overall 90 cases, 78 of them treaty-based, being appointed 92 times during or before their respective terms.[64] I have revisited the available data on investment disputes, using

57 Ballantyne & Ross, *supra* note 6; Vantress, *supra* note 6.

58 Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship,* 106 American J. Int'l L. 1 (2012); Jakob V.H. Holtermann & Mikael Rask Madsen, *Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law,* 29 Leiden J. Int'l L. 1001 (2016).

59 Eric A Posner & Miguel F P de Figueiredo, *Is the International Court of Justice Biased?,* 34 J. Legal Stud. 599 (2005); Charlotin, *supra* note 21; Niccolò Ridi, *The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication,* 10 J. Int'l Disp. Settlement 200 (2019).

60 Catherine A Rogers, *The Politics of International Investment Arbitrators,* 12 Santa Clara J. Int'l L. 223 (2003); Wolfgang Alschner, Joost Pauwelyn & Sergio Puig, *The Data-Driven Future of International Economic Law,* 20 J. Int'l Econ. L. 217 (2017); Daniel Behn, Malcolm Langford & Laura Létourneau-Tremblay, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?,* 21 J. World Invest. Trade 188 (2020).

61 Puig, *supra* note 11; Langford et al., *supra* note 52.

62 Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration,* 50 Harv. Int'l L. J. 435 (2009); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration,* 50 Osgoode Hall L. J. 211 (2012); Daniel Behn, Tarald Laudal Berge & Malcolm Langford, *Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration,* 38 Northwest. J. Int'l L. Bus. 333 (2018).

63 Puig, *supra* note 11; Langford et al., *supra* note 52.

64 Bernasconi-Osterwalder & Brauch, *supra* note 1, at 1. The difference between the number of cases and appointments arises from the fact that, in a single case, there can be more than one ICJ judge appointed.

the same databases as the authors of the IISD commentary,[65] looking for all the appointments of all ICJ permanent members before, during and after their respective terms. While appointment after ICJ tenure does not raise moonlighting concerns, it is nevertheless relevant for the analysis of the involvement of ICJ judges (sitting or former) in ISDS. As I have argued before, ICJ judge status appears to be a relevant factor in arbitral appointment and even after the respective ICJ term finishes, a (former) ICJ judge maintains status. In addition, the 2018 decision is likely to put an end to appointing sitting ICJ members and thus to encourage appointing former ICJ members (if any) instead.

3.1 Data overview

As of 1 May 2022, there were six sitting and 22 former ICJ judges being individually appointed 217 times to work in 200 cases, 191 of them treaty-based. While since the end of 2017 there have been further 29 appointments of sitting and former ICJ judges, the key difference from the IISD data is full inclusion of appointments of the prospective and former ICJ judges. Out of 217 total appointments, 37 took place before the respective ICJ term, 90 during the term and another 90 after the term. Thus, a vast majority of ISDS appointments occurred during or after the term of ICJ judges, suggesting that the ICJ judge status is a relevant factor in the appointing process. ICJ judges have been appointed 169 times (in 160 cases) as arbitrators and 48 times (in 40 cases) as ICSID annulment committee members. In 91 arbitrations and 18 annulments respectively, they had the function of the president. That particular aspect will be discussed further below.

Fifteen times we may find more than one ICJ judge, sitting, former or prospective, at a single tribunal or committee. In eight arbitrations and four annulments, two ICJ members adjudicated the same case and further two annulment committees were composed fully from three ICJ judges.[66] Fourteen times in 13 cases, ICJ judges did not participate in final decision (if any) due to their disqualification,[67] resignation[68] or death[69] preceding the conclusion of the dispute. To sum up, the IISD finding that ICJ judges are significantly involved in ISDS is confirmed by the fact that they decided in more than 10% of known investment arbitrations and in almost one third of ICSID annulment proceedings (40 out of 133). While treaty-based disputes are a vast majority of known investment cases, the dominance of these in cases involving ICJ judges (191 out of 200) tellingly

65 IISD conducted research of the following databases: Investment Policy Hub, www.italaw.com, International Centre for Settlement of Investment Disputes, Permanent Court of Arbitration Case Repository and Investment Arbitrator Reporter. For this research, I have used the same databases (as of May 1, 2022), supplemented with the data from Investor-State Law Guide and Jus Mundi as well as Python regex search of the publicly available investment jurisprudence at www.italaw.com to corroborate the findings.

66 CMS v. Argentina, ICSID Case No. ARB/01/8, Annulment (Guillaume, Crawford, Elaraby, Sept. 25, 2007); Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, Annulment (Schwebel, Shahabuddeen, Tomka, Apr. 16, 2009); on the latter case, *see* Mahnoush H. Arsanjani & W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: the "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties,* 104 American J. Int'l L. 597 (2010).

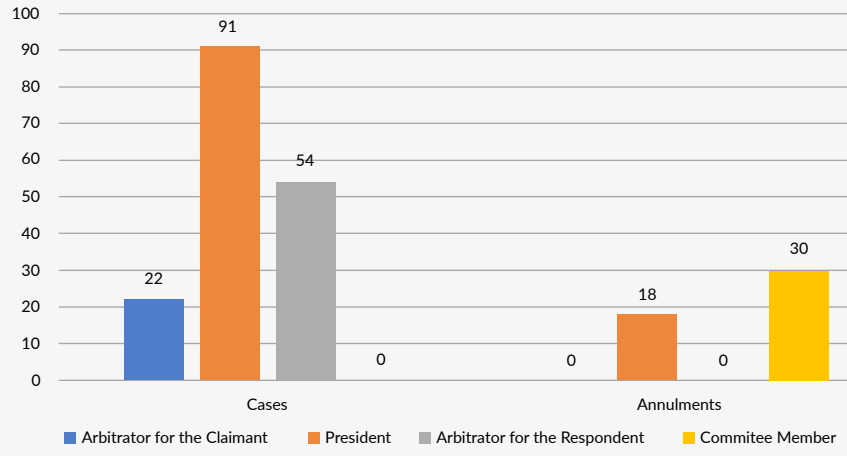
67 *See* Judge Bedjaoui, an ICJ judge from 1982–2001, in *Victor Pey Casado and President Allende Foundation v. Chile,* ICSID Case No. ARB/98/2, which disqualified the decision of the ICSID Chairman of the Administrative Council on February 21, 2006.

68 *See e.g.,* Judge Keith, ICJ judge from 2006–2015, in *ConocoPhillips v. Venezuela,* ICSID Case No. ARB/07/30, who resigned in 2016.

69 *See also* Judge Petrén, ICJ judge from 1967–1976, in *Holiday Inns v. Morocco,* ICSID Case No. ARB/72/1, who died in 1976.

points to the public international law dimension of these disputes and their settlement mechanism, with the use of international judges.

Graph 1: ICJ judges' appointments (divided by type of proceedings and function)



It is not only the numbers that matter here. ICJ judges were involved not only in many investment disputes but also in cases important for the development of investment law and arbitration as a field. An ICJ judge took part in deciding, to mention just a few, the first ICSID case ever,[70] a second known investment treaty dispute,[71] the first annulled ICSID case,[72] one of the first NAFTA disputes and reportedly the most often cited investment case,[73] a precedential case expanding the scope of the most-favored-nation treatment to arbitration clause,[74] cases with the largest compensations awarded,[75] several Argentine cases,[76] and an exceptional case of successful counterclaim against the

70 Holiday Inns v. Morocco, ICSID Case No. ARB/72/1, with Sture Petrén as President.

71 American Manufacturing & Trading, Inc. (AMT) v. Zaire (currently the Democratic Republic of the Congo), ICSID Case No. ARB/93/1, with Keba Mbaye, the ICJ judge from 1982–1991 as respondent's appointee.

72 Klöckner v. Cameroon, ICSID Case No. ARB/81/2, with Eduardo Jiménez de Aréchaga, the ICJ judge from 1970–1979 and ICJ President from 1976–1979).

73 Mondev v. the United States of America, ICSID Case No. ARB(AF)/99/2, with James Crawford, the ICJ judge from 2015 –2021, and Stephen Schwebel (ICJ judge 1981-2000 and ICJ President 1997-2000) as claimant's and respondent's appointees respectively. Charlotin, *supra* note 12, at 149.

74 Emilio Augustin Maffezini v. Spain, ICSID Case No. ARB/97/7, with Thomas Buergenthal (ICJ judge 2000–2010) as claimant's appointee.

75 Yukos Universal Limited (Isle of Man) v. Russian Federation, PCA Case No. AA227, with Stephen Schwebel as arbitrator for the respondent, and Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, with Bernardo Sepúlveda-Amor (ICJ judge 2006–2015 and ICJ Vice-President 2012–2015) as annulment committee member.

76 Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina (1), ICSID Case No. ARB/97/3, with Francisco Rezek (ICJ judge 1997–2006) as President and Thomas Buergenthal as arbitrator for the respondent, CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, and LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, both with Francisco Rezek as arbitrator for the respondent. Even more ICJ judges were involved in annulment proceedings concerning these and other Argentine cases. *See supra* note 69.

investor.[77] These and many other cases with ICJ judge participation arguably contributed to the development of investment arbitral jurisprudence.[78]

3.2. The appointment of ICJ judges over time

The historical account of ISDS appointments of ICJ judges is parallel to the general history of investment arbitration. The first investment arbitration proceedings were usually based on a contract or domestic law.[79] Although a vast majority of ISDS appointments of ICJ judges concern treaty-based disputes, in the early years they were involved predominantly in contract-based cases. As investment treaty disputes focus on the interpretation of the international treaty underlying a given dispute while in contractual disputes more attention is usually put on domestic law governing the contract, with possible additions from international law, the involvement of ICJ judges in the former appears to be more understandable. As noted above, in 1972, a sitting ICJ judge was appointed to the first ICSID arbitration (which was contract-based),[80] the only ICJ judge's appointment in ISDS until the next decade. The 1980s, with the slow increase of investment disputes, saw nine appointments, including three to some of the first ICSID annulments.[81] In that period, ICJ members were also appointed four times as presiding arbitrators. In the 1990s, a decade which saw a significant increase of both investment treaties and disputes, 14 appointments were given to ICJ judges, nine of them being then active at the ICJ. Interestingly, all of these were arbitral appointments, i.e. no ICJ judge was appointed to an annulment committee. This may be explained by the fact that, until 2000, there were only very few annulment proceedings.[82]

In the following decades, the number of investment disputes exploded. This is also visible in the huge increase of appointments of ICJ judges to respectively 87 in the 2000s and 95 in the 2010s. ICJ judges were massively appointed arbitrators, particularly presidents, and members of ICSID annulment committees. While in the 2000s, 27 out of 87 appointments occurred before the respective ICJ term (20 out of these 27 concerned a single individual – the late James Crawford), in the 2010s only five out of 95 appointments concerned ICJ judges before their term. Thus, as noted above, a vast majority of ICJ judges' ISDS appointments concerned sitting or former judges. The current decade would probably mark the decline of appointing ICJ judges as ISDS adjudicators, mainly due to the 2018 decision. After that, only once was a sitting ICJ member appointed arbitrator and he resigned

77 Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, with Peter Tomka (ICJ judge from 2003, ICJ Vice-President 2009–2012 and ICJ President 2012–2015).

78 *See e.g.,* CME Czech Republic B.V. v. Czech Republic, UNCITRAL case, with Stephen Schwebel as arbitrator for the claimant; World Duty Free Company v. Republic of Kenya, ICSID Case No. ARB/00/7, with Gilbert Guillaume (ICJ judge 1987–2005 and ICJ President 2000–2003); Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, with the annulment committee composed exclusively from ICJ judges: Stephan Schwebel, Mohammad Shahabuddeen (ICJ judge 1988–1997) and Peter Tomka, *supra* note 69; Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, with James Crawford as arbitrator for the respondent.

79 Langford et al., *supra* note 52, at 306–08.

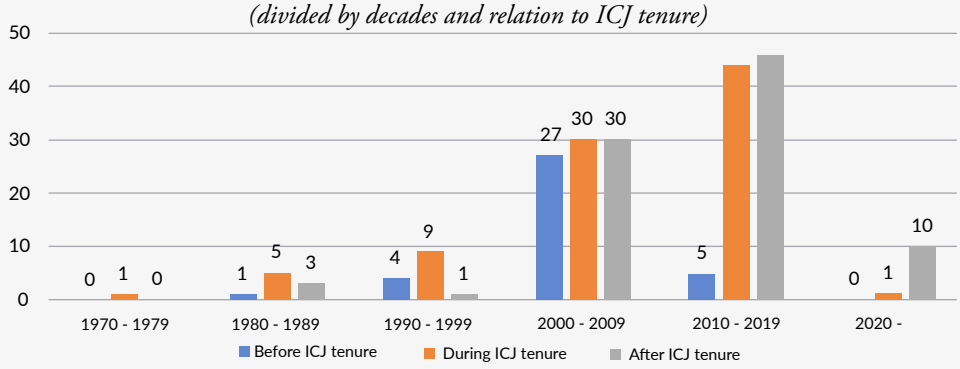
80 Holiday Inns v. Morocco, ICSID Case No. ARB/72/1, with Sture Petrén as President.

81 All these three annulment appointments concern Keba Mbaye during his ICJ term (1982–1991).

82 ICSID, *Decisions on Annulment,* https://icsid.worldbank.org/node/81661.

shortly afterwards.[83] The remaining 10 post-2018 appointments concerned former ICJ judges only. Most probably, this trend will continue in the future.

Graph 2: ICJ judges appointments (divided by decades and relation to ICJ tenure)



3.3. The appointment of ICJ judges – demographics

International arbitration professionals constitute a relatively small and closed group which is heavily male- and West-dominated.[84] They are described as 'pale, male, and stale'.[85] The gender and ethnic diversity, despite the international nature of the profession, is significantly low.[86] That low diversity among the adjudicators, combined with investment claims seemingly targeting mainly developing countries, is another ground for criticism of the ISDS legitimacy.[87] At the same time, the number of appointments is strongly diversified between individual group members. While most individuals are appointed only once or a few times, there some central figures (including some ICJ judges) with numerous appointments and thus symbolic power.[88] These individuals are often involved in the controversial practice of 'double-hatting', that is acting in various roles in different cases in the same field, e.g. as an arbitrator in one dispute and as a counsel in another.[89] Langford and others identified several ICJ judges who were 'double-hatting' before (Crawford, Greenwood) or after (Schwebel) their respective ICJ term.[90] It is worthy to reiterate that, at the ICJ, double-hatting is strictly prohibited for both sitting and *ad hoc* judges.

83 Judge Tomka was appointed arbitrator by the respondent in Macro Trading v. China, ICSID Case No. ARB/20/22; Damien Charlotin, *ICJ judge resigns from ICSID case involving China, following controversy over arbitral appointment,* Investment Arbitration Reporter (Feb. 9, 2021), http://www.iareporter.com/articles/icj-judge-resigns-from-icsid-case-involving-china-after-controversy-over-arbitral-appointment/.

84 Puig, *supra* note 11, at 404–07, 418–19.

85 Dezalay & Garth, *supra* note 26, at 9; Susan D Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration,* 53 Columbia J. 86 Transnat'l L. 429, 452–53; Langford et al., *supra* note 52, at 305.

86 Franck et al., *supra* note 85, at 452–53; Puig, *supra* note 11, at 404–05.

87 Langford et al., *supra* note 52, at 305.

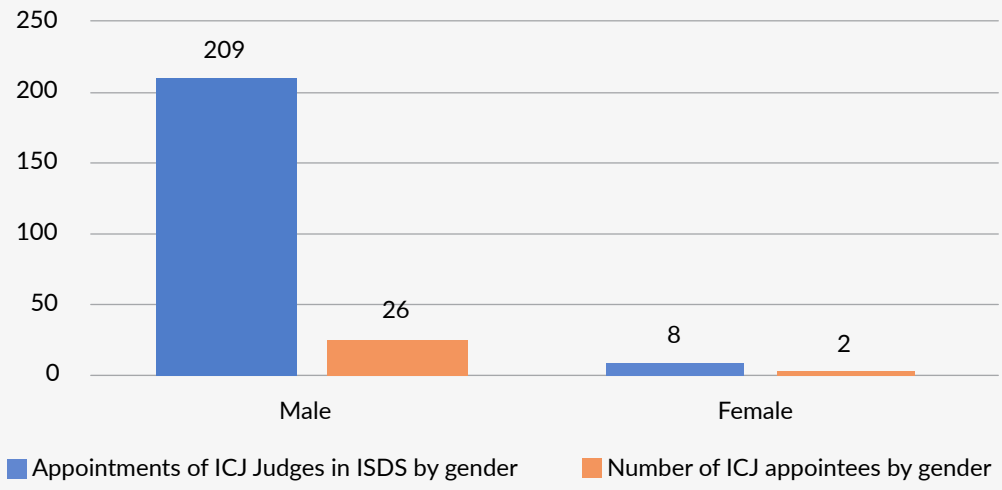
88 Puig, *supra* note 11, at 419–22; Langford et al., *supra* note 52, at 309–14.

89 Andrea Bjorklund, *The Emerging Civilization of Investment Arbitration,* 113 Penn St. L. Rev. 1269, 1298 (2009); Langford et al., supra note 52, at 321.

90 Langford et al., *supra* note 52, at 322, 326–27.

Very similar dynamics of the arbitration network are present both in the ICJ itself and in ICJ members appointments in ISDS. While four out of 15 ICJ members are female, they constitute virtually all the female members in the Court's history. Out of 28 ICJ judges involved as adjudicators in ISDS, only two are female and were appointed only eight times. Judge Higgins and Judge Donoghue, both being the only former female ICJ judges, served as ICJ Presidents. Thus, as generally in ISDS, female adjudicators are a minority. While in the field there can be noted 'formidable women' with numerous appointments,[91] Judges Higgins and Donoghue apparently have no such position.

Graph 3: ICJ judges appointments (divided by gender)

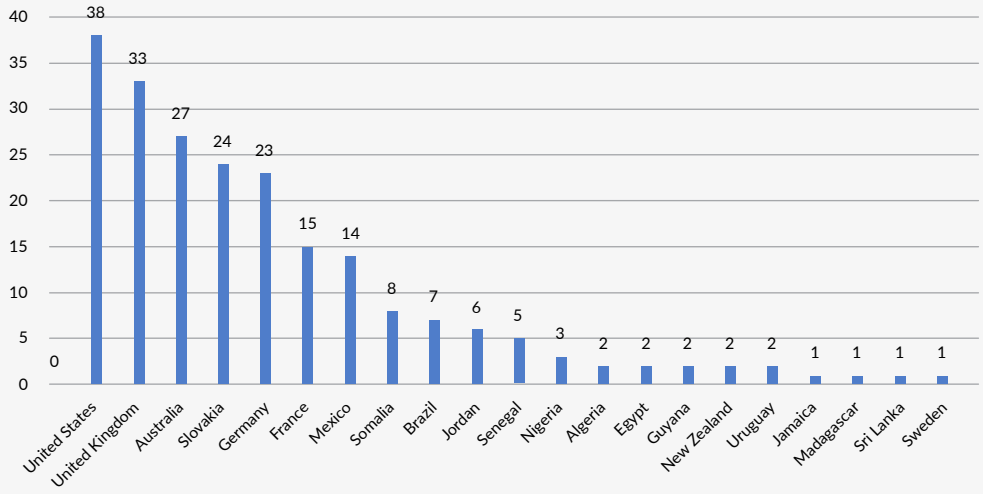


Both female judges have Anglo-American origin, comprising with other Anglosphere ICJ members almost a half of all the appointments of ICJ judges in ISDS. One Australian, three American and four British nationals at the ICJ have been appointed 27, 38 and 33 times respectively, in total 98 times. Adding five European ICJ members (France – two judges with 15 appointments, Germany – 23 appointments, Slovakia – 24 appointments and Sweden – one appointment), the Westerners comprise 74% of appointments, demonstrating their strong dominance in ISDS decision-making. The remaining 15 ICJ members from non-Western countries are thus appointed much less often (56 times) and individually not more than a few times. These numbers reflect only the nationality – if to take into account ICJ judges' education, often received at Western universities, and other previous professional activity, the dominance would be perhaps even starker.[92] As will be discussed later, however, Western-educated international lawyers from developing countries may play a particular role in ISDS and some ICJ judges perfectly match such a description.

91 Puig, *supra* note 11, at 404–05, 410–11.

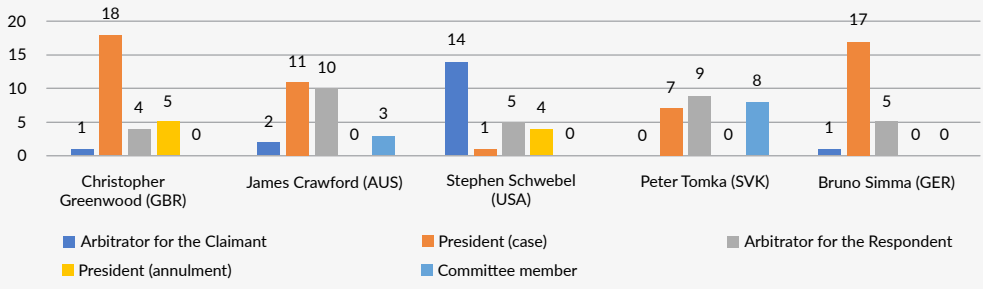
92 Prott, *supra* note 17, at 224–26; a similar observation concerns international arbitrators from traditionally non-Western countries. *See* Langford et al., *supra* note 52, at 309–10.

Graph 4: ICJ judges' appointments (divided by nationality, decreasing order)



The number of appointments of individual ICJ members show strong individual differences in involvement in ISDS, similar to those noticeable generally among international arbitrators. As noted above, fewer than half of ICJ judges, all from Western nations, concentrate almost 75% of all the appointments, while just five individuals have been appointed 127 times. These individuals with large portion of appointments represent certain overlapping types of ICJ judge appointments in ISDS as well as provide some general insights on the modes of appointment.

Graph 5: ISDS appointments - top 5 ICJ appointees (divided by function)



Sir Christopher Greenwood is the most popular (former) ICJ judge among investment arbitration professionals. He is likely to increase the collection of his 28 ISDS appointments in the near future. As one of the few ICJ judges, he received some (namely five) arbitral appointments before his term at the Court due to his work in international dispute settlement business. Almost half of his appointments (13) he obtained only after finishing his term at the ICJ in 2018 when, perhaps surprisingly, he was not reappointed by the UN General Assembly. He serves as an example of a strong preference to have an ICJ judge as president: he presided respectively 18 times over arbitral tribunals and five times over annulment committees.

The late James Crawford, similarly to Judge Greenwood, after whom he was the second most popular

ICJ appointee in ISDS (27 appointments), was a renowned international dispute settlement lawyer before his ICJ term. Despite the 2018 decision, he continued his arbitral work (but did not get new appointments) until his death in 2021. Understandably but still exceptionally among ICJ judges, most of his appointments (21) occurred before he became ICJ judge. Most often, he acted in arbitrations either as president or arbitrator for the respondent.

The third top ICJ appointee in ISDS, Stephen Schwebel, is exceptional among all the ICJ judges in the field for his strong preference for serving as arbitrator for the claimant (14 out of 22 appointments of ICJ judges in ISDS as arbitrator for the claimant). Judge Schwebel also had a large stake in contractual investment disputes. Twenty-two out of his 25 ISDS appointments occurred after his ICJ term.

Peter Tomka is the only one among top ICJ appointees to receive all his ISDS appointments during his (still ongoing) ICJ term. That arises mainly from the length and timing of his ICJ tenure as well as perhaps his nationality. As will be elaborated further below, and similarly to Judge Greenwood, a portion of disputes involving Judge Tomka concerns countries from the CEE region where he was born. Similarly to Judge Crawford, Judge Tomka usually served in arbitrations either as president (seven times) or arbitrator for the respondent (nine times) but also often participated in annulment proceedings (eight times), although never as the president.

Bruno Simma, similarly to Judge Greenwood, received most of his ISDS appointments after his ICJ term, most often as presiding arbitrator at investment tribunals (17 out of 23 cases). Already before his appointment, Judge Simma was a renowned scholar of international law. It is worth noting that both Judges Simma and Greenwood are now sitting at the Iran-U.S. Claims Tribunal, another international dispute settlement institution the jurisprudence of which is relevant in investment arbitration.

Further elaboration of these observations and considerations based on the profiles of these top appointees as well as other ICJ judges follow in the subsequent section.

3.4. Typology of ICJ judges' appointments

A first type to be identified are the ICJ judges who were appointed from one to three times only. They constitute a majority of all the ICJ appointees in ISDS (15 out of 28) while being appointed only 26 times (~12%) in total. As noted above, a significant portion (nine) comprise judges from non-Western states. These rare appointees usually have only either the role of the president (Higgins, Jennings, Jiménez de Aréchaga, Keith, Petrén) or the arbitrator for the respondent (Cançado Trindade, Ranjeva, Weeramantry). Others have been involved only in annulment proceedings (Bola, Robinson, Shahabudeen). Just a look at the names shows that Western 'one time players' appear usually as tribunal presidents[93] while non-Westerners take up other roles.

The non-Western ICJ judges another discernible type of ICJ appointments in ISDS and constitute

93 The only other two Western ICJ judges in this group are Ronny Abraham and Gerald Fitzmaurice, both appointed once as wing arbitrators.

a significant group. Several ICJ judges acted as arbitrators in disputes where the host state was either a state of their nationality or a state close geographically or otherwise (e.g., due to culture, language, or religion). In the former case, they were always respondent's arbitrators, in the latter also at times presidents. We find in this group, for example, Judge Al-Khasawneh from Jordan, who was involved in disputes against Egypt, Iraq, Mauritius, Pakistan, and Turkey; Judge Mbaye from Senegal who decided cases against Cameroon, the Democratic Republic of the Congo, Egypt, Guinea, and his own Senegal; Judge Rezek from Brazil who had cases concerning only Argentina, Chile, and Paraguay. Judge Tomka from Slovakia, while having a broader 'geographical portfolio', heard cases involving Czechia, Estonia, Latvia, Poland, and his own Slovakia, adding further three involving post-Soviet republics. While Judge Greenwood has also often been appointed to decide on the disputes involving countries form the CEE region (11 out of 28 cases), that may rather just confirm that post-Communist countries have been often found respondents in investment disputes.[94] A strong geographical focus on Latin America and Spanish speaking countries can be also ascribed to Judge Sepúlveda-Amor from Mexico (Bolivia, Colombia, Cuba, Ecuador, Equatorial Guinea, Spain). At the same time, no geographical focus can be noted in annulment appointments. Generally, these appointments appear to be much more balanced geographically when compared to arbitral appointments.

The geographical focus of ICJ judges' appointments, particularly those from non-Western countries, suggests a pattern to look for intermediaries between the universal of international law and the local of domestic context. That search is understandable in the logic of investment disputes, a large part of which involves an investor claimant from the West and a non-Western state respondent. In their seminal work on the sociology of international arbitration, Dezalay and Garth emphasize that transnational role of international arbitrators.[95] explicitly indicate 'appointment to the World Court' as a way for local legal notables, often educated in the West, to be recognized as impartial adjudicators, sufficiently distanced from their domestic setting.[96] The ICJ judge status enables recognition as a 'local universalist', having sufficient international social capital and the aura of neutrality to get arbitral appointments but also perceived by states as neutral, however friendly, adjudicator aware of their domestic context. That may explain the trend to appoint ICJ judges mainly as presidents, members of annulment committees and arbitrators for the respondent, described further below.

Another type, or rather a general trait of ICJ judges repeatedly involved in ISDS is an ICJ judge who had a vast majority of appointments during or after the respective ICJ term. As noted above, only a small number of ICJ judges in far fewer cases (37 out of 218) were appointed before their ICJ term. Moreover, 21 of these appointments concern James Crawford, the only person in the dataset who had more than a few appointments, the majority of which occurred before his ICJ term. His respective popularity in the field can be explained both by his status of eminent international jurist

94 According to UNCTAD Investment Disputes Navigator, around 24% of known investment treaty disputes involve post-Communist states as respondents (289 of 1190).

95 Dezalay & Garth, *supra* note 26, at 3–15.

96 *Id.* at 297; in a quoted interview, when asked about non-Western arbitrators, a respondent pointed out to several ICJ judges.

due to his work on the ILC Draft Articles on State Responsibility[97] as well as his work as a counsel in investment disputes.[98] These findings suggest that the ICJ appointment provides an individual with a 'prestige boost' and that this is a relevant factor behind appointment in ISDS, which in turn benefits from the involvement of such a respectable adjudicator.

International arbitration as a profession is usually construed as comprising two groups: arbitration professionals and international law academics.[99] While it might seem that ICJ judges belong predominantly to the latter, actually several, both from Western and non-Western countries, were established also in arbitration market, domestic or international, before their respective ICJ term. Among them we can note Judges Bedjaoui, Bola Ajibola, Crawford, Greenwood, Jiménez de Aréchaga and Mbaye. Interestingly, Judges Bola Ajibola, Jiménez de Aréchaga and several other ICJ judges, just like numerous prominent international lawyers and arbitrators, are or were also members of the World Bank Administrative Tribunal.[100] It is worth emphasizing that the ICSID is also a World Bank institution. It might also be that their professional background as international arbitration lawyer explains the frequent appointments of certain ICJ judges, particularly Judges Crawford and Greenwood.

As noted before, ICJ judges may be involved in ISDS as neutral international dispute professionals or as 'local universalists', translating between general international law and particular local context. This function matches the role in which they are typically appointed: in arbitration cases as presidents or arbitrators for the respondent and in annulment proceedings as presidents or committee members. The data shows a strong tendency to have ICJ judges, especially the Westerners, as presidents of their respective tribunals or committees, as half of appointments are presidential (91 in cases and 18 in annulment proceedings). Some individuals, both of few and numerous appointments, have a strong focus on that role, just to mention Judges Greenwood (23 out of 28), Guillaume (13 out of 14), Higgins (three out of three), Keith (two out of two) or Simma (17 out of 23). That trend emphasizes the significant prestige of the ICJ status and its relevance for the role of the president in ISDS, whose power and prestige is greater than that of wing arbitrators.[101] It appears from the aggregate data that ICJ judges are very often appointed particularly for that most prestigious (and influential) role.

As a wing arbitrator, an ICJ judge has been appointed respectively 54 times arbitrator for the respondent and 22 times arbitrator for the claimant. That may suggest the perception of ICJ judges as more 'state-friendly', in particular that two thirds of the claimant appointments account for one particular individual – Judge Schwebel (14 times). Besides 18 presidential appointments to

97 James Crawford, *The ILC Articles on State Responsibility of Internationally Wrongful Acts, with Commentaries* (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

98 Langford et al., *supra* note 52, at 315–20.

99 Dezalay & Garth, *supra* note 26, at 34–40; T. Schultz & R. Kovacs, *The Rise of a Third Generation of Arbitrators?: Fifteen Years after Dezalay and Garth,* 28 Arb. Int'l 161, 170–71 (2012); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System,* 107 American J. Int'l L. 45, 54–55 (2013).

100 Ridi, *supra* note 59, at 235–37.

101 Langford et al., *supra* note 52, at 304.

annulment committees, an ICJ judge was appointed 30 times as an annulment committee member, in several cases already chaired by another ICJ judge. Indeed, as noted before, ICJ judges participated in roughly one third of annulment proceedings (40 out of 133), including the first few as well as the most recent and pending cases.[102] As noted above, the ICSID tended to select annulment committee members from a narrow group of individuals, apparently including several ICJ judges.[103] The strong representation of ICJ judges in annulment proceedings suggest the importance of their role in maintaining consistency and coherence of ISDS jurisprudence particularly at the annulment stage which is virtually the only mode of appealing from otherwise inconsistent outcomes in ISDS. Selecting international judges to review arbitration awards makes sense if the institutions which appoint them are preoccupied with jurisprudential correctness. Indeed, as we will see below, the arbitration institutions appoint ICJ judges no less often than the parties.

3.5. Institutional preferences

A very important role in appointing is played not only by the parties and/or their arbitral appointees, as it is traditionally in arbitration, but also by arbitral institutions and other appointing authorities, as applicable. It may happen (and indeed often does happen in investment arbitration) that the parties or co-arbitrators cannot agree on the president of the tribunal. It is no surprise in the face of substantial importance of president selection to the course and outcome of the proceedings. At times, also wing arbitrators have to be nominated by someone else than a party to the dispute – an appointing authority. That role is usually taken by the respective arbitral institution (ICSID, PCA, ICC etc.) or, rarely, an individual respectable in the field, indicated in turn by the underlying instrument of the dispute (treaty or contract) or arbitral rules or by another authority appointing the appointing authority. Even in cases where formally the president was appointed by the parties or their appointed arbitrators, arbitral institutions often play an informal, but significant, role in selecting the president by, for example, presenting lists of eligible individuals to the parties. It should be no surprise that often among these individuals appear again ICJ judges, especially presidents and vice-presidents of the Court.[104] That demonstrates yet again the interrelation of ICJ judges and ISDS and explains ICJ judges' appointments in ISDS – though a sitting ICJ judge is seldom appointed by another one.

Interestingly, ICJ judges are appointed presidents of arbitral tribunals quite often by the decision of the parties (28 times), party-appointed co-arbitrators (20 times) and by arbitral institutions (33 times). Some ICJ judges demonstrate strong presidential profiles and a tendency to be appointed mainly by arbitral institutions instead of the parties or co-arbitrators. For example, Gilbert Guillaume, a former ICJ President, has been appointed president 13 times (out of 14 total appointments), 10 times by the ICSID.[105] Similarly, all of four presidential appointments of Judge Donoghue were

102 International Centre for Settlement of Investment Disputes, *The ICSID Caseload Statistics,* https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

103 Peterson, *supra* note 46.

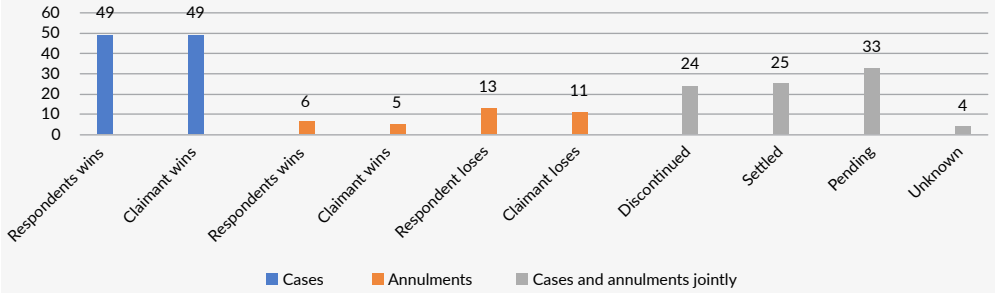
104 While this aspect of ICJ judges as appointing authorities in investment arbitration is outside the scope of this article, the conducted data search identified at least thirteen cases in which ICJ judges appeared as appointing authorities.

obtained from arbitral institutions. Judge Sepúlveda-Amor was appointed president six out of seven times by arbitral institutions. Thus, it can be discerned that some ICJ judges enter the ISDS mainly through the party appointment, while others are involved mainly or even only through the institutional framework. Arguably, ICJ judge status serves these institutions as evidence of fulfilling requirements for an international arbitrator and guarantees both neutrality as well as sufficient knowledge of international law, required by the ICJ Statute. It is not surprising then that such individuals are shortlisted by arbitral institutions as suitable arbitrators.

3.6. Balanced outcomes of ISDS disputes decided by ICJ judges

A review of the outcomes of the analyzed cases does not confirm the assumption of a more 'state-friendly' approach taken by tribunals or committees with an ICJ judge. A general overview of concluded investment treaty disputes by the UNCTAD shows that respondent states prevail slightly more often (37%) than investor claimants (28%) while another substantial part of cases is settled or discontinued for other reasons (32%).[106] In comparison, the outcomes of both cases and annulment proceedings decided by ICJ judges are strikingly balanced. In arbitration proceedings involving ICJ judges, claimants and respondents won (i.e., in case of the former, both jurisdiction and state liability were established, or, in the case of the latter, either jurisdiction or state liability were not found) exactly the same number of times (49 each – 23%). Analogously, proceedings were settled 25 times (22 cases and three annulments) and discontinued 24 times (15 cases and nine annulments). A further 33 proceedings (31 cases and two annulments – 15%) are pending. Thirty-three annulment proceedings were concluded. In the latter, 11 times annulment was granted at least in part and 22 times denied. The balance is also in annulment outcomes: claimants and respondents succeeded respectively five and six times and were denied respectively 11 and 13 times.[107]

Graph 6: outcomes of ISDS disputes involving ICJ judges as adjudicators



105 Puig, *supra* note 11, at 404.

106 UNCTAD, *International Dispute Settlement Navigator* (data as of Dec. 31, 2021), https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited May 19, 2022); Langford at al., *supra* note 52, at 308.

107 While thirty-three annulment proceedings have been concluded, they involve in total sixteen annulment applications by claimant and nineteen by respondent as in two cases. Klöckner v. Cameroon, ICSID Case No. ARB2/81/2; Continental Casualty v. Argentina, ICSID Case No. ARB/03/9). Both parties sought annulment, and all these applications were dismissed.

No individual ICJ judge demonstrated any particular preference or a 'success ratio' in the data on the outcomes, even if a given judge showed a strong preference in appointments in particular roles. It could only be noted that six out of ten tribunals involving Judge Sepúlveda-Amor (also six out of seven tribunals chaired by him) decided in favor of the respondent while six out of ten tribunals involving Judge Guillaume (five out of nine tribunals chaired by him) decided in favor of the claimant. Among other ICJ judges who had more than six appointments, none had more than 50% of particular outcomes. Due to the small numbers of appointments, no correlation between the ICJ status of an individual or her individual preferences and the case outcome can be found.

Thus, the outcome balance is not tilted towards respondent states as one might have expected despite the visible skew in the pattern of appointments. The 'state-friendly' paradigm of the ICJ judges as ISDS adjudicators is thus not confirmed in the outcomes. If we split the numbers between positions in the tribunal, the only interesting pattern is that most of the pending cases (23) involve ICJ judges as presidents, which may suggest a trend to move from appointing them party arbitrators to appointing them as presidents. It should be reiterated here that most probably this would nevertheless apply to former ICJ judges or arbitrators appointed before becoming an ICJ judge only as, from 2018 on, sitting ICJ judges are now excluded from appointments. To sum up, the data does not suggest that appointing an ICJ judge has visible or direct influence on the outcome of the proceedings.

The picture might have been different if we had examined detailed legal reasoning of particular decisions. As states tend to be repeat players more often than investors in ISDS, they might benefit in the long run from a more 'state-friendly' reasoning in future disputes even if they lose a particular case. That, however, requires further qualitative analysis beyond the scope of this article.

3.7. Summary of data analysis

Several takeaways can be taken from the data analysis. First, ICJ judges' appointments in ISDS are substantial both quantitatively and qualitatively – they were adjudicators in numerous and important cases. Second, these appointments are not coincidental – their vast majority concern ICJ judges during or after their term, suggesting that ICJ judge status provides a 'prestige boost' to one's investment arbitration career, on the one hand, and to the ISDS on the other. Third, the historical trend of appointing ICJ judges increased along general increase of investment cases and aligns with general demographic of the arbitral profession, being predominantly male and Western (with a strong dominance of the Anglosphere). Fourth, what is particularly interesting, is that ICJ judges tend to be appointed in particular roles, mainly as presidents but also as arbitrators for the respondent and annulment committee members. Fifth, several types of ICJ judges appointed to arbitration are present, including a few repeat players, numerous 'one time players' and 'local universalists' – particularly from non-Western countries – with a strong geographical focus of appointments. Sixth, ICJ judges are not necessarily typical international legal scholars but already established international disputes professionals, thus bridging the two main professional groups of international arbitration. Seventh and final, despite significant imbalance in appointment patterns, the outcomes of cases involving ICJ members are strikingly balanced and do not differ substantially from the general population of ISDS decisions. These takeaways invite some normative considerations in the wake of substantive limitation of involving active ICJ members in adjudicating investment disputes.

4. Conclusion – implications of excluding ICJ judges from ISDS decision making

As the quantitative analysis demonstrates, numerous ICJ judges' appointments to ISDS occurred during their respective terms. Most probably, the 2018 decision would lead to a substantial decrease of these appointments. Since then, only one sitting ICJ judge has accepted a new arbitral appointment, but he resigned immediately. While active ICJ judges are still involved in ongoing ISDS cases, they are highly unlikely to be appointed, in particular as arbitrators, in future investment disputes, at least during their respective terms.

More often, recent cases involve former ICJ judges. Even though that is less problematic from the point of view of the IISD critique, functionally it is very similar to the involvement of active judges. The decrease of appointments may apply, to a certain extent, also to former ICJ judges despite the fact that the prohibition of the 2018 decision does not apply to them. That is consistent with the observed appointments of former ICJ judges after the 2018 decision: four in 2019, seven in 2020, two in 2021 and only one in 2022 (as of May).

The fate of hypothetical future ICJ judges appointed to the Court during sitting at arbitral tribunal or annulment committees is uncertain. Historically, ICJ judges have seldom resigned from their ISDS appointments, and not once has a resignation been directly related to their appointment to the Court. No resignations after the 2018 decision suggest that an arbitrator (or annulment committee member) would carry on with appointment after being appointed to the ICJ. The practice on that matter is yet to emerge.

Nevertheless, the gap after the ICJ judges is significant both quantitatively and qualitatively, due to the reasons discussed in section 2. In effect, the available arbitral and annulment committee positions are most probably to be filled with individuals from different professional groups associated with international arbitration. Whether these will be arbitration professionals or public international law scholars, remains to be seen. Puig suggests the former are more likely to get appointments.[108] The review of replacements of ICJ judges as adjudicators in ISDS confirms that prediction: in 10 out of 14 cases, including six out of seven in the recent six years, an ICJ judge was replaced by a professional arbitrator.

The source of filling the gap after ICJ judges in arbitral appointments may have implications for the perceived legitimacy of ISDS, especially given that very often ICJ judges served as presidents. If the professional arbitrators and 'arbitral technocrats' continue to be appointed, that may foster the private international paradigm in investment disputes. Arguably, this may further fuel the critique of ISDS. On the other hand, it has to be emphasized that a quantitative analysis of outcomes of the cases involving ICJ judges does not demonstrate any skew in favor of states. Whether there is some qualitative difference in legal reasoning by ICJ judges in ISDS remains to be analyzed further.[109] A research on ICJ citations suggests that this might be the case and thus, a decreased role of ICJ judges may lead to a lesser reliance on ICJ precedents in ISDS.[110] That, in turn, poses important normative questions.

108 Puig, *supra* note 11, at 419–21.

109 Roberts, *supra* note 99, at 53–55; Ridi, *supra* note 59, at 247.

110 Charlotin, *supra* note 12, at 213–14.

The question of the legitimacy of ISDS and the implications of limiting the ICJ involvement for the legitimacy concerns remains open. While the 2018 decision solved a legitimacy issue for the ICJ, it closed an important way for ISDS to engage with the Court and, consequently, with general public international law. The avoided legitimacy cost on the part of the ICJ might have been a larger legitimacy cost for ISDS. Arguably, the disappearance of ICJ judges from the field limits the ways to foster consistency and coherence, both internal and external, of investment decisions as well as their general perception, even though ICJ judges themselves were 'double-hatting', challenged or even disqualified as arbitrators.

As argued above, involving a professional judge of a permanent international court might have several functions in a decentralized framework of *ad hoc* arbitral tribunals. The most important function seems to be the broad legal expertise in general international law matters which may appear in investment disputes. But also less legal traits cannot be ignored. The substantial prestige of the Court and its judges plays a role in such a socially contextualized field as international arbitration. The clout of ICJ judges adds to the clout of the tribunal and thus the persuasiveness and the legitimacy of its decision. While the same observation may apply to former ICJ judges and judges of other courts and tribunals, a significant part of these international dispute professionals will be barred from participation in the field at least until their respective term ends.

Excluding the ICJ judges may slow down the process of judicialization of international arbitration although the process is fueled not only by the personal involvement of judges. As noted above, this process is variously perceived. The absence of ICJ judges may be considered a negative development as arguably it weakens attempts to ensure consistency and coherence of investment arbitration jurisprudence both internally and externally – i.e., with general international law. From another perspective, it may lead to return to the paradigmatic *ad hoc* character of international arbitration and distinguish it from other forms of international dispute settlement.

Paradoxically, while the composition of the ICJ is not representative for the global population, despite the fact that its members are selected by the UN General Assembly, the involvement of ICJ judges was one of the factors for inclusiveness and diversity in international arbitration. Several of the few international arbitrators outside the Western world are or were in fact ICJ judges. Arguably, that status was a significant element of their social capital to make it possible to enter the field. Despite ongoing efforts to ensure gender, racial and ethnic equality in international arbitration profession, particularly in arbitral appointments, there is still a long way to go. As we may note from the replacement of ICJ judges, regardless their geographical background, all but one of 14 replacements were Westerners and only four were female. Thus, the involvement of ICJ judges overall, although perhaps unsatisfactorily, fostered geographical diversity among ISDS decision makers. The question remains, where to find non-Western international adjudicators of similar knowledge and prestige if not at international courts.

To sum up, the multi-faceted involvement of ICJ judges as adjudicators in ISDS is, or rather was, quantitively and qualitatively, significant. Their involvement encompasses several functions, including enhanced perceived legitimacy of the tribunal, its decisions and the whole field. As currently ISDS is facing a backlash as well as being subject to a multi-faceted reform debate, excluding ICJ judges from it may in fact exacerbate the legitimacy challenge rather than mitigate it.